The GLADUE PRINCIPLES

A GUIDE TO THE JURISPRUDENCE

EXECUTIVE SUMMARY

FOR JUDGES

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PURPOSE

This guide has been created as a tool to be used in conjunction with *The Gladue Principles: A Guide to the Jurisprudence* ("*The Gladue Principles*"). It provides a short summary of relevant considerations specifically for sentencing judges tasked with implementing the *Gladue* principles. A summary of the judicial role can be found in Chapter 11 of *The Gladue Principles* as well. The points summarized here are all derived from existing case law and citations are provided as endnotes for ease of reference. If more detailed discussion is provided in *The Gladue Principles*, pinpoint references are provided to the full-length text.

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OVERVIEW

This document summarizes jurisprudence in relation to the following questions:

A) What are the *Gladue* principles that need to be applied? 4

B) What questions guide the application of the *Gladue* principles? 8

C) Who do the *Gladue* principles apply to? 11

D) What if an Indigenous person waives their right to have their unique circumstances explored during sentencing? 14

E) How much case-specific information is required in order to sentence an Indigenous person? 15

F) What are the unique systemic and background factors that must be taken into account when sentencing an Indigenous person? 19

G) What unique types of sentencing procedures and sanctions might be appropriate based on an Indigenous person's particular heritage or connection? 22

H) Is there a duty to provide reasons as to how the *Gladue* principles have been applied? 25

I) What errors have been identified by appellate courts in terms of the misapplication of the *Gladue* principles in sentencing? 27

J) How are the unique circumstances of an Indigenous person relevant when they are the victim of a crime? 30

K) How else might the unique circumstances of an Indigenous person be relevant within the legal system? 31

A) WHAT ARE THE *GLADUE* PRINCIPLES THAT NEED TO BE APPLIED?

In *Gladue*, *Wells*, and *Ipeelee* the Supreme Court of Canada articulated a broad, open-ended sentencing framework to be applied when determining a fit sentence for an Indigenous person. This framework emerged from the Supreme Court of Canada's interpretation of s 718.2(e) of the *Criminal Code*, which currently reads as follows:

> all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The Supreme Court has referred to the various considerations arising under this framework as "the *Gladue* principles".[1] The wide-ranging and open-textured nature of this framework makes it difficult to definitively summarize all the relevant considerations that might arise whenever an Indigenous person is before the court for sentencing. As the Supreme Court clarified in *Wells*, they were never intended to provide "a single test".[2] However, for ease of reference a non-exhaustive list is provided below, drawn from the Supreme Court's directions in *Gladue*, *Wells*, and *Ipeelee*. You are encouraged to refer to Chapters 5, 6, and 7 of *The Gladue Principles* for a more thorough and contextualized discussion of each point.

A non-exhaustive list of the *Gladue* principles

- There is a judicial duty to give section 718.2(e)'s remedial purpose real force.
- Section 718.2(e) of the *Criminal Code*:
    - is part of an overall re-orientation towards restorative sentencing;
    - responds to the long-standing problem of overincarceration in Canada more generally;
    - directs sentencing judges to address Indigenous over-incarceration and systemic discrimination more specifically; and
    - reflects Parliament's sensitivity towards Indigenous justice initiatives.
- Courts have the power to influence how Indigenous people are treated in the criminal justice system, including by changing sentencing practices to ensure they effectively deter and rehabilitate Indigenous offenders and by ensuring systemic factors do not contribute to systemic discrimination.
- The circumstances of Indigenous individuals and collectives are unique and they may make prison less appropriate as a sanction.
- At least the following two categories of circumstances must be considered when determining the fit and proper sentence for an Indigenous person:

    A) The role of unique systemic and background factors in bringing them before the court for sentencing; and

    B) Appropriate types of sentencing procedures and sanctions based on their particular Indigenous heritage or connection.

- Sentences may vary from one community to the next as a consequence of these unique circumstances and sentencing judges must ensure parity does not undermine s 718.2(e)'s remedial purpose.
- The unique perspectives, worldviews, and needs of Indigenous individuals and communities may affect the relevancy of sentencing objectives and the effectiveness of particular sentences for Indigenous offenders.
- For serious offences, principles of separation, denunciation, and deterrence may still be given primacy when sentencing an Indigenous person. However, it is inappropriate to take a categorical approach to the seriousness of an offence and the greatest weight may still be accorded to restorative justice principles for serious crimes in appropriate circumstances.
- For serious offences, the length of the term of imprisonment must be considered in light of an Indigenous offender's unique circumstances.
- Section 718.2(e) provides flexibility for a more holistic and contextual approach to sentencing.
- Various questions guide the search for a fit sentence for an Indigenous person, including an inquiry into what the appropriate sanction is under the *Criminal Code* for this offence, committed by this offender, harming this victim, in this community.
- Sentencing judges have a duty to consider every Indigenous person's unique situation.
- Judicial notice of such matters as the history of colonialism, displacement, and residential schools and how they translate into lower rates of educational attainment, lower incomes, higher unemployment, higher rates of substance abuse, and higher levels of incarceration for Indigenous people is mandatory and provides the necessary context for sentencing, but further case-specific information may still be required.
- Counsel on both sides should adduce relevant evidence absent waiver.

- Sentencing judges must make further inquiries if the record is insufficient.
- Relevant information may be obtained through *Gladue* reports, pre-sentence reports, or witness testimony.
- Reasons for sentence and fresh evidence upon appeal will assist in appellate review.
- Indigenous people must be treated fairly by taking into account their difference.
- Section 718.2(e) is applicable when sentencing any Indigenous person, regardless of where they live.
- Alternatives to incarceration must be explored even in the absence of community support.
- Systemic and background factors may bear upon an Indigenous person's moral culpability.
- Systemic and background factors may impact the sentencing principles of deterrence and denunciation.
- The history of Indigenous peoples is unique in Canada and it is tied to the legacy of colonialism.
- There is no burden of persuasion on counsel to demonstrate direct, causal connections between an Indigenous person's unique circumstances and individual offending as these are intertwined in complex ways.

The Table of Contents for *The Gladue Principles* provides a detailed list of the main considerations identified by the Supreme Court of Canada in *Gladue*, *Wells*, *Ipeelee*, and related judgments. For this reason pinpoint citations were not reproduced in this abridged user guide.

B) WHAT QUESTIONS GUIDE THE APPLICATION OF THE *GLADUE* PRINCIPLES?

Several lower courts have provided lists of questions to guide counsel and the court whenever an Indigenous person is being sentenced.[3] Some of these inquiries will be explored in greater detail in subsequent sections. However, for ease of reference they have been merged to create the following list:

- Is the person being a sentenced an "Aboriginal person" within the meaning of ss 25 and 35 of the *Constitution Act, 1982*, which refer to Inuit, Métis, and First Nations (i.e. "Indians")?
- If so, is it possible to identify any community or communities, band(s), nation(s), or other Indigenous collectives to which they are connected?
- Do they reside in a rural area, on a reserve, on settlement land, or in an urban centre?
- What systemic or background circumstances have played a part in bringing them before the courts? For example:
    - Have they been affected by substance abuse in their family or their community?
    - Have they been affected by poverty?
    - Have they been affected by racism?
    - Have they been affected by family or community breakdown?
    - Have they been affected by unemployment, low income, and a lack of employment opportunities?
    - Have they been affected by dislocation from Indigenous communities, loneliness, and community fragmentation?

- What is the historical, societal, and community-level context? For example:
    - What are the main social issues affecting any Indigenous community or communities to which they are connected?
    - Has a significant proportion of any Indigenous community or communities to which they are connected been relocated?
    - Has a significant proportion moved to urban centres?
    - Have community members been affected by abuses in the residential school system?
- What alternative procedures and sanctions are available in any community or communities to which they are connected? For example:
    - What are the particulars of available treatment facilities (e.g. length of treatment, eligibility requirements, and content)?
    - Are there any active justice committees?
    - Are there any alternative measures or community-based programs?
    - Are there alternative sentencing traditions in the Indigenous community or communities to which they are connected (e.g. Elder counselling or sentencing circles)?
    - How else are common social issues being addressed by the Indigenous community or communities to which they are connected?
    - What culturally relevant alternatives to incarceration can be set in place that would be healing for the offender and all others involved, including the relevant community or communities as a whole?
    - Is there an Indigenous community to which they are connected that has the resources to assist in their supervision?

    - What is their understanding of and willingness to participate in traditional Indigenous forms of justice, whether through a relevant Indigenous community or local Indigenous support agencies?
    - Do they have the support of an Indigenous community to which they are connected?

