

The

GLADUE PRINCIPLES

A GUIDE TO THE JURISPRUDENCE

BENJAMIN A.
RALSTON

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**BENJAMIN A.
RALSTON**



Indigenous Law Centre
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ABOUT THE BC FIRST NATIONS JUSTICE COUNCIL

At its most basic level, justice is understood differently by Indigenous people. Instead of punitive sentences, in an Indigenous justice system, the goal is to restore peace and equilibrium within the community and to reconcile the accused with their own conscience and with the individual or family who has been wronged by their actions. These innate differences are at the root of many challenges that Indigenous people face with today's justice model.

Established in 2015 by the BC Assembly of First Nations, Union of BC Indian Chiefs and the First Nations Summit, the BC First Nations Justice Council (BCFNJC) was mandated to address the significant justice hurdles First Nations face including:

1. The overrepresentation of Indigenous children and youth in care, who make up approx. 65 per cent of the overall total, and the rate of Indigenous men and women in incarceration, which now stands at more than 30 per cent, growing from a pre-*Gladue* rate of 10 per cent.
2. The underrepresentation of Indigenous people working within the justice system (very few Indigenous police, prosecutors, judges, AG or PSSG staff exist).
3. Poor access to legal representation, partly due to the defunding of Legal Aid in 2002.
4. Poor access to justice services due to the defunding of a network of 14 Native Community Law Offices that functioned from 1975 to 2002.

To accomplish this transformative work, the BC First Nations Justice Strategy, signed on March 6, 2020, was developed over two years by the BCFNJC, BC First Nations communities, the Province of British Columbia along with input from key justice system stakeholders participating at two Indigenous justice summits.

The 2020 BC First Nations Justice Strategy calls for 42 actions along two tracks of transformative change:

Track 1: Reform the current justice system

- Reduce youth incarceration through prevention, diversion and access to justice
- Increase public safety and access to justice for women and girls
- Establish a network of 15 Indigenous Justice Centres
- Increase cultural safety training and Indigenous representation in positions of authority
- Systemic implementation of *Gladue* Principles
- Independent third-party oversight regarding Indigenous peoples and the justice system

Track 2: Restore First Nation legal traditions and structures

- Reclaim legal space and revitalize First Nations legal orders
- Rebuild self-determined and culturally-appropriate institutions
- Use restorative and healing approaches at all levels
- Create a community justice fund for stable and ongoing investment in programs

Fully implemented, the BC First Nations Justice Strategy will reduce the number of First Nations people who become involved with the criminal justice system, improve the experience of those who do, increase the number of First Nations people working within the justice system and support First Nations' communities in the restoration of their justice systems and structures.

ACKNOWLEDGMENTS

This has been a labour-intensive project. I started work on this book in mid-2019, a first draft was finalized during the first few weeks of the pandemic in the spring of 2020, only to be later updated and revised at the end of the year, and its publication is now on track for the spring of 2021. Looking back, I want to express my sincere thanks to everyone who made this book possible. First and foremost, I would like to thank Doug White and his colleagues at the BC First Nations Justice Council for entrusting me with this task and providing direction and encouragement throughout the process. Timothy Scolnick and his colleagues at the BC Ministry of the Attorney General were of great help in this regard as well. In addition, I also want to recognize Meredith Maloof and her colleagues at the Indigenous Law Centre for their own hard work and vital contributions. I am in their debt for being willing and able to publish this monograph, taking on all the administrative burdens this entails. Likewise, I want to acknowledge contributions from two research assistants, Sophie Kassel and Taylor Bereziak, as well as the cover art of Shain Jackson that is as meaningful as it is beautiful. And I wish to extend a special thanks to Judge Gerry Morin and Doug White again for the very gracious set of dueling forewords.

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Benjamin A. Ralston

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FOREWORD (ILC)

**Kinowahpum awah kah-ohskhigapawit, ehko ansinew
kawiwanuswatut!**

Look at the person standing in front of you. This is the person you are judging.

**Kinowhapatah omeskanaw, ekwah kakenistotah awina
kakee-oshetat anima meskanow.**

Look at the road they have followed and ask yourself who made the road for this person to follow?

**Awina onwanuswewin ekwah ohmamitonehneechikan kah
apacheetahack tah wanuswatahack awa ansinew.**

Whose law are we using and whose way of understanding are we using to reach this decision, with this person?

**Meechet wanuswewina ekwa owanuswenenuwuk
musinamuk tansi tahkeesiaputchetahack omah wanuswewin
ka-esshineekatamaak Gladue uschee Ipeelee.**

There are many laws used and many judges who have written how we should interpret the judgments of *Gladue* and *Ipeelee*.

*The Honourable Gerald M. Morin**

* Judge Morin knows and understands the 3 dialects (“TH”, “N” and “Y”) used in Saskatchewan. He is predominantly an “N” dialect speaker and thus the pronunciation is “N” based.

FOREWORD (BCFNJC)

The development of this book was spearheaded by the BC First Nations Justice Council to assist in the vital and urgent work of addressing the overrepresentation of Indigenous peoples in the criminal justice system. This overrepresentation is well-documented and understood, long-standing and ever worsening, and reveals the depths of the legacy and intractability of colonialism in the criminal justice system. No fact is more illustrative of this than the trajectory of overrepresentation over the past 30 years. In the mid-1990s Indigenous people made up 10% of the prison populations in the country while making up only 5% of the overall population of Canada. As of 2020, just over 30% of prison populations are Indigenous.

The unacceptable reality of overrepresentation has been well-known by the Canadian justice system for decades. Indeed, it has been decades since it was recognized as an urgent crisis in Canadian society and something had to be done about it. Section 718.2(e) of the *Criminal Code of Canada* was adopted in 1996 as a remedial provision aimed at addressing this crisis. The historic decision of the Supreme Court of Canada in *R. v. Gladue* was issued in 1999. These important developments were designed to tackle the issue of overrepresentation, while recognizing that many other actions were needed, including the rebuilding of Indigenous systems of justice, upholding the basic constitutional and human rights of Indigenous peoples, and addressing systemic racism while creating an anti-racist culture.

While *Gladue* is a good and important decision that holds real promise for helping to address overrepresentation, to date this promise has not been met. The simple reason for this, as is often the case, is that Supreme Court decisions regarding Indigenous peoples or their rights are generally not fully or rapidly implemented. This is the reality with respect to decisions regarding Indigenous Title and Rights, and it is the case with respect to *Gladue*.

This volume, commissioned by the BCFNJC and written by Professor Benjamin Ralston, is intended to help spur greater action to implement *Gladue*. As a leader and mentor to many, Professor Ralston has authored a guide to the jurisprudence and its history that should be used by all those who work in the criminal justice system—from Indigenous leaders and communities, to lawmakers, to judges, to prosecutors, to defence counsel, to police and law enforcement, to corrections and parole.

Let us be clear, this is a book not only to read, but to use. Turn to it when deciding how to act in relation to an Indigenous accused and strive to find justice through a deep understanding of the intersection of colonialism and criminal justice. This is what we are called to at this moment in time—to reject the ways of the past, to do better, to act in a principled way, to recognize the lived experience of Indigenous peoples, and make our systems ever more just and fair.

A focus on implementing *Gladue* is one aspect of the comprehensive *BC First Nations Justice Strategy* that was jointly adopted by BC First Nations and the Government of British Columbia on March 6, 2020, and forms the blueprint for addressing the legacy of colonialism in relation to criminal justice. Rooted in the foundation of Indigenous self-determination and recognizing the practical stages and steps that are needed to move from where we are today to where we must be, the *Strategy* is the guide to transforming our current reality. Fully implementing *Gladue* throughout the system is a vital part of the early implementation of the *Strategy*. Let's get on with it—and use this guide to help in doing this essential work.

Douglas S. White III (Kwul'a'sul'tun), Q.C.
Chair, BC First Nations Justice Council

INTRODUCTION

The Supreme Court of Canada issued a unanimous set of reasons in an appeal called *R v Gladue* on April 23, 1999.¹ This was the Supreme Court's first opportunity to interpret an amendment to the *Criminal Code* directing sentencing judges to “pay particular attention to the circumstances of Aboriginal offenders” in exploring whether alternatives to prison might be available and reasonable in any given case—namely, s 718.2(e). This sentencing framework provides the basis and overall structure for this publication.

Ironically the outcome from the *Gladue* appeal had no impact on the sentence imposed on Ms. Jamie Tanis Gladue, a Cree woman living in Nanaimo whose name is reflected in its style of cause. She was sentenced for manslaughter in 1997 with little to no attention paid to her unique circumstances as an Indigenous woman, or to those of her common-law spouse and victim, his family, and their community.² By April 1999, Ms. Gladue had been released on full parole and the Supreme Court did not see any benefit in disturbing this outcome in spite of the errors that had been made by courts below it.

In stark contrast, Ms. Gladue's appeal has had an immeasurable impact on Canadian law and the criminal justice system since then. The broad implications of the *Gladue* decision are reflected in its near universal recognition among Canadian law students, lawyers, judges, and others working in the justice system today. It has also spurred countless well-known neologisms like “*Gladue* reports”, “*Gladue* courts”, and “*Gladue* factors”, as well as the “*Gladue* principles” referenced in the title of this publication.

While the *Gladue* principles emanating from this decision are recognized by name throughout Canada's criminal justice system, it is more difficult to say how widely understood they are. This is not so much a criticism as it is a reflection of the open-textured and all-encompassing nature of

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue*].

2 *Ibid* at para 94.

this sentencing framework. As the Supreme Court of Canada made clear in its subsequent decision in *R v Wells*, the sentencing guidelines in the *Gladue* decision were never intended to provide a “single test”.³ Instead, they called on courts and counsel to broaden their gaze and explore a wide variety of circumstances that make Indigenous individuals and collectives unique, particularly in terms of their relationship with the Canadian government and criminal justice system.

Parliament insisted on greater attention to Indigenous difference in sentencing as its response to two different realities that had emerged by the mid-1990s. First, the grossly disproportionate rates of imprisonment for Indigenous people had been linked to systemic discrimination in the criminal justice system. Second, many Indigenous justice initiatives and culturally relevant programs were (re-)emerging across the country by that time. These two realities opened up very different lines of inquiry for the courts and counsel.

First, the circumstances of many Indigenous individuals are “markedly different” because of the impacts of a wide range of unique systemic and background factors on their lives.⁴ Addressing systemic discrimination in the criminal justice system may require us to work backwards from the system’s disparate consequences for Indigenous people and question how these are produced by practices and attitudes within it, intentional or otherwise.⁵ Achieving equality may require attention to the social, political, economic, and historical factors that have contributed to inequality, and it may require differential treatment to ameliorate disparities.⁶ From this perspective, Parliament’s insistence that Indigenous people must be sentenced differently can be seen as a demand for closer attention to the differences that contribute to their overrepresentation in the criminal justice system.

Second, an Indigenous person’s community will frequently understand the nature of a just sanction in a manner “significantly different” from that of many non-Indigenous communities.⁷ With the introduction of s 718.2(e), Parliament sought to expand the use of restorative justice principles and reduce reliance on prison in the *Criminal Code* “with a

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

4 *Gladue*, *supra* note 1 at para 77.

5 *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1138-39, 1987 CanLII 109, citing Justice Rosalie S Abella, *Report of the Commission on Equality in Employment* (Ottawa: Minister of Supply and Services Canada, 1984) at 2.

6 *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 39.

7 *Gladue*, *supra* note 1 at para 77.

sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders”.⁸ Recognition and respect for Indigenous perspectives and justice initiatives leads to distinct inquiries into the legal, cultural, and historical differences between Indigenous collectives and non-Indigenous communities in Canada, which have “vastly dissimilar legal cultures”.⁹ This may refocus our attention on the broader context of Indigenous self-government and self-determination and the promotion of this through federal policy since at least the 1980s.¹⁰ In short, sentencing Indigenous individuals differently can also mean greater respect for Indigenous collectives and perspectives.

These divergent lines of inquiry emerge within the *Gladue* sentencing framework itself. The Supreme Court of Canada has interpreted s 718.2(e) as requiring lawyers and judges to canvass at least two sets of circumstances that make Indigenous people unique:

- (A) The unique systemic and background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
- (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.¹¹

The Supreme Court of Canada’s open-ended call for attention to Indigenous difference in *Gladue* initiated an expansive and complex body of sentencing jurisprudence. It provided a mandatory sentencing framework that must be applied in both rural and urban settings. The categories of “unique circumstances” that were outlined in *Gladue* take on meaning by reference to vastly different cultures, histories, experiences, legal traditions, programs, and justice initiatives across Canada. Its broadest principles are now applied in several analogous contexts beyond sentencing and the strict confines of Canadian criminal law.

This publication is an attempt to collate as much as possible of the existing jurisprudence in one place to make it more navigable and comprehensible for anyone who is engaged in the implementation of the *Gladue* principles. It is anticipated that the primary audience for this book will be made

8 *Ibid* at para 48.

9 *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216, Lamer CJ at paras 42, 49, McLachlin J at paras 232, 310, 313.

10 *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3, 1995 CanLII 145, La Forest J at paras 18, 74, Sopinka J at paras 113-115.

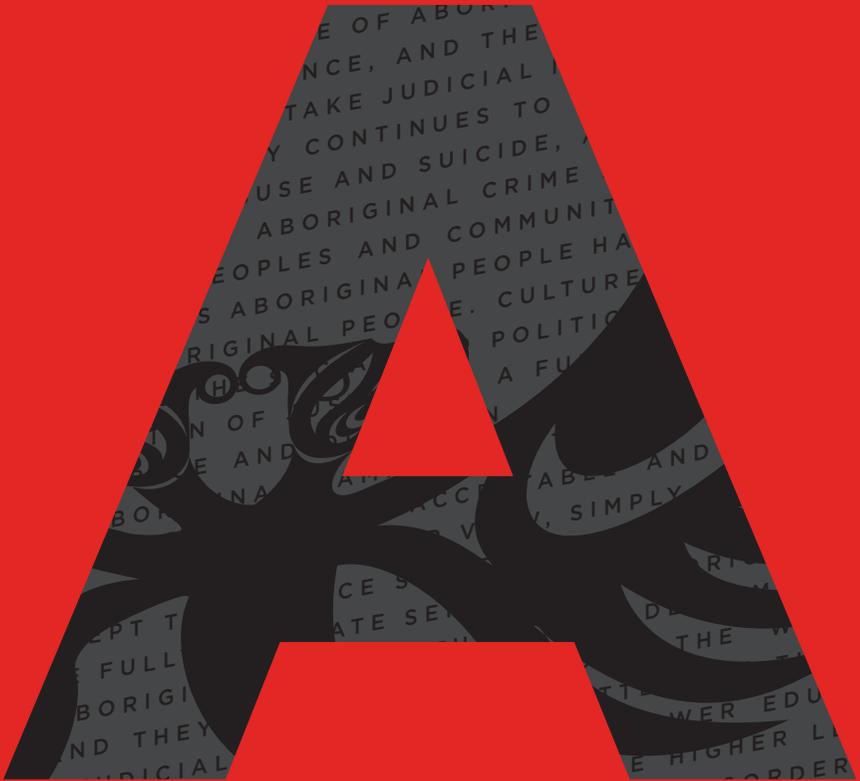
11 *Gladue*, *supra* note 1 at para 66; *Wells*, *supra* note 3 at para 38.

up of individuals with formal legal training. However, it is written with the understanding that this area of law is critically relevant to the work of many others, including *Gladue* report writers and community justice workers. For this reason it is written with the intention of making it accessible to the widest audience possible. For example, long excerpts from relevant legislation appear with less frequency than one might expect from a publication exclusively for lawyers practising criminal law.

The existing case law on the *Gladue* principles has also been synthesized and organized within this monograph in an attempt to bring it together into a coherent whole so as to assist in its principled development into the future. In support of this objective, the book is divided into four distinct parts. First, the implications of the *Gladue* decision and the enactment of s 718.2(e) of the *Criminal Code* are placed in context by summarizing some of the prior jurisprudence on the accommodative sentencing of Indigenous people that was already in place, as well as the many task forces and inquiries that contributed to these reforms to the law, and the legislative context and debate that further informed the *Gladue* framework. Second, the Supreme Court of Canada's judgments interpreting s 718.2(e) have been summarized in detail, along with other case law from the Supreme Court that indicates broader horizons for its core principles and values. Third, the two categories of unique circumstances referenced in *Gladue* and the need for case-specific information are each canvassed in reference to lower court jurisprudence that has filled in the *Gladue* framework and illustrated its flexibility. Fourth, emerging extensions of the *Gladue* principles to specific legal contexts will be explored, including the sentencing of Indigenous youth and dangerous offenders, and accounting for collateral consequences.

This publication does not attempt to critically engage with the *Gladue* principles or the academic literature they have engendered. There are countless thoughtful and persuasive articles, books, and graduate theses dedicated to critiquing the *Gladue* decision itself and its subsequent implementation by Canadian courts. These publications largely fall outside the scope of this monograph. The more modest goal here is to gather together as much of the existing case law as possible and organize it in a way that makes it readily accessible and transparent for anyone involved in the implementation of the *Gladue* analysis. It is meant to provide a roadmap for authoritative statements of Canadian law as it currently stands rather than any expression of how the law ought to change. In other words, it is no more nor less than what it purports to be: a guide to the jurisprudence.

PART



LEGAL AND HISTORICAL CONTEXT

PART A: LEGAL AND HISTORICAL CONTEXT

Most of the ignoble history of Indigenous peoples' interactions with the criminal justice system in Canada is well beyond the scope of this publication. However, Parliament was responding to a particular legal and historical context when it directed sentencing judges to consider all available sanctions other than imprisonment that are reasonable in the circumstances "with particular attention to the circumstances of aboriginal offenders" in the *Criminal Code* in 1996. The Supreme Court then interpreted this amendment in a particular legal and historical context in *Gladue* three years later. In order to fully grasp what was decided in *Gladue*, the existing context can be of great assistance.

Above all, s 718.2(e) and the *Gladue* principles insist upon the acknowledgement and accommodation of the unique circumstances of Indigenous people in sentencing. To do so, courts must confront the many complex ways in which Indigenous societies and individuals are differently situated. When the Supreme Court of Canada articulated its distinct and accommodative methodology for the sentencing of Indigenous people it did so building on an emerging jurisprudence, evolving practices and programming in both institutional and community settings, a deep body of knowledge amassed by several prior commissions of inquiry and task forces, and a thorough legislative debate.

Each of these topics will be canvassed in turn to highlight the legal and historical foundations on which the *Gladue* principles were first constructed. This background context provides a frame of reference for the Supreme Court's intentions when it directed sentencing judges to pay attention to a wide variety of unique and conceptually distinct circumstances whenever an Indigenous person is sentenced. Among other things, it can provide context for references to Indigenous perspectives, systemic and background factors, culturally appropriate sanctions and procedures, and systemic discrimination.

CHAPTER 1: EARLIER ACCOMMODATIVE SENTENCING PRACTICES

There is a long line of cases preceding the *Gladue* decision, which offers a convenient place to start. The common law is known for evolving incrementally rather than abruptly and this can be seen in the sentencing jurisprudence on the accommodation of the unique circumstances of Indigenous people in Canadian law. Recognizing what came before the *Gladue* decision helps stabilize its principles where they have deeper roots in precedent. It is worth noting from the outset that the Supreme Court of Canada interpreted s 718.2(e) as having a remedial purpose rather than simply codifying principles from these earlier cases.¹ In other words, s 718.2(e) was meant to change the law and not just reflect and entrench its existing state. Yet it is only possible to assess what this provision remedied if we first account for the prior state of the law in terms of sentencing Indigenous people.

Canada's criminal justice system has been grappling with the distinct circumstances of Indigenous societies and their members ever since it was first forcibly imposed upon them. In the early 19th century there was lingering uncertainty among colonial courts regarding their jurisdiction over crimes committed amongst Indigenous people.² However, by the 20th century Canadian courts were more or less unequivocal in their position that the *Criminal Code* should be applied to Indigenous people.³ This has given rise to other challenging questions, such as how Indigenous laws are to be reconciled with the civil and common law imported and imposed by European settlers.⁴ Cultural and spiritual divergence can

1 *R v Gladue*, [1999] 1 SCR 688 at para 33 [*Gladue*].

2 See: *Sero v Gault* (1921), 64 DLR 327, 4 CNLC 468 (Ont SC) at 473; Mark D Walters, "The extension of colonial criminal jurisdiction over the Aboriginal peoples of Upper Canada: Reconsidering the *Shawanakiskie* case (1822-26)" (1996) 46:2 UTLJ 273.

