R v. Gladue: A Study of Historical Trauma Theory

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ABSTRACT

Historical trauma, a subset of trauma studies, is worth exploring, particularly in the context of events that affect individuals and communities. Focusing on community responses to trauma, historical trauma is separately studied from individualized responses to trauma. This emerging field of research was introduced by Dr. Maria Yellow Horse Brave Heart. After visiting numerous Lakota communities, Brave Heart observed consistent physiological and psychological markers of trauma. Residential schools have been used as an example of historical trauma because their effects have been empirically studied to have shown to have individual, familial and community-wide consequences. I explore the *Gladue* case to elucidate applications of historical trauma theory and the disproportionate number of Indigenous peoples in the criminal justice system. *Gladue* writers prepare for the court information of an Indigenous offender's background in providing sentencing recommendations. *Gladue* report writers specifically identify background and systemic factors highlighted in the *Gladue* decision. *Gladue* reports tell the offender's story, offer suggestions, and address healing and basic human needs.

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I. INTRODUCTION

Canada has been engaged, for a long time, in the process of reconciliation with Indigenous[1] communities. Reconciliation, as a term, has (almost) become ensconced in our national dialogue to the point that it is a token word rather than knowledge of the historical context and gravity associated with the rationale related to the process. Settler-colonial policies have long-term ramifications and contribute to adverse physical and psychological conditions. Indian Residential Schools (IRS) are an example of a significant event with long-term consequences, explored as historical trauma.

In recent years, a substantial body of scholarly work has examined the relationship between policies of settler colonialism (e.g. IRS and forced displacement) and poor health outcomes of Indigenous communities in Canada and the United States. Historical trauma, a subset of trauma studies, is worth exploring, particularly in the context of events that affect individuals and communities. Focusing on *community* responses to trauma, historical trauma is separately studied from *individualized* responses to trauma. Individualized responses to trauma may be varied (e.g. anxiety and sleep disorders), but what of responses to en masse community trauma?

This emerging field of research was introduced by Dr. Maria Yellow Horse Brave Heart.[2] After visiting numerous Lakota communities, Brave Heart observed consistent physiological and psychological markers of trauma. Findings demonstrated specific markers and grief symbolizing the long-term impact of significant traumatic events, particularly in community loss.[3] Brave Heart defines historical trauma as "cumulative emotional and psychological wounding, over the lifespan and across generations,

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1 Indigenous is a branch term which includes First Nations, Inuit, and Métis communities. Though the nomenclature has shifted from Aboriginal to Indigenous, both terms are used within our discourse. While I will be predominantly using Indigenous throughout my research, I will apply the term used by various authors in my discussion.

2 Maria Yellow Horse Brave Heart, *The Return to the Sacred Path: Healing from Historical Trauma and Historical Unresolved Grief Among the Lakota* (PhD Dissertation, Smith College for Social Work, 1995) [unpublished].

3 Maria Yellow Horse Brave Heart, "The Return to the Sacred Path: Healing the Historical Trauma and Historical Trauma Unresolved Grief Response Among the Lakota Through A Psychoeducational Group Intervention" (1998) 68:3 Smith College Studies in Social Work 287 at 289 [Brave Heart, "Sacred Path"].

emanating from massive group trauma experiences."[4] Individual and community reactions to historical trauma is the historical trauma response.

Historical trauma responses are "the constellation of features in reaction to this trauma. The historical trauma response may include substance abuse as a vehicle for attempting to numb trauma-related pain. The historical trauma response often includes other types of self-destructive behaviour, suicidal thoughts and gestures, depression, anxiety, low self-esteem, anger, and difficulty recognizing and expressing emotions."[5] We continue to see the effects of colonization in aspects such as boil water advisories, precarious housing in the North, the disproportionate number of Indigenous children in the child welfare system and the overrepresentation of Indigenous peoples in the criminal justice system

The qualitative measurement of responses to historical trauma, among other research findings, as well as the work of Brave Heart, resulted from a longitudinal study by Dr. Les Whitbeck. I point to Whitbeck in that he and his team completed the first long-term study into Brave Heart's work to substantiate her conceptualization of historical trauma. Whitbeck interviewed elders and young children in four Upper New York and Southern Ontario Indigenous communities.[6] The study's primary purpose was to explore *proximate* and *distal* trauma to determine the transgenerational[7] transmission of trauma. It formed the basis for the Historic Loss Scale and the Historic Loss Associated Related Symptom Scale.[8] Whitbeck, among others, suggests that the interconnectedness between trauma and substance abuse cannot be reconciled without a complete picture of a historical context. Integral to understanding historical trauma and its effects, such as substance abuse and its related responses, is

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4 Maria Yellow Horse Brave Heart, "The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration" (2003) 35:1 J Psychoactive Drugs 7.

5 *Ibid* at 7-8.

6 Les Whitbeck et al, "Conceptualizing and Measuring Historical Trauma Among American Indian Peoples" (2004) 33:3-4 Am J Community Psychology 119.