- What mainstream or non-traditional sentencing or healing options are available in the community at large?
- What is the quality of their relationship with their family, including their extended family?
- Who comprises their support network, whether spiritually, culturally, or in terms of family or community?
- What is their living situation, including past, present, and planned (e.g. housing and access to transportation)?
- Based on all the available information, would imprisonment effectively deter or denounce this crime or would crime prevention be better addressed through restorative justice?

This list of questions can assist in determining whether there is an adequate level of case-specific information available to the court in order to meaningfully apply the *Gladue* principles. It can also assist in determining how this information might be relevant to sentencing. However, it is by no means an exhaustive list. The *Gladue* jurisprudence continues to evolve and expand alongside the legal system's collective understanding of the unique circumstances of Indigenous peoples.

C) WHO DO THE *GLADUE* PRINCIPLES APPLY TO?

While s 718.2(e) does not apply exclusively to Indigenous people, it does call for particular attention to the circumstances of Indigenous offenders. The Supreme Court of Canada has interpreted this as a direction for Indigenous people to be sentenced differently and in a way that accounts for how their circumstances are unique.[4] This leads to an important threshold question for every sentencing proceeding: does the individual who is before the court for sentencing have unique circumstances as an Indigenous person that must be taken into account?[5]

It is critically important to determine whether the person being sentenced self-identifies as Indigenous or has Indigenous heritage or connections. However, it is not an appropriate role for sentencing judges or counsel to police who is and who is not Indigenous.[6] Instead, the Supreme Court of Canada provided two basic parameters for the relevancy of the *Gladue* principles:

1) It held that "the class of aboriginal people who come within the purview of the specific reference to the circumstances of aboriginal offenders in s. 718.2(e) must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*", and it expressly referred to Inuit, Metis, and "Indians (registered or non-registered)".[7]
2) It rejected the submission that s. 718.2(e) ought to operate as an affirmative action provision that provides for "an automatic reduction of sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal".[8]

Case-specific information is key

Lower courts have further elaborated on these parameters, emphasizing the need for individualized analysis of case-specific information in lieu of judicial regulation of Indigenous identity claims with categorical impacts on sentencing:

- In keeping with the direction that s 718.2(e) does not provide a basis for affirmative action in sentencing, the Ontario Court of Appeal has insisted that more than mere self-identification as an Indigenous person will be required before the *Gladue* principles influence what is a fit and proper sentence.[9] Instead, sentencing judges must determine if the case-specific information before the court "lifts [their] life circumstances and Aboriginal status from the general to the specific", as well as whether it bears on their culpability or indicates which sentencing objectives can and should be actualized.[10]
- On the other hand, if the person being sentenced has limited knowledge of their Indigenous heritage or connections this could be the result of cultural displacement and loss of identity, which are relevant systemic or background factors to be taken into account when sentencing an Indigenous person.[11]
- Likewise, the inquiry into an Indigenous person's unique circumstances in sentencing is not limited to how their personal circumstances impact their moral blameworthiness. More general, contextual circumstances are also relevant, as is the individual's relationship to their community.[12]

Analogous considerations for non-Indigenous offenders

Lower courts have also navigated the fuzzy outer boundaries of relevancy for the *Gladue* principles when considering related or analogous systemic and background factors faced by non-Indigenous people. For example:

- A non-Indigenous person living within an Indigenous community or with an Indigenous partner or family member could be vicariously exposed to some of the systemic and background factors taken into account when sentencing an Indigenous person. Non-Indigenous people are not the intended

targets of either s 718.2(e)'s reference to the circumstances of Indigenous people or the *Gladue* principles articulated by the Supreme Court of Canada. However, their personal circumstances are still relevant to individualized sentencing.[13]

- Non-Indigenous members of marginalized social groups such as individuals experiencing homelessness may also face systemic factors that shed light on why they are before the court for sentencing. This does not mean this has a categorical impact on what will be a fit and proper sentence for them, but it may still be relevant in an individualized approach to sentencing.[14]
- Social context and judicially noticed facts could provide a framework for the sentencing of members of racialized communities that also suffer racism and systemic discrimination in the criminal justice system and Canadian society more generally.[15] However, it requires more than just a loose analogy to the circumstances of Indigenous peoples.[16] For instance, the sentencing of members of other racialized communities may or may not engage collective perspectives analogous to how Indigenous legal traditions and concepts of justice favour community healing and restorative justice.[17]

In sum, case-specific circumstances and information are critical when determining the impact of an Indigenous person's systemic and background factors on what is a fit and proper sentence. Self-identification will have little to no impact without these case-specific details, which could be either specific to the individual being sentenced or at the collective or community level. Even non-Indigenous people may face some related or analogous systemic and background factors that need to be taken into account as part of an individualized approach to sentencing. As a result, the focus should not be the validity of the offender's Indigenous identity.[18] Instead, it should be whether systemic and background factors are apparent within the case-specific details, whether there are culturally appropriate procedures and sanctions relevant to their particular heritage or connection, and how these unique circumstances bear upon the determination of a fit and proper sentence.

D) WHAT IF AN INDIGENOUS PERSON WAIVES THEIR RIGHT TO HAVE THEIR UNIQUE CIRCUMSTANCES EXPLORED DURING SENTENCING?

The Supreme Court of Canada has clearly stated every Indigenous person is entitled to expressly waive their right to have case-specific information collected and considered regarding their unique circumstances.[19] For example, they may not be willing to wait for a *Gladue* report to be prepared in a time-sensitive proceeding like a bail hearing. However, sentencing judges may need to inquire as to whether the Indigenous person before them simply wishes to waive the preparation of a *Gladue* report or if they wish to waive all *Gladue* considerations as the two are not synonymous.[20]

Lower courts have provided further guidance on the issue of waiver:

- In keeping with the general principle that applies whenever someone waives a procedural right enacted for their benefit, the Ontario Court of Appeal has cautioned that waiver of an Indigenous person's right to have their case-specific information explored must be "express and on the record" and it must be "clear and unequivocal, made with full knowledge of the right that is surrendered and of the effect of waiver of that right".[21]
- At a minimum, sentencing judges should not assume an Indigenous person has waived their right to have their unique circumstances considered simply because counsel gives little to no attention to the *Gladue* principles in their submissions. Further clarification may be necessary.[22]
- If an Indigenous person only waives their right to have their case-specific information explored through the preparation of a *Gladue* report, the court will still be obliged to take

judicial notice of systemic and background factors that affect Indigenous peoples generally and assess all available case-specific information in light of this broader social context.[23]

E) HOW MUCH CASE-SPECIFIC INFORMATION IS REQUIRED IN ORDER TO SENTENCE AN INDIGENOUS PERSON?

There are various means by which case-specific information regarding an Indigenous person's unique circumstances can be brought before the court. As long as an Indigenous person does not waive their right to have this kind of case-specific information collected and considered, the Supreme Court of Canada anticipated that it would be adduced by "counsel on both sides".[24] The Supreme Court also clearly anticipated that these unique circumstances would receive "special attention" in pre-sentence reports, potentially including representations from Indigenous communities.[25] Likewise, sentencing judges are expected to make further inquiries as reasonable and necessary, and they are entitled to seek witness testimony to address gaps if needed.[26] In *Ipeelee*, the Supreme Court expressly endorsed the practice of obtaining *Gladue* reports that canvass this case-specific information in detail as well.[27]

The two categories of unique circumstances

As further explored in subsequent sections of this guide, the Supreme Court also made it clear that case-specific information must canvass at least the following two categories of circumstances when an Indigenous person is being sentenced:

1) the unique systemic and background factors which may have played a part in bringing the particular Indigenous offender before the courts; and
2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection.[28]

Adequacy of case-specific information

Lower courts have provided guidance on how to determine whether there is adequate case-specific information for the sentencing of an Indigenous person, placing considerable emphasis on the substance of the information before the court rather than assuming its adequacy based on its particular source or form:

- To date most courts have rejected the proposition that *Gladue* reports are required in every sentencing proceeding for an Indigenous person. Instead, they tend to explore whether adequate case-specific information is available in substance through various means, including submissions from counsel, pre-sentence reports, and witness testimony, as well as *Gladue* reports.[29]
- Yet while *Gladue* reports are not mandatory in all cases, they are often seen as compelling. For example, when appellate courts assess whether adequate case-specific information was available in the absence of a *Gladue* report, they often do so by comparing the record from the sentencing proceeding to a *Gladue* report admitted as fresh evidence on appeal.[30]
- Submissions from counsel with case-specific information may suffice in some circumstances, such as where the time required for the preparation of a pre-sentence report or a *Gladue* report will prejudice the accused, or where there is no funding available for reports to be prepared.[31]
- However, it may be challenging for counsel to collect an equivalent level of case-specific information to what is provided in a *Gladue* report that collates the results of multiple interviews with the subject and various collaterals.[32]