3 See *R v Beboning* (1908), 13 CCC 405, 3 CNLC 517 (Ont CA) at 525.

4 See especially *Connolly v Woolrich* (1867), 17 RJRQ 75, 1 CNLC 70 (Sup Ct), aff'd *Johnstone v Connelly* (1869), 17 RJRQ 266, 1 CNLC 151 (QB). See also *R v Nan-*

be seen in early cases as well.⁵ Language barriers are also apparent in some early cases.⁶ While the criminal justice system promises a form of equality before the law, underlying differences persist. And while Canadian law has long differentiated between Indigenous people and others, it historically did so in ways that are now universally recognized as oppressive and discriminatory.⁷ The *Gladue* principles continue to reflect the historical depth of this encounter and these legal, cultural, and spiritual differences in ways that make them particularly challenging.

The precursors to the *Gladue* principles can be seen in experimental and accommodative sentencing jurisprudence that emerged from northern courts during the late 20th century, as well as appellate courts reviewing their decisions. These early cases demonstrate how sentencing with Indigenous difference in mind led courts to question the criminal law's equal application. The case law leading up to *Gladue* indicates shifting judicial attitudes around the relevance of social circumstances to moral blameworthiness, as well as the place of Indigenous peoples' unique cultures, perspectives, and values in sentencing. By the 1990s, Canadian courts were also engaging with Indigenous justice initiatives that aimed to involve Indigenous communities and governments in the administration of justice. Taken together, these cases demonstrate the basic foundations for the Supreme Court of Canada's *Gladue* analysis.

Accommodative sentencing of Indigenous people from remote communities

Some of the earliest precedents for an accommodative approach to sentencing Indigenous people can be found in the decisions of the

e-quis-a-ka [1889] Terr LR 211, 2 CNLC 368 (NWTSC) and *R v Bear's Shin Bone* [1899] Terr LR 173, 3 CNLC 513 (NWTSC) where courts addressed whether polygamy charges could be brought based on Indigenous customary marriages.

- 5 See for example *R v Machekeqonabe* (1897), 28 OR 309, 3 CNLC 575 (Div Ct) where an appeal from a manslaughter conviction was unsuccessfully argued based on a common law defence of having acted pursuant to a religious belief when a man killed someone he mistook to be a Wendigo.
- 6 See for example *R v Louie* (1903), 10 BCR 1, 3 CNLC 566 (CA) where an appeal addressed concerns over the admissibility of an Indigenous woman's dying declaration made through an interpreter.
- 7 See for example: Wendy Moss & Elaine Gardner-O'Toole, *Aboriginal People: History of Discriminatory Laws* (Ottawa: Law and Government Division, 1987); John S Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879 to 1986* (Winnipeg: U of M Press, 1999); Constance Backhouse, *Colour-coded: a legal history of racism in Canada, 1900-1950* (Toronto: Osgoode Society for Canadian Legal History, 1999).

Northwest Territories Territorial Court during the tenures of Judge Sissons and Judge Morrow. In *Itsi*, for example, Judge Sissons held that a minimum fine for supplying alcohol to a minor would impact Indigenous people “more heavily and unfairly” than southerners visiting the territories due to their differing circumstances and intentions and he called for the provision to be disallowed on this basis.⁸ Following the precedents set by Judge Sissons, Judge Morrow took into account the shorter life expectancy for an Inuk by halving the period of incarceration he would have otherwise imposed for manslaughter in *Moses E9-833*.⁹ Judge Morrow also directed the correctional authorities to allow this sentence to be served in Yellowknife so the accused would be held among other Inuktitut speakers, as well as closer to psychiatric services.¹⁰ In *Esagok*, Judge Morrow went on to describe this contextual approach to the sentencing of Inuit as one that accounts for the “clash of social cultures” between them and non-Indigenous southerners.¹¹

Another early example can be seen in the Ontario Court of Appeal’s *Fireman* decision from 1971.¹² It reduced a Cree man’s ten-year penitentiary sentence for manslaughter to a period of two years less a day in order to properly account for his cultural background, his character, and his prospects for rehabilitation. Mr. Fireman was a trapper from a remote settlement on the Attawapiskat River who spoke no English and had little formal education. The Court found even a short term of imprisonment would be a “substantial punishment” for him given the “loneliness” he would face when unable to communicate with others in a southern penitentiary, and based on the stark contrast with his life in the north.¹³ Mr. Fireman’s community was also said to have “an apparent different value of death”.¹⁴ The Court found deterrence was met by the community’s participation in the arrest of Mr. Fireman, as well as his initial ostracism followed by reintegration into the community. The Court stated that “[w]hat is important in these circumstances is that to the whole community justice appears to have been done and

8 *R v Itsi* (1966), 6 CNLC 394 (NWT Terr Ct) at 402.

9 *R v Moses E9-833* (1969), 6 CNLC 515 (NWT Terr Ct).

10 *Ibid* at 516. See also: *R v Teemotee* (1969), 6 CNLC 627 (NWT Terr Ct); *R v Onalik* (1970), 6 CNLC 523 (NWT Terr Ct).

11 *R v Esagok* (1971), 7 CNLC 332 (NWT Terr Ct) at 332.

12 *R v Fireman* (1971), 4 CCC (2d) 82, 7 CNLC 337 (Ont CA).

13 *Ibid* at 340.

14 *Ibid*.

that there will be respect for the law”.¹⁵ Mr. Fireman’s reformation and rehabilitation were dominant considerations for sentencing, along with the community’s respect for the justice system.¹⁶

In *Curley*, Judge Bourassa of the Northwest Territories Territorial Court followed a similar tack when sentencing three Inuit men from Hall Beach for statutory rape of a 13-year-old girl.¹⁷ He took into account that this particular offence was viewed differently in the Eastern Arctic than in the south at that time, based on both a pre-sentence report and the court’s own experience, and noted that the accused men were not aware they had even committed a crime until they were confronted by the police and the *Criminal Code*.¹⁸ He sentenced them to one week in prison in addition to the three weeks of pre-trial custody they had already served, followed by eight months of probation.¹⁹ After a successful Crown appeal, the Northwest Territories Court of Appeal substituted four-month prison terms to ensure general deterrence was served.²⁰ Yet it imposed a shorter custodial term in recognition of the “cultural consideration” that taking the accused out of their home community and imprisoning them in “a totally foreign environment” would add to the harshness of these sentences.²¹ On the other hand, it emphatically rejected the proposition that residents of remote communities should be judged by their own standards.²²

The impact of the appellate decisions in *Fireman* and *Curley* on sentencing practices is difficult to assess from the reported case law. The *Fireman* case was distinguished in several decisions involving Indigenous people who judges perceived to be more acculturated than Mr. Fireman or whose communities were seen to be less remote, with the underlying assumption being that a clash of social cultures gradually abates over time.²³ In *Naqitarvik*, for instance, the Northwest Territories Court of Appeal distinguished *Fireman* from the circumstances of an Inuk from Arctic Bay who “had considerable contact with, and experiences of, the

15 *Ibid* at 341.

16 *Ibid*.

17 *R v Curley*, [1984] NWTR 263, 4 CNLR 65 (Terr Ct) [cited to CNLR].

18 *Ibid* at 68.

19 *Ibid* at 70-71.

20 *R v Curley*, [1984] NWTR 281, 4 CNLR 72 (CA) at 75.

21 *Ibid* at 74.

22 *Ibid*.

23 See for example *R v Whitney*, [1995] AJ No 301 (QL), 167 AR 187 (Prov Ct).

way of life of Canadians outside his own remote community”.²⁴ The majority held that the residents of Arctic Bay on the northern coast of Baffin Island had been “exposed for some time to the same laws and customs as other Canadians” and theirs was not “a culture markedly different than that in the rest of Canada”.²⁵ Similarly, the Saskatchewan Court of Appeal found *Fireman* could not be applied in a case involving an Indigenous man with a Grade 11 education from La Ronge in northeastern Saskatchewan.²⁶ Likewise, in *Baillargeon*, Justice Marshall of the Northwest Territories Supreme Court declined to follow *Fireman*’s reasoning altogether, noting that the Dene community of Dettah in the North Slave Region was “not nearly so remote, in any event”.²⁷

On the other hand, these cases did set important precedents for courts to inquire into the differential impacts of the criminal law on the Indigenous people they sentenced, and for courts operating in Indigenous communities to familiarize themselves with this context. The Newfoundland and Labrador Court of Appeal accepted the reasoning in *Fireman* as justifying deference to the greater knowledge and familiarity of sentencing judges with local conditions in Labrador, including the local knowledge of Canada’s first Inuk judge, Judge Igloliorte.²⁸ Similar deference appears to have been afforded to non-Indigenous sentencing judges regularly operating in Indigenous communities in some older cases of the British Columbia Court of Appeal as well.²⁹ On the other hand, some of the unique circumstances that were considered to be relevant in *Fireman*, *Curley*, and *Naqitarvik* proved to be far more controversial, particularly the notion that Indigenous perspectives, values, and community initiatives were relevant to sentencing under the *Criminal Code*.

24 *R v Naqitarvik* (1986), 26 CCC (3d) 193 at 195, 3 CNLR 119 (NWTCA) [*Naqitarvik*].

25 *Ibid.*

26 *R v Beatty* (1982), 69 CCC (2d) 223, [1983] 2 CNLR 125 (Sask CA).

27 *R v Baillargeon*, [1986] 3 CNLR 104 (NWTSC) at 109. But see *R v Ettagiak*, [1986] NWTJ No 39 (QL), NWTR 203 (SC).

28 See for example: *R v Onalik* (1987), 65 Nfld & PEIR 74, 1987 CanLII 3960 (NLCA); *R v Jararuse*, [1988] NJ No 338 (CA); *R v GA*, [1994] 3 CNLR 77, 1994 CanLII 9724 (CA) [*GA*].

29 See for example: *R v Charleyboy*, [1977] BCJ No 192 (QL) (CA); *R v Austin*, [1986] BCJ No 144, 1986 CarswellBC 912 (CA); *R v Michel*, [1986] BCJ No 272 (QL), 1986 CarswellBC 1394 (CA).

Cultural context and distinct community values and perspectives

While *Fireman* suggests the values and perspectives of an Indigenous community can be relevant when sentencing a member of that community, the Court of Appeal in *Curley* appears to denounce this proposition. The same tension can be seen in the majority and dissenting reasons in *Naqitarvik*. The trial judge had considered the re-establishment of traditional counselling by Inuit Elders in Arctic Bay to be a suitable alternative to a long period of incarceration for a major sexual assault and he imposed an intermittent prison sentence of 90 days.³⁰ The majority found this to be wholly inadequate, it substituted an 18-month sentence, and it distinguished contemporary Elder counselling in Arctic Bay from the historic practices of the Inuit.³¹ Yet Justice Belzil wrote a detailed set of reasons in dissent, concluding that the community's response reflected unique values and cultural identity, addressed community protection and rehabilitation, and had an added benefit of effecting reconciliation between the victim and offender.³²

There are appellate decisions that pre-date *Gladue* where the relevance of cultural context in the sentencing of Indigenous people is emphatically rejected. Justice Kerans of the Alberta Court of Appeal characterized defence counsel's argument for "mitigation based upon cultural conflict" in a case of indecent assault on a minor as an entirely baseless suggestion that Indigenous cultures might permit such abuse.³³ The British Columbia Court of Appeal adopted a similar position in a case of arson in *Quilt*.³⁴ The Alberta Court of Appeal also took a dim view of the suggestion that sentences for sexual assaults in the remoter areas of northern Alberta were being routinely discounted.³⁵ The Court further insisted that the starting point in weapons or violence cases should not "hinge on considerations of heritage, geography or social circumstance" and there is little relevance to where the offender grew up and learned their priorities, "whether in private schools or while on public assistance, to say nothing of latitudes".³⁶

30 *Naqitarvik*, *supra* note 24 at 194.

31 *Ibid* at 198.

32 *Ibid* at 199-200.

33 *R v N*, [1983] AJ No 278 (QL) (CA) at para 4.

34 *R v Quilt*, [1984] BCJ No 1830 (QL), 14 CCC (3d) 572 (CA).

35 *R v CAC* [1992] AJ No 368 (QL), 1992 ABCA 133 (CanLII).

36 *Ibid* at paras 5-6.

While not all courts rejected cultural background arguments out of hand, let alone in such absolute and categorical terms, some of the confounding issues that persist in the *Gladue* jurisprudence today were already apparent by the early 1990s. In *PGH*, for instance, the Newfoundland and Labrador Court of Appeal concluded that “[t]here is no doubt that an accused’s antecedents are always relevant and that includes the culture, traditions and customs of a Native or aboriginal people”.³⁷ However, “mere proof of a Native blood line with a Native culture or heritage, by itself, without more, is not at all likely to constitute a mitigating consideration”.³⁸ The Court of Appeal went on to narrowly circumscribe the relevancy of cultural background as a mitigating factor in the sentencing of Indigenous people to cases where a clear nexus could be demonstrated:

[...] Counsel must provide the link between the particular aspect of the accused’s Native heritage and the circumstances and the facts of the offence giving rise to the conviction. In any situation where the court is urged to acknowledge culture or heritage as a factor in sentencing, there must exist and be demonstrated some connection or nexus between the accused’s Native legacy, attitudes and traditions and the proven offence whereby it can reasonably be said that the accused’s circumstances, in all fairness, warrant a sympathetic hearing—and a compassionate disposition.³⁹

Discriminatory impacts on Indigenous people in sentencing

Another legacy of these early cases can be seen in judicial recognition that prison can impact Indigenous people more harshly than others, resulting in collateral consequences or “secondary penalties”.⁴⁰ In addition to the impacts of being sent far from one’s home, family, culture, language, and support network, the demographic makeup of some distant institutions can make them a more isolating, alien environment.⁴¹ Consistent with *Moses E9-833*, *Fireman*, and *Curley*, these consequences are accounted

37 *R v PGH*, [1994] NJ No 16 (QL), 1994 CanLII 9721 (CA) at para 22.

38 *Ibid* at para 21.

39 *Ibid* at para 22. See also *GA*, *supra* note 28.

40 *R v Bero*, [1998] OJ No 4882 (QL) (Ct J (Prov Div)) at para 34.

41 *R v Capot-Blanc*, [1978] BCJ No 272 (QL) (CA) at para 6.

for in many decisions preceding *Gladue*. In some cases sentencing judges addressed the harsher impacts of a penitentiary sentence in the south by making strong recommendations for prison to be served in northern institutions.⁴² In other cases courts addressed these collateral impacts as a mitigating factor.⁴³ Prison was found to have an even harsher impact on Indigenous women in *Daniels* where Justice Wedge of the Saskatchewan Court of Queen's Bench held that the relocation of Indigenous women to the alien culture of a Kingston prison far from their home, children, and extended family breached their right to equality under s 15 of the *Charter*.⁴⁴

Recognition that penalties under the *Criminal Code* can impact Indigenous people more harshly than others is also apparent in several early cases where firearms prohibitions were challenged as a form of cruel and unusual punishment. The outcome in these cases often turned on individual circumstances as opposed to generalizations. In *Weyallon*, for example, the Northwest Territories Court of Appeal overturned a Dene man's exemption based on judicial notice that an automatic firearms prohibition would have a "self-evident" impact on his hunting and trapping.⁴⁵ In contrast, the Yukon Court of Appeal upheld an exemption in *Chief* where the pre-sentence report confirmed that an Indigenous man was a bona fide trapper who depended significantly on his earnings from the sale of furs and hunting to support his family.⁴⁶ Likewise, the Saskatchewan Court of Appeal upheld such an exemption in *McGillivray* where the record disclosed that a Cree man from Cumberland House relied on hunting and trapping for the support and subsistence of his wife and seven children.⁴⁷ A majority of the Northwest Territories Court of Appeal came to the same conclusion in *Netser* where the prohibition would have impacted an Inuk's safety, daily life, and livelihood.⁴⁸ While it might have been clear that these mandatory prohibitions were more

42 See for example: *R v Attagutaluk*, [1986] NWTJ No 129 (QL) at para 17, NWTR 21 (SC); *R v Ashoona*, [1986] NWTJ No 130 (QL) at paras 39-40, NWTR 238 (SC).

43 See for example: *R v Kuksiak*, [1998] NWTJ No 103 (QL) (Terr Ct) at paras 16, 22, 47, 52; *R v Kopalie*, [1998] NWTJ No 97 (Terr Ct) at paras 16, 22, 47, 52; *R v Kellypalik*, [1998] NWTJ No 25 (QL) (Terr Ct) at para 13.

44 *R v Daniels*, [1990] 4 CNLR 51, 1990 CanLII 7612 (Sask QB), rev'd on other grounds [1991] 4 CNLR 113 (Sask CA).

45 *R v Weyallon*, [1985] 4 CNLR 184 (NWTCA). See also *R v Tobac* (1985), [1986] 1 CNLR 138 (NWTCA).

46 *R v Chief* (1989), [1990] 1 CNLR 92, 1989 CanLII 281 (YCA)

47 *R v McGillivray*, [1991] 3 CNLR 113, 1991 CanLII 8033 (Sask CA).

48 *R v Netser*, [1992] NWTJ No 15 (QL), 1992 CanLII 12783 (CA).

likely to impact Indigenous hunters and trappers more harshly than recreational firearms users, constitutional exemptions required careful attention to the personal circumstances of each individual.

Indigenous community involvement and culturally relevant programming

Another important line of jurisprudence preceding the *Gladue* decision incorporated Indigenous justice initiatives, community involvement, and cultural programming in sentencing. The majority reasons in *Naqitarvik* were by no means the last word on this topic. The best-known decisions prior to *Gladue* are likely those where sentencing circles were relied upon to craft innovative community-based sentences. In *Moses*, for example, Judge Barry Stuart of the Yukon Territorial Court provided detailed guidance on the use of sentencing circles, pointing out that “First Nations have the best knowledge and ability to prevent and resolve the long list of tragedies plaguing their communities”, among other things.⁴⁹ Similar considerations are apparent in several other decisions that precede the enactment of s 718.2(e) and its seminal interpretation by the Supreme Court of Canada.

In *Mitchell*, the British Columbia Court of Appeal directed a probation officer to consult with Indigenous court workers and the Gitksan–Wet’suwet’en Tribal Council to prepare a plan for a young Wet’suwet’en man aimed at breaking his cycle of crime and pursuing rehabilitation.⁵⁰ The Court allowed an appeal from Mr. Mitchell’s 18-month prison sentence for theft of two trucks, reducing it to time served plus one-year probation. The Court found this to be “a case where a cycle of crime has developed in a seriously disadvantaged young person and that we should investigate further”.⁵¹ It ordered a post-sentence report to assess available resources in the Smithers–Morisetown area to permit “something more constructive than just continuing the cycle which is demonstrated in the record of this accused”.⁵² The Court examined Mr. Mitchell’s personal circumstances, including family instability, childhood sexual abuse, prenatal exposure to alcohol, and physical and cognitive impairments, and concluded that he was an “unfortunate product” of “historical disadvantages” facing many

49 *R v Moses*, [1992] 3 CNLR 116 at 140, 1992 CanLII 12804 (Y Terr Ct).

50 *R v Mitchell*, [1990] BCCJ No 381 (QL), 1990 CanLII 1210 (CA) [cited to CanLII].

51 *Ibid* at para 9.

52 *Ibid* at para 10.

Indigenous communities.⁵³ It held that Mr. Mitchell ought to benefit from the support of his community and the probation officer was encouraged to pass supervision over to the Tribal Council.

In *Jules*, the Yukon Court of Appeal followed this reasoning in upholding a sentence of four months' incarceration followed by probation for a young Indigenous man convicted of theft and breaking and entering in Teslin, Yukon.⁵⁴ His probation conditions included psychological treatment and completion of an alcohol addictions course, and restitution was ordered. The Court of Appeal found that the sentencing judge had been guided by a report from a probation officer and a letter from the Chief of Mr. Jules's First Nation. The pre-sentence report disclosed a family history of alcohol addiction and domestic violence, but also his positive employment history and acceptance into Poundmaker's Lodge in St. Albert, Alberta. The Chief's letter encouraged a sentence of restitution, an apology, anger management, and other programming as a more effective way for dealing with this young man's problems than incarceration, the sentencing decision placed a great deal of weight on that recommendation, and the Court of Appeal took no issue with this approach.

In *Moosenose*, Judge Davis of the Northwest Territories Territorial Court heard from several members of a Tlicho woman's community when crafting a sentence for theft, including an Elder and other representatives from her First Nation.⁵⁵ He found that the probation officer, the Band Council, and the Hamlet Council were all in support of a community-based disposition. Judge Davis concluded that the level of community support and involvement in this case constituted special circumstances that would allow for a sentence other than prison to be imposed and he accepted most of the sentencing recommendations that had been developed by the community. Ms. Moosenose received a suspended sentence and she was ordered to perform community service at the direction of her Band Council. She was also placed under a curfew, and any travel outside the community was made subject to her Band Council's discretion, among other conditions.

Many other examples can be seen of Indigenous leaders and Elders being integrated into sentencing conditions in the 1990s. In *P(JA)*, Judge Lilles of the Yukon Territorial Court directed a probation officer to keep in close contact and consult with clan leaders of the Teslin

53 *Ibid* at paras 16-17.

54 *R v Jules*, [1990] YJ No 139 (QL) (CA).