7 Scholarship has approached intergenerational trauma and transgenerational trauma also interchangeably. However, intergenerational trauma is specifically studied as concerning the effects of trauma from one generation to the next (i.e., parent to child). Transgenerational trauma is more applicable in the context of my research as it approaches the effects of trauma across multiple generations (e.g., grandparent to grandchild).

8 Whitbeck, *supra* note 6 at 124-125.

recognizing the deliberate suppression of Indigenous culture by state policies. There are linkages between loss of culture, lack of wellness and the historical trauma response observed throughout Indigenous communities.[9]

I seek to differentiate historical trauma from other trauma studies. Subfields of trauma (e.g., emotional, neurological, psychological, and physiological[10]) studies, such as approaches to post-traumatic stress disorders, tend to approach and postulate outcomes pertaining to individualized responses to trauma as opposed to transgenerational community responses. This paper will explore approaches to historical trauma and historical trauma responses. To demonstrate jurisprudential application, I explore the landmark Supreme Court of Canada case, *R v Gladue*.[11] My paper is scaffolded in two parts. I first provide approaches to historical trauma theory, particularly in the context of settler colonialism. I then contextualize the *Gladue* case through a lens of historical trauma.

II. HISTORICAL TRAUMA THEORY

A. *Approaches to Historical Trauma*

Stressors as responses to trauma have been studied at the individual and community levels. Research focused on the stressors describes linkages between manifestations of physiological and psychological responses to trauma.[12] Trauma, particularly long-term stress, can lead to adverse neurological effects. Psychological studies surrounding post-traumatic stress disorder included the following areas: "resting physiological state, responses to standard trauma cues (i.e., gunfire) or personalized trauma cues (i.e., the script of individual's traumatic event) or startle reactivity to sudden loud auditory stimuli."[13] These criteria may detail how an individual processes

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9 *Ibid* at 122.

10 Mohamad Ali Zoromba et al, "Advancing trauma studies: A narrative literature review embracing a holistic perspective and critiquing traditional models" (2024) 10:16 Heliyon at 2.

11 *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*].

12 Sarilee Khan & Myriam Denov, "Transgenerational trauma in Rwandan genocidal rape survivors and their children: A culturally enhanced bioecological approach" (2022) 59:6 Transcultural Psychiatry 727 at 729.

13 Michael Griffen, "Psychophysiology of Traumatic Stress and Posttraumatic Stress Disorder" in Lee M Cohen & Robert H Paul, eds, *The Wiley Encyclopedia of Health*

fear, indicating that the trauma response could be "learned" based on unique experiences.[14]

Though there may be overlaps, historical trauma differentiates from other subsets of trauma studies, such as post-traumatic stress disorder. Characteristics of post-traumatic stress disorder do not account for transgenerational effects of historical trauma. Post-traumatic stress disorder does not address transgenerational trauma and does not address familial and social experiences of trauma.[15] It does not account for a link between present trauma and historical events, nor the long-term impact of trauma.[16] We see an initial physiological response to post-traumatic stress disorder, which is noted as a significant predictor of the long-term effects of trauma.[17] Like historical trauma, this may include nightmares, flashbacks, and self-harm as a coping mechanism.[18] Historical trauma, thus, is a legacy of trauma with three characteristics: the event was pervasive, resulted in elevated levels of distress among communities, and was perpetuated by an outside force.[19] Residential schools (or boarding/industrial schools in a United States context) have been used as an example because their effects have been empirically studied and have been shown to have individual, familial and community-wide consequences.[20]

A relatively extensive body of research demonstrates how the residential school system was an example of historically traumatic events with long-term ramifications throughout generations. Residential schools, thus, becomes historical and transgenerational trauma, as learned behaviour (both

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Psychology: Volume 1: Biological Bases of Health Behaviour (Hoboken, NJ: John Wiley & Sons Ltd, 2021) 287 at 288.

14 *Ibid* at 290.

15 Tessa Evans-Campbell, "Historical Trauma in American Indian/Alaska Native Communities: A Multilevel Framework for Exploring Impacts on Individuals, Families and Communities" (2008) 23:3 J Interpersonal Violence 316 at 319.

16 *Ibid*.

17 Bessel A van der Kolk, "The Trauma Spectrum: The Interaction of Biological and Social Events in the Genesis of the Trauma Response" (1988) 1:3 J Traumatic Stress 273 at 274.

18 *Evans-Campbell, supra* note 15 at 322.

19 *Ibid* at 320-321.

20 *Ibid* at 327, 331.

physiological and psychological) is passed down through the ages.[21] Research demonstrated that the "[m]ore generations that attended IRS, the poorer the psychological well-being of the next generation."[22] The exclusion of how Indigenous communities and survivors of mass trauma have thrived is a central part of the recovery process, as demonstrated in the work of Brave Heart. Research demonstrates that parental exposure to trauma at residential schools has transgenerational effects, where children experience an array of psychological ramifications such as attachment issues, loss of trust, anxiety, helplessness, and rage.[23]

Transgenerational trauma is observed at the individual, familial and community levels, meaning that "symptoms of trauma can manifest and cause distress or dysfunction at any of these levels."[24] Transgenerational trauma can have adverse results; we also see that resilience is transgenerational. Coping mechanisms (being affiliated to positive and negative reactions) to trauma are passed down throughout generations to combat loss.[25]

Loss, as an outcome of transgenerational trauma, is measured in the *Historic Loss Scale*, as explored in Whitbeck's research.[26] Further research demonstrated that students who attended an IRS experienced a profound loss of familial bonds, language and culture.[27] The Truth and Reconciliation Commission (TRC) demonstrated that these losses were part of an indoctrination/assimilation program using violence (spiritual, physical, psychological, and sexual) to "kill the Indian in the child."[28] Empirical

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21 Amy Bombay, Kim Matheson & Hymie Anisman, "The Intergenerational Effects of Indian Residential Schools: Implications for the Concept of Historical Trauma" (2014) 51:3 Transcultural Psychiatry 320 at 326.