- Likewise, the accused may not be aware of all relevant community-level circumstances and some may struggle to articulate their own personal and familial situation due to the nature of their constrained circumstances (e.g. cognitive deficits from Fetal Alcohol Spectrum Disorder or dislocation from their Indigenous family and community due to apprehension or adoption).[33]
- In some jurisdictions, sentencing judges have expressed satisfaction with the level of case-specific information provided in pre-sentence reports authored by probation officers.[34] However, there are also cases in which sentencing judges have found pre-sentence reports to be deficient or inadequate sources of information in support of the *Gladue* principles.[35]
- The role probation officers play in the administration of justice may impact their ability to develop a rapport with the offender and their collaterals, and they may have limited training or time to explore the unique circumstances of Indigenous individuals and collectives when preparing their reports.[36]
- Where pre-sentence reports are focused on risk assessment, this could steer their authors away from the information required for the application of the *Gladue* principles and inadvertently perpetuate systemic discrimination by coding the systemic and background factors faced by Indigenous peoples as risk factors that reinforce disproportionate levels of incarceration.[37]
- In contrast, *Gladue* reports aim to provide a more contextual and restorative approach to exploring the unique circumstances of Indigenous individuals and collectives, and some courts have described them as the "preferable" way in which to obtain this case-specific information.[38]
- At the same time, even a *Gladue* report may have gaps or deficiencies that need to be addressed through supplementary reports or other means, such as testimony from family or community members or service providers.[39]

Remedies for inadequacy of case-specific information

Lower courts have also addressed potential remedies where an adequate level of case-specific information is not made available:

- Judicial notice and inferential reasoning have been given greater prominence in sentencing to avoid prejudice to the interests of an Indigenous accused.[40]
- In exceptional circumstances, it may be appropriate for a sentencing judge to order the preparation of a *Gladue* report at state-expense, either pursuant to a necessarily incidental power flowing from s 718.2(e) of the *Criminal Code* or based on a superior court's inherent jurisdiction.[41]
- The length of an Indigenous person's sentence may be reduced to account for state misconduct if there is a systemic failure to dedicate adequate resources to this sentencing requirement.[42]
- A stay of proceedings in favour of the accused may be available where Crown counsel or the state has failed to ensure adequate information is available.[43]
- Prison has been categorically eliminated as an appropriate sanction.[44]
- Delays incurred due to the state's failure to dedicate adequate resources to the implementation of the *Gladue* analysis may also be relevant to remedies under s 11(b) of the *Charter* where they impact an Indigenous accused's right to be sentenced within a reasonable time.[45]

F) WHAT ARE THE UNIQUE SYSTEMIC AND BACKGROUND FACTORS THAT MUST BE TAKEN INTO ACCOUNT WHEN SENTENCING AN INDIGENOUS PERSON?

The first category of unique circumstances that must be accounted for whenever an Indigenous person is being sentenced relates to the history of colonialism and maltreatment of Indigenous peoples in Canada, its legacy in disproportionate rates of social and economic marginalization, and how these contribute to systemic discrimination throughout the criminal justice system.[46] More specifically, the Supreme Court of Canada has directed sentencing judges to take judicial notice of both: (i) "such matters as the history of colonialism, displacement, and residential schools"; and (ii) "how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[47] Taken together, these factors provide the necessary context for understanding and evaluating case-specific information before the court.[48]

Every Indigenous nation, community, family, and individual will have their own unique history and each Indigenous person will have a distinct constellation of systemic and background factors in their life. The Supreme Court of Canada has never drawn a clear distinction between systemic factors and background factors and they often overlap in complex ways. To provide clearer illustrations of what might constitute relevant systemic and background factors in any given case, Chapter 9 of *The Gladue Principles* provides a detailed summary of factors that are frequently taken into account by lower courts.

Frequently considered systemic and background factors

- Intergenerational and direct impacts from attendance at residential schools (e.g. the suppression of Indigenous parenting practices and social norms);
- Intergenerational and direct impacts from attendance at day schools (e.g. trauma from experiences of sexual, physical, spiritual, and emotional abuse);
- Intergenerational and direct impacts of child apprehension and out-adoption, including but not limited to those occurring during the Sixties Scoop (e.g. loss of culture, language, and identity);
- Loss of collective and individual autonomy through legislation and policies such as the *Indian Act*, the reserve system, and the pass system;
- Loss and denial of status and band membership under the *Indian Act*, with impacts on identity, cultural and community connections, and access to the government programs linked to status and band membership;
- Individual, familial, and collective experiences of racism and discrimination (e.g. impacts of discrimination in policing, education, or the workplace);
- Gang involvement and exposure;
- Geographic challenges such as community isolation and remoteness;
- Experiences and cycles of abuse, violence, and victimization/criminalization;
- Personal, familial, and community-level impacts of alcohol and drug misuse;
- Fetal Alcohol Spectrum Disorder associated with intergenerational or community-level misuse of alcohol; and
- Loss of identity, culture, language, values, traditions, ancestral knowledge, spirituality, and territorial connection.

These bullets are not meant to function as a list of "Gladue factors" to be checked off whenever an Indigenous person is being sentenced. As the Saskatchewan Court of Appeal pointed out in *Chanalquay*, the *Gladue*

analysis requires sentencing judges to do more than "simply stack up of all *Gladue*-type considerations at play in a case and, if the list is long or severe, automatically proceed on the assumption that such factors have had a substantial limiting effect on the offender's culpability".[49] Instead, sentencing judges need to examine how they cast light on an Indigenous person's moral blameworthiness, among other relevant sentencing considerations.[50]

As the Alberta Court of Appeal has repeatedly pointed out, an Indigenous person's unique circumstances may be relevant in more than one way and their relevance to sentencing should be explored both at an individual-specific level and a broader community or societal level.[51] In other words, they are "both general and specific in nature".[52]

The relevance of systemic and background in sentencing

According to the Supreme Court of Canada's guidelines in *Gladue*, an Indigenous person's systemic and background factors may be relevant to sentencing in several conceptually distinct but overlapping ways, including:

- Assessing why an Indigenous person ended up before the courts;
- Assessing whether prison will impact them more adversely than others;
- Assessing whether prison is less likely to rehabilitate them;
- Assessing whether prison is likely to deter or denounce their conduct in a way that is meaningful to their community; and
- Assessing whether restorative sentencing principles ought to be given primacy to address crime prevention and bring about individual and broader social healing.[53]

To the degree an Indigenous person's systemic and background factors shed light on their moral blameworthiness, these factors must be considered in accordance with the fundamental sentencing principle of proportionality.[54] This sentencing principle also has constitutional dimensions by virtue of ss 7 and 12 of the *Charter*.[55]

G) WHAT UNIQUE TYPES OF SENTENCING PROCEDURES AND SANCTIONS MIGHT BE APPROPRIATE BASED ON AN INDIGENOUS PERSON'S PARTICULAR HERITAGE OR CONNECTION?

This second category of unique circumstances is analytically distinct from the first. In *Gladue*, the Supreme Court of Canada first called for close attention to sentencing procedures and sanctions that may be appropriate for an Indigenous person based on their particular heritage or connection.[56] In *Wells*, the Court clarified this to mean courts must both "conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community" and it suggested courts may need to consider whether an Indigenous community has decided to address criminal activity associated with social problems with a restorative focus.[57] In *Ipeelee*, the Court further explained that these culturally appropriate sentencing procedures and sanctions respond to a need 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".[58]

In short, an Indigenous nation or community's distinct conception of sentencing and understanding of the meaningfulness of particular sanctions may be relevant to the application of the *Gladue* principles. And the meaning of 'community' in this context extends to any network of support and interaction available to the Indigenous person being sentenced, whether they reside in a rural area or an urban centre.[59]

Similar to the first category of unique circumstances summarized above, there will be a great deal of diversity among Indigenous nations, communities, families, and individuals, with each having their own unique strengths, needs, and perspectives. To provide clearer guidance on the meaning of culturally appropriate sentencing procedures and sanctions in this context, Chapter 10 of *The Gladue Principles* sets out a detailed summary of common examples that have emerged from the lower court jurisprudence to date.