55 *R v Moosenose*, [1992] NWTJ No 134 (QL), NWTR 394 (Terr Ct).

Tlingit to monitor a community-based sentence for sexual assault that included regular attendance at a healing circle, public acknowledgement and apology for the offence, and community service, among other conditions.⁵⁶ In *Wahpay*, Judge Stach of the Ontario Court of Justice sentenced an Ojibway woman to a year of incarceration followed by a year of probation for manslaughter of an infant, placing her under the direction of a probation officer, the Shoal Lake First Nation, and its Elders for her counselling and community service conditions.⁵⁷ In *Charleyboy*, Judge Barnett imposed a suspended sentence that placed a Tsilhqot'in man under the supervision of his Chief and Elders, and required him to organize and manage a camp for youths and a support group for assaultive men, among other conditions.⁵⁸ Likewise, in *Dunn* the British Columbia Court of Appeal varied the terms of a banishment condition requested by a Band Council, but maintained the Council's discretion over Mr. Dunn's access to his home reserve.⁵⁹ There were ample precedents for Indigenous communities to participate in both the crafting of sentences and their implementation by the early 1990s.

Several decisions from this same era held that cultural differences should be met with culturally appropriate programming as well, regardless of whether this takes place in custody or in a community setting. For example, Judge Lilles of the Yukon Territorial Court took judicial notice of the traditional culture of Old Crow when calling for the development of relevant programming and counselling for a young Gwich'in man in *F(WR)*.⁶⁰ In *RJS*, Justice Goodfellow of the Nova Scotia Supreme Court determined that a Mi'kmaw youth's best hope for rehabilitation would be working with a Mi'kmaw role model who could help him learn about his culture, develop his self-esteem, and gain better insight into the impacts of his conduct, after having been convicted of murder.⁶¹ In *Laprise*, Justice Wedge of the Saskatchewan Court of Queen's Bench held that the Crown failed to prove an Indigenous man's behaviour was intractable in a dangerous offender proceeding based in part on the strength of evidence that his conduct could be addressed by working with Indigenous professionals and Elders in culturally informed ways.⁶²

56 *R v P(JA)*, [1991] YJ No 180 (QL), 6 CR (4th) 126 (Terr Ct).

57 *R v Wahpay*, [1991] OJ No 2300 (QL) (Ct J (Gen Div)).

58 *R v Charleyboy*, [1993] BCJ No 2854 (QL) (Prov Ct).

59 *R v Dunn*, [1993] BCJ No 2254 (QL), 1993 CanLII 2357 (CA).

60 *R v F(WR)*, [1989] YJ No 111 (QL) (Terr Ct).

61 *R v RJS*, [1995] NSJ No 544 (QL) at paras 22-23, 58, 61, 147 NSR (2d) 225 (SC).

62 *R v Laprise*, [1997] SJ No 40 (QL) at paras 46, 50-51, 1997 CanLII 11315 (QB).

Contextual assessment of moral blameworthiness in sentencing Indigenous people

Other precursors for the methodology articulated by the Supreme Court in *Gladue* can be found in early cases where courts closely examined the difficult personal background of an Indigenous person during sentencing, often set out in a detailed report, and assessed their moral culpability in light of this context. In addition to decisions like *Mitchell* and *RJS* canvassed above, there are other early examples of innovative sentencing from the 1990s that clearly foreshadow the context-sensitive approach in *Gladue*.

In *Pettigrew*, for example, the British Columbia Court of Appeal ordered a post-sentence report and took into account a Métis woman's difficult background before reducing her 12-month prison sentence for manslaughter to one of six months followed by 12 months' probation.⁶³ The Court noted there was no pre-sentence report before the trial judge and it only knew what had been provided in counsel's submissions so it ordered the preparation of a post-sentence report for the appeal.⁶⁴ This individualized information then helped the Court assess what sentencing principles were of most relevance to Ms. Pettigrew:

The report which we have now received says that Ms. Pettigrew is a Metis, that she was born in the Northwest Territories, that her parents both used alcohol heavily, and that she was abused during her childhood. She has consumed alcohol since an early age and her life has been marked by a series of misfortunes, several of them tragic. Her childhood circumstances and life experiences, as now disclosed, make a sentence wholly based on "denunciation", "rejection" or "abhorrence", in my view difficult to justify.⁶⁵

In *JS*, Judge Diehl of the Saskatchewan Provincial Court sentenced an Indigenous woman to two years' incarceration for manslaughter of her mother after a similar examination of her unique circumstances in the record before the court.⁶⁶ In addition to a pre-sentence report

63 *R v Pettigrew*, [1990] BCJ No 996 (QL), 1990 CanLII 5417 (CA) [cited to CanLII].

64 *Ibid* at para 19.

65 *Ibid* at para 21.

66 *R v JS*, [1998] SJ No 247 (QL), 38 WCB (2d) 196 (Prov Ct) [cited to SJ].

and a psychiatrist's report, Judge Diehl was presented with a report authored by a counsellor at James Smith Cree Nation that he found to be particularly insightful:

This report is a comprehensive and elucidating account “woman to woman” between the accused and her counsellor. Unlike the two prior-listed reports, its narrative is a continuum of anecdotal uncoverings and personal revelations that came together fragmentarily, though not necessarily chronologically, over a much longer period of time. In this sense the report is more “personal” and, thus, more reliable. It portrays the painful journey intrinsic in any personal voyage of discovering one's self where, before healing can occur, layer upon layer of abuse and related indignities have to be painfully peeled away, like the clothes from a burn-victim, to whom, metaphorically, she bears a close and painful resemblance. For this accused the voyage continues to be long, and the suffering intense.⁶⁷

Judge Diehl went on to find that the offence in this case was “almost a derivative crime born of the unresolved effects of past conditions, abuse and indignities”, such as “feelings of loneliness, fear, worthlessness, and marginalization” related to substance abuse.⁶⁸ He closely examined the programming available in the Okimaw Ohci Healing Lodge that had recently opened in Saskatchewan and he made a non-binding recommendation to the correctional authorities that the sentence ought to be served there.⁶⁹

Conclusion

Many of the principles articulated by the Supreme Court of Canada in *Gladue* have clear analogues in this earlier jurisprudence, even if these decisions may have been exceptions rather than the norm in their time. When s 718.2(e) was added to the *Criminal Code* it would be interpreted as Parliament's direction for the courts to pay greater attention to the unique circumstances canvassed in these earlier cases. Prior to *Gladue*, s 718.2(e) was already interpreted as a call for attention to community values and distinct perspectives on sentencing, other cultural differences, socio-economic deprivation, justice initiatives like sentencing circles

67 *Ibid* at para 34.

68 *Ibid* at para 64.

69 *Ibid* at paras 96-97.

and Elder panels, community input and support, and the criminal law's harsher impact on Indigenous people when differences go unrecognized.⁷⁰

In summary, the Supreme Court of Canada's sentencing methodology in *Gladue* was not simply plucked out of the ether and read into a short amendment to the *Criminal Code*. However, it should not be characterized as little more than a synthesis of this prior case law either. The Crown raised both *Fireman* and the sentencing circle jurisprudence in the *Gladue* appeal to argue that s 718.2(e) amounted to little more than a codification of these existing principles.⁷¹ It was argued that nothing had changed nor needed to change in the way Indigenous people were being sentenced. That premise was soundly rejected by a unanimous Supreme Court of Canada, which held that s 718.2(e) could not be interpreted by simply looking at these older cases. Instead, it must be viewed in context to the larger "watershed" of sentencing reforms that accompanied this provision.⁷² The Supreme Court's interpretation of s 718.2(e) built on more than the past jurisprudence alone. It also took notice of an emerging body of knowledge regarding the underlying causes and the most effective responses to the crisis of Indigenous over-incarceration.

70 See for example: *R v HR*, [1997] AJ No 816 (QL), at paras 52-53, 61, 1997 CanLII 24699 (Prov Ct); *R v Jacobish* (1997), [1998] 4 CNLR 198 at paras 28-56, 1997 CanLII 14650 (NLCA); *R v Wells*, 1998 ABCA 109 at para 47; *R v George*, [1998] BCJ No 1505 (QL), 1998 CanLII 5691 (CA) at paras 15-19; *R v Paul*, [1998] NBJ No 331, [1999] 1 CNLR 149 (Prov Ct) at para 5; *R c Chabot* (1998), [1999] 1 CNLR 139 (QC Crim Div) at paras 25-37; *R v Young*, [1998] MJ No 495 (QL), 1998 CanLII 17787 (CA) at paras 11-13.

71 *Gladue*, *supra* note 1 at para 38.

72 *Ibid* at para 39.

CHAPTER 2: PRIOR TASK FORCES AND COMMISSIONS OF INQUIRY

The *Gladue* principles can also be challenging to understand as a result of the complex factual conclusions on which they are premised. The underlying causes of the crisis of Indigenous over-incarceration and its potential remedies are only briefly summarized in the Supreme Court of Canada’s wide-ranging reasons. Yet the Supreme Court was clearly engaged with a body of knowledge developed outside the courtroom.

When s 718.2(e) was introduced in 1996 it was part of a package of amendments to the *Criminal Code* that had been preceded by decades of academic research and government reports on sentencing reform. Among other topics, these prior studies canvassed the criminal justice system’s adverse treatment of Indigenous people and Indigenous over-representation in that system. By the late 1960s and throughout the 1970s this research was bringing academic, political, and institutional attention to the disproportionate rates at which Indigenous people were entering the criminal justice system, as well as their unique circumstances, perspectives, and needs.¹ By the 1980s, numerous federal and provincial

1 See for example: Canadian Corrections Association, *Indians and the Law* (Ottawa: The Canadian Welfare Council, 1967); Donald N McCaskill, *A Study of Needs and Resources Related to Offenders of Native Origin in Manitoba* (Report prepared for the Correctional Planning Branch, Ministry of the Solicitor General, Ottawa, 1970); Michael C Bennett, “The Indian Counsellor Project—Help for the Accused” (1973) 15 *Can J Corr* 1; Rita M Bienvenue & AH Latif, “Arrests, Dispositions and Recidivism: A Comparison of Indians and Whites” (1974) 16:2 *Can J Crim & Corr* 105; John Hagan, “Criminal Justice and Native People: A Study of Incarceration in a Canadian Province” (1974) *Can Rev of Sociology & Anthropology* 220; Douglas Schmeiser, Hans WB Heumann, & John R Manning, *The Native Offender and the Law* (Ottawa: Law Reform Commission of Canada, 1974); Derek F Wynne & Timothy F Hartnagel, “Race and Plea Negotiation: An Analysis of Some Canadian Data” (1975) 2 *Can J of Sociology* 147; H Savage, “Problems in Delivering Legal Services to Native Groups in Remote Areas” in *Conference on Legal Aid: Report and Proceedings* (Ottawa: Canadian Council on Social Development, 1975); William T Badcock, “Problems of Native Offenders in the Correctional System” (1976) 18:4 *Can J Crim & Corr* 281.

task forces and commissions of inquiry were being initiated to investigate the treatment of Indigenous people in the criminal justice system as well. And by the 1990s, lawyers and judges were engaging with the factual findings and recommendations set out in these reports, as can be seen in many of the pre-*Gladue* cases summarized in the previous chapter. In other words, the innovative jurisprudence around sentencing Indigenous people in the 1990s developed in dialogue with these inquiries and studies.

Commissions of inquiry into the treatment of Indigenous people in the criminal justice system have had palpable impacts on the criminal law's evolution in Canada in many different ways, such as the Supreme Court of Canada's reliance on the findings from the Donald Marshall Jr. Commission when it reformulated the Crown's duty of disclosure in *Stinchcombe*.² The Supreme Court relied on this same extensive body of knowledge when it provided a comprehensive framework for the sentencing of Indigenous people in 1999.³ Furthermore, the Court directed sentencing judges to take judicial notice of many of the broad conclusions these commissions and task forces reached when sentencing Indigenous people in the future. Key recommendations and findings from the task forces and commissions of inquiry that preceded the *Gladue* decision are summarized in this chapter to provide not only background context for the development of these principles, but also convenient pinpoint references to help readers navigate these lengthy reports as needed. While the Supreme Court of Canada did not cite each and every one of the reports summarized in this chapter in *Gladue*, those it did rely on engaged with and built upon the many reports preceding them. Moreover, while many subsequent commissions and task forces have continued to address these issues since *Gladue* was decided, this chapter is focused on those pre-dating the *Gladue* decision as part of the underlying context on which this sentencing framework was first constructed. Some of the inquiries and task forces that post-date the *Gladue* decision in 1999 are referenced elsewhere in this book to the extent they have been invoked by the courts in subsequent case law.

2 *R v Stinchcombe*, [1991] 3 SCR 326, 1991 CanLII 45.

3 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at paras 58-60, 62-63, 71, 91.

Inquiry re Administration of Justice in the Hay River Area of the Northwest Territories

In one of the earliest examples of an inquiry bringing attention to the underlying causes of Indigenous over-representation in the criminal justice system, Judge Morrow of the Territorial Court of the Northwest Territories was appointed as a Commissioner to hold an Inquiry into the Administration of Justice in the Hay River Area of the Northwest Territories in 1967.⁴ He was tasked with assessing the administration of justice in the Hay River in general, in addition to investigating specific allegations made by a weekly newspaper named *Tapwe*—Cree for ‘truth’.⁵ Among other things, it was alleged that “all individuals do not receive equal treatment in the Courts (of the Justices of the Peace) in Hay River”.⁶ Judge Morrow made it clear that he found no evidence of direct, intentional discrimination in the course of this inquiry.⁷ However, he did point out how the unique socio-economic circumstances of Indigenous peoples in the region resulted in differential impacts from the administration of justice.

Judge Morrow concluded that Indigenous people suffered high rates of alcohol addiction in Hay River.⁸ Whenever this led to arrest, he found that their unfamiliarity with court procedure, the lack of interpreters, and the lack of legal representation meant they “very often felt the only solution was to plead guilty and get it over with”.⁹ Judge Morrow also observed that justices of the peace were likely to assume that Indigenous people before the courts were earning their money from welfare and Indigenous women were involved in the sex trade so they would send them to jail without offering the fine option that was made available to non-Indigenous people employed in the region.¹⁰ Further, he stated that the police often felt obliged to arrest Indigenous people who were intoxicated in public on the assumption they might freeze to death or “get into trouble”, while assuming non-Indigenous people “probably had enough money to taxi home”.¹¹

4 Justice William G Morrow, *Inquiry re Administration of Justice in the Hay River Area of the Northwest Territories Report* (Ottawa: Government of Canada, 1968).

5 *Ibid* at 1.

6 *Ibid* at 2.

7 *Ibid* at 2-3, 22-23.

8 *Ibid* at 94.

9 *Ibid* at 94-95.

10 *Ibid* at 95.

11 *Ibid*.

In light of these local circumstances, Judge Morrow recommended several reforms that included the provision of a “friend in court” for Indigenous people accused of crimes and more strenuous efforts to recruit Indigenous people as RCMP officers, special constables, and justices of the peace.¹² More generally, he recommended improved access to legal aid and court facilities, and the provision of an alcoholic rehabilitation centre, a full-time psychiatrist, and a dedicated lawyer from the Department of Justice for the Northwest Territories, among other things.¹³

Native Peoples in the Administration of Justice in the Provincial Courts of Alberta

Another early example of an inquiry addressing the treatment of Indigenous people in the criminal justice system can be found in the Board of Review on Native Peoples in the Administration of Justice in the Provincial Courts of Alberta. As part of a broader review of Alberta’s provincial court system initiated in 1973, the Board of Review was mandated to address “aspects of the administration of justice in Alberta affecting native people which can and should be corrected”.¹⁴ After five years of public hearings, the Board issued a series of recommendations aimed at improving accommodation of Indigenous peoples’ culture, customs, and language in Alberta’s provincial justice system. The Board identified issues around policing, the courts, alcohol, and the regulation of harvesting activities. Its recommendations included an endorsement of the integral role played by Indigenous court workers in Alberta’s justice system, as well as a call for more uniform access to interpreters across the province.¹⁵ It also called for court sittings on reserve for certain matters.¹⁶ Indigenous over-incarceration was lightly touched upon by the Board of Review in context to incarceration for non-payment of fines and the need for alternatives.¹⁷

12 *Ibid* at 6.

13 *Ibid* at 5–6, 101–105.

14 Justice WJC Kirby (Chair), *Native People and the Administration of Justice in the Provincial Courts of Alberta*, Provincial Courts Board of Review: Report No 4 (Edmonton: Government of Alberta, 1978) at 1.

15 *Ibid* at 43–48.

16 *Ibid* at 30.

17 *Ibid* at 49.

The Royal Commission on the Donald Marshall Jr. Prosecution (Nova Scotia)

In 1986, the Government of Nova Scotia initiated the Royal Commission on the Donald Marshall, Jr. Prosecution “to determine why Donald Marshall, Jr. was wrongfully convicted and to make recommendations to ensure such a miscarriage of justice does not happen again”.¹⁸ While the Commission’s mandate focused on determining what had led to the wrongful conviction of Donald Marshall Jr. in 1971 (a Mi’kmaw man), it also made recommendations for broader reforms to Nova Scotia’s justice system, many of which came to be echoed in subsequent commissions dealing with the treatment of Indigenous people in the criminal justice system. More broadly, the Commission found that racism against visible minorities had played a part in this particular wrongful conviction. It therefore sought to identify “specific steps that can—and should—be taken to reduce discrimination in the justice system itself.”¹⁹

Of relevance to all visible minorities in Nova Scotia, the Commission’s recommendations included: the adoption of a provincial Policy on Race Relations aimed at ensuring better representation of visible minorities as prosecutors, defence counsel, and judges;²⁰ further education opportunities for police, law students, lawyers, and judges on the legal issues visible minorities face;²¹ continuing education programs for prosecutors to “familiarize them with the problem of systemic discrimination and suggest ways in which they can reduce its impact”;²² alternative sanctions to incarceration for those too poor to pay fines;²³ the development of appropriate diversion programs for Black Nova Scotians and Indigenous people in cooperation with Black Nova Scotian and Indigenous groups;²⁴ and the encouragement of federal corrections officials to recruit and hire more minority staff, implement programs tailored to the particular needs of Black Nova Scotians and Indigenous people, and sensitize other employees to these needs.²⁵

18 Nova Scotia, *Royal Commission on the Donald Marshall, Jr. Prosecution: Digest of Findings and Recommendations* (Halifax: Royal Commission on the Donald Marshall, Jr. Prosecution, 1989) at 10.

19 *Ibid* at 10.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 *Ibid* at 11.

24 *Ibid.*

25 *Ibid.*

Several of the Commission's recommendations were specific to the circumstances of Indigenous people in light of their unique historic, cultural, and constitutional factors.²⁶ It stated that Indigenous people "have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language".²⁷ Its principle recommendation to operationalize this right was as follows:

To help achieve this, we recommend that a community controlled Native Criminal Court be established in Nova Scotia, initially as a five-year pilot project. This would involve, on one or more reserves, Native Justices of the Peace hearing summary conviction cases, the development of community diversion and mediation services and community work projects as alternatives to fines and imprisonment, the establishment of aftercare services and the provision of court worker services. Native communities would be entitled to opt in or out of this pilot project model.²⁸

In addition to this, the Commission recommended the establishment of a "Native Justice Institute" to address the incorporation of Indigenous law into the criminal and civil law as they apply to Indigenous people, among other important Indigenous justice issues.²⁹ It also recommended hiring Mi'kmaq interpreters to work in all courts in the province, the establishment of an Indigenous court worker program in Nova Scotia, regular sittings of the Provincial Court on reserves, and the establishment of "Native Justice Committees" composed of community leaders for judges to seek advice from whenever they sentence Indigenous people.³⁰ Further recommendations included: a study to address proportional representation of visible minorities on juries;³¹ funding for Nova Scotia Legal Aid to assign "sensitized lawyers" to work with Indigenous clients and to hire an Indigenous social worker/counsellor to act as a liaison with Indigenous people;³² the development of an Indigenous liaison program for the Nova Scotia Barristers Society, as well as educational programming for lawyers regarding the unique needs of Indigenous

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 *Ibid* at 11.

30 *Ibid.*

31 *Ibid* at 12.