22 *Ibid* at 331.

23 Amy Bombay, Kim Matheson & Hymie Anisman, *Origins of Lateral Violence in Aboriginal Communities: A Preliminary Study of Student-to-Student Abuse in Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2014) at 62-65.

24 Rachael D Goodman, "The transgenerational trauma and resilience genogram" (2013) 26:3-4 Counselling Psychology Q 386 at 388.

25 *Ibid* at 389-390.

26 *Whitbeck, supra* note 6 at 124.

27 Laurence J Kirmayer, Joseph P Gone & Joshua Moses, "Rethinking Historical Trauma" (2014) 51:3 Transcultural Psychiatry 299 at 310.

28 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and*

studies have explored convergence transmission symptoms of trauma because of historically traumatic events. Shared emotional outcomes included anger, shame, and sadness, with particular attention to trans-generational suffering.[29]

B. *Historically Traumatic Events and Long-term Implications*

Events classified as historical trauma refer to a myriad of experiences. These events, though they share similar characteristics, should not be compared. Individuals may experience trauma differently, but community responses will also vary. What primarily separates historical trauma is that individuals who feel the effects of these traumas are often not present, thus perpetuating the multigenerational impact of historical trauma. Brave Heart cites the 1890 Wounded Knee Massacre and the forcible removal of Indigenous children from their homes to attend federally run boarding schools.[30] High rates of tuberculosis contributed to manifestations of historically unresolved grief as deficient health standards increased the death rate at schools.[31] Settler colonial policies are demonstrative in having transgenerational implications. Residential schools are demonstrative as the apex of settler-colonial policy. We also saw continuations of this policy, such as the Sixties Scoop, the overrepresentation of Indigenous children in the child welfare system, and the disproportionate number of Indigenous peoples in the criminal justice system.[32]

To ground Brave Heart's theoretical approach to historical trauma, Whitbeck developed two measures to evaluate the multi-generational impact of historical trauma: Firstly, the Historic Loss Scale primarily

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Reconciliation Commission of Canada, (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 130, online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf> [perma.cc/UU8U-KKWC].

29 Rachel Lev-Wiesel, "Intergenerational Transmission of Trauma Across Three Generations: A Preliminary Study" (2007) 6:1 Qualitative Social Work 75 at 84, 92.

30 Maria Yellow Horse Brave Heart, "Waiksuyapi: Carrying the historical trauma of the Lakota" (2000) 21-22 Tulane Studies in Social Welfare at 245.

31 Brave Heart, "Sacred Path", *supra* note 3 at 289.

32 Amy Bombay et al, "Familial Attendance at Indian Residential School and Subsequent Involvement in the Child Welfare System Among Indigenous Adults Born During the Sixties Scoop Era" (2020) 15:1 First Peoples Child & Family Rev 62 at 64.

explored the community's broad implications of the historically traumatic event.[33] Contextually, this scale predominantly measured the frequency of perceived losses such as land, culture and language.[34] Secondly, the Historic Loss Related Symptoms Scale explored the individualized physiological and psychological manifestations of the historical trauma.[35] Such manifestations included frequency of sadness, anger, rage, shame and avoidance, among others.[36] Whitbeck's scale, as I view it, supports the study of historical trauma as separate from previously studied forms of individualized trauma by citing the personalized historical trauma responses and community-wide impacts. Whitbeck interviewed elders and parents of children to evaluate historical and multigenerational trauma. Whitbeck's scale explores the long-term impact that home displacement and violence may cause, particularly in the context of loss of culture and home.[37]

Coincident to the consideration of historical trauma and historical trauma responses are experiences of proximate and distal trauma.[38] Also known as *near* (proximate) or *far* (distal) trauma, these are personal experiences and occurrences that, while different, are embedded within and arise from the larger context of historical traumas and responses to these.[39] Historical trauma links both elements together. Ongoing violence towards Indigenous peoples (proximate) can be connected to the Residential schools (distal). Contemporary issues resulting from the effects of colonization should be distinguished from historical trauma, which are behaviours stemming from trauma.

C. *Historical Trauma Responses and Grief*

In 2021, it was reported that mass graves were discovered at the site of the Kamloops Residential School in British Columbia.[40] A Special

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33 *Whitbeck, supra* note 6 at 124.

34 *Ibid.*

35 *Ibid* at 125.

36 *Ibid.*

37 *Ibid* at 119.