Frequently considered culturally appropriate procedures and sanctions

- **Justice committees** allowing for Indigenous community members to inform the sentencing process with regards to community perspectives, needs, and conditions.[60] They may assist with sentencing recommendations, pre-sentence reports, healing and sentencing circles, diversion and community-based sentences, and other culturally appropriate processes and sanctions.
- **Sentencing and healing circles** that provide a way for an Indigenous person's community, service providers, family, or victim to inform the sentencing process.[61] Participation in these processes can also contribute to meeting substantive sentencing objectives like rehabilitation, community reintegration, acknowledgment of harm, and deterrence as well.
- **Family group conferencing** where an Indigenous person's community, service providers, victim, or family inform the sentencing process, especially for Indigenous youth.[62] Like sentencing and healing circles, conferencing can contribute to substantive sentencing objectives in addition to providing case-specific information.
- **Elder panels, participation, and input** to address community perspectives, needs, and conditions.[63] Elders may wish to speak to the values, worldview, and legal traditions of their community, provide views on an appropriate disposition or conditions, or admonish, encourage, and otherwise counsel the person being sentenced, among other things.

- **Specialized sentencing courts** that incorporate restorative justice practices into the sentencing process for an Indigenous person, often in conjunction with other culturally appropriate sentencing procedures or sanctions.[64]
- ***Gladue* reports** that provide the person being sentenced with an opportunity for introspection and critical contemplation of their personal circumstances in context to those of their family and community.[65] These often include a range of perspectives similar to other culturally appropriate procedures.
- **Community banishment** or a period of **land-based isolation** where this provides an Indigenous community with greater control over reintegration, protects victims, or facilitates rehabilitation.[66] Banishment may be culturally relevant for some Indigenous collectives, but it is a rare and controversial option that needs to be carefully designed to meet these objectives.
- **Community service orders** tailored to the needs of a particular community, such as those that require someone to contribute through culturally relevant activities (e.g. chopping wood for Elders) or public speaking regarding their offence or their background circumstances.[67] These may be tailored to foster pro-social skills and interests of the person being sentenced as well.
- **Indigenous programming** in the community or even the correctional system (e.g. sweat lodges) where it supports an Indigenous person's reintegration and rehabilitation, among other sentencing objectives.[68]

These bullets do not constitute an exhaustive checklist of all culturally appropriate sentencing procedures or sanctions that might be available in any given case. There is a great deal of diversity among the worldviews, values, and legal traditions that are held by Indigenous collectives across Canada, and there is also great diversity among the available sentencing options that might be considered pursuant to the *Gladue* principles.

Sentencing judges have taken into account unique circumstances ranging from Nisga'a shame feasts in northern British Columbia to the sacred and spiritual values associated with eating game meat and hunting for Cree in northern Quebec.[69] Some sentencing judges have considered how certain community-specific initiatives relate to the Supreme Court of Canada's direction to consider Indigenous peoples' distinct perspectives and conceptions of justice and sentencing as well, such as Judge Krinke's

assessment of the Kainai Peacemaking Project in *Callihoo*.[70] While it remains rare for sentencing judges to explicitly connect Indigenous worldviews and legal traditions to the culturally appropriate sentencing procedures and sanctions they consider, this may help integrate the various elements of the *Gladue* analysis.

Similar to the first category of unique circumstances, sentencing judges may require detailed case-specific information regarding any culturally appropriate procedures and sanctions that are available. For instance, the Ontario Court of Appeal set an exacting standard in *Macintyre-Syrette* by insisting on details of broader community perspectives and the specific institutions, ceremonies, or individuals that would be involved in carrying out any alternative to incarceration.[71]

H) IS THERE A DUTY TO PROVIDE REASONS AS TO HOW THE *GLADUE* PRINCIPLES HAVE BEEN APPLIED?

A sentencing judge's application of the *Gladue* principles frequently becomes a point of contention for appellate review, making clear and cogent reasons valuable in this context.[72] Appellate courts in some jurisdictions have even insisted there is a duty to be explicit in your application of the *Gladue* principles, although the Supreme Court of Canada's position on this question is more ambiguous.

In *Gladue*, the Supreme Court of Canada encouraged sentencing judges to provide "at least brief reasons" to explain how an Indigenous person's unique circumstances have been taken into account in the sentencing process, but it also confirmed there is no statutory duty to do so.[73] On this basis, some appellate courts have applied a functional approach when reviewing the adequacy of reasons with respect to the application of the *Gladue* principles even in the absence of any explicit reference to them.[74] This would mean

examining the reasons for sentence alongside submissions and the record before the court at first instance, including case-specific information set out in any *Gladue* report or pre-sentence reports. Yet this implicit approach has not been encouraged even when it has withstood appellate review.[75]

When the Supreme Court of Canada revisited the *Gladue* framework in *Ipeelee* it endorsed the British Columbia Court of Appeal's position that appellate intervention is warranted whenever a sentencing judge fails to give "tangible consideration" to an Indigenous person's circumstances in their reasons.[76] It is unclear if a sentencing judge's application of the *Gladue* principles can be characterized as 'tangible' if it is merely implicit when the record is viewed as a whole. Many appellate courts have thus taken the position that an Indigenous person's unique circumstances need to be explicitly addressed in sentencing reasons since *Ipeelee*.[77] Thorough case-specific information in the record plays an important role in ensuring transparency and meaningful appellate review, and it may even further reconciliation with Indigenous peoples more broadly.[78] However, this does not mean it will be sufficient on its own.

On the other hand, the Saskatchewan Court of Appeal has pointed out that there are certain aspects of individualized sentencing more generally, and the application of the *Gladue* principles more specifically, that are inherently subjective, that cannot always be verbalized or reduced to words on a page, and that nevertheless warrant deference to the wise and judicial exercise of discretion by sentencing judges.[79] In other words, there are limits to an appellate court's ability to scrutinize how lower courts have quantified the impact of an Indigenous person's unique circumstances on a fit and proper sentence in all the circumstances. While the precise contours of the duty to give reasons in this context are unclear, appellate courts clearly expect "robust consideration" of an Indigenous person's unique circumstances and they are prepared to revisit "an impoverished approach" at first instance.[80]

I) WHAT ERRORS HAVE BEEN IDENTIFIED BY APPELLATE COURTS IN TERMS OF THE MISAPPLICATION OF THE *GLADUE* PRINCIPLES IN SENTENCING?

Another source of helpful guidance can be found in how appellate courts negatively define the contours of the *Gladue* principles through their identification of errors in the approaches taken by courts below them. Familiarity with these common errors can assist sentencing judges in meaningfully applying the *Gladue* principles at first instance.

Errors identified by the Supreme Court of Canada in *Gladue* and *Ipeelee*

In *Gladue*, the Supreme Court of Canada concluded that both courts below it had erred in their approaches to s 718.2(e) with respect to the sentencing of Ms. Jamie Gladue. The trial judge failed to consider systemic or background factors that might have influenced her to engage in criminal conduct and he failed to explore whether Ms. Gladue, her victim's family, or their community held any distinct conception of sentencing.[81] The trial judge also erroneously concluded that s 718.2(e) was only relevant to Indigenous people who live in rural areas or on reserves.[82] A majority of the British Columbia Court of Appeal also failed to consider these factors and further erred by rejecting Ms. Gladue's application to adduce fresh evidence on appeal.[83]

In *Ipeelee*, the Supreme Court of Canada concluded that the courts below it erred in their approach to the sentencing of Mr. Ipeelee by concluding rehabilitation was not a relevant sentencing objective for breach of a long-term supervision order and by giving only attenuated consideration to

Mr. Ipeelee's unique circumstances as an Indigenous person based on the incorrect view that these play little to no role when sentencing long-term offenders.[84] The Supreme Court also upheld the conclusion of the British Columbia Court of Appeal's majority judgment that the sentencing judge below it erred in failing to give Mr. Ladue's unique circumstances as an Indigenous person "tangible consideration".[85] Likewise, the Supreme Court agreed Mr. Ladue's unique circumstances, including his desire to succeed and demonstrated capacity for abstinence, indicated that rehabilitation ought to have been given greater emphasis as a sentencing objective.[86]

The Supreme Court also identified the following errors in prior appellate decisions that were not directly under appeal in *Ipeelee*, thereby clarifying the framework:

- Some courts were wrongly insisting on the need for demonstration of a "causal link" between an Indigenous person's background factors and the commission of the offence for which they are being sentenced before these factors would be considered in sentencing.[87] The Supreme Court provided the Alberta Court of Appeal's decision in *Poucette* as an example of this error, where the Court of Appeal concluded that systemic and background factors need to be "traced" or "link[ed]" to the particular offender before they are relevant.[88] The Supreme Court also identified two other appellate decisions that fell into error by insisting on the need for systemic factors to be traced, linked, or tied to the particular offender or offence.[89] None of the impugned decisions explicitly refers to a "causal" link.[90] In contrast, the Supreme Court endorsed two appellate decisions that considered systemic and background factors as being generally relevant in the absence of any direct relationship.[91]
- Some courts were erroneously concluding that the *Gladue* principles do not apply to violent or serious offences based on the Supreme Court's broad generalization regarding such offences in *Gladue* and *Wells*.[92] The Supreme Court clarified that the fit sentence for an Indigenous person should not be compared to the sentence that a hypothetical non-Indigenous person would receive and all circumstances must be taken into account when sentencing an Indigenous person "including the unique circumstances described in *Gladue*".[93] The Court made it clear that the consideration of an Indigenous person's unique circumstances is not discretionary, instead describing this as a

statutory duty, and it clarified that a failure to consider these circumstances would not be consistent with the fundamental principle of proportionality and would be an error justifying appellate intervention.[94]

Errors identified by other appellate courts

Other appellate courts have provided further guidance on the *Gladue* principles by identifying errors justifying appellate intervention, most of which are attributable to a failure to follow the clarifications to the analysis set out in *Ipeelee*. These include:

- Failing to assess the impacts of systemic and background factors on moral blameworthiness to achieve proportionality in sentencing.[95]
- Insisting on clear or direct links between systemic and background factors and offending conduct, or failing to recognize readily apparent links.[96]
- Failing to give explicit and tangible effect or weight to systemic and background factors.[97]
- Erroneously concluding the *Gladue* principles do not apply or are "moot" due to the seriousness of the offence.[98]
- Failing to ensure adequate case-specific information is before the court.[99]
- Failing to clarify whether an Indigenous person has waived their right to have their case-specific circumstances meaningfully explored.[100]
- Expecting a *Gladue* report or defence counsel to provide an assessment of the impact of systemic and background factors on the individual being sentenced rather than undertaking this analysis as part of the sentencing process.[101]

The Supreme Court of Canada's reasons in *Ipeelee* engaged with academic criticism that had emerged with respect to the practical application of the *Gladue* principles. It is worth noting that courts and commentators continue to question whether the principles are consistently and robustly implemented in practice.[102] Proactively engaging and responding to these critiques could help circumvent the need for a further restatement of the law by the Supreme Court of Canada in the future.

J) HOW ARE THE UNIQUE CIRCUMSTANCES OF AN INDIGENOUS PERSON RELEVANT WHEN THEY ARE THE VICTIM OF A CRIME?

Indigenous people are more likely to be victims of crime due to many of the same systemic and background factors that drive disproportionate rates of incarceration and this is relevant to the sentencing process as well.[103] In *Gladue*, the Supreme Court directed sentencing judges to "take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person".[104] It also contemplated the possibility that an Indigenous victim's family and community might hold a distinct conception of sentencing of relevance to the analysis under s 718.2(e).[105] Furthermore, the Court concluded that most traditional Indigenous conceptions of sentencing place a primary emphasis upon the ideals of restorative justice and this tradition is extremely important to the analysis under s 718.2(e).[106] It described this restorative approach as one where "[t]he appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender".[107]

In short, the circumstances and needs of victims are therefore clearly relevant to sentencing under the *Gladue* framework, which requires judges to ask: "[f]or this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?"[108]

Many courts have also raised the concern that s 718.2(e) should not be interpreted in a way that appears to discount harms done to Indigenous victims or afford them less protection under the law.[109] Some have taken into account the disproportionate rates of victimization suffered by Indigenous people as well, especially Indigenous women and girls.[110] In *Friesen*, the Supreme Court of Canada acknowledged that Indigenous

children and youth are more vulnerable to sexual violence due in part to the same systemic and background factors that fuel the disproportionate rates at which Indigenous people are incarcerated.[111] Likewise, Parliament has amended the *Criminal Code* to ensure more consistent attention to the vulnerability of Indigenous victims to abuse and violence.[112]

A victim's Indigeneity and systemic and background factors may be relevant context for a more holistic approach to sentencing pursuant to the *Gladue* framework.[113] If an Indigenous person has been victimized, their systemic and background factors could justify greater emphasis on denunciation and deterrence due to their greater vulnerability or due to higher rates of certain forms of violence in the community.[114] The need for attention to the vulnerability of Indigenous women and girls to abuse is now codified in ss 718.04 and 718.201 of the *Criminal Code*. However, it does not follow that an Indigenous offender's unique circumstances are rendered irrelevant if they commit a violent crime against another Indigenous person.[115] On the contrary, this could indicate that a restorative approach to sentencing is most appropriate.[116] Likewise, the disproportionate rates of victimization and disproportionate rates of criminalization faced by Indigenous people are inter-related phenomena that may problematize categorical distinctions between victims and offenders.[117]

K) HOW ELSE MIGHT THE UNIQUE CIRCUMSTANCES OF AN INDIGENOUS PERSON BE RELEVANT WITHIN THE LEGAL SYSTEM?

It is clear that the relevance of an Indigenous person's unique circumstances within Canadian law is not restricted to determinations of moral culpability, the weighing of various sentencing objectives, or the crafting of culturally appropriate procedures and sanctions in criminal sentencing. In *Wells* and

Ipeelee the Supreme Court not only reiterated the *Gladue* framework, but went on to detail how it functions alongside other provisions in the *Criminal Code* for conditional sentencing and long-term offenders, respectively. As summarized in Chapter 8 of *The Gladue Principles*, the Supreme Court subsequently addressed how the unique circumstances of Indigenous people relate to systemic discrimination in the correctional system and the jury process, as well as how they relate to the vulnerability of Indigenous children to abuse. In Part D of *The Gladue Principles* a number of other topics are explored in terms of how these principles have been further elaborated and extended by lower courts.

The broader relevancy of an Indigenous person's unique circumstances

- In **joint sentencing submissions** an Indigenous person's unique circumstances may need to be explored in detail to justify the submission or its rejection by the court (see Chapter 12 of *The Gladue Principles*).
- In **bail hearings** courts need to carefully assess bail criteria, conditions, and release plans to avoid perpetuating systemic discrimination and to ensure adequate attention is paid to cultural differences (see Chapter 13). For example, no-contact or no-go conditions may be unreasonable in light of overcrowding or transportation challenges in a community and unique cultural considerations may strengthen or contextualize the release plan.
- In **dangerous and long-term offender proceedings** an Indigenous person's unique circumstances are relevant to the proportionality of their sentence and might also shed light on future treatment prospects and the potential for systemic discrimination in the assessment of risk and dangerousness (see Chapters 7 and 14).
- In the **sentencing of young persons** an Indigenous youth's unique circumstances are relevant under a standard *Gladue* analysis and might also be relevant to the assessment of whether an adult sentence is appropriate, among other considerations (see Chapter 15). For example, an Indigenous youth's unique vulnerabilities might indicate that they should remain in a youth custody facility even after reaching the age of 20.

- When considering the **collateral consequences** of an offence, conviction, or sentence for an Indigenous person their systemic and background factors may amplify these consequences or there may be collateral consequences unique to their circumstances (see Chapter 16). For example, impacts on an Indigenous person's employment may be amplified by systemic factors like a high unemployment rate in their community or their offence might result in banishment from the community or loss of a hereditary title.
- In applications for **absolute and conditional discharges** an Indigenous person's unique circumstances might shed light on their best interests or whether a discharge is contrary to the public interest (see Chapter 17).
- Likewise, in **civil and administrative law sentencing proceedings** an Indigenous person's unique circumstances will remain relevant, as will broader concerns around Indigenous alienation from the justice system, among other things (see Chapter 18).