32 *Ibid.*

clients;³³ and increased hiring and recruitment of Indigenous constables by the RCMP and municipal police forces.³⁴

Task Force on the Reintegration of Aboriginal Offenders as Law-Abiding Citizens (Canada)

In 1987, the Solicitor General of Canada established the Task Force on the Reintegration of Aboriginal Offenders as Law-Abiding Citizens to accomplish the following:

Examine the process which Aboriginal offenders (status and non-status Indians, Metis, and Inuit) go through, from the time of admission to a federal penitentiary until warrant expiry, in order to identify the needs of Aboriginal offenders and to identify ways of improving their opportunities for social reintegration as law-abiding citizens, through improved penitentiary placement, through improved institutional programs, through improved preparation for temporary absences, day parole and full parole, as well as through improved and innovative supervision.³⁵

In order to fulfill its mandate, the Task Force consulted with federal institutional staff, Indigenous inmate groups, Parole Board staff and members, Correctional Service Canada (CSC) staff, Indigenous communities, and various other organizations involved in social reintegration programming for Indigenous people.³⁶ The Task Force interpreted its mandate in light of the recognized disproportionate representation of Indigenous people among federally incarcerated inmates at the time, as well as the disproportionately low rates of access to parole for Indigenous people.³⁷ The Task Force's recommendations focused on the need for Indigenous-specific approaches as Indigenous people "face unique difficulties in obtaining and completing parole" and "unique solutions are required because of their cultural and socio-economic backgrounds".³⁸

33 *Ibid.*

34 *Ibid.*

35 Canada, *Final Report: Task Force on Aboriginal Peoples in Federal Corrections* (Ottawa: Solicitor General of Canada, 1988) at 5.

36 *Ibid.*

37 *Ibid.*

38 *Ibid.* at 10.

Expanding on this, the Task Force argued that Indigenous-specific approaches to reintegration programming and services could likely constitute ameliorative programs aimed at remedying the disadvantages faced by individuals or groups so as to benefit from protection under s 15(2) of the *Charter*.³⁹ In other words, Indigenous-specific programming would address the systemic discrimination that Indigenous people face in the prison system rather than amount to an impermissible form of reverse discrimination.

The Task Force explained that systemic discrimination occurs when an apparently neutral law or program has the effect of disadvantaging people already in need of protection from discrimination, often in ways that are not readily identifiable and that require statistical analysis to detect.⁴⁰ In its view, governments may institute programs that give special treatment or consideration to members of disadvantaged minorities in order to preclude or at least minimize litigation alleging systemic discrimination.⁴¹ It argued that the greater socio-economic disadvantage of Aboriginal offenders pointed to the need for special remedial treatment.⁴² It also concluded that “[t]he socio-economic circumstances demanding special treatment for Aboriginal offenders include their cultural and spiritual background”.⁴³ This would include values like community, language, family, and art.⁴⁴

The Task Force issued a wide range of recommendations for reform, including: increasing data collection and further studies addressing the circumstances of Indigenous people under federal supervision;⁴⁵ validating actuarial assessment tools, criteria, and procedures for their applicability to Indigenous people;⁴⁶ assessing parole criteria for differential impacts on Indigenous people and, if necessary, proposing more appropriate methods;⁴⁷ recognizing case assessments by Elders as having the same weight as other professional assessments for parole decisions;⁴⁸ increasing Indigenous representation in the Ministry of

39 *Ibid* at 11.

40 *Ibid*.

41 *Ibid*.

42 *Ibid* at 12.

43 *Ibid* at 13.

44 *Ibid* at 14.

45 *Ibid* at 32-33.

46 *Ibid* at 36.

47 *Ibid* at 37.

48 *Ibid* at 38.

the Solicitor General, in CSC, and on the National Parole Board;⁴⁹ involving Indigenous communities and organizations in supervising released inmates;⁵⁰ developing Indigenous cultural awareness training for correctional staff and screening new employees for their ability to work effectively with Indigenous people;⁵¹ providing treatment, training, and reintegration programming suited to the spiritual and cultural needs and way of life of Indigenous people;⁵² attending to the unique needs of Indigenous women in custody through opportunities to meet with families, programming in prison, and day parole facilities;⁵³ providing institutional programming specifically designed for Inuit;⁵⁴ implementing Indigenous-specific substance abuse programs;⁵⁵ seeking the views of Indigenous leadership whenever inmates are released to Indigenous communities and accepting any special conditions leadership might propose, so long as they were legal;⁵⁶ and developing legislation to enable Indigenous communities or organizations to assume control over certain correctional processes that affect them.⁵⁷

Access to Justice: the Report of the Justice Reform Committee (British Columbia)

In 1987, British Columbia appointed its own Justice Reform Committee “to cause the justice system of the Province of British Columbia to be accessible, understandable, relevant and efficient to all those it seeks to serve”.⁵⁸ Rather than being confined to criminal justice, the Committee was mandated to address citizens’ attitudes and offer policy advice in various areas of the provincial justice system. Among other things, its findings addressed Indigenous people’s lack of confidence in the justice system more broadly and their disproportionate rate of involvement in the criminal justice system in particular. It proposed an accommodative response:

49 *Ibid* at 39-42.

50 *Ibid* at 43.

51 *Ibid* at 45-46.

52 *Ibid* at 50.

53 *Ibid* at 56-57.

54 *Ibid* at 58.

55 *Ibid* at 58.

56 *Ibid* at 76.

57 *Ibid* at 78.

58 British Columbia, Justice Reform Committee, *Access to Justice: Report of the Justice Reform Committee* (Victoria, BC: Ministry of the Attorney General, 1988) at iv.

Native people have traditional values and customary ways that the justice system can and should accommodate. Native people tend to resolve disputes through mediation or conciliation, bringing the community together. There is much scope for this approach within the present justice system.⁵⁹

Following its review of the Justice Reform Committee's report, British Columbia undertook further consultations on Indigenous justice issues with representatives of First Nations, Tribal Councils, and off-reserve Indigenous organizations.⁶⁰ This led the Province to identify five common themes for its action plan in response:

1. Individual Indigenous communities should assume increasing responsibility for providing justice services to their own people, through traditional conflict resolution practices.
2. Indigenous people should be encouraged to better understand the existing justice system; justice system personnel should be encouraged to better understand Indigenous people, their traditions and culture.
3. Regular communication between Indigenous people and the agencies of the justice system should be established.
4. A holistic approach to justice, integrating justice with broader social reconstruction initiatives, should be developed in Indigenous communities.
5. Career opportunities should be created for more Indigenous people to become involved in the delivery of justice services—non-Indigenous personnel should be able to see Indigenous people as colleagues rather than just offenders or clients.⁶¹

Based on this consultation process, the Government of British Columbia proposed various specific measures for increasing Indigenous involvement in the justice system, including: establishing, training, and resourcing 25 local justice councils to “quickly respond to justice issues on the local level”;⁶² establishing protocol agreements between probation offices and

59 *Ibid*, as cited in British Columbia, *Native Justice Consultations: Progress Report and Action Plan* (Victoria BC: Ministries of Solicitor General, Attorney General & Native Affairs, 1990) at 4.

60 *Ibid*.

61 *Ibid* at 8.

62 *Ibid* at 14.

Indigenous communities;⁶³ negotiating with Indigenous communities for on-reserve court sittings;⁶⁴ inviting Indigenous proposals for diversion, community work/service, and attendance programs;⁶⁵ soliciting contracts for Indigenous-operated conditional release programs for youths and adults;⁶⁶ exploring reserve-based house arrest or other intermittent/short-term sentencing alternatives with Indigenous communities;⁶⁷ facilitating Indigenous community involvement in sentencing through Crown counsel;⁶⁸ consulting with Indigenous leaders to establish a framework for Indigenous peacekeeping and input on sentencing and conditional release;⁶⁹ and advising Indigenous communities of their right to file submissions to the provincial parole board.⁷⁰

Osnaburgh Windigo Tribal Council Justice Review (Ontario)

Beginning in January 1989, the Osnaburgh Windigo Tribal Council Justice Review Committee in Ontario was tasked with studying and making recommendations “to improve the delivery of services related to the administration of justice, policing and related services, in the Windigo Tribal Council area, the Town of Pickle Lake and in the Southern Windigo Tribal Area including the communities of Saugeen, Cat Lake and Slate Falls”.⁷¹ The Committee was jointly appointed by the Government of Ontario and several Treaty No. 9 First Nations.⁷² This initiative was preceded by an incident in which Mr. Stanley Shingebis, a member of the Osnaburgh First Nation (now Mishkeegogamang First Nation), was arrested for public intoxication and rendered quadriplegic between the time of his arrest and his release from custody.⁷³ The

63 *Ibid.*

64 *Ibid* at 15.

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 *Ibid.*

69 *Ibid* at 16.

70 *Ibid.*

71 Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee—Tay Bway Win: Truth, Justice and First Nations* (Toronto: The Osnaburgh/Windigo Tribal Council Justice Review Committee, 1990) at 117, 120-121.

72 *Ibid* at 1.

73 *Ibid.*

Committee expressed the view that if its recommendations were to be fully implemented, “incidents such as the Shingebis matter would not be so likely to be repeated”.⁷⁴

The Committee’s recommendations are prefaced by a summary discussion of settler colonialism and its impacts on Indigenous peoples in Canada, including “loss of land, autonomy and culture” and cultural clashes between differing Indigenous and Euro-Canadian “concepts of law, justice and society”.⁷⁵ The relationship between its proposed reforms to the justice system and this broader context are described as follows:

While this Report addresses the justice system, it is but the flashpoint where the two cultures come into poignant conflict. The Euro-Canadian justice system espouses alien values and imposes irrelevant structures on First Nations communities. The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness. It is evident that the frustration of the First Nations communities is internalized: the victims, faced with what they experience as a repressive and racist society, victimize themselves. In most cases, both victim and offender are First Nations people. They kill and injure each other and they kill and injure themselves, having a suicide rate several times the non-native average in Canada.⁷⁶

The Committee’s recommendations are extensive, complex, and wide-ranging, dealing with land, economic, and social matters, on the basis that “it is impossible to examine how the justice system impacts on these First Nations communities without looking at the underlying issues”.⁷⁷ For example, it recommended granting reserve status to two of the Indigenous communities it examined and made recommendations with respect to co-management of resources, housing, water treatment, recreational facilities, drug and alcohol treatment services, family violence intervention, treaty rights, education, race relations, policing, and much more.⁷⁸ With respect to the courts, its recommendations canvass holding court on reserve, post-release transportation issues, court translation services, appointment of Indigenous justices of the peace, creation of

74 *Ibid.*

75 *Ibid* at 5.

76 *Ibid.*

77 *Ibid* at 72.

78 *Ibid* at 72-78.

Indigenous justice committees to provide information and advice on appropriate sentences, development of diversion programs and alternative measures with reference to “traditional means or otherwise”, and reforms to legal aid and Indigenous court worker programming, among other things.⁷⁹ The Committee also made a series of recommendations for improvements to probation and corrections, including recommending that probation be supervised by Indigenous residents of the same reserve who share probationers’ language and culture.⁸⁰

Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta

In January 1990, the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta was mandated to review the criminal justice system in relation to First Nations and Métis in Alberta. Its objective was to identify any problems and propose solutions to ensure First Nations and Métis “receive fair, just and equitable treatment at all stages of the criminal justice process”.⁸¹ The Task Force introduced its final report and recommendations as a response to the disproportionate number of Indigenous people in correctional institutions and the tendency for Indigenous people to be “at the receiving end of what appears to them to be a foreign system of justice delivered to a large extent by non-Aboriginals”.⁸²

The Task Force identified various barriers that Indigenous people face in the criminal justice system. Among other things, it found barriers preventing Indigenous people in remote communities from accessing legal aid and obtaining bail.⁸³ It found Indigenous people to be poorly represented by legal aid lawyers who spent insufficient time with their clients and lacked understanding of Indigenous cultures and languages.⁸⁴ The Task Force also identified a greater tendency for Indigenous people

79 *Ibid* at 78-80.

80 *Ibid* at 80.

81 Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, vol I (Edmonton: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, 1991) [*Justice on Trial*, vol I].

82 *Ibid* at 1-1.

83 *Ibid* at 3-5.

84 *Ibid* at 3-6 to 3-17.

to plead guilty to offences to avoid remand regardless of guilt.⁸⁵ It also found that automatic jail sentences were being applied to individuals who had been unable to pay fines in the past, which had a discriminatory impact on Indigenous people.⁸⁶ Likewise, resources for intermittent sentencing were found to be unavailable in remote Indigenous communities.⁸⁷ The Task Force concluded that the pre-sentence and pre-disposition reports written for Indigenous adults and young offenders were generally culturally insensitive as well.⁸⁸ Furthermore, it found that the process for judicial interim release (i.e. bail) has a heavier impact on Indigenous people.⁸⁹

Among other things, the Task Force criticized past reforms that centralized Alberta's criminal justice system and moved away from the use of lay judges on the basis that these changes undermined the accountability of the courts to Indigenous communities.⁹⁰ In contrast, it endorsed a practice whereby committees of Indigenous laypersons were advising on sentences in Hinton and Fort Chipewyan at that time.⁹¹ Its recommendations also included: various forms of networking and communication between judges and Indigenous communities;⁹² various initiatives aimed at Indigenous representation in the justice system, including through Indigenous justices of the peace;⁹³ improved access to translation and interpretation for Indigenous languages;⁹⁴ court sittings being held closer to or within Indigenous communities;⁹⁵ improved access to culturally sensitive legal counsel;⁹⁶ establishment of Elder sentencing panels to assist judges;⁹⁷ greater use of pre-sentence and pre-disposition reports that are "culturally sensitive and reflective of the community sentiment".⁹⁸

85 *Ibid* at 4-29.

86 *Ibid* at 4-35.

87 *Ibid* at 4-38.

88 *Ibid* at 4-35.

89 *Ibid* at 4-44.

90 *Ibid* at 4-4 to 4-5.

91 *Ibid* at 4-5.

92 *Ibid* at 4-7 to 4-8.

93 *Ibid* at 4-8 to 4-13.

94 *Ibid* at 4-14 to 4-19.

95 *Ibid* at 4-19 to 4-26.

96 *Ibid* at 4-26 to 4-28.

97 *Ibid* at 4-40.

98 *Ibid*.

The Task Force dedicated one section of its final report to the roles played by judges, prosecutors, and defence lawyers. It concluded that “[a]lthough subtle and usually unconscious, judicial bias exists” and “[t]he judiciary must face this fact and act to remedy it”.⁹⁹ It recommended cross-cultural education as a starting point and the appointment of Indigenous judicial personnel as an improvement, while noting that some Indigenous people believe a separate justice system is needed.¹⁰⁰ It also found that biases exist among defence counsel and Crown prosecutors that can impact the exercise of prosecutorial discretion and plea bargaining.¹⁰¹ Furthermore, the Task Force found that a lack of knowledge about Indigenous peoples among members of the legal profession was resulting in systemic discrimination.¹⁰² To remedy this situation, its recommendations included: intensive cross-cultural education for judges, lawyers, and prosecutors; that judges be more sensitive to and consider cultural and socio-economic factors when Indigenous people appear before them; and that defence counsel familiarize themselves “with the total situation of an accused person” in order to act in their best interests.¹⁰³

The Task Force dedicated another short chapter to the differing premises underlying Indigenous and non-Indigenous cultures and worldviews, entitled “An Aboriginal Perspective on Justice”.¹⁰⁴ The Task Force, which included Professor Leroy Little Bear of the University of Lethbridge, summarized its conclusions as follows:

...The problems that Aboriginal people have with the criminal justice system are, to a large extent, a result of the implicit convictions of white society embedded in Canadian law. The end result is a clash of two cultures. For the Aboriginal people of Alberta, this results in non-fulfillment and frustration of expectations because the criminal justice system does not embody their implicit convictions about life and existence.¹⁰⁵

The Task Force found that Indigenous worldviews tend to be “cyclical/ holistic, generalist, and process oriented”, as compared to “White

99 *Ibid* at 5-6.

100 *Ibid.*

101 *Ibid* at 5-6 to 5-9.

102 *Ibid* at 5-9.

103 *Ibid* at 5-11.

104 “An Aboriginal Perspective on Justice” in *Justice on Trial*, vol I, *supra* note 81 at 9-1.

105 *Ibid.*

society's linear/singular worldview".¹⁰⁶ It identified several underlying foundations among First Nations and Métis societies that differ from those of White society, including: the idea of equality among all creation;¹⁰⁷ the assumption that all things have spirit and are inter-related;¹⁰⁸ an emphasis on harmony and balance;¹⁰⁹ the prioritizing of the group over the individual;¹¹⁰ communal ownership of land and resources;¹¹¹ and the idea that disorder "is corrected through rehabilitative and restorative action".¹¹² The Task Force also contrasted Canada's retributive model of justice to the more restorative model of justice it found in justice and dispute resolution processes among Indigenous societies.¹¹³ It stated that the latter tends to focus on: crime as a violation of one person by another; problem-solving and restoration of harmony; dialogue and negotiation as normative; restitution and reconciliation as means of restoration; justice as right relationship and harmony; and remorse, repentance, and forgiveness as important factors.¹¹⁴ The Task Force also found that offenders and their communities take an active role in these restorative processes, and the holistic context of an offence is taken into consideration "including moral, social economic, political, religious and cosmic considerations".¹¹⁵

In addition, the Task Force reviewed and compiled the recommendations from twenty-two earlier reports that had been prepared on the treatment of Indigenous people in the criminal justice system in Canada between 1967 and 1990.¹¹⁶ These included the final reports from commissions of inquiry and task forces already canvassed above, as well as several others addressing the treatment of Indigenous people in policing, corrections,

106 *Ibid* at 9-3.

107 *Ibid* at 9-3 & 9-4.

108 *Ibid* at 9-3 to 9-5.

109 *Ibid* at 9-3 to 9-4.

110 *Ibid*.

111 *Ibid* at 9-4.

112 *Ibid*.

113 *Ibid* at 9-6.

114 *Ibid*.

115 *Ibid*.

116 "A Review and Compilation of Recommendations of Twenty-Two Major Reports From 1967 to 1990 on Aboriginal People and the Criminal Justice System" in Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, vol III (Edmonton: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, 1991) at 4-3 to 4-4 [*Justice on Trial, vol III*].

and the broader criminal justice system in Canada.¹¹⁷ After reviewing these past reports, the Task Force identified the following “top ten” themes among past recommendations:

- Cross-cultural training for non-Indigenous staff;
- Greater Indigenous representation among staff;
- More community-based programs in corrections;
- More community-based alternatives in sentencing;
- Special assistance to Indigenous offenders;
- Indigenous community involvement in planning, decision-making, and service delivery;
- Indigenous advisory groups at all levels;
- Greater recognition of Indigenous culture and law in criminal justice system service delivery;
- Emphasize crime prevention programs; and
- Self-determination must be considered in planning and operation of the criminal justice system.¹¹⁸

Aboriginal Justice Inquiry of Manitoba

In April of 1988, the Manitoba government initiated the Public Inquiry into the Administration of Justice and Aboriginal People—

117 The reports identified by the Task Force that are not addressed elsewhere in this chapter include: Canada, *Task Force on Policing on Reserves Report* (Ottawa: Indian Affairs and Northern Development, 1973); National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System, *Native Peoples and Justice* (Ottawa: Ministry of the Solicitor General, 1975); Native Council of Canada, *Metis and Non-Status Indian Crime and Justice Commission Report* (Ottawa: Native Council of Canada, 1978); Canada, *Advisory Committee to the Solicitor General of Canada on the Management of Correctional Institutions Report* (Ottawa: Solicitor General Canada, 1984); Canada, Saskatchewan & Federation of Saskatchewan Indian Nations, *Reflecting Indian Concerns and Values in the Justice System* (Ottawa: Department of Justice, 1985); Canada, *Task Force on Program Review, Study Team, Improved Program Delivery: Indians and Natives* (Ottawa: Supply and Services, 1985); GS Clark & Associates, *Native Victims in Canada: Issues in Providing Effective Assistance* (Ottawa: Solicitor General Canada, 1986); Michael Jackson, *Locking Up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release* (Ottawa: Canadian Bar Association, 1988); Brad Morse & Linda Lock, *Native Offenders' Perception of the Criminal Justice System* (Ottawa: Supply and Services, 1988); Canada, Standing Committee on Justice and Solicitor General, *Taking Responsibility* (Ottawa: House of Commons, 1988); Alberta, *Task Force on Legal Aid* (Edmonton: Attorney General of Alberta, 1988); Canada, Task Force on Indian Policing, *Indian Policing Policy Review: Task Force Report* (Ottawa: Indian and Northern Affairs Canada, 1990).

118 *Justice on Trial*, vol III, *supra* note 116 at 4-7.

better known as the Aboriginal Justice Inquiry.¹¹⁹ This was a response to two controversial incidents. First, Indigenous and non-Indigenous community leaders called for an inquiry into delays and irregularities with respect to the investigation and trial stemming from the murder of a young Indigenous woman named Helen Betty Osborne in The Pas in 1971.¹²⁰ Second, several individuals called for an inquiry after J.J. Harper, executive director of the Island Lake Tribal Council, died following an encounter with a City of Winnipeg police officer who was exonerated by the police department the very next day.¹²¹ However, the inquiry's Commissioners, Associate Chief Judge Murray Sinclair and Associate Chief Justice Al Hamilton, were more broadly tasked with investigating, reporting on, and making recommendations on the overall relationship between the administration of justice and Indigenous peoples in Manitoba.¹²²

Similar to the Task Force in Alberta, the Commissioners dedicated a chapter to similarities and differences between Indigenous and non-Indigenous concepts of justice.¹²³ Among other things, this section outlines the prominent position and influence of Elders and healers within Indigenous societies.¹²⁴ It also identifies the traditional values of the Anishinaabe, Dakota, Apache, and Cheyenne as examples of distinct Indigenous worldviews.¹²⁵ More generally, the Commissioners found Indigenous societies see justice as being aimed at the restoration of peace and equilibrium within the community and the reconciliation of the accused with their conscience and those they have wronged.¹²⁶ These outcomes were contrasted against the goals of controlling and preventing potentially harmful behaviour and punishing deviants as a means of control and public protection within non-Indigenous society.¹²⁷

The Commissioners also addressed matters of Indigenous law, including Indigenous conflict resolution processes and systems of sanctions, which it found to be generally based on kinship and aimed at dispute resolution,

119 Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991), vol I at 3.