38 Peter Martin & Mike Martin, "Proximate and Distal Influences on Development: The Model of Developmental Adaptation" (2002) 22:1 Developmental Review 78 at 78-79.

39 *Ibid* at 88.

40 Courtney Dickson & Bridgette Watson, "Remains of 215 children found buried at

Interlocutor (Kimberly Murray) was announced since then to compile reports and hold hearings, coupled with further evidence coming forward in association with discourse and public conversations on approaches to reconciliation. I say within the public conversation because the Truth and Reconciliation Commission warned of this strong possibility.[41] The final report from the Office of the Independent Special Interlocutor demonstrated that "the lack of care given to Indigenous children during their lives at Indian Residential Schools carried over to their death and burials. Government policies prioritized cost saving and efficiency over treating the children who died and their families and communities with the humanity they deserved".[42] Historical Trauma is connected both individually and collectively. Research and evidence tell us that when events like the discovery of mass graves become ensconced in the public dialogue, there is a possibility of re-traumatization.

Studies on grief yield reactions that, while painful, may be short-lived.[43] Grief is typically studied in the context of *individualized* responses such as depression, anger, and prolonged periods of sadness.[44] Brave Heart also developed the concept of historically unresolved grief. It is defined as "the component of [historical trauma] response is the profoundly unsettled

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former B.C residential school, First Nation says", *CBC News* (27 May 2021), online: <www.cbc.ca/news/canada/british-columbia/tk-emlúps-te-secwépemc-215-children-former-kamloops-indian-residential-school-1.6043778> [perma.cc/FR2Z-GXEL].

41 Volume 4 of the Truth and Reconciliation Commission addressed Missing Children and Unmarked Burials. They note specifically that there was a "tragedy of the loss of children was compounded by the fact that many burial places remain unknown." See *Canada's Residential Schools: Missing Children and Unmarked Burials: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 4 (Montreal, Kingston, London & Chicago: McGill-Queen's University Press, 2015) at 2, online (pdf): <publications.gc.ca/collections/collection_2015/trc/IR4-9-4-2015-eng.pdf> [perma.cc/GT6D-8ZR4].

42 Independent Special Interlocutor, *Sites of Truth, Sites of Conscience: Unmarked Burials and Mass Graves of Missing and Disappeared Indigenous Children in Canada*, (Ottawa: Office of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools, 2024) at 79, online (pdf): <osi-bis.ca/wp-content/uploads/2024/11/1.OSI-Sites-of-Truth-Sites-of-Conscience.pdf> [perma.cc/8NSE-XRDF].

43 Yuval Neria & Brett Litz, "Bereavement by Traumatic Means: The Complex Synergy of Trauma and Grief" (2004) 9:1 J Loss & Trauma 73 at 74.

44 Bonnie L Green, "Traumatic loss: Conceptional and empirical links between trauma and bereavement" (2000) 5:1 J Personal & Interpersonal Loss at 3.

bereavement resulting from devastating cumulative losses, compounded by the prohibition and interruption of Indigenous burial practices and ceremonies."[45] This grief is amplified as a result of high suicide rates among Indigenous peoples, which at the time of her research were 50% higher than their non-Indigenous counterparts.[46] Explorations of historical unresolved grief work in tandem with the historical trauma response, as communities may experience varied multigenerational experiences of trauma. Resilience is also essential in Brave Heart's position on historical trauma recovery: "healing from generations of trauma and unresolved grief appears feasible. Neither Wounded Knee nor the generational boarding schools can be forgotten. However, the Lakota must shift from identifying with the victimization and massacre of deceased ancestors and develop a constructive collective memory to include traditional Lakota values and language."[47] Resilience among Indigenous communities contributes to collective healing.

The effects of trauma transcend time and will often impact the lives of surrounding and subsequent others, not just the individual who is the direct recipient of immediate trauma. There has long been a stereotype of alcohol misuse amongst Indigenous peoples.[48] Research demonstrates that Indigenous people are less likely to consume alcohol than their non-Indigenous counterparts.[49] Alcohol use, particularly binge drinking, is associated with a stress response, as individuals who experience traumatic

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45 Maria Yellow Horse Brave Heart et al, "Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research, and Clinical Considerations" (2011) 43:4 J Psychoactive Drugs 282 at 283.

46 *Ibid.*

47 Brave Heart, "Sacred Path", *supra* note 3 at 302.

48 I point towards the death of Brian Sinclair who died in a Manitoba waiting room from a treatable bladder infection but whose symptoms were ignored due to a stereotypical stigmatization as 'another drunk Indian'. See Brian Sinclair Working Group, "Out of Sight: A Summary of the events leading up the Brian Sinclair's Death and the inquest that examined it and the Interim Recommendations of the Brian Sinclair Working Group" (September 2017), online: (pdf): <www.mmiwg-ffada.ca/wp-content/uploads/2019/06/P03P03P0201_Toronto_Exhibit_18_Lavallee.pdf> [perma.cc/T8UP-EXWC].