In addition to these emerging areas of case law, there are several other contexts where the broader relevance and implications of an Indigenous person's unique circumstances have at least been tentatively explored to date. These include:

- A court martial sentencing decision;[118]
- Judicial review of a decision of the Ontario Review Board relating to an accused found not criminally responsible on account of mental disorder;[119]
- Judicial review of extradition decisions;[120]
- Judicial review of a decision of the Parole Board of Canada;[121]
- *Habeas corpus* applications related to further restrictions on the liberty of Indigenous people within the correctional system;[122]
- An application to withdraw a guilty plea prior to sentencing;[123]
- An application for a stay of proceedings based on pre-charge delay;[124]
- A *Corbett* application to have an Indigenous person's criminal record edited before cross-examination on it before a jury;[125]
- An application to change the terms of a non-communication order pursuant to s 516 of the *Criminal Code*;[126]

- An application for the use of a firearm or restricted weapon for sustenance purposes as an exception from a firearms prohibition;[127]
- The judicial screening stage of a faint hope application to obtain a reduced period of parole ineligibility;[128]
- Determining whether an Indigenous person has a reasonable excuse for failing to provide requisite notice for a tort claim against a municipality;[129]
- Determining the voluntariness of an Indigenous person's statements to the police;[130] and
- Contextualizing the assessment of credibility and reliability for testimony from an Indigenous witness.[131]

None of these decisions purports to artificially extend the reach of s 718.2(e)'s direction to sentencing judges under the *Criminal Code*. Instead, they draw upon the judicially noticed social context and underlying concepts articulated by the Supreme Court of Canada in *Williams*, *Gladue*, *Wells*, *Ipeelee*, *Ewert*, and *Barton*, among others. As discussed in Part D of *The Gladue Principles*, it may not be possible to formulate an a *priori* limit on the relevancy of the unique circumstances of an Indigenous person given the innumerable instances in which courts exercise their discretion with regards to all the circumstances before them. Presumably counsel and the courts will continue to explore the relevancy of these unique circumstances in other contexts and the examples discussed in this user guide and The Gladue Principles are not exhaustive even at the time of writing.

ENDNOTES

1 See for example *R v Ipeelee*, 2012 SCC 13 at paras 34, 63, 74, 84, 87 [*Ipeelee*].

2 *R v Wells*, 2000 SCC 10 at para 41 [*Wells*].

3 See especially: *R v Laliberte*, 2000 SKCA 27 at para 59; *R v Rose*, 2013 NSPC 99 at para 31; *R v Watts*, 2016 ABPC 57 at para 63, citing Judge Mary Ellen Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (2000) 43 *Criminal Law Quarterly* 34. These lists are fully reproduced in Benjamin Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre, 2021) at 253-256 [Ralston].

4 *R v Gladue,* [1999] 1 SCR 688, 1999 CanLII 679 at paras 33, 36-37 [*Gladue*]. See also Ralston, *supra* note 3 at Chapter 3.

5 For a detailed discussion of whether there is a judicial duty to inquire as to whether the person being sentenced identifies as Indigenous, see *R v Whitstone*, 2018 SKQB 83 at paras 1-2, 36-37. See discussion in Ralston, *supra* note 3 at 250-251.

6 Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Montgomery Publications Ltd, 2019) at 102 [Rudin]. See also: *R v Boyd*, 2015 ONCJ 120 at paras 14-17; *R v Ceballo*, 2019 ONCJ 612 at paras 11-12 [*Ceballo*].

7 *Gladue*, *supra* note 4 at para 90 [emphasis added].

8 *Gladue*, *supra* note 4 at para 88. The term "affirmative action" is sometimes used to encompass any positive state action that aims to ameliorate discrimination. However, controversy over the implementation of affirmative action in Canada has often focused on a narrower understanding of the term as referring to preferential treatment based on group membership and a social justice understanding of equality as opposed to addressing direct and adverse effect discrimination from an individualized understanding of equality. See for example: Mark A Drumbl and John DR Craig, "Affirmative Action in Question: A Coherent Theory for Section 15(2)" (1997) 4 Rev Const Stud 80; Michel Bastarache, "Does Affirmative Action Have a Future as an Instrument of Social Justice? (1998) 29:2 Ottawa L Rev 497.

9 See for example: *R v Monckton*, 2017 ONCA 450 at para 115; *R v FHL*, 2018 ONCA 83 at para 38 [*FHL*]; *R v EC*, 2019 ONCA 688 at para 16; *R v Brown*, 2020 ONCA 657 at para 48 [*Brown*]. See also *R v Bennett*, 2017 NLCA 41, Hoegg JA at para 77, dissenting [*Bennett*].

10 See for example: *FHL*, *supra* note 9 at paras 40-49; *Brown*, *supra* note 9 at paras 44-53.

11 See for example: *R v Gilliland*, 2014 BCCA 399 at paras 7, 21 [*Gilliland*]; *R v Demmons*, 2016 BCPC 363 at paras 25-28, 77; *R v Kreko*, 2016 ONCA 367 at paras 24-25; *R v SC*, 2017 ONCJ 293 at paras 57-60; *R v Norman*, 2018 ONSC 2872 at paras 17-18, 53-65; *R c Brazeau*, 2018 QCCQ 10151 at paras 35-37, 89, 116; *R v Gower*, 2019 BCSC 559 at paras 86-91.

12 See for example: *R v Jack*, 2008 BCCA 437 at paras 29-46 [*Jack*]; *R v Collins*, 2011 ONCA 182 at paras 32-33 [*Collins*]. The approaches taken in these two cases were cited with approval in *Ipeelee*, supra note 1 at para 82. See also Ralston, *supra* note 3 at 126-127.

13 See for example: *R v Antoine*, 2017 BCPC 333; *R v Golding*, 2018 ONCJ 320; *R v Young*, 2021 BCPC 6.

14 *Matte c R*, 2020 QCCA 1038 at paras 10-28.

15 See especially cases addressing the circumstances of Black/African-Canadian individuals, such as: *R v Diabikulu*, 2016 BCPC 390; *R v Gabriel*, 2017 NSSC 90; *R v Morris*, 2018 ONSC 5186; *R v Jackson*, 2018 ONSC 2527 [*Jackson*]; *R v Kandhai*, 2020 ONSC 3580; *R v Fisher*, 2020 NSSC 325. An appeal decision in *Morris* remains outstanding from the Ontario Court of Appeal at the time of writing.

16 *Jackson*, *supra* note 15 at paras 55-73, 115.

17 See for example: *R v Borde*, [2003] OJ No 354 (QL), 2003 CanLII 4187 (CA) at para 32; *R v Hamilton*, [2004] OJ No 3252 (QL), 2004 CanLII 5549 (CA) at paras 98-99; *Jackson*, *supra* note 15 at paras 113-114.

18 Rudin, *supra* note 6 at 104.

19 *Gladue*, *supra* note 4 at paras 83, 93(7); *Ipeelee*, *supra* note 1 at para 60.

20 Rudin, *supra* note 6 at 142-143. See also Ralston, *supra* note 3 at 259-261.

21 *R v Kakekagamick* (2006), 214 OAC 127, 2006 CanLII 28549 (CA) at para 44, leave to appeal to SCC refused, 21826 (10 May 2007); *R v Pelletier*, 2012 ONCA 566 at para 142, *citing Korponay v Canada (Attorney General)*, [1982] 1 SCR 41 at 49, 1982 CanLII 12.

22 *R v Park*, 2016 MBCA 107 at paras 28, 47 [*Park*]; *Bennett*, *supra* note 9, Welsh JA at paras 20-22, 26, Hoegg JA at para 68, dissenting.

23 *Gilliland*, *supra* note 11 at paras 14-15; *R v Kanatsiak*, 2020 QCCS 1523 at paras 98-108 [*Kanatsiak*]. See for example *R v Matchee*, 2019 ABCA 251 at paras 26-29, 36-44 [*Matchee*].

24 *Gladue*, *supra* note 4 at para 83. A more detailed discussion of the respective roles of Crown and defence counsel can be found in Ralston, *supra* note 3 at 263-268.

25 *Gladue*, *supra* note 4 at paras 84, 93(7).

26 *Gladue*, *supra* note 4 at paras 84. *Wells*, *supra* note 2 at para 54. A more detailed discussion of this judicial duty can be found in Ralston, *supra* note 3 at 250-252.

27 *Ipeelee*, *supra* note 1 at para 60.

28 *Wells*, *supra* note 2 at para 38; *Ipeelee*, *supra* note 1 at para 72.

29 *R v Blanchard*, 2011 YKTC 86 at para 25; *R v Corbiere*, 2012 ONSC 2405 at para 23; *R v Lawson*, 2012 BCCA 508 at para 26; *R v Burwell*, 2017 SKQB 375 at para 81. See also Ralston, *supra* note 3 at Chapter 11.

30 See for example: *R v Chickekoo*, 2008 ONCA 488; *R v Legere*, 2016 PECA 7 at paras 20-24 [*Legere*]; *R v Moyan*, 2017 BCCA 227 at paras 27-29 [*Moyan*]; *R v Wolfleg*, 2018 ABCA 222 at paras 52, 78-112 [*Wolfleg*]; *R v Zoe*, 2020 NWTCA 1 at paras 50-60 [*Zoe*].