120 *Ibid* at 2.

121 *Ibid*.

122 *Ibid* at 3.

123 *Ibid* at 19.

124 *Ibid* at 19-20.

125 *Ibid* at 21.

126 *Ibid* at 22.

127 *Ibid*.

the healing of wounds, and restoration of social harmony.¹²⁸ Likewise, they identified several cultural imperatives or rules of behaviour common among Indigenous societies, including non-interference, non-competitiveness, emotional restraint, and sharing.¹²⁹ The Commissioners argued that the criminal justice system's failure to recognize and understand the different cultural imperatives of Indigenous societies lies "at the heart of systemic discrimination".¹³⁰ They asserted that "[i]f the justice system in Manitoba is to earn the respect of Aboriginal people, it must first recognize and respect their cultures, their values and their laws".¹³¹

The Commissioners dedicated a subsequent chapter to Indigenous over-incarceration and how it relates to racism, prejudice, and discrimination in the justice system.¹³² In order to explain the presence of systemic discrimination in the criminal justice system, they first identified various statistics and studies demonstrating Indigenous people are adversely impacted throughout that system, including through over-incarceration, over-charging, denial of bail, less time with lawyers, higher rates of guilty pleas, and higher rates of custodial sentences.¹³³ They then pointed to several discriminatory factors that led to these adverse impacts on Indigenous people, including overall economic disadvantage, less formal educational credentials, linguistic barriers, cultural factors including different concepts of justice, a lack of facilities, resources, and services in Indigenous communities, and underrepresentation among decision makers in the system.¹³⁴ The Commissioners argued these factors in turn lead to over-policing, higher rates of pre-trial detention, delays, difficulties, and misunderstandings in court hearings, and higher rates of incarceration for Indigenous people.¹³⁵

Another chapter in the report is dedicated to the deep history of Indigenous societies in the area now encompassed by Manitoba, with a particular focus on the imposition of the Euro-Canadian legal system on Indigenous peoples and the displacement of Indigenous law.¹³⁶ Building

128 *Ibid* at 22-29.

129 *Ibid* at 29-35.

130 *Ibid* at 36.

131 *Ibid* at 46.

132 *Ibid* at 85-113.

133 *Ibid* at 101-103.

134 *Ibid* at 103-107.

135 *Ibid* at 107-109.

136 *Ibid* at 49-83.

on this historical context, the Commissioners clearly stated their belief “that the social situation of Aboriginal people is a direct result of a history of social, economic and cultural repression, all carried out under a cloak of legality”.¹³⁷ They found that the criminal justice system “has been a central instrument of the destructive policies of the past”.¹³⁸ Yet they argued that it could play a positive role in the future by “helping to make reasonable accommodation for Aboriginal peoples as it deals with individuals who come into conflict with the law, and with the larger Aboriginal community as that community takes control of its own justice system”.¹³⁹

The Commissioners’ detailed report addresses a wide variety of topics that go far beyond the scope of this publication, as well as more closely related topics on policing, jails, and child welfare. One chapter of particular relevance to the *Gladue* principles is entitled “Alternatives to Incarceration”.¹⁴⁰ There the Commissioners criticize the status quo approach to sentencing and argue for a new approach that is less dependent on prison as a sanction, that strengthens community sanctions and reconciliation programs, that focuses on the needs of victims, communities, and offenders rather than punishment, that gives greater consideration to cultural factors, and that allows the community to play a more meaningful role.¹⁴¹ They also criticize the Northwest Territories Court of Appeal decision in *Naqitarvik*—discussed in Chapter 1—for perpetuating the standardization of sentences for particular crimes without concern for unique circumstances and for discouraging the initiative of trial judges.¹⁴² In contrast, they recommended that the Manitoba Court of Appeal “encourage more creativity in sentencing by trial court judges so that the use of incarceration is diminished and the use of sentencing alternatives is increased, particularly for Aboriginal peoples”.¹⁴³

137 *Ibid* at 110.

138 *Ibid* at 113.

139 *Ibid*.

140 *Ibid* at 389 to 428.

141 *Ibid* at 402. The Commissioners elaborate on this proposal through several more detailed recommendations: 402-428.

142 *Ibid* at 404.

143 *Ibid* at 405.

Law Reform Commission of Canada: Aboriginal Peoples and Criminal Justice

In June of 1990, the Minister of Justice and Attorney General of Canada asked the Law Reform Commission of Canada to study the extent to which Canadian criminal law ensures that Indigenous people and members of cultural or religious minorities “have equal access to justice and are treated equitably and with respect.”¹⁴⁴ The Commission decided to address the circumstances of Indigenous people in the criminal justice system in a report dedicated to this topic alone. In its first substantive chapter, the Commission described the “remarkably uniform picture” of the criminal justice system that had been drawn by the Indigenous representatives it consulted:

From the Aboriginal perspective, the criminal justice system is an alien one, imposed by the dominant white society. Wherever they turn or are shuttled throughout the system, Aboriginal offenders, victims or witnesses encounter a sea of white faces. Not surprisingly, they regard the system as deeply insensitive to their traditions and values: many view it as unremittingly racist.¹⁴⁵

The Commission went on to describe Indigenous peoples’ “vision of a justice system that is sensitive to their customs, traditions and beliefs”.¹⁴⁶ It explained that Indigenous peoples aspire to have a criminal justice system that is Indigenous designed, run, and populated from top to bottom.¹⁴⁷ The Commission described an Indigenous vision of justice as: being faithful to Indigenous traditions and cultural values while adapting these to modern society; evincing appropriate respect for community Elders and leaders; taking heed of the requirements of Indigenous spirituality; and paying homage to the relations between humanity, the land, and nature.¹⁴⁸ It stated that an Indigenous vision of justice gives pre-eminence to collective interests and is holistic, integrative, and community-based.¹⁴⁹ This approach would emphasize mediation and conciliation, but also seek acknowledgement of responsibility from

144 Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 1.

145 *Ibid* at 5.

146 *Ibid* at 6.

147 *Ibid*.

148 *Ibid*.

149 *Ibid*.

those who transgress societal norms.¹⁵⁰ An Indigenous justice system would pursue the larger objective of reintegrating an offender into the community as a whole while working toward reconciliation between offender and victim.¹⁵¹ It is also a pluralistic vision of justice, with customary laws (i.e. Indigenous law) varying from one community to the next and promoting harmony within each community.¹⁵²

The Commission interpreted its terms of reference as requiring it to go beyond the traditional focus of criminal law on formal equality, drawing on the substantive equality jurisprudence of the Supreme Court of Canada with respect to human rights statutes and s 15 of the *Charter*.¹⁵³ It stated that in order to ensure Indigenous people receive the same minimum level of service and are treated equitably and with respect, it must be recognized that the level of service in interaction with police, access to legal aid, and understanding of the court process is not equal among all groups in society.¹⁵⁴ The Commission recommended as follows:

...Differences between members of various groups must be considered by police, prosecutors, defence lawyers, judges, legislators and all other participants in the criminal justice system. Indeed, the structure of the criminal justice system itself must be adjusted to allow greater recognition of those differences. Justice can no longer be blind: Justice must open her eyes to the inequities in society and see to it that they are not mirrored in the criminal justice system.¹⁵⁵

The Commission also addressed the viability of Indigenous-controlled systems of justice. It referenced various academic publications and past reports that found Indigenous crime rates to be a product of Indigenous societies' marginalization through colonization.¹⁵⁶ The Commission concluded that the criminal justice system itself played a role in this marginalization by displacing other mechanisms for social control such as the traditional role of Elders in Indigenous societies.¹⁵⁷ It also canvassed cultural differences that lead to differential impacts for

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*

153 *Ibid* at 9-12.

154 *Ibid* at 11.

155 *Ibid* at 12.

156 *Ibid* at 15.

157 *Ibid.*

Indigenous people in the criminal justice system with respect to guilty pleas and pre-sentence reports.¹⁵⁸ The Commission discussed the unique justice processes that already existed in some Indigenous communities, such as an Elders Council on Vancouver Island involved in diversion, bail supervision, the preparation of pre-sentence reports, speaking to sentence, and the supervision of open custody and probation at the time.¹⁵⁹ It stated that Indigenous justice systems would be scaled to the communities themselves and would reflect their specific needs and priorities.¹⁶⁰

In addition to its discussion of Indigenous justice systems and processes, the Commission outlined various steps to make the mainstream criminal justice system more equitable for Indigenous people.¹⁶¹ Among other things, the Commission recommended: programs for improved Indigenous representation in the system as police, lawyers, judges, probation officers, and correctional officials;¹⁶² expansion of Indigenous court worker programs;¹⁶³ cross-cultural training for all participants in the justice system;¹⁶⁴ incorporation of Indigenous culture into law school programs and recognition of lawyers specializing in the representation of Indigenous people by legal aid services;¹⁶⁵ greater attention to the needs of speakers of Indigenous languages;¹⁶⁶ creation of permanent liaison mechanisms between local Crown prosecutors and Indigenous communities and leaders;¹⁶⁷ allowing representatives of Indigenous communities to give evidence of alternatives to custody at bail hearings, prepare release plans, and supervise individuals in the community upon release from custody;¹⁶⁸ allowing Elders or other respected community members to sit with a judge to advise on appropriate sentences;¹⁶⁹ and funding research regarding Indigenous law.¹⁷⁰

158 *Ibid.*

159 *Ibid* at 17.

160 *Ibid* at 19.

161 *Ibid* at 26.

162 *Ibid* at 29.

163 *Ibid.*

164 *Ibid* at 30.

165 *Ibid* at 31.

166 *Ibid* at 32-34.

167 *Ibid* at 36.

168 *Ibid* at 37.

169 *Ibid.*

170 *Ibid* at 39.

The Commission prescribed myriad reforms to policing, the exercise of prosecutorial discretion, charge screening, disclosure, access to counsel, and interrogation, among other topics.¹⁷¹ Echoing past commissions, it recommended reforms such as the appointment of more Indigenous justices of the peace and holding court in or near the Indigenous community where an offence was committed.¹⁷² It recommended amending bail legislation to ensure more equitable application to Indigenous people, such as: ensuring an accused's cultural background, community, and requirements for engaging in traditional pursuits are better understood;¹⁷³ more flexible consideration of an intended surety's financial resources, character, and proximity to an accused in terms of kinship or place of residence;¹⁷⁴ and abolishment or reduced reliance on cash deposits.¹⁷⁵

The Commission also recommended reforms to sentencing that included: prioritizing alternatives to incarceration;¹⁷⁶ expanding victim-offender reconciliation programs;¹⁷⁷ and creating community service order programs in willing communities.¹⁷⁸ Other proposed reforms included: making probation services available in a wider range of Indigenous communities;¹⁷⁹ accommodating cultural differences in probation criteria;¹⁸⁰ recognition of the application of traditional Indigenous sanctions as a mitigating factor for sentencing;¹⁸¹ greater access, detail, cultural sensitivity, and reference to the special circumstances of Indigenous people in pre-sentence reports;¹⁸² and aftercare programs for Indigenous people that are designed and administered by Indigenous community organizations.¹⁸³

171 *Ibid* at 43-55.

172 *Ibid* at 57, 59.

173 *Ibid* at 63.

174 *Ibid* at 65.

175 *Ibid* at 66.

176 *Ibid* at 68.

177 *Ibid* at 69.

178 *Ibid* at 73.

179 *Ibid* at 74.

180 *Ibid*.

181 *Ibid* at 76.

182 *Ibid* at 77-78.

183 *Ibid* at 83.

Saskatchewan Indian and Metis Justice Review Committees

In June of 1991, two separate justice review committees were jointly established by provincial Indigenous organizations and the Government of Saskatchewan with parallel mandates: the Indian Justice Review Committee and the Metis Justice Review Committee. The Committees were established to formulate recommendations for the delivery of criminal justice services to First Nations and Métis in the province, with a particular focus on the development and operation of practical, community-based initiatives to enhance those services.¹⁸⁴ The Committees were given a six-month timeframe to propose “practical changes and initiatives that could be implemented almost immediately, or within a very reasonable period of time”.¹⁸⁵

Among other things, the Committees recommended: establishing Indigenous justice committees for youth and adults that could make sentencing recommendations, assist with the preparation of pre-sentence reports, and administer alternative measures;¹⁸⁶ developing employment equity programs aimed at proportionate representation of Indigenous people in various aspects of the criminal justice system;¹⁸⁷ developing cross-cultural and race sensitivity training for various actors in the criminal justice system;¹⁸⁸ reforming civilian complaints mechanisms for police services;¹⁸⁹ re-establishing an Indigenous court worker program on a province-wide basis;¹⁹⁰ establishing culturally appropriate and holistic youth and adult mediation, diversion, and reconciliation programs, with eligibility criteria that encourage Indigenous participation;¹⁹¹ encouraging more flexibility and creativity from prosecutors and judges with respect to the use of pre-trial custody and custodial sentences for Indigenous offenders, and greater use of culturally appropriate alternative

184 Saskatchewan, *Report of the Saskatchewan Indian Justice Review Committee* (Regina: Saskatchewan Indian Justice Review Committee, 1992) at 1; Saskatchewan, *Report of the Saskatchewan Metis Justice Review Committee* (Regina: Saskatchewan Indian Justice Review Committee, 1992) at 1.

185 *Ibid* at 1.

186 *Ibid* at 14, 41.

187 *Ibid* at 17, 21, 35, 56.

188 *Ibid* at 17, 23, 25, 36-37, 49-50, 52-53.

189 *Ibid* at 31-32.

190 *Ibid* at 34.

191 *Ibid* at 41.

measures;¹⁹² improving the accommodation of the unique needs and circumstances of Indigenous women within correctional facilities;¹⁹³ and reviewing the psychological assessment tests used in correctional facilities for cultural bias against Indigenous people.¹⁹⁴

Cariboo-Chilcotin Justice Inquiry (British Columbia)

In October 1992, British Columbia initiated a commission of inquiry to investigate “the relationship between the native people of the Cariboo-Chilcotin and the justice system of this province” led by retired Provincial Court Judge Anthony Sarich.¹⁹⁵ The inquiry was prompted by complaints and allegations from Indigenous peoples in the Cariboo-Chilcotin region of central British Columbia with respect police, lawyers, judges, and other functionaries of the justice system.¹⁹⁶ For the purposes of this inquiry, the Cariboo-Chilcotin region was defined as an area encompassing 100 Mile House, Williams Lake, Quesnel, various towns, and 15 Dakelh, Tsilhqot’in, and Secwepemc First Nations.¹⁹⁷

The first stage of the inquiry involved hearing complaints directly from Indigenous people with respect to the justice system.¹⁹⁸ The second stage involved written and oral submissions from various parties.¹⁹⁹ In the first phase, the Commission heard “complaints against police conduct, remote and obdurate bureaucracy and the frightening and incomprehensible justice process”, as well as “issues of land claims, resource management, and control of their own lives”.²⁰⁰ It also heard testimony on the negative impacts that a residential school near Williams Lake had on generations of Indigenous people in the region.²⁰¹ It also heard about the trial and hanging of Tsilhqot’in chiefs at Quesnel Mouth in 1864,

192 *Ibid* at 42.

193 *Ibid* at 53-54, 58.

194 *Ibid* at 59.

195 British Columbia, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993) at 4.

196 *Ibid* at 5.

197 *Ibid* at 6.

198 *Ibid* at 7.

199 *Ibid*.

200 *Ibid* at 8.

201 *Ibid*.

which many considered to be “a political event in a deliberate process of colonization”.²⁰² These and other grievances were carefully documented.

The report’s first substantive chapter is entitled “Clash of Cultures”.²⁰³ It provides a short history of settler colonialism in the region, ranging from the introduction of smallpox to the imposition of the residential school system and the *Indian Act*.²⁰⁴ The Commission noted that “from the beginning, government officials were unable or unwilling to accept that the community- and family-centred cultural values of the native people were irreconcilable with the values of a free-enterprise, individual-oriented, self-acquisitive society”.²⁰⁵ It also outlined a contemporary “attitude problem” among the non-Indigenous population from which police officers were recruited in the region, which led officers to “unquestioningly accept allegations made against natives while keeping a closed mind to anything they raise in answer”, and explained their “apparent disrespect for any rights of native people and the aggression and arrogance to which they are often subjected”.²⁰⁶

Most of the Commission’s findings relate to policing. Yet its report does canvass cultural and language barriers within the judicial process, including the impossibility of translating terms like “guilt” and “innocence” into local Indigenous languages, and the foreignness of non-Indigenous standards of proof and civil procedure for witness testimony.²⁰⁷ The Commission contrasted the community-level dispute resolution processes of Indigenous peoples in the region against the adversarial court process, which “runs counter to their traditional values and understanding”.²⁰⁸ It also provided examples of language barriers preventing Indigenous accused from understanding this process.²⁰⁹

The Commission found that Indigenous people have not been well-served by the process of justice of non-Indigenous society and “[c]ultural differences have left a wide chasm that will not be easy to bridge”.²¹⁰ It noted that the Indigenous peoples of the region were seeking to

202 *Ibid.*

203 *Ibid* at 9.

204 *Ibid* at 9-11

205 *Ibid* at 10.

206 *Ibid* at 11.

207 *Ibid* at 13.

208 *Ibid* at 13-14.

209 *Ibid* at 14-16.

210 *Ibid* at 28.

control their own lives, manage their own affairs, and create a process of justice that is “comprehensible and culturally acceptable to them”.²¹¹ The Commission stated that the non-Indigenous court system must be made more accessible and comprehensible to Indigenous people. It also urged judges to adopt “a sensitive and knowledgeable approach” to engaging with evolving Indigenous justice processes.²¹²

The Commission’s recommendations with respect to the courts include: appointing and training Indigenous justices of the peace who are fluent in local Indigenous languages;²¹³ accommodating requests from Indigenous leaders for court sittings to be held in their communities;²¹⁴ training family counsellors and establishing safe houses for victims in peril in Indigenous communities;²¹⁵ improving the preparation of prosecutors and the transparency of their decision-making in the region;²¹⁶ improving the coordination and management of legal aid services in the region;²¹⁷ and ensuring Indigenous court workers are fluent in local Indigenous languages.²¹⁸

Advisory Committee on the Administration of Justice in Aboriginal Communities (Québec)

In December 1992, the Government of Québec appointed the Advisory Committee on the Administration of Justice in Aboriginal Communities, chaired by Judge Coutu of the Court of Québec.²¹⁹ The Committee was mandated “to conduct a systematic and orderly consultation intended to devise models of justice able to respond to the specific needs of each Aboriginal community in Québec and respectful of the traditions, customs and socio-cultural values of those communities”.²²⁰ Among other things,

211 *Ibid.*

212 *Ibid.*

213 *Ibid* at 36-37.

214 *Ibid* at 37.

215 *Ibid.*

216 *Ibid* at 37-38.

217 *Ibid* at 38-39.

218 *Ibid* at 41.

219 Quebec, *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Sainte-Foy, Que: Advisory Committee on the Administration of Justice in Aboriginal Communities, 1995) at 173.

220 *Ibid* at 7.

it was asked to consider models put forward during a justice summit in 1992, including mediation, diversion, justices of the peace, and justice committees.²²¹ Indigenous communities had agreed to these models as an interim measure during the negotiated transfer of responsibility for services to Indigenous peoples.²²² While many Indigenous communities within Québec participated in the process, the Malécit, Mohawk, and Cree Nations chose not to participate.²²³

The Committee found that not one of the Indigenous communities that did participate in its consultation process outright rejected Québec's criminal justice system and criminal laws.²²⁴ Only the laws governing hunting and fishing were singled out as inherently problematic.²²⁵ However, they did express a general uneasiness, dissatisfaction, or grave insecurity with respect to the justice system being misunderstood, insufficiently informed about Indigenous realities, and administered by people perceived as foreigners.²²⁶ Most of the communities that participated were also confident that they could assume at least partial responsibility for the administration of justice.²²⁷

As a result of its consultations, the Committee found mediation to be a model for resolving conflicts that is well accepted by Indigenous communities and all those involved in the administration of justice.²²⁸ It was found to be consistent with Indigenous cultures and perspectives in that it aims to create consensus rather than confrontation.²²⁹ The Committee recommended mediators be chosen from members of a justice committee and suggested mediation could have benefits if applied to areas such as youth protection matters.²³⁰ At the same time, it found that mediation should not be a substitute for criminal prosecution in cases of family violence or sexual assault.²³¹

221 *Ibid.*

222 *Ibid* at 11.