49 Amy Bombay, Kim Matheson & Hymie Anisman, "Intergenerational Trauma: Convergence of Multiple Processes Among First Nations Peoples in Canada" (2009) 5:3 Intl J Indigenous Health 6 at 9.

events are likely to consume higher levels of alcohol.[50] Flashbacks and trauma memories contribute to stress and sleep issues (i.e., insomnia). It is more likely that these memories will become pathologized and require therapeutic intervention.[51]

Research suggests that there are three primary mechanisms by which historical trauma may be transmitted across generations: "biological (i.e., hereditary dispositions to PTSD), cultural (through storytelling) and psychological (through memory)."[52] Memories of trauma may trigger stress responses. Individual physiological responses to the event may often involve intense fear, helplessness, horror, or, in children, disorganized and agitated behaviour. Trauma-informed therapeutic interventions are vital to support those suffering personal and collective trauma.[53] This trauma-informed care approach mirrors previous research developed by Brave Heart as part of her leadership addresses multi-generational healing from historical trauma, such as boarding school experiences among the Lakota.[54]

We also see that an individual's environment may play a role in not only their capacity for coping with trauma stressors but also how poor health conditions may foster a predisposition[55] to disease susceptibility.[56] Stressors may stem from adverse childhood experiences such as neglect (whether physical or emotional), socio-economic conditions, spousal violence, aggression and violence towards self or siblings.[57] Traumatized children are more likely than their non-traumatized counterparts to manifest emotion

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50 *Ibid.*

51 Jennifer A Bell, "Preventing post-traumatic stress disorders or pathologizing bad memories?" (2007) 7:9 Am J Bioethics 29 at 29-30.

52 Krista Maxwell, "Historizing historical trauma theory: Troubling the trans-generational transmission paradigm" (2014) 51:3 Transcultural Psychiatry 407 at 408.

53 Leonie Pihama et al, "Investigating Māori approaches to trauma informed care" (2017) 2:3 J Indigenous Wellbeing 18 at 18-19.

54 Maria Yellow Horse Brave Heart, "Oyate Ptayela: Rebuilding the Lakota Nation Through Addressing Historical Trauma Among Lakota Parents" (1999) 2:1-2 J Human Behaviour in Social Environment 109 at 114.

55 This must always be taken with a grain of salt with the focus on the ways in policies of settler colonialism and/or policies that have fostered adverse health conditions in communities.

56 Edith Heard & Robert A Martienssen, "Transgenerational Epigenetic Inheritance: Myths and Mechanisms" (2014) 157:1 Cell 95 at 105.

57 Hiram E Fitzgerald et al, "Historical and Race-Based Trauma: Resilience Through Family and Community" (2021) 2 Adversity & Resilience Science 215 at 217.

regulation difficulties, which can then increase risk.[58] Studies show the importance of considering emotional dysregulation across generations in treatment programs.[59]

Children being exposed to violence may lead to adverse outcomes in adulthood[60]; likewise, children who experience interpersonal violence (i.e., family/close friends) risk further revictimization by being vulnerable to trauma in later life.[61] Of note is the prevalence and development of post-traumatic stress disorder in recent years.[62] We see similar links between the emotional reaction to interpersonal violence and community trauma, such as self-blame and guilt.[63] Comorbidities may include depression, anxiety, shame and grief.[64] In addition to mental and physical health, healing models also focus on resilience coping strategies to trauma.[65] Studies have indicated a causative link between prenatal stress and adapting to adversity.[66] We also see adversity due to socioeconomic and socioecological geographic positioning, which led to inequities in education, employment and precarious housing.

Prolonged exposure to violence may lead to increased stress and susceptibility to physical and psychological symptoms associated with stress.[67] There may also be a 'transfer' of violence from generation to

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58 Abigail Powers et al, "Intergenerational Transmission of Risk for PTSD Symptoms in African American Children: The Roles of Maternal and Child Emotion Dysregulation" (2020) 14:7 Am Psychological Assoc 1099 at 1101.

59 *Ibid* at 1104.

60 Caroline Dugal et al, "Childhood Interpersonal Trauma and its Repercussions in Adulthood: An Analysis of Psychological and Interpersonal Sequelae" in Ghassan El-Baalbaki & Christophe Fortin, eds, *A Multidimensional Approach to Posttraumatic Stress Disorder: from Theory to Practice* (Montreal: InTechOpen, 2016) at 71.

61 *Ibid* at 73.

62 *Ibid* at 74.

63 *Ibid* at 81.

64 *Ibid* at 86-87.

65 Jack P Shonkoff et al, "Early Childhood Adversity, Toxic Stress, and the Impacts of Racism on the Foundations of Health" (2021) 42 Annual Rev Public Health 115 at 116.

66 *Ibid* at 117.

67 MKM Lünnemann et al, "The intergenerational impact of trauma and family violence on parents and their children" (2019) 96 Child Abuse & Neglect 1.

generation, and past traumas may have multigenerational implications.[68] Parental trauma can be passed on to children and manifest as a risk factor.[69] As such, evidence supports familial trauma healing programs to limit offspring exposure and susceptibility to trauma.[70] Specific demographics are vital to the study of trauma, which often accounts for the study of race in trauma research.[71] Factors that impact transgenerational trauma include family functioning, cognitive impediments to trauma, parental resilience, and parental trauma.[72] Family health can be an indicative pathway to delineate instances of transgenerational trauma.[73] Consistent among each categorization of transmission, prevention is crucial to recovery from trauma.[74] While this research requires further investigation, particularly in the context of transgenerational effects, it does give credence to the necessity of understanding the long-term impact of significant traumatic events.