31 See for example: *R v Gruben*, 2013 NWTSC 59 at 2; *R v Contreras*, 2019 ONSC 3152 at paras 25, 31. For further discussion of sentencing submissions and evidence adduced by counsel in support of the *Gladue* principles see Ralston, *supra* note 3 at 236-238.

32 *R v Lewis and Lewis*, 2014 BCPC 93 at para 15 [*Lewis and Lewis*]; *R v Parent*, 2019 ONCJ 523 at paras 72, 78-86, 147 [*Parent*].

33 See for example: *Lewis and Lewis*, *supra* note 32 at paras 16-17; *R v CJHI*, 2017 BCPC 121 at para 29; *Peepeetch v R*, 2019 SKQB 132 at paras 17, 56 [*Peepeetch*]; *R v Chappell*, 2020 BCSC 536 at paras 15-16, 64.

34 See for example: *R v Desjarlais*, 2019 SKQB 6 at paras 30, 33; *R v Sand*, 2019 SKQB 18 at para 48 [*Sand*]; *R v Angus*, 2020 SKQB 205; *R v GH*, 2020 NUCJ 21. For further discussion of reliance on pre-sentence reports authored by probation officers in support of the *Gladue* principles see Ralston, *supra* note 3 at 238-243.

35 See for example: *R v LLDG*, 2012 MBCA 106 at para 30; *R v Derion*, 2013 BCPC 382 at paras 6-7; *R v Keitlah*, 2014 BCPC 202 at para 35; *R v Noble*, [2017] 3 CNLR 135, 2017 CanLII 32931 (NL Prov Ct) at para 52 [*Noble*]; *R c Awashish*, 2020 QCCQ 3614 at para 19 [*Awashish*].

36 *Lewis and Lewis*, *supra* note 32 at para 14. See also *Parent*, *supra* note 32 at paras 59-64; *Awashish*, *supra* note 35 at para 19.

37 See discussion in: *R v CJA*, 2005 SKPC 10 at paras 40-46; *R v Knott*, 2012 MBQB 105 at paras 22-32, 40; *R v Quock*, 2015 YKTC 32 at paras 92-97; *R v Nepinak*, 2017 MBPC 62; *R v Head*, 2020 ABPC 211 at para 32; *R v Kishayinew*, 2021 SKCA 32 at para 63. See also Ralston, *supra* note 3 at at 241-242.

38 See for example: *R v Magill*, 2013 YKTC 8 at para 28; *R v Fontaine*, 2014 BCCA 1 at para 34 [*Fontaine*]; *Wolfleg*, *supra* note 29 at para 52. See also Ralston, *supra* note 3 at 243-246.

39 See for example *R v Macintyre-Syrette*, 2018 ONCA 259 at paras 19-23 [*Macintyre-Syrette*].

40 *Lewis and Lewis*, *supra* note 32 at paras 20-22; *Kanatsiak*, *supra* note 23 at paras 96-100, 108. For a detailed discussion of case law addressing remedies for an inadequate level of case-specific information, see Ralston, *supra* note 3 at 269-275.

41 *Sand*, *supra* note 34 at para 52; *Peepeetch*, *supra* note 33 at paras 28, 51-58; *R v Gamble*, 2019 SKQB 327 at para 59.

42 *R v Knockwood*, 2012 ONSC 2238 at paras 69-73; *Noble*, *supra* note 35 at paras 39, 50-53, 108.

43 *R v Carratt*, 1999 SKQB 116 at paras 30-32; *Parent*, *supra* note 32.

44 *Perley v R*, 2019 NBCA 88 at paras 19-20.

45 *R v Hartling*, 2020 ONCA 243 at paras 97, 99-100, 102-103, 124.

46 See Ralston, *supra* note 3 at Chapter 9 for a detailed discussion of this first category of unique circumstances.

47 *Ipeelee*, *supra* note 1 at para 60.

48 *Ibid*.

49 *R v Chanalquay*, 2015 SKCA 141 at para 52 [*Chanalquay*].

50 *Ibid*. See Ralston, *supra* note 3 at Chapter 9 for more detailed illustrations of how systemic and background factors can be relevant to sentencing in various overlapping ways as explored in the existing jurisprudence.

51 See for example: *R v Gladue*, 2012 ABCA 118 at para 6; *R v Crazyboy*, 2012 ABCA 228 at para 32; *R v Laboucane*, 2016 ABCA 176 at para 71 [*Laboucane*]. See also: *R v Kuliktana*, 2020 NUCA 7 at para 31; *R v GH*, 2020 NUCA 16 at paras 23-26.

52 *R v Harry*, 2013 MBCA 108 at para 61. See also *Gilliland*, *supra* note 11 at para 15.

53 *Gladue*, *supra* note 4 at paras 67-69. See also Ralston, *supra* note 3 at 80-81.

54 *Ipeelee*, *supra* note 1 at paras 68, 73, 87

55 *Ibid* at para 36; *R v Anderson*, 2014 SCC 41 at paras 24-25.

56 *Gladue*, *supra* note 4 at para 66. See Ralston, *supra* note 3 at Chapter 10 for a detailed discussion of common culturally appropriate sentencing procedures and sanctions.

57 *Wells*, *supra* note 2 at paras 39, 50.

58 *Ipeelee*, *supra* note 1 at para 74.

59 *Gladue*, *supra* note 4 at paras 84, 91-92.

60 See Ralston, *supra* note 3 at 202-205.

61 *Ibid* at 205-212.

62 *Ibid* at 212-215.

63 *Ibid* at 215-217.

64 *Ibid* at 217-220.

65 *Ibid* at 221-222.

66 *Ibid* at 222-226.

67 *Ibid* at 227-228.

68 *Ibid* at 228-230.

69 See for example: *R v Kawapit*, 2013 QCCQ 5935 at paras 25-31; *R v EJTM*, 2016 BCSC 356 at paras 11-12, 15.

70 *R v Callihoo*, 2017 ABPC 40 at paras 38, 45, 68-86.

71 *Macintyre-Syrette*, *supra* note 39 at paras 19-24.

72 See Ralston, *supra* note 3 at 261-262 for further discussion of adequacy of reasons in this context.

73 *Gladue*, *supra* note 4 at para 85.

74 See for example *R v Good*, 2012 YKCA 2 at paras 23-38.

75 *Ibid* at para 37: "It is unfortunate the sentencing judge did not deal with Ms. Good's Aboriginal heritage expressly. It is unsatisfactory for both the offender and the public to have to resort to inference to ensure those circumstances were properly considered. Nevertheless, based on the record before him and his reasons, I am satisfied the sentencing judge was aware of and considered her Aboriginal heritage, but ultimately found it could not justify restorative measures or a reduced term of incarceration given the seriousness of the offences and Ms. Good's past history of similar violence."

76 *Ipeelee*, *supra* note 1 at para 95.

77 See for example: *Fontaine*, *supra* note 38 at para 35; *R v Napesis*, 2014 ABCA 308 at para 8 [*Napesis*]; *Legere*, *supra* note 30 at para 45; *Park*, *supra* note 22 at para 35; *Laboucane*, *supra* note 51 at para 5.

78 *Wolfleg*, *supra* note 29 at paras 100-102.

79 *R v Whitehead*, 2016 SKCA 165 at paras 68-74 [*Whitehead*].

80 *Zoe*, *supra* note 30 at para 54.

81 *Gladue*, *supra* note 4 at para 94.

82 *Ibid*.

83 *Ibid* at para 95.

84 *Ipeelee*, *supra* note 1 at para 90.

85 *Ibid* at para 95.

86 *Ibid*.

87 *Ibid* at para 80.

88 *Ibid* at para 81, citing *R v Poucette*, 1999 ABCA 305 at para 14.

89 *Ibid* at para 81, citing: *R v Gladue*, 1999 ABCA 279; *R v Andres*, 2002 SKCA 98.

90 For a more detailed discussion see Ralston, *supra* note 3 at 125-128.

91 *Ipeelee*, *supra* note 1 at para 82, citing: *Collins*, *supra* note 12 at paras 32-32; *Jack*, *supra* note 12.

92 *Ibid* at paras 84-86.

93 *Ibid* at para 86.

94 *Ibid* at paras 85, 87.

95 See for example: *R v DG*, 2014 BCCA 84 at paras 24-32; *R v Swampy*, 2017 ABCA 134 at paras 22-39; *R v Campbell*, 2017 ABCA 147 at paras 3-4; *R v JLM*, 2017 BCCA 258, Bennett JA at paras 30-38 [*JLM*]; *R v JP*, 2020 SKCA 52 at paras 63-66 [*JP*].