223 *Ibid* at 19.

224 *Ibid* at 20.

225 *Ibid.*

226 *Ibid* at 21.

227 *Ibid.*

228 *Ibid* at 26.

229 *Ibid.*

230 *Ibid* at 27.

231 *Ibid.*

The Committee also found diversion to be a model for resolving conflicts that is well received by both members of Indigenous communities and those involved in the existing justice system.²³² It was found to be consistent with Indigenous cultures and perspectives in that it allows for a reconciliation process to be initiated rather than solely focusing on punishment.²³³ The Committee found diversion could facilitate the transfer of responsibility to Indigenous communities and should result in lower crime rates and fewer prison terms.²³⁴ It also noted diversion was being practised in other provinces and territories and found this could provide a more expedient and cost effective alternative for remote communities in particular.²³⁵

The Committee found that a majority of the Indigenous communities in Québec wished to have Indigenous justices of the peace appointed.²³⁶ While it recognized legislative amendments would be necessary, the Committee anticipated these justices of the peace would have extensive jurisdiction over summary offences, municipal or band by-laws, and potentially even youth protection matters.²³⁷ It linked the establishment of Indigenous justices of the peace to the adoption of more Indigenous community by-laws that would be administered locally.²³⁸ It anticipated Indigenous justices of the peace would improve the day-to-day administration of justice, particularly with respect to detention hearings.²³⁹

Based on the input of the communities and organizations it consulted, the Committee found that the creation of justice committees in Indigenous communities “constitutes one of the best ways to have the community participate in the administration of justice”.²⁴⁰ These committees would be made up of community members, including Elders, women, and young people.²⁴¹ Among other things, they would provide input on sentencing, assist in elaborating by-laws, ensure follow up on probation orders, supervise community work programs, and suggest sentencing

232 *Ibid* at 33.

233 *Ibid.*

234 *Ibid.*

235 *Ibid* at 33-34.

236 *Ibid* at 42.

237 *Ibid* at 34.

238 *Ibid.*

239 *Ibid.*

240 *Ibid* at 50.

241 *Ibid* at 44.

circles if the need arises.²⁴² Some of the Indigenous communities the Committee consulted had already formed justice committees of their own initiative whereas others wanted assistance in setting these up.²⁴³ The Committee recommended that justice committees assume the role of diversion committees as well.²⁴⁴ It also recommended that each justice committee have a paid coordinator with adequate training and support.²⁴⁵

The Committee also consulted on the potential use of sentencing circles in Québec. While several Indigenous communities wished to be consulted by judges on their choice of sentences, doing so by way of a sentencing circle was not universally accepted.²⁴⁶ The Committee ultimately recommended encouraging judges to consult Indigenous communities in sentencing either through one of the methods proposed in its report, or “any other method which may be developed in concert with the communities and those involved in the justice system”.²⁴⁷

In addition to its consultations on particular models like justice committees and justices of the peace, the Committee addressed broader concerns raised by Indigenous communities and organizations. For example, it recommended that the concerns of Indigenous women’s organizations be taken into account and that Indigenous women and men should participate on “as equal a footing as possible” in the operation of the proposed models.²⁴⁸ It also recommended: reforms to the provision of legal aid;²⁴⁹ new public legal education initiatives;²⁵⁰ improved accommodation of Indigenous languages and access to interpreters;²⁵¹ Indigenous advisors and training on Indigenous peoples’ “habits and customs” for judges;²⁵² improved communications between prosecutors and authorities in Indigenous communities, and training for prosecutors with respect to Indigenous peoples’ “customs and usages”;²⁵³

242 *Ibid.*

243 *Ibid* at 50-51.

244 *Ibid* at 51.

245 *Ibid.*

246 *Ibid* at 56.

247 *Ibid* at 65.

248 *Ibid.*

249 *Ibid* at 66-69.

250 *Ibid* at 69-70.

251 *Ibid* at 77-79.

252 *Ibid* at 80-82.

253 *Ibid* at 82-86.

and professional and cross-cultural training for everyone working with Indigenous people in the justice system.²⁵⁴

Royal Commission on Aboriginal Peoples— Bridging the Cultural Divide (Canada)

In August 1991, the Government of Canada established the Royal Commission on Aboriginal Peoples with a comprehensive mandate to investigate and propose specific solutions regarding the evolution of the relationship between Indigenous peoples, the Canadian government, and Canadian society as a whole.²⁵⁵ Prior to issuing their five-volume final report in 1996, the Commissioners released *Bridging the Cultural Divide* as a special report that same year.²⁵⁶ In that report they acknowledged that “literally hundreds of recommendations by task forces and commissions of inquiry” had already been issued on how to reform the criminal justice system to make it more respectful and responsive to the experience of Indigenous people.²⁵⁷ For this reason, they chose to focus on providing a framework for implementing those past recommendations, as well as proposing the recognition and establishment of Indigenous justice systems.²⁵⁸

Echoing prior commissions, the Commissioners found that Indigenous perspectives on justice differ from how non-Indigenous Canadians think of the administration of justice as a highly specialized and professionalized aspect of society.²⁵⁹ They stated that Indigenous perspectives of justice reflect distinctive Indigenous worldviews and “in particular a holistic understanding of peoples’ relationships and responsibilities to each other and to their material and spiritual world”.²⁶⁰ According to the Commissioners, “Aboriginal conceptions of justice must be understood as part of the fabric of social and political life rather than as a distinct,

254 *Ibid* at 110-111.

255 Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 12.

256 Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996).

257 *Ibid* at xii.

258 *Ibid*.

259 *Ibid* at 2-3.

260 *Ibid* at 3.

formal legal process”.²⁶¹ They stated that Indigenous peoples’ perception of the justice system as illegitimate and oppressive has deep historical roots and Indigenous peoples’ contemporary realities in the justice system must be understood in a historical context of their relationship with non-Indigenous people.²⁶² They also canvassed the distinctive nature of Indigenous laws and justice systems, as well as the different assumptions underlying them.²⁶³

The Commissioners found a remarkable consensus in its review of past reports on how the criminal justice system has failed Indigenous people, but also found “notwithstanding the hundreds of recommendations from commissions and task forces, the reality for Aboriginal people in 1996 is that the justice system is still failing them”.²⁶⁴ They noted the continuing trend towards Indigenous over-incarceration and sought to identify its root causes.²⁶⁵ The Commissioners found that recent studies and reports had confirmed that the over-representation of Indigenous people in the justice system is both linked to disproportionately high crime rates and a consequence of systemic discrimination.²⁶⁶ They also pointed to how systemic discrimination has contributed to higher crime rates among Indigenous people due to the phenomenon of simultaneous over-policing and under-policing of Indigenous people and communities.²⁶⁷

The Commissioners identified three primary explanatory theories for Indigenous over-incarceration and socio-economic disadvantage that point in different directions:

- 1) First, they identified the theory of cultural clash or conflict that views Indigenous disadvantage as a result of cultural differences between Indigenous and non-Indigenous people.²⁶⁸ While the Commissioners agreed that cultural conflict explains much of the alienation that Indigenous people experience in the justice system, they cautioned that an exclusive focus on this explanation locates the source of the problem within Indigenous cultures, assumes Indigenization of the existing system will be sufficient,

261 *Ibid.*

262 *Ibid* at 7.

263 *Ibid* at 12-25.

264 *Ibid* at 26-27.

265 *Ibid* at 28-33.

266 *Ibid* at 33.

267 *Ibid* at 35-39.

268 *Ibid* at 40-42.

and obscures structural problems grounded in the economic and social inequalities experienced by Indigenous people.²⁶⁹

- 2) Second, they identified the theory that Indigenous over-incarceration can be explained as “a particular example of the established correlation between social and economic deprivation and criminality”.²⁷⁰ The Commissioners agreed that economic and social deprivation is a major underlying cause of disproportionately high rates of criminality among Indigenous people, as well as a direct contributor to the systemic discrimination they face in the justice system.²⁷¹ They also accepted that socio-economic factors could aggravate other cultural factors, such as how over-crowded housing aggravated the already problematic nature of sedentary living being imposed on the James Bay Cree.²⁷²
- 3) Nevertheless, the Commissioners found that the cultural and socio-economic explanations for Indigenous over-incarceration need to be integrated with a broader historical and political analysis that can explain how Indigenous people have been made “poor beyond poverty”.²⁷³ They identified the relationship of colonialism as providing “an overarching conceptual and historical link in understanding much of what has happened to Aboriginal peoples”.²⁷⁴ In their view, responding to the historical roots of Indigenous crime and social disorder requires healing of relationships both internally within Indigenous societies and communities and externally between Indigenous and non-Indigenous people.²⁷⁵

While the remainder of the report is focused on the establishment of Indigenous courts and justice systems, which goes beyond the scope of this publication, the Commissioners did canvass and endorse various existing initiatives, including Indigenous constables and police forces, Indigenous justices of the peace and judges, Indigenous court workers, cultural awareness training programs, diversion programs, Elder panels,

269 *Ibid.*

270 *Ibid* at 42.

271 *Ibid* at 42-46.

272 *Ibid* at 43.

273 *Ibid* at 46.

274 *Ibid* at 47.

275 *Ibid* at 53.

sentencing circles, and healing lodges.²⁷⁶ They also undertook detailed case studies of the Community Council Project of Aboriginal Legal Services of Toronto and the Hollow Water First Nation's Community Holistic Circle Healing Project in Manitoba in order to identify best practices for future initiatives.²⁷⁷ Furthermore, they highlighted the federal government's failure to implement recommendations from previous commissions and recommended that accountability mechanisms be put in place for both past commissions and the Commission's own further recommendations.²⁷⁸

Conclusion

Many of the factual conclusions reached by the Supreme Court of Canada in *Gladue* may be more transparent and meaningful when read in light of the myriad findings of prior commissions of inquiry and task forces. The *Gladue* decision is just one example among many of Canadian courts incorporating these reports into their sentencing decisions. Yet the *Gladue* framework may be particularly challenging to grasp without this context in mind. Well in advance of the enactment of s 718.2(e) and the Supreme Court of Canada's purposive interpretation of this provision, commissions and task forces were undertaking extensive research and engaging in consultations on the underlying causes of Indigenous over-incarceration and its solutions. They consistently identified systemic discrimination throughout the criminal justice system, regardless of intention, including in policing, bail, sentencing, parole, and corrections. Many identified unconscious biases and knowledge gaps among sentencing judges, Crown prosecutors, and defence counsel, among others. They urged the incorporation and accommodation of Indigenous languages, practices, cultures, and legal traditions within the mainstream justice system. And they called for more involvement of Indigenous individuals and collectives in all aspects of the administration of justice, including bail, sentencing, probation, and parole.

Above all, these reports emphasize the alienation of Indigenous peoples from a criminal justice system that reflects a foreign worldview, a foreign legal tradition, and foreign perspectives. They anticipate accommodation of the distinct legal, cultural, and historical perspectives of Indigenous peoples through a variety of alternative procedures, such

276 *Ibid* at 82-147.

277 *Ibid* at 148-176.

278 *Ibid* at 289-291.

as justice committees, Elder panels, culturally sensitive pre-sentence reports, specialized courts, and alternative dispute resolution processes, as well as alternative community-based dispositions. Furthermore, these reports explain that Indigenous over-incarceration is more than just a consequence of socio-economic marginalization and culture clash; it must also be viewed within the broader context and narrative of settler colonialism.

CHAPTER 3: LEGISLATIVE HISTORY AND CONTEXT

While the *Gladue* sentencing framework reflects the accumulation of knowledge from many cases and studies that came before it, the Supreme Court of Canada’s decision is fundamentally based on a purposive and remedial interpretation of Parliament’s statutory direction in s 718.2(e) of the *Criminal Code*. This provision mandates that courts must consider “all available sanctions other than imprisonment” that are reasonable in the circumstances when crafting a fit sentence for any person regardless of background. However, it also compels them to do so “with particular attention to the circumstances of Aboriginal offenders”. Section 718.2(e) neither explicitly sets out the specific alternative sanctions that might be available nor does it specify the circumstances of Indigenous people that must be considered. These were left to the courts to explore in context to the many other amendments that came with it. In interpreting this two-part directive from Parliament, the Supreme Court of Canada sought guidance from its legislative history and context, which supported its interpretation that Indigenous people must be sentenced “differently” to achieve a truly fit and proper sentence in each case.¹ To round out the historical and legal context from which the *Gladue* principles emerged it is worth briefly canvassing that legislative debate and context here as well.

Introduction of Bill C-41 (*The Sentencing Reform Act*)

The brief legislative mention of the circumstances of Indigenous people in s 718.2(e) came as part of an ambitious series of statutory reforms to the sentencing process within the *Criminal Code*. In January 24, 1994, following the speech from the throne for Canada’s 35th Parliament, then Minister of Justice and Attorney General Allan Rock set the tone for these changes by announcing that his government’s upcoming agenda

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 33.

would include attention to equal access to justice and equal treatment in the justice system.² Among other things, this would include “the search for better ways of ensuring that the justice needs of aboriginal peoples are recognized and acted upon”.³ He further elaborated on this broader agenda for criminal justice reform as follows:

Aboriginal people, among others, say the law has become a system more about process than about justice and to some extent they are right. In many aboriginal communities there is now a remarkable will to actually do something about this challenge. It is a will to carve out new relationships with the justice system. The process of change will be gradual and difficult but we have an obligation to aggressively pursue this opportunity for change. ...⁴

In June 1994, Minister Rock went on to introduce Bill C-41 (*The Sentencing Reform Act*), proposing comprehensive reforms to the sentencing process under the *Criminal Code*.⁵ These amendments were subsequently debated and passed before being proclaimed into force in 1996.⁶ The amendments were the culmination of over a decade of research and public consultation on sentencing reform. They created a new Part XXIII of the *Criminal Code* that included the following elements: enabling provisions for alternative measures (diversion) programs; a statement of the purpose and principles of sentencing; a statutory code of procedure and evidence for sentencing; modernized probation provisions; a new fine regime; a stand-alone restitution order; and an enabling provision for conditional sentences as a new sentencing alternative.⁷ In short, Bill C-41 addressed reform to both the sentencing process and the available outcomes.

Among other things, Parliament authorized alternative measures in s 717 of the *Criminal Code* in order to increase opportunities for creative, individualized responses to relatively minor offences, including restitution, personal service work for the victim, community service

2 *House of Commons Debates*, 35th Parl, 1st Sess, No 9 (27 Jan 1994) (Hon Allan Rock).

3 *Ibid.*

4 *Ibid.*

5 *House of Commons Debates*, 35th Parl, 1st Sess, No 84 (13 June 1994) (Hon Allan Rock).

6 For a more detailed discussion of the background to these amendments, see David Daubney & Gordon Parry, “An Overview of Bill C-41 (*The Sentencing Reform Act*)” in Julian V. Roberts & David P. Cole, *Making sense of sentencing* (University of Toronto Press, 1999).

7 *Ibid* at 33.

work, mediation (where the victim agrees), and referral to specialized programs for counselling and treatment.⁸ It also introduced a statement of the purpose and principles of sentencing in s 718. This not only codified existing objectives from the jurisprudence such as denunciation, deterrence, rehabilitation, and incapacitation, but it “also signal[led] Parliament’s interest in the restorative justice objectives of restoration for harm done to victims and the community and in promoting a sense of responsibility in offenders and acknowledgement of harm done to victims and to the community”.⁹ The fundamental principle of sentencing was identified as proportionality in s 718.1, stating that every sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Further principles were set out in s 718.2, including s 718.2(e). Section 718.2(d) codified the principle of restraint: “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances”. Immediately following this principle of restraint, Parliament directed that sentencing judges must consider all reasonable and available alternatives to prison with particular attention to the circumstances of Indigenous people via s 718.2(e). This provision formed part of an extensive series of amendments that not only directed courts to reduce their reliance on incarceration and to explore all available alternatives, but also enabled them to do so through new sentencing options like conditional sentences and expanded options for alternative measures. Furthermore, it placed restorative justice sentencing objectives alongside traditional objectives within Canadian sentencing jurisprudence like deterrence and denunciation.

Section 718.2(e) in context to emerging Indigenous justice initiatives

Minister of Justice Allan Rock made it clear that the rationale behind s 718.2(e) was to address the disproportionate representation of Indigenous people in the criminal justice system by encouraging courts to examine alternatives. Speaking to the Standing Committee on Justice and Legal Affairs, he explained the provision as follows:

[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations

8 *Ibid* at 33-34.

9 *Ibid* at 34.

of Canada. I think it was the Manitoba justice inquiry that found that although aboriginal people make up only 12% of the population of Manitoba, they comprise over 50% of the prison inmates. Nationally aboriginal persons only represent about 2% of Canada's population, but they represent 10.6% of persons in prison. Obviously there's a problem here.

What we're trying to do, particularly having regard to the initiatives in the aboriginal communities to achieve community justice, is to encourage courts to look at alternatives where it's consistent with the protection of public—alternatives to jail—and not simply resort to that easy answer in every case.¹⁰

Other Members of Parliament within the Government of Canada at the time similarly linked Bill C-41 to both the unique circumstances of Indigenous people and innovative justice initiatives for Indigenous sentencing that had already emerged by the mid-1990s. For example, the Honourable Roseanne Skoke (Central Nova, Nova Scotia) described Bill C-41 as recognizing “that wherever appropriate, alternative measures designed to meet the special needs of aboriginal offenders should be used”.¹¹ The Honourable Derek Lee (Scarborough-Rouge River, Ontario) described Bill C-41 as having the potential for change “from the aboriginal perspective” by building on existing leadership for justice reform and community-based pilot projects already in existence.¹²

The Honourable Morris Bodnar (Saskatoon-Dundurn, Saskatchewan) emphasized that Bill C-41 would provide alternatives to incarceration for Indigenous people by relating these changes to the emerging use of sentencing circles in Saskatchewan's courts, giving an example of an urban sentencing circle that was successfully held in the City of Saskatoon.¹³ His remarks echo several of the points raised in both the case law and the reports canvassed in the previous two chapters:

[...] The use of alternatives for aboriginal offenders is a very important principle of this bill. In my province of Saskatchewan

10 House of Commons, Standing Committee on Justice and Legal Affairs, *Minutes of Proceedings and Evidence*, no 62 (Nov 17, 1994).

11 *House of Commons Debates*, 35th Parl, 1st Sess, No 93 (20 Sept 1994) at 5909 (Hon Roseanne Skoke).

12 *House of Commons Debates*, 35th Parl, 1st Sess, No 108 (18 Oct 1994) at 6817 (Hon Derek Lee).

13 *House of Commons Debates*, 35th Parl, 1st Sess, No 95 (22 Sept 1994) at 6028 (Hon Morris Bodnar).

the aboriginal population is the fastest growing segment of society today. It also represents a disproportionate percentage of the offenders incarcerated.

The courts in Saskatchewan have started to experiment with sentencing circles. A sentencing circle brings together elders of the community and also includes members of the non-native community and professionals such as lawyers and police officers.

The emphasis is not on retribution but rather on returning to the community its sense of harmony as defined by the aboriginal population.¹⁴

Members in opposition characterized s 718.2(e) in a similar light even if they vehemently opposed its inclusion in Bill C-41, linking it to the precedents already set by sentencing circles and other emerging initiatives.¹⁵ The Honourable Pierrette Venne (Saint-Hubert, Quebec) of the Bloc Québécois went so far as to describe s 718.2(e) as trying to “sneak through the back door the concept of a parallel system of justice for Aboriginals”, calling it an “enormity hidden under nine sneaky words”.¹⁶ To Ms. Venne, this was a “horror” that would allow Indigenous people to “benefit from a legal system different from that which applies to all other Canadians”—“a parallel justice, an ethnic justice, a cultural justice”.¹⁷ While there was clearly no consensus among the political parties on whether Indigenous people ought to be sentenced differently, it appears to have been common ground that this is precisely what s 718.2(e) would encourage and enable.

Conclusion

In sum, the “nine sneaky words” set out in s 718.2(e), calling for particular attention to the circumstances of Indigenous people when exploring every reasonable and available alternative to incarceration, entered the *Criminal Code* in a very specific historical and legal context. They were part of a complete overhaul of the Canadian sentencing regime, including its objectives, process, and available outcomes. They fell within a wide set

14 *Ibid.*

15 See for example *House of Commons Debates*, 35th Parl, 1st Sess, No 219 (15 June 1995) at 13964 (Hon Dick Harris).

16 *House of Commons Debates*, 35th Parl, 1st Sess, No 93 (20 Sept 1994) at 13964 (Hon Pierrette Venne).