Instances of trauma (be it historical or transgenerational) interrupt the genesis of an individual's narrative and subsequent perception and incorporation of culture.[75] Just as Brave Heart describes the long-term impact of significant historically traumatic events, Crawford describes, as an example of loss of culture, the killing of sled dogs in the North as an inflection point in affecting Inuit perception of ancestral heritage.[76] The multigenerational effects are evident: "I remember a comment from an elder I remember quite well, when his dogs were killed, I became a no one, my hands could not provide for my family anymore, so I looked at my them and just put them in my pockets and walked back and forth in my home that I could not even get away from because my transportation was taken

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68 *Ibid* at 2.

69 *Ibid* at 3.

70 *Ibid* at 10.

71 Emma Reese et al, "Intergenerational Transmission of Trauma: The Mediating Effects of Family Life" (2022) 19 Int J Environmental Research & Public Health at 1.

72 *Ibid* at 2.

73 *Ibid* at 7.

74 *Ibid* at 9.

75 Allison Crawford, "'The trauma experiences by generations past having an effect in their descendants': Narrative and historical trauma among Inuit in Nunavut, Canada" (2014) 51:3 Transcultural Psychiatry 339 at 344-345.

76 *Ibid* at 346-347.

and I could not hunt anymore."[77] This led to the creation of the Qikiqtani Truth Commission, which explored HT events that had enduring effects on the Inuit, which included "settlement, relocations, tuberculosis treatment in the south, the killing of *qimmit* (sled dogs), residential schools, loss of culture and language."[78] We see that resilience is demonstrated through community projects that, while detailing loss, also represent how these shared traumas became teaching tools for future generations.[79]

III. *R V GLADUE* AND HISTORICAL TRAUMA

The overrepresentation of Indigenous people in criminal justice has been acknowledged in multiple commissions of inquiry. The final report of the Royal Commission on Aboriginal Peoples (RCAP), released in 1996, included recommendations to address the overrepresentation of Indigenous Peoples in the Criminal Justice system as part of their twenty-year mandate. In addition to addressing health disparities, the report demonstrated that, when compared to non-Indigenous people, Indigenous peoples spend "more time in jails and prison."[80] On the twentieth anniversary of its release, Commissioner Paul Chartrand acknowledged that there were no significant changes.[81] The 38th Call to Action from the Truth and Reconciliation Commission recommended policy frameworks to decrease the number of Indigenous youth in custody.[82] The National

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77 *Ibid* at 366.

78 *Ibid* at 346.

79 *Ibid* at 354.

80 Canada, Royal Commission on Aboriginal Peoples, *People to People, Nation to Nation: Highlights from the Reports of the Royal Commission on Aboriginal Peoples*, September 2010 update (Ottawa: RCAP, 1996), online: <rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018> [perma.cc/SU23-YUDD].

81 Martha Troian, "20 years since Royal Commission on Aboriginal Peoples, still waiting for change" *CBC News* (3 March 2016), online: <www.cbc.ca/news/indigenous/20-year-anniversary-of-rcap-report-1.3469759> [perma.cc/D5B5-F8GL].

82 Truth and Reconciliation Commission of Canada, "Truth and Reconciliation Calls to Action" (2015) online (pdf): <ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf> [perma.cc/7RF4-RHZX]. See also Catherine Bell & Hadley Friedland, "Introduction: Law, Justice and Reconciliation in post-TRC Canada" (2019) 56:3 Alta L Rev 659; Naomi Metallic, "Aboriginal Rights, Legislative Reconciliation and Constitutionalism" (2023) 27:1 Rev Const Stud 1.

Inquiry into Missing and Murdered Indigenous Women and Girls concluded that, specifically rates of Indigenous female incarceration are representative of discrimination and inequity in the criminal justice system.[83] Each of the three Commissions of Inquiry, spread across approximately twenty-five years, concludes that the disproportionate number of Indigenous peoples in the criminal justice system results from policies stemming from colonization.

In addition to establishing connections between policies of colonization and the overrepresentation of Indigenous peoples in the criminal justice system, *R v Gladue*[84] was the first case to test the expansion of sentencing guidelines established in the *Criminal Code*. *Gladue* is concerned with the application of s.718.2(e), which states that: "[a] court that imposes a sentence shall also take into consider the following principles: all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."[85] There is a preponderance of evidence demonstrating that Indigenous Peoples are disproportionately involved with the state and criminal justice system.[86]

In the Supreme Court's interpretation of s.718.2(e):

> Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people and of the priority given in Aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report, which takes into account the factors set out, which in turn may come from

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83 Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1(b) (Vancouver: Privacy Council Office, 2019) at 153, online (pdf): <publications.gc.ca/collections/collection_2019/bcp-pco/CP32-163-2-2-2019-eng.pdf> [perma.cc/DU6T-YZQ3].

84 *Gladue*, *supra* note 11.