96 See for example: *R v Predham*, 2016 ABCA 371 at para 10; *Whitehead*, *supra* note 79 at paras 42-57; *R v Joe*, 2017 YKCA 13 at paras 77-84 [*Joe*]; *Moyan*, *supra* note 30 at paras 23-29; *JLM*, *supra* note 95, Bennett JA at paras 30-38; *R v Grandjambe*, 2018 ABCA 191 at paras 6-10; *Matchee*, *supra* note 23 at paras 26-29; *R v McInnis*, 2019 PECA 3 at paras 46-55; *JP*, *supra* note 95 at para 73.

97 See for example: *R v Gabriel*, 2013 MBCA 45 at paras 23-29; *R v Wheatley*, 2016 BCCA 397 at para 18; *R v Okimaw*, 2016 ABCA 246 at paras 64-68 [*Okimaw*]; *Park*, *supra* note 22 at paras 33, 46; *Joe*, *supra* note 96 at paras 77-84; *R v Souvie*, 2018 ABCA 148 at paras 52-55; *R v Martin*, 2018 ONCA 1029 at paras 13-20; *R v Isbister*, 2019 BCCA 135 at paras 18-19; *JP*, *supra* note 95 at paras 62-67; *R v Hiscock*, 2020 BCCA 355 at paras 18-41; *R v Neepin*, 2020 MBCA 55 at paras 69-73.

98 See for example: *Okimaw*, *supra* note 97 at para 69; *JP*, *supra* note 95 at para 71; *Brown*, *supra* note 9 at paras 40, 44-45.

99 See for example: *Napesis*, *supra* note 77 at para 9; *Legere*, *supra* note 30 at paras 11-24.

100 See for example: *Park*, *supra* note 22 at paras 28-32, 46-47; *Wolfleg*, *supra* note 30 at paras 50, 81, 108-112, 123-124; *Zoe*, *supra* note 30 at para 56.

101 *Okimaw*, *supra* note 97 at paras 65-68; *JP*, *supra* note 95 at paras 33-34.

102 See especially *R c LP*, 2020 QCCA 1239, Thibault JA at paras 199-208, dissenting [*LP*], citing: Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51 UBC L Rev 548; Kent Roach, "*Ipeelee* in the Courts of Appeal: Some Progress but Much Work Remains" (2020) 67 CLQ 386; Kent Roach, "Plan B for Im-

plementing *Gladue*: The Need to Apply Background Factors to the Punitive Sentencing Purposes" (2020) 67 CLQ 355; Noah Wernikowski, "Negative Retributivism: A Response to *R. v. Ipeelee*'s Innovative Call" (2020) 67 CLQ 37; Canada, Department of Justice, *Spotlight on* Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Department of Justice, 2017); Nate Jackson, "The Substantive Application of *Gladue* in Dangerous Offender Proceedings: Reassessing Risk and Rehabilitation for Indigenous Offenders" (2015) 20:1 Can Crim L Rev 77; *inter alia*.

103 See for example: *R v Atkinson*, 2012 YKTC 62 at para 33; *Chanalquay*, *supra* note 49 at paras 42-43; *R v Iqalukjuak*, 2020 NUCJ 15 at para 35.

104 *Gladue*, *supra* note 4 at para 81 [emphasis added].

105 *Ibid* at para 94.

106 *Ibid* at para 70.

107 *Ibid* at para 71 [emphasis added].

108 *Ibid* at para 80.

109 See for example: *R v Wells*, 1998 ABCA 109 at para 48; *R v Nikal*, 1999 BCCA 738, Lambert JA at para 41, concurring; *R v Morris*, 2004 BCCA 305 at paras 62, 67-70; *R v Suarak*, 2007 NLTD 5 at para 74; *R v RRM*, 2009 BCCA 578 at paras 22-23; *Whitehead*, *supra* note 79 at para 83, citing Sanjeev Anand, "The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: a comment on the decision in *R. v. Gladue*" (2000) 42 Can J Crim 412.

110 See for example: *R v PJB*, 2015 BCPC 390 at para 22; *R v RDC*, 2016 BCPC 388 at paras 52-53 [*RDC*]; *R v AD*, 2019 ABCA 396 at paras 25-26 [*AD*].

111 *R v Friesen*, 2020 SCC 9 at para 70 [*Friesen*]. See also Ralston, *supra* note 3 at 149-151.

112 See especially ss 718.04 and 718.201. For judicial interpretation of their relevance to the *Gladue* principles see for example: *R v PMM*, 2019 BCPC 276 at paras 36-40; *LP*, *supra* note 102, Ruel JA at paras 71-101; *R v West*, 2020 BCSC 352 at paras 33-37; *R v Kolola*, 2020 NUCJ 38 at paras 56-73.

113 *R v Black*, 2014 ONCJ 236 at para 89; *R v Quock*, 2015 YKTC 32 at paras 104-106; *R c Neashish*, 2016 QCCQ 10775 at paras 134-145; *R v Johnny*, 2016 BCCA 61 at para 21 [*Johnny*].

114 See for example: *R v Zarpa*, 2009 NLTD 175 at para 27; *RDC*, *supra* note 110 at para 55; *R v Huskey*, 2018 NWTTC 2 at paras 29-30.

115 *Johnny*, *supra* note 113 at para 21; *AD*, *supra* note 110 at paras 27-28; *Friesen*, *supra* note 111 at paras 92, 104, 124.

116 See for example: *R v LJJ*, 1999 CanLII 15162 (BCSC) at paras 26-44; *R v Ledesma*, 2012 ABPC 10 at para 39; *R c McConini Mitchell*, 2018 QCCS 5157 at paras 44-51.

117 See for example: *R v L et al*, 2012 BCPC 503 at paras 1-2, 44-49, 55-60; *R v Nashkewa*, 2016 ONCJ 729 at para 44; *R v Sharma*, 2018 ONSC 1141 at paras 25-26, 184, rev'd in part on other grounds 2020 ONCA 478, leave to appeal to SCC granted, 39368 (14 January 2021); *R v TLC*, 2019 BCPC 314 at paras 55-58, 70-71; *R v A(M)*, 2020 NUCJ 4. For discussion of case law addressing experiences and cycles of abuse, violence, and victimization/criminalization in context to the *Gladue* principles see Ralston, *supra* note 3 at 183-185.

118 *R v Levi-Gould*, 2016 CM 4003.

119 *R v Sim*, (2005), [2006] 2 CNLR 298, 2005 CanLII 37586 (Ont CA).

120 See especially: *United States of America v Leonard*, 2012 ONCA 622, leave to appeal to SCC refused, 35086 (7 March 2013); *Sheck v Canada (Minister of Justice)*, 2019 BCCA 364.

121 *Twin v Canada (Attorney General)*, 2016 FC 537.

122 See especially: *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at paras 9, 105-106; *Germa c Tremblay*, 2019 QCCS 1764 at paras 87-99; *Lorne Snooks c Giordano*, 2019 QCCS 1766 at paras 65-78.

123 *Ceballo*, *supra* note 6.

124 *R v Miller*, 2019 ONCJ 480.

125 *R v King*, 2019 ONSC 6851.

126 *R v Brennan Nicholas*, 2016 ONSC 5949.

127 *R v Shobway*, 2017 ONCJ 476.

128 *R v Abram*, 2019 ONSC 3383.

129 *O'Shea v City of Vancouver*, 2015 BCPC 398.

130 *R v Camille*, 2018 BCSC 301; *R v Wabason*, 2018 ONCA 187.

131 *R v AS*, 2016 ONSC 6965 at paras 67-68.

Over the past two decades Canadian courts have repeatedly acknowledged that Indigenous individuals and collectives face systemic discrimination throughout the criminal justice system. The system's disproportionate adverse impacts on Indigenous peoples have also been thoroughly studied and documented for over half a century. Indigenous individuals are over-represented among those charged, convicted, and sentenced to prison, as well as those who are victims of crime. Among other disparities, Indigenous individuals are more likely to be denied parole, spend a disproportionate amount of time in segregation, and are less likely to receive community-based sentences. At the same time, the criminal justice system has often marginalized the legal responses of Indigenous collectives to wrongdoing among their members.

These systemic issues require systemic responses. On April 23, 1999, the Supreme Court of Canada provided one such response in its decision in *R v Gladue*, articulating a broad, open-ended framework to address this crisis of legitimacy and outcomes in the sentencing of Indigenous persons. The *Gladue* decision's main principles have since been extended to various other facets of the criminal justice system. At the direction of the BC First Nations Justice Council, this user guide was prepared as a tool to be used in conjunction with the more detailed synthesis of case law in *The Gladue Principles: A Guide to the Jurisprudence*.

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