17 *Ibid.*

of criminal justice reforms aimed at achieving equal treatment and equal access to justice. Parliament clearly linked the provision to Indigenous alienation from the mainstream justice system, Indigenous over-representation in that system, and Indigenous peoples' unique justice needs. Furthermore, it was meant to build on the existing leadership and agency of Indigenous peoples as reflected in the Indigenous justice initiatives that had already emerged by that time.

PART



THE ACCOMMODATIVE
JURISPRUDENCE OF
THE SUPREME COURT
OF CANADA

PART B: THE ACCOMMODATIVE JURISPRUDENCE OF THE SUPREME COURT OF CANADA

The most logical starting point for any detailed discussion of the *Gladue* principles would be the Supreme Court of Canada's *Gladue* decision itself. While this framework has received extensive interpretation in the decisions of sentencing judges and appellate courts from across Canada, the most authoritative statements of the law remain those of our highest court. In the chapters that follow the Supreme Court of Canada's relatively steadfast approach to the *Gladue* principles will be traced from its initial judicial notice of widespread bias and systemic discrimination in the criminal justice system in *Williams* all the way to their more recent consideration in *Friesen* in context to the disproportionate rates of victimization that Indigenous children and youth contend with. Over two decades of case law from the Supreme Court of Canada amply demonstrate the versatility of these principles when understood at the highest level of abstraction as directions for courts to recognize and accommodate the circumstances that make Indigenous people unique and that feed into systemic discrimination in the criminal justice system.

In *Gladue*, the Supreme Court of Canada took into account the sentencing jurisprudence that predated this case, the legislative context and debate around s 718.2(e), and the long line of commissions and task forces that addressed Indigenous over-incarceration prior to this amendment to the *Criminal Code*, as summarized in Part A. However, the framework the Supreme Court articulated in *Gladue* builds from these foundations to provide a more flexible, practical, and systematic approach. Judicial notice of the social context of systemic discrimination, settler colonialism, and widespread racism that Indigenous people face is now a mandatory consideration whenever an Indigenous person comes before the court for sentencing. The Supreme Court also instructed judges, counsel on both sides, and the authors of pre-sentence reports to pay more attention to the unique circumstances of Indigenous people going forward. The Court called for a holistic approach to sentencing Indigenous people that not only attends more carefully to the circumstances of the individual being sentenced, but also to victims and communities.

The broad principles and concepts established in the *Gladue* decision address everything from the constrained circumstances that many Indigenous people face to the different worldviews and legal perspectives of Indigenous collectives and communities. All of these differences have implications for the sentencing process, and each may need to be accommodated elsewhere in the broader legal system as well.

CHAPTER 4: JUDICIAL NOTICE OF DISCRIMINATION IN *WILLIAMS*

By the late 1990s, a more accommodative approach to sentencing Indigenous people had clear legislative backing, theoretical and empirical support from several decades of studies and reports, and the benefit of experience and insight from early innovative judicial decisions. Yet a wider implementation of these modifications to sentencing practices for Indigenous people faced an additional barrier in terms of institutional constraints on the courts and counsel in the day-to-day functioning of the criminal justice system. While the *Gladue* decision was preceded by a number of significant and promising pilot projects within Indigenous communities and judicial experiments in specific courts and regions, this is no indication that they had become the rule rather than the exception by the 1990s.

Much of the early jurisprudence canvassed in the first chapter emphasized the need for detailed information and extensive community involvement as the prerequisites for any alternative sentencing practices to be undertaken for Indigenous people. However, the timeliness of the delivery of justice under the *Criminal Code* was clearly a concern in the 1990s as well. Of particular note, the Supreme Court of Canada decided a pair of appeals in 1998 clarifying that a person's *Charter* right to be tried within a reasonable time would be extended to the sentencing process that follows trial.¹ Likewise, the legislative direction in s 718.2(e) was accompanied by Parliament's insistence that sentencing must take place "as soon as practicable" after conviction, as set out in s 720 along with other reforms to the overall sentencing process. This tension between practical, time-constrained procedural concerns and the deep seated systemic factors that underlie Indigenous over-incarceration and alienation appear to have set the stage for the Supreme Court's addition of judicial notice to the analysis in *Gladue*.

1 *R v MacDougall*, [1998] 3 SCR 45, 1998 CanLII 763; *R v Gallant*, [1998] 3 SCR 80, 1998 CanLII 764.

The factual context and lower court decisions

One year prior to releasing the *Gladue* decision, the Supreme Court addressed questions of judicial notice and anti-Indigenous racism in the distinct procedural context of jury trials in the *Williams* decision. Victor Williams, an Indigenous man, sought to appeal his conviction for robbery of a pizza parlour in Victoria, British Columbia.² He had pleaded not guilty and elected for trial by jury. His defence was essentially that someone else committed the robbery. The legal issue that made its way up to the Supreme Court was whether Mr. Williams had a right to question potential jurors to determine whether they “possess prejudice” against Indigenous people that might impair their partiality—in other words, to challenge them for cause.³

In first applying to question potential jurors for racial bias, Mr. Williams filed materials alleging widespread racism against Indigenous people in Canadian society along with an affidavit stating in part that he hoped the jurors were not “Indian haters”.⁴ The initial trial judge accepted this evidence and allowed Mr. Williams to ask the potential jurors whether their ability to judge the evidence in the case without bias, prejudice, or partiality might be affected by the fact that he was an “Indian” and the complainant was white.⁵ Additional questions were allowed to clarify responses and twelve potential jurors were disqualified for risk of bias as a result. The Crown successfully applied for a mistrial based on procedural issues and the “unfortunate publicity” stemming from this jury selection process.⁶

At the commencement of a second trial, Mr. Williams again applied for an order to challenge jurors for cause in relation to the risk of bias against Indigenous people. His second application was supported by the ruling and transcript from the first motion, as well as testimony from four witnesses. The motions judge accepted that the evidence supported the view that Indigenous people “historically have been and continue to be the object of bias and prejudice which, in some respects, has become more overt and widespread in recent years as the result of tensions created

2 *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782 [*Williams* SCC] at para 1.

3 *Ibid* at paras 1-2.

4 *Ibid* at para 3.

5 *Ibid*.

6 *Ibid*.

by developments in such areas as land claims and fishing rights”.⁷ He also acknowledged there was a reasonable possibility that a potential juror would be biased against an Indigenous person charged with robbery of a white person. However, the motions judge was of the view that “there was no reasonable possibility that this bias would translate into partiality at the trial, because jurors can be expected to put aside their biases and because the jury system provides effective safeguards against such biases”.⁸ The judge who presided over the second trial denied a renewed application to challenge potential jurors for cause but did instruct the jury that it ought to “be aware of or disregard any bias or prejudice that they might feel towards Williams as a native person”.⁹

Mr. Williams appealed his conviction to the British Columbia Court of Appeal on the sole issue of the court dismissing his application to challenge potential jurors for cause. Speaking for the Court of Appeal, Justice Macfarlane found no error in principle in the decision of the motions judge. He considered the evidence and quoted at length from the *Bridging the Cultural Divide* report of the Royal Commission on Aboriginal Peoples in order to conclude that non-Indigenous people can in fact have subconscious biases against Indigenous people and that Indigenous people perceive the justice system as unfair and inconsistent with their traditions, values, and culture.¹⁰ Justice Macfarlane found ample evidence in the materials before him of Indigenous over-incarceration and systemic discrimination due to socio-economic factors as well. However, he also found a lack of studies demonstrating this general bias would affect the decision-making of jurors. The decision of the motions judge and the subsequent conviction were upheld.

Widespread racial prejudice in the community may be subject to judicial notice

The Supreme Court of Canada unanimously allowed an appeal from this decision. In doing so, the Court outlined the Canadian approach to jury trials and how it would be modified to address widespread anti-

7 *Ibid* at para 3.

8 *Ibid* at 5.

9 *Ibid* at 6.

10 *R v Williams* (1996), [1997] 1 CNLR 153, 1996 CanLII 3687 (BCCA) at paras 48-52, 57.

Indigenous bias and discrimination. Potential jurors are presumed to be indifferent or impartial and counsel must raise concerns that displace this presumption before challenging or questioning them. This usually entails calling evidence in order to substantiate the basis for such concerns, but the Court stated that it could also be the subject of judicial notice if it is notorious “in the sense of being widely known and accepted”.¹¹ Among other things, it may be possible to take judicial notice of the existence of racial prejudice in the community from which the jury pool is drawn as a fact so notorious as to “not be the subject of dispute between reasonable people”.¹² The Court also held that a judicial finding of widespread racial prejudice in the community could allow judges in subsequent cases to take judicial notice of this fact. Furthermore, it pointed out that “events and documents of indisputable accuracy may permit judicial notice to be taken of widespread racism in the community” as well.¹³

Emphasizing the need for practical solutions, the Court urged against “duplicat[ing] the investment in time and resources” involved in establishing prejudice in the community in all subsequent cases.¹⁴ Judicial notice would allow for practices to change over time and avoid endless re-litigation of these complex issues. Foreshadowing *Gladue*, the Court suggested that similar concerns warranted consideration with respect to other aspects of criminal procedure as well:

...[i]t is unlikely that long inquiries into the existence of widespread racial prejudice in the community will become a regular feature in the criminal trial process. While these comments are not necessarily limited to challenges for cause, the question whether they are applicable to other phases of the criminal trial is not to be decided in the present case.¹⁵

Racial prejudice can unconsciously shape the daily behaviour of individuals

The Supreme Court went on to address the nature of racial prejudice and its potential impact on jury decision-making as a form of unintentional discrimination:

11 *Williams* SCC, *supra* note 2 at para 13.

12 *Ibid* at para 54.

13 *Ibid*.

14 *Ibid*.

15 *Ibid*.

...racial prejudice interfering with jurors' impartiality is a form of discrimination. It involves making distinctions on the basis of class or category without regard to individual merit. It rests on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals. Buried deep in the human psyche, these preconceptions cannot be easily and effectively identified and set aside, even if one wishes to do so. ...¹⁶

Judges may infer that some people will struggle to identify and eliminate biases

The Supreme Court held that “[r]acial prejudice and its effects are as invasive and elusive as they are corrosive”.¹⁷ It stated that post-jury selection safeguards might not suffice on their own given “the destructive potential of subconscious racial prejudice”.¹⁸ The Court urged lower courts to err on the side of caution by permitting prejudices to be examined whenever doubts are raised. It also took the additional step of disagreeing with the British Columbia Court of Appeal’s finding in another case that “concrete evidence” is needed in order to challenge prospective jurors regarding their biases.¹⁹ Instead, the Court held that “[w]here widespread racial bias is shown, it may well be reasonable for the trial judge to infer that some people will have difficulty identifying and eliminating their biases” and to permit challenges on this basis.²⁰ In other words, the tension between general knowledge of the existence of anti-Indigenous bias and discrimination in the criminal justice and the specific individuals and facts before the court can be bridged by reasonable inferences.

16 *Ibid* at para 21.

17 *Ibid* at para 22.

18 *Ibid*.

19 *Ibid* at para 23.

20 *Ibid*.

Widespread racism has led to systemic discrimination in the criminal justice system

The Court found ample evidence that widespread prejudice could have affected the impartiality of the jurors. It found “[r]acism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity”.²¹ The Court also found that “widespread racism has translated into systemic discrimination in the criminal justice system”, citing reports from the Royal Commission on Aboriginal Peoples, the Royal Commission on the Donald Marshall Jr. Prosecution, and the Cariboo-Chilcotin Justice Inquiry for this conclusion.²² It held that in these circumstances, the trial judge should have allowed the accused to challenge the prospective jurors for cause.

Conclusion

In *Williams*, the Supreme Court of Canada set the stage for its distinct methodology for the sentencing of Indigenous people in many respects. The Supreme Court clearly accepted the factual findings of prior commissions of inquiry that Indigenous people face widespread bias and systemic discrimination throughout the criminal justice system. It also provided a practical process for addressing these deeply engrained issues in the day-to-day functioning of that system. In essence, the factual findings of commissions of inquiry and past precedents would provide the basis for inferential reasoning in future cases. This would allow the complex issues Indigenous peoples face in the justice system to be addressed without making “long inquiries” a regular feature of criminal process.

21 *Ibid* at para 58.

22 *Ibid*.

CHAPTER 5: THE FRAMEWORK AND PRINCIPLES SET OUT IN *GLADUE*

The Supreme Court of Canada returned to the complex issues of systemic discrimination and widespread bias against Indigenous people in the criminal justice system within less than a year of the *Williams* decision through its reasons for decision in *Gladue*. In doing so, the Supreme Court also revisited the role of judicial notice in addressing these issues in the daily functioning of the courts, outlining a practical approach that builds on both the factual findings of prior commissions of inquiry and the sentencing innovations and jurisprudence of the early 1990s. With the support of explicit legislative direction for Indigenous people to be sentenced differently, it provided extensive guidelines on the proper interpretation and practical implementation of s 718.2(e) going forward.

Several alternative sentencing practices, community-based dispositions, and other justice initiatives were in place in urban and rural Indigenous communities by this time so it is little surprise the Court provided a guiding framework of overarching principles, broad categories of relevant considerations, and generalizable procedural rules rather than prescribing any one-size-fits-all formula or uniform set of rules and considerations. However, the breadth and open-texture of this sentencing framework may have worked against it in subsequent jurisprudence of lower courts, as later addressed by the *Ipeelee* decision over a decade later. As the *Gladue* decision sets out the core principles around which the remainder of this publication will be structured, they will be set out in detail in this chapter with various headings created for ease of reference to specific principles.

The factual context and lower court decisions

Jamie Tanis Gladue is an Indigenous woman who sought to appeal a three-year prison sentence for manslaughter of her common law husband. By the time her matter was before the Supreme Court of Canada, the sole basis for Ms. Gladue's appeal was her argument that the trial judge failed to give appropriate consideration to her circumstances as an Indigenous person pursuant to s 718.2(e) of the *Criminal Code*. According to the sentencing judge, there were no "special circumstances" arising from either Ms. Gladue's Indigeneity, or that of her common law husband and victim, as they were both living in an urban area off-reserve rather than "within the aboriginal community as such".¹

Ms. Gladue is a Cree woman from Alberta.² She was engaged to her common law partner and they had moved to Nanaimo in British Columbia the same year he died. Ms. Gladue killed her partner while intoxicated after celebrating her 19th birthday. She confronted him over alleged infidelity with her sister and then stabbed him twice after he mocked and insulted her. While no submissions were made regarding her Indigenous circumstances during the sentencing proceeding, the trial judge had confirmed that she was Cree and that the town in Alberta where she had grown up was not an Indigenous community.³ He went on to emphasize the seriousness of the offence before imposing a three-year prison term and a ten-year weapons prohibition.

The British Columbia Court of Appeal heard an appeal from Ms. Gladue's three-year prison sentence based in part on the ground that the trial judge failed to give appropriate consideration to her circumstances as an Indigenous person.⁴ She also applied to present fresh evidence at her appeal regarding her attempts to maintain links with her Indigenous heritage since the killing, including applying for "full Cree status" for herself, obtaining status for her daughter, and maintaining contact with the Cree mother of her late partner and victim.⁵ The Court of Appeal unanimously held that the trial judge erred when he concluded that s 718.2(e) did not apply simply because Ms. Gladue and her common law

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 18 [*Gladue*].

2 *Ibid* at para 2.

3 *Ibid* at para 12.

4 *Ibid* at para 19.

5 *Ibid*.

husband and victim lived off reserve. However, a majority of the justices agreed with the trial judge's finding that there was no basis for special consideration of her Indigenous background in light of the circumstances of this "near murder", including Ms. Gladue's deliberation, motivation, viciousness, and persistence.⁶ The majority also appeared to dismiss her application to rely on fresh evidence of her efforts to maintain links with her Indigenous heritage.

The foundations for a purposive analysis of s 718.2(e) in the dissent of Justice Rowles

In stark contrast to the majority's approach, Justice Rowles of the Court of Appeal issued a lengthy set of dissenting reasons that foreshadowed the framework that would be set by the Supreme Court. She referred to various reports on sentencing reform that had been published in the lead up to s 718.2(e)'s enactment, as well as some of the reports on the relationship between Indigenous peoples and the justice system that are summarized in Chapter 2 of this publication, including the Royal Commission on Aboriginal Peoples' *Bridging the Cultural Divide* report and the *Report of the Aboriginal Justice Inquiry of Manitoba*.⁷ Justice Rowles found two constant themes throughout all these reports: (i) the overuse of incarceration as a sentencing tool more generally; and (ii) the particularly high rate of imprisonment of Indigenous people.⁸ In light of these reports and the parliamentary debates on Bill C-41, she found it clear that ss 718.2(d) and 718.2(e) "were designed to remedy [...] the excessive use of incarceration in the criminal justice system in Canada and the disproportionately high number of aboriginal people who are incarcerated".⁹

Justice Rowles went on to hold that the over-representation of Indigenous people in the justice system is well-documented and that it "results, in part, from what is referred to as systemic discrimination".¹⁰ She cited Professor Tim Quigley for an explanation of how systemic discrimination is the ultimate result when "the unemployed, transients, and the poorly educated" are treated as "better candidates for imprisonment" in the sentencing

6 *Ibid* at para 20.

7 *R v Gladue*, [1999] 2 CNLR 231, 1997 CanLII 3015 (BCCA) at paras 49-50.

8 *Ibid* at para 49.

9 *Ibid* at para 54.

10 *Ibid* at para 55.

process in spite of the fact that “the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter”.¹¹ She also cited Professor Quigley’s description of how these factors can create a snowball effect in light of other factors, including the younger demographics of Indigenous peoples, their alienation from the justice system, the over-policing they face, the greater likelihood that they will be denied bail and imprisoned for fine default, and the lower likelihood that they will receive probation.¹² She described s 718.2(e) as “invid[ous] recognition and amelioration of the impact systemic discrimination has on aboriginal people”.¹³

Justice Rowles also considered how Indigenous peoples “have traditionally dealt with unacceptable conduct in a different manner from that imbedded in the Canadian penal system”, referring again to the *Report of the Aboriginal Justice Inquiry of Manitoba*.¹⁴ She stated that “[t]he conception of justice as restorative of the community may be relevant to the degree to which ‘justice’ may be seen to be done by aboriginal people” and “the need for rehabilitation, reintegration and reconciliation may be essential to the community’s cohesion”.¹⁵ She also addressed the additional complexity involved when considering the Indigenous culture of an individual who lives in an urban setting, but stated that this “cannot be regarded as irrelevant in the sentencing process”.¹⁶

In elaborating on the need to consider the culture of Indigenous people living in an urban setting during sentencing, Justice Rowles again pointed to *Bridging the Cultural Divide* and the *Report of the Aboriginal Justice Inquiry of Manitoba*, citing the following passage from the latter report:

Great care must be taken in these cases, because the influence of Aboriginal cultures is present, although difficult to detect. [...] it is important to distinguish between a person’s lifestyle, which for some individuals may appear to be one of complete integration into the mainstream, and his or her culture, which is reflective of the values in which a person was raised and which continues to shape that person’s behaviour. Thus, it is important for the courts to satisfy themselves as to the true influence of

11 *Ibid.*

12 *Ibid* at para 57.

13 *Ibid* at para 56.

14 *Ibid* at para 60.

15 *Ibid.*

16 *Ibid* at para 63.

Aboriginal culture. The acceptance of outward appearances is not sufficient. In fact, where the influence of Aboriginal culture is difficult to detect, this itself may be a factor that the courts should take into consideration.¹⁷

Justice Rowles cited the Royal Commission on Aboriginal Peoples for cautioning against limiting the consideration of community-based programs to rural reserve communities and for highlighting Indigenous-specific programming in urban settings. She quoted the Commission's warning that assuming urban Indigenous people need to deal with the non-Indigenous system "makes the promise of culturally appropriate justice systems an illusion for almost half of all Aboriginal people in Canada—the half that live in towns and cities".¹⁸ She found nothing in the legislation to suggest that s 718.2(e) is limited to Indigenous people living on reserve and found that Ms. Gladue's residence off-reserve did not alter her Indigenous heritage or her cultural ties, nor did it alter the significance of those factors in her rehabilitation.¹⁹ Justice Rowles found that the three-year sentence of imprisonment was excessive and she would have imposed a sentence of two years less a day followed by a three-year period of probation.²⁰

There is a judicial duty to give s 718.2(e)'s remedial purpose real force

In introducing the unanimous reasons for judgment of the Supreme Court of Canada, Justice Cory and Justice Iacobucci described the *Gladue* appeal as requiring it "to begin the process of articulating the rules and principles that should govern the practical application of s. 718.2(e) of the *Criminal Code* by a trial judge".²¹ In other words, the Court appeared to anticipate this framework would provide the foundations for a new body of jurisprudence under s 718.2(e) without providing the final word on this subject. Importantly, it interpreted s 718.2(e) as "more than simply a re-affirmation of existing sentencing principles", indicating that its analysis would be more than just the sum of existing precedents

17 *Ibid* at para 61.

18 *Ibid* at para 66.