85 *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

86 See e.g. Justin EC Tetrault, "Indigenizing Prisons: A Canadian Case Study" (2022) 51:1 Crime & Justice 187; Davinder Singh, Sarah Prowse & Marcia Anderson, "Overincarceration of indigenous people: a health crisis" (2019) 191:18 CMAJ E487; Leticia Guitierrez, Nick Chadwick & Kayla A Wanamaker, "Culturally Relevant Programming verses the Status Quo: A meta-analytic Review of the Effectiveness of Treatment of Indigenous Offenders" (2018) 60:3 Can J Corr 321.

> representations of the relevant aboriginal community, which will usually be that of the offender.[87]

Recent statistics have determined that Indigenous peoples are incarcerated in Canada at rates approximately nine times higher than non-Indigenous peoples.[88] There has been a consistent upward trend of incarceration levels for Indigenous peoples since the 1970s, and it is a problem that has been addressed in several assessments.[89] *Gladue* outlined the systemic problem:

> The findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may be fairly termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within the Canadian prison population and the criminal justice system reveals a sad and pressing social problem.[90]

Justice Iacobucci's report concluded that, although Indigenous people are overrepresented in the criminal justice system, they are underrepresented in aspects of the administration of justice (i.e., juries).[91] We see that a disproportionate number of Indigenous people are in federal and provincial custody, particularly women and youth.

The lack of criminal prosecutions stemming from residential schools should be considered.[92] In discussions surrounding the National Inquiry into Missing and Murdered Indigenous Woman and Girls, it was

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87 *Gladue, supra* note 11 at para 93.7. A companion case to *Gladue, R v Ipeelee*, 2012 SCC 13 clarified that *Gladue* rights extend not only to those on and off reserve, but to all Indigenous offenders and are thus entitled to the protections extended by s.718.2(e).

88 Statistics Canada, *Overrepresentation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021*, by Paul Robinson et al, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2023) online: <www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm#> [perma.cc/FD54-W9Q3].

89 Canada, Department of Justice, *Understanding the Overrepresentation of Indigenous people in the Criminal Justice System* (2024) online: <www.justice.gc.ca/socjs-esjp/en/ind-aut/uo-cs> [perma.cc/ZRF4-AYED].

90 *Gladue, supra* note 11 at para 64.

91 Independent Review Conducted by The Honourable Frank Iacobucci, *First Nations Representation on Ontario Juries* (Ontario: Ministry of Attorney General, February 2013) at para 14, online: <web.archive.org/web/20240809000000*/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html24> [perma.cc/SU7J-GLHN].

92 See Andrew Woolford & James Gacek, "Genocidal carcerality and Indian residential schools in Canada" (2016) 18:4 Punishment & Society 400 at 409-413; David MacDonald & Graham Hudson, "The Genocide Question and Indian Residential Schools in Canada" (2012) 45:2 Can J Political Science 427 at 438-441.

demonstrated that "First Nations women, Métis women, women with disabilities, criminalized women and women with lower incomes are particularly likely to have personal and third-party records that can be used against them because of the over-involvement of the state in the lives of these women."[93] For many Indigenous peoples, existing structures and systems represent ongoing colonialism and sanctioned state violence.[94]

Gladue writers prepare for the court information of an Indigenous offender's background in providing sentencing recommendations.[95] Reports tell the offender's story, offer suggestions, and address healing and basic human needs.[96]

Gladue reports are more than presentence reports in the usual sense of this term. Presentence reports written by parole officers include similar information as found in a *Gladue* report.[97] Both reports contain information given by the offender, family members, employers, etc.[98] In addition to these considerations, *Gladue* report writers specifically identify background and systemic factors highlighted in the *Gladue* decision. These factors include socioeconomic conditions, physical abuse, possible dependence on substance abuse, educational opportunities, and cultural and familial history.[99]

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93 Jennifer Matsunaga, "The red tape of reparations: settler governmentalities of truth telling and compensation for Indian residential schools" (2021) 11:1 Settler Colonial Studies 21 at 22.

94 Romi Laskin, "Expanding the Reach of Gladue: Exploring the Use of Gladue Reports in Child Protection" (2021) 26:25 Appeal 25 at 35.

95 Jane Dickson, "Making an 'ASH' out of *Gladue*: The Bowden Experiment" (2022) 44:5 Man LJ 1 at 3.

96 Absent from some *Gladue* research is the review process of *Gladue* reports between clients and counsel. On occasion (albeit, ideally), reports are reviewed between counsel and offender. It should be noted that, in this context 'review' does not allow the defence to request changes to suit their position as this would detract from the objectivity of *Gladue* reports. Instead, counsel reviews the report with their clients.

97 See e.g. Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325; Sean Gallop, "11(e) Shattered: The Historic and Continued Breaching of Indigenous Persons Right to Reasonable and Timely Bail" (2021) 44:6 Man LJ 170.

98 Public Safety Canada, *Presentence Reports* (Research Summary), Vol 10:5 (Ottawa: PS, 2005), online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/prsntc-rprt/index-en.aspx> [perma.cc/7QHD-PUUQ].

99 *Gladue*, *supra* note 11 at para 68.