19 *Ibid* at paras 69-70.

20 *Ibid* at paras 83-84.

21 *Gladue*, *supra* note 1 at para 24.

and practices.²² It described the remedial purpose of this provision as Parliament’s “direction to sentencing judges to undertake the process of sentencing aboriginal offenders differently, in order to achieve a truly fit and proper sentence in the particular case”.²³ Taking into account its legislative context and history, the Court described s 718.2(e) as “alter[ing] the method of analysis which each sentencing judge must use in determining the nature of a fit sentence for an aboriginal offender”.²⁴ Likewise, the provision “creates a judicial duty to give its remedial purpose real force”.²⁵

Indigenous people’s circumstances are unique and may make prison less appropriate

The Supreme Court went on to note that s 718.2(e) both directs sentencing judges to consider all available sanctions other than prison that are reasonable in the circumstances for *all* offenders and calls for “particular attention to the circumstances of aboriginal offenders”.²⁶ It found the general role of this provision to be clear: for all offenders “imprisonment should be the penal sanction of last resort”, only to be used “where no other sanction or combination of sanctions is appropriate to the offence and the offender”.²⁷ As for why the circumstances of Indigenous people warranted particular attention, the Court interpreted this as Parliament’s recognition that Indigenous people’s circumstances are unique and different from those of non-Indigenous people. It also held that this specific reference to Indigenous people in s 718.2(e), which deals with restraint in the use of prison, “suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction”.²⁸

22 *Ibid* at para 33.

23 *Ibid*.

24 *Ibid*.

25 *Ibid* at para 34.

26 *Ibid* at para 37.

27 *Ibid*.

28 *Ibid*.

Section 718.2(e) is part of an overall re-orientation towards restorative sentencing

The Supreme Court recognized that “some courts in the past have taken the unique circumstances of an aboriginal offender into account in determining sentence”, making specific mention of the Ontario Court of Appeal’s *Fireman* decision.²⁹ Likewise, it recognized that it has always been a principle of sentencing that courts should consider all available sanctions other than imprisonment that are reasonable in the circumstances. Nevertheless, it held that s 718.2(e) cannot be interpreted simply by looking to past cases for similar statements of principle. Instead, it “must be interpreted in its total context, taking into account its surrounding provisions”.³⁰ The Court identified the availability of conditional sentences under the new amendments as “giv[ing] an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances” and indicating Parliament’s desire to lessen the use of incarceration.³¹ It also pointed to the newly introduced sentencing goals in s 718, which focus on “the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgement of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender”.³² The Court insisted that s 718.2(e) must be construed in light of these broader changes to the *Criminal Code*.

Section 718.2(e) reflects Parliament’s sensitivity to Indigenous justice initiatives

The Court went on to review the legislative history of Bill C-41 as corroboration for its purposive interpretation of s 718.2(e). In the statements of the Minister of Justice and other Members of Parliament it found a clear government position that s 718.2(e) is aimed at “reducing the use of prison as a sanction, at expanding the use of restorative justice principles in sentencing, and at engaging in both of these objectives with a sensitivity to aboriginal community justice initiatives when

29 *Ibid* at para 38. See Chapter 1 for a summary of this and other earlier cases.

30 *Ibid* at para 39.

31 *Ibid* at para 40.

32 *Ibid* at para 43.

sentencing aboriginal offenders”.³³ As summarized in the first part of this publication, Indigenous justice initiatives in urban and rural contexts were clearly contemplated by Parliament during this legislative debate, linking s 718.2(e) to the agency of Indigenous communities.

Section 718.2(e) responds to Canada’s long-standing problem of over-incarceration

The Supreme Court pointed out that the parties and interveners before it all agreed that the purpose of s 718.2(e) is to respond to both the general issue of over-incarceration in Canada, as well as “the more acute problem of the disproportionate incarceration of aboriginal peoples”.³⁴ They also agreed that one of its roles “is to encourage sentencing judges to apply principles of restorative justice alongside or in the place of other, more traditional sentencing principles when making sentencing determinations”.³⁵ Still, the Court decided to address these issues in its reasons by summarizing the findings reached by various reports and studies on Canada’s high rates of incarceration and the failures of imprisonment as a sanction to provide “additional insight into the purpose and proper application of this new provision”.³⁶ It found widespread consensus that imprisonment has not been successful in achieving some of the traditional goals of sentencing and it understood Part XXIII and s 718.2(e) of the *Criminal Code* to be “a reaction to the overuse of prison as a sanction”.³⁷ This broader sentencing objective is by no means exclusive to the sentencing of Indigenous people.

Section 718.2(e) directs sentencing judges to address Indigenous over-incarceration

The Supreme Court went on to address what was by then a well-documented problem—“the excessive incarceration of aboriginal peoples”—pointing out that this had received the attention of a large

33 *Ibid* at para 48.

34 *Ibid* at para 50.

35 *Ibid*.

36 *Ibid* at para 51.

37 *Ibid* at para 57.

number of commissions and inquiries.³⁸ It cited extensively from Professor Michael Jackson's 1988 article "Locking Up Natives in Canada", describing this as "a disturbing account of the enormity of the disproportion".³⁹ The Court also pointed out that the situation had not improved since then, citing more recent statistics from contemporary government reports.⁴⁰ The Court described the overrepresentation of Indigenous people in the criminal justice system as a "sad and pressing social problem", noting that "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian justice system".⁴¹

The Supreme Court also pointed out in its reasons that "the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned".⁴² It reiterated its finding in *Williams* that there is widespread bias and racism against Indigenous people in Canada and this has translated into systemic discrimination within the criminal justice system.⁴³ The Court also cited the Royal Commission on Aboriginal Peoples' *Bridging the Cultural Divide* report and the *Report of the Aboriginal Justice Inquiry of Manitoba* for their findings that the criminal justice system has largely failed Indigenous peoples due to their fundamentally different worldviews, cultural values, and experiences.⁴⁴ It held that s 718.2(e)'s singling out of Indigenous people for "distinct sentencing treatment" is "Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process".⁴⁵

Courts have the power to influence how Indigenous people are treated in the system

The Supreme Court acknowledged that "sentencing innovation" alone cannot remove the causes of offending by Indigenous people or the greater problem of Indigenous peoples' alienation from the

38 *Ibid* at para 59.

39 *Ibid* at para 60.

40 *Ibid* at para 58.

41 *Ibid* at para 64.

42 *Ibid* at para 61.

43 *Ibid* at para 61.

44 *Ibid* at para 62-63.

45 *Ibid* at para 64.

criminal justice system.⁴⁶ It identified the reasons underlying the over-incarceration of Indigenous people as including “poverty, substance abuse, lack of education, and lack of employment opportunities”, bias against Indigenous people, and “an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms” for Indigenous people.⁴⁷ Yet the Supreme Court insisted that sentencing judges do still play at least a “limited role” in remedying injustice against Indigenous peoples in Canada, which it described as follows:

Sentencing judges are among those decision-makers who have the power to influence whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.⁴⁸

Two categories of circumstances must be canvassed in sentencing Indigenous people

The Supreme Court pointed out that a clear implication of the wording of s 718.2(e) is that the circumstances of Indigenous people are “significantly different” from the non-Indigenous people who come before the courts.⁴⁹ It noted that there are a wide range of unique circumstances and background considerations with respect to the distinct situation of Indigenous peoples in Canada.⁵⁰ Without suggesting they were exhaustive categories, however, the Court identified two types of unique circumstances that “most particularly” require attention from sentencing judges:⁵¹

- (A) The unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
- (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

46 *Ibid* at para 65.

47 *Ibid*.

48 *Ibid*.

49 *Ibid* at para 66.

50 *Ibid*.

51 *Ibid*.

Category A—The role of unique systemic and background factors in sentencing

The Supreme Court summarized this first category of relevant background circumstances as the “well-known” systemic and background factors that “figure prominently in the causation of crime” by Indigenous people.⁵² It described how “[y]ears of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation”.⁵³ Echoing the dissent of Justice Rowles, it cited Professor Quigley’s description of how these factors interact with one another in a snowball effect in order to produce Indigenous over-incarceration.⁵⁴

The Court accepted that systemic and background factors may partially explain offences and recidivism among non-Indigenous people as well. However, it went on to explain why the systemic and background factors affecting Indigenous peoples are unique, as well as why Indigenous people are more adversely affected by prison:

...the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been explained repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.⁵⁵

The Court went on to explain that sentencing judges must pay attention to how these unique background and systemic factors played a role in bringing a particular individual before the courts. They also play a role in crafting an effective sentence and determining the most relevant sentencing principles for the courts to emphasize:

52 *Ibid* at para 67.

53 *Ibid*.

54 *Ibid*.

55 *Ibid* at para 68.

In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.⁵⁶

In summary, an Indigenous person's unique systemic and background factors may have relevance to sentencing in several conceptually distinct but overlapping ways. These include: (i) shedding light on why they ended up before the court; (ii) assessing whether prison will impact them more adversely than others; (iii) assessing whether prison is less likely to rehabilitate them; (iv) determining whether prison is likely to deter or denounce their conduct in a way that is meaningful to their community; and (v) addressing whether restorative sentencing principles ought to be given primacy to address crime prevention and bring about individual and broader social healing.

In doing so, the Court appears to have framed this first category of unique circumstances broadly enough to encompass prior precedents for assessing the collateral consequences of incarceration on Indigenous people who would be dislocated from their land, culture, family, and community, such as Mr. Fireman and Mr. Curley.⁵⁷ Yet at the same time it also appears to embrace prior precedents where Indigenous people were found to be less morally blameworthy due to their disadvantaged circumstances and the role these played in bringing them into contact with the criminal justice system, such as Ms. Pettigrew and Mr. Mitchell. Furthermore, it linked this category of factors to broader social healing and collective, community perspectives, implying their relevance to the second category of unique circumstances as well, which focuses on culturally-relevant sentencing processes and sanctions.

56 *Ibid* at para 69.

57 See Chapter 1 for a summary of these earlier cases.

Category B—Procedures and sanctions particular to their heritage or connection

The Court linked this second category of relevant unique circumstances to “the different conceptions of appropriate sentencing procedures and sanctions held by aboriginal people”.⁵⁸ It pointed to the “significant problem” that Indigenous people in the criminal justice system face when their own understanding of sentencing, as well as that of their community, is “often far removed from the traditional sentencing ideals of deterrence, separation, and denunciation”.⁵⁹ This in turn was linked to the distinct traditions and sentencing practices of Indigenous peoples. The Court found “most traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice” and “[t]his tradition is extremely important to the analysis under s. 718.2(e)”.⁶⁰

The Court anticipated the need for further jurisprudential development of “[t]he concept and principles of a restorative approach” and suggested “different issues and different conceptions of sentencing” will each be “addressed in their appropriate context”.⁶¹ The Court also noted that the sentencing judge failed to explore any distinct conception of sentencing that might have been held by Ms. Gladue, her victim and his family, or her community in this case.⁶² However, it provided a general characterization of restorative justice as “an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist”.⁶³ It described this approach as focusing on the human beings closely affected by the crime, in which “[t]he appropriateness of the particular sanction is largely determined by the needs of the victims, and the community, as well as the offender”.⁶⁴

The Court explained that restorative justice does not necessarily entail a more lenient approach to crime than imprisonment. In fact, it noted that some proponents of restorative justice view it as potentially imposing a

58 *Gladue*, *supra* note 1 at para 70.

59 *Ibid.*

60 *Ibid.*

61 *Ibid* at para 71.

62 *Ibid* at para 94.

63 *Ibid.*

64 *Ibid.*

“greater burden on the offender than a custodial sentence”.⁶⁵ The Court quoted extensively from a law review article exploring how restorative justice fits within a punishment paradigm, including the following:

...Restorative justice necessarily involves some form of restitution and reintegration into the community. Central to the process is the need for offenders to take responsibility for their actions. By comparison, incarceration obviates the need to accept responsibility. Facing victim and community is for some more frightening than the possibility of a term of imprisonment and yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a term of imprisonment.⁶⁶

The Court also clarified that its general description of “the basic tenets of traditional aboriginal sentencing approaches” is not meant to imply that “all aboriginal offenders, victims, and communities share an identical understanding of appropriate sentences for particular offences and offenders”.⁶⁷ It pointed out that the customs, traditions, and concepts of sentencing among Indigenous peoples “vary widely”.⁶⁸ However, the Court pointed to the importance of recognizing that “for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities”.⁶⁹

The Court declined to engage in any extensive discussion of the “innovative sentencing practices” available to Indigenous people in the criminal justice system, but listed healing circles, sentencing circles, and community council projects as a few examples.⁷⁰ It did point to a common underlying principle among the varying conceptions of sentencing held by Indigenous peoples—namely, “the importance of community-based sanctions”.⁷¹ At the same time, the Court cautioned judges against concluding that the absence of any community-based alternatives “eliminates their ability to impose a sanction that takes into

65 *Ibid* at para 72.

66 *Ibid*, citing Daniel Kwochka, “Aboriginal Injustice: Making Room for a Restorative Paradigm” (1996) 60 Sask L Rev 153 at 165.

67 *Ibid* at para 73.

68 *Ibid*.

69 *Ibid*.

70 *Ibid* at para 74.

71 *Ibid*.

account principles of restorative justice and the needs of the parties involved”.⁷² Instead, it clarified that one of the unique circumstances for the sentencing of Indigenous people is that “community-based sanctions coincide with the aboriginal concept of sentencing and the needs of aboriginal people and communities”.⁷³

The Court went on to encourage sentencing judges to implement community-based sanctions in circumstances where it is reasonable to do so. It also stated that “[i]n all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective”.⁷⁴ Notably, this reference to sentencing in accordance with an Aboriginal perspective echoes the use of this same phrase in the reports cited in *Gladue*, which use it to describe Indigenous peoples’ unique legal traditions and worldviews.⁷⁵ The same phrase is also consistently used in other Supreme Court of Canada cases as a short-form reference to perspectives derived from Indigenous peoples’ distinct customs, practices, traditions, and laws.⁷⁶

In summary, the Court directed sentencing judges to consider whether any alternative sentencing procedures or sanctions might be appropriate for the Indigenous person being sentenced based on a number of additional factors. These include: (i) any different conceptions of sentencing or perspectives on justice that are held by the Indigenous community to which the accused is connected, by heritage or otherwise; (ii) any community-based sanctions or justice initiatives within the Indigenous community to which the accused is connected; and (iii) whether alternative sanctions or procedures can achieve restorative justice objectives by addressing the victims, the community, and the offender even in the absence of any community-based sanctions or justice initiatives.

In this way, the Court framed this second category of unique circumstances in an equally open-textured manner that encourages the involvement of Indigenous communities in the sentencing process and community-based sanctions, consistent with existing practices and prior jurisprudence, while also resolving the debate in the jurisprudence

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 See Chapter 2 for a summary of some of these earlier reports.

76 See for example: *R v Van der Peet* [1996] 2 SCR 507, 1996 CanLII 216 at para 49; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at paras 112, 147-149.

over the role of community-specific perspectives and values in favour of greater pluralism.⁷⁷ At the same time, in context to Ms. Gladue's own circumstances, the Court also took great pains to ensure this framework was broad enough to encompass Indigenous people who live in an urban setting and who may have only a limited connection to the community to which they are connected by heritage or otherwise.

Unique circumstances can lead to sentences varying from one community to the next

The Supreme Court went on to clarify how both categories of Indigenous peoples' unique circumstances fit within the fundamental duty of every sentencing judge, which is "to determine a fit sentence taking into account all the circumstances of the offence, the offender, the victims, and the community".⁷⁸ It noted that this long-standing principle of Canadian sentencing law has an "individualized focus", for which "[d]isparity of sentences for similar crimes is a natural consequence".⁷⁹ The Court also cited itself for the principle that sentences for a particular offence may vary across various communities and regions as "the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurs".⁸⁰ This general principle was said to be "particularly apt" in context to the sentencing of Indigenous people.⁸¹

Community perspectives and needs can affect the relevant sentencing objectives

The Court provided the following rationale for an individualized approach to sentencing that is sensitive to the needs and conditions of particular Indigenous communities and meaningful to Indigenous peoples:

As explained herein, the circumstances of aboriginal offenders are markedly different from those of other offenders, being characterized by unique systemic and background factors.

77 See Chapter 1 for a summary of cases addressing the relevance of community perspectives.

78 *Gladue*, *supra* note 1 at para 75.

79 *Ibid* at para 76.

80 *Ibid*, citing *R v M(CA)*, [1996] 1 SCR 500 at 567, 1996 CanLII 230.

81 *Ibid* at para 77.

Further, an aboriginal offender's community will frequently understand the nature of a just sanction in a manner significantly different from that of many non-aboriginal communities. In appropriate cases, some of the traditional sentencing objectives will be correspondingly less relevant in determining a sentence that is reasonable in the circumstances, and the goals of restorative justice will quite properly be given greater weight.⁸²

Principles of separation, denunciation, and deterrence remain relevant

At the same time, the Court also clarified that its approach to s 718.2(e) would not mean that “as a general practice, aboriginal offenders must always be sentenced in a manner which gives greatest weight to principles of restorative justice, and less weight to goals such as deterrence, denunciation, and separation”.⁸³ It cautioned against assuming that Indigenous peoples do not believe in the importance of the latter goals or “even if they do not, that such goals must not predominate in appropriate cases”.⁸⁴ The Court stated that there are some serious offence and some offenders for whom separation, denunciation, and deterrence are “fundamentally relevant”.⁸⁵

The length of the term of imprisonment must be considered for serious offences

On the other hand, the Court added that “even where an offence is considered serious, the length of the term of imprisonment must be considered”.⁸⁶ It noted that the length of a prison sentence for an Indigenous person could be less in some circumstances or the same in other circumstances. It also stated that “generally” the more violent and serious the offence, the more likely it will be that the terms of imprisonment for Indigenous and non-Indigenous offenders “will be close to each other or the same, even taking into account their different concepts of sentencing”.⁸⁷ As will be addressed in context to the *Ipeelee*

82 *Ibid.*

83 *Ibid* at para 78.

84 *Ibid.*

85 *Ibid.*

86 *Ibid* at para 79.

87 *Ibid.*

decision, lower courts' embrace and expansion upon this generalization overshadowed the other principles in this framework in several subsequent decisions.

Various questions guide the search for a fit sentence for an Indigenous person

The Court listed off several questions that should guide sentencing judges' application of this individualized, case-by-case approach to sentencing Indigenous people:

- For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?
- What understanding of criminal sanctions is held by the community?
- What is the nature of the relationship between the offender and their community?
- What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence?
- How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown?
- Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing?
- What sentencing options present themselves in these circumstances?⁸⁸

Section 718.2(e) provides flexibility for a more holistic approach to sentencing

The Supreme Court went on to state that when sentencing Indigenous people, as well as others, the analysis “must be holistic and designed to achieve a fit sentence in the circumstances”.⁸⁹ A sentencing judge must

88 *Ibid* at para 80.

89 *Ibid* at para 81.

take into account all surrounding circumstances regarding the offence, the offender, the victims, and the community, including but not limited to circumstances that are unique to Indigenous peoples. It stated that sentencing must proceed with sensitivity to and an understanding of the many difficulties that Indigenous people have faced “with both the criminal justice system and society at large”.⁹⁰ Considering these circumstances in light of the aims and principles of sentencing will assist with the determination of what is “just and appropriate in the circumstances”.⁹¹ Section 718.2(e) provides judges with “a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing”.⁹² This allows judges to give effect to “the aboriginal emphasis upon healing and restoration of both the victim and the offender”.⁹³

Sentencing judges have a duty to consider every Indigenous person’s unique situation

The Court described s 718.2(e) as imposing a *duty* on judges to: (a) consider all available sanctions other than imprisonment that are reasonable in the circumstances; and (b) pay attention to the circumstances of Indigenous people. It stated that “[t]here is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sanction”.⁹⁴

Judicial notice is mandatory but further individualized evidence may be needed

The Supreme Court went on to state that the way in which sentencing judges carry out their duty in the daily functioning of the courts may vary from case to case, but it sought to provide a general framework for this analysis. In doing so, the role of judicial notice it had previously addressed in *Williams* was extended to the sentencing process. The Court held that “[i]n all instances it will be necessary for the judge to take

90 *Ibid.*

91 *Ibid.*

92 *Ibid.*

93 *Ibid.*

94 *Ibid* at para 82.

judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders”.⁹⁵ On the other hand, it suggested that “it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence” for each particular offence and offender.⁹⁶ It is worth noting that the Supreme Court described the role of case-specific evidence in permissive terms rather than as a mandatory requirement, implying a relatively robust role for judicial notice. The role of case-specific information was stated more forcefully in *Ipeelee*, however.

Counsel on both sides should adduce relevant evidence absent waiver

The Court anticipated some Indigenous people would not want to have detailed evidence of their particular personal circumstances placed before the courts, in which case they are entitled to waive this process. The Court also provided very basic guidance on the role that Crown