The Supreme Court sought to define the proper interpretation and application of s.718.2(e). To this end, *Gladue* proposed a two-factor requirement for judges to consider during the sentencing phase:

(A) The unique systemic or background factors may have played a part in bringing the particular Aboriginal offender before the courts.

(B) Types of sentencing procedures and sanctions may be appropriate in the offender's circumstances because of their aboriginal heritage or connection.[100]

A and B summarize the requirements while also simultaneously acknowledging linkages between increased rates of incarceration of Indigenous offenders and policies of settler colonialism.[101] The Court also required lower courts to receive and consider individual experiences of colonialism as expressed in what has become known as the *Gladue* factors.[102] *Gladue* reports have become the vehicle for that information and the aforementioned sentencing options.[103]

Gladue reports provide court actors (i.e., defence, Crown, and Judges) with an opportunity to learn about an offender's transgenerational history and, through that, how colonialism may have impacted this person before the courts. The transgenerational focus of reports achieves two ends, including first, confirmation of Indigenous heritage and, second, providing the court with insights into the impacts of mass group traumas experienced by previous generations as well as of lived traumas experienced by the individual, many of which stem from maladaptive responses of earlier generations to historically traumatic events.[104] These transgenerational and lived traumas speak directly to moral blameworthiness and are thus integral to determining fit sentences for Indigenous persons before the courts.

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100 *Ibid* at para 66.

101 See e.g. a discussion on consistent punishment as unjust "[d]ue to the complex and debilitating effects of colonialism and its related ills, as manifested by Aboriginal overrepresentation and other factors". Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' Empty Promises" (2002) 65:1 Sask LR 3 at 27.

102 Sharmi Jaggi, "Principled Justice for Indigenous Peoples? An Empirical Analysis of the Application of *Gladue* Factors in Canadian Lower Courts" (2024) 64:1 Alta Law Rev 845 at 851.

103 See e.g. Elena Marchetti, Valmaine Toki & Jonathan Rudin, "Indigenous Sentencing Courts and Gladue Reports" in Chris Cunneen et al, eds, *The Routledge International Handbook on Decolonizing Justice* (London: Routledge, 2023) at 345.

104 Dickson, *supra* note 94 at 16.

Historical Trauma theory has long been central to understanding and explicating the transgenerational impacts of settler colonialism on Indigenous people generally and specifically on Indigenous offenders in the research and writing of *Gladue* reports.[105] Used as a tool for understanding the 'unique background and circumstances' of Indigenous persons before the courts, the theory also provides perspective on Indigenous histories that may be protective for both the writer and the Indigenous recipient of the report, especially when revisiting past traumas in the interview process.[106]

Integral to *Gladue* methodology and reports is a focus on exploring experiences of historical and proximate trauma and how this has shaped the multigenerational histories of offenders and their communities of care. Historical trauma theory is both a methodological tool and a means for assisting those interviewed for reports to process their histories and begin to heal.[107] Given the nature of historical trauma theory, it may also serve as a protective, 'perspective-giving' factor for *Gladue* writers in their work. Likewise, awareness of triggers resulting from vicarious trauma may be a protective mechanism to safeguard the mental health of a *Gladue* writer.[108]

Indigenous people who face a possible loss of liberty at all stages of the criminal justice system have a legal right to consider '*Gladue* factors' in determining their matter. In what would be seen as an overly optimistic aspiration over time, the Court noted in the *Gladue* decision that these factors are communicated through specialized presentence reports, colloquially as *Gladue* reports.[109] Incorporating *Gladue* reports into the court process is intended to provide judges with "comprehensive, case-specific"[110] information about the offender before them to assist in assessing moral blameworthiness and a fit and proportionate outcome. Despite this, we have seen little statistical movement, and incarceration rates have worsened

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105 Jane Dickson & Kory Smith, "Exploring the Canadian Judiciary's Experience with and Perceptions of *Gladue*" (2022) 66:3-4 Can J Corr 23 at 35.

106 *Ibid* at 35.

107 Dickson, *supra* note 94 at 15.

108 Dana Branson, "Vicarious trauma, themes in research and terminology: A review of literature" (2019) 23:1 Traumatology 2 at 3.

109 Gladue rights are protected under s.718.2(e) of the *Criminal Code of Canada.*

110 See, for example: *R v HGR*, 2015 BCSC 681; *R v Kokopenace*, 2015 SCC 28; *R v Wells*, 2000 SCC 10.

over *Gladue's* 25-year history. However, there is substantial demand for *Gladue* reports to fulfill *Gladue's* promise.[111]

IV. CONCLUSION

In this paper, I have offered a modest consideration of the application of historical trauma as demonstrative of the multigenerational impact of policies of settler colonialism. My research predominantly examines how historical trauma theory serves as a protective measure to support *Gladue* writers in researching and developing *Gladue*. As *Gladue* writers are exposed to discussions of background and systemic factors, they are at risk for vicarious trauma. An elucidation of historical trauma and historical trauma responses explores correlations between, in this research context, a historically traumatic event (i.e., residential schools) and policies of colonization and ongoing reconciliation.

[111] Dickson & Smith, *supra* note 104 at 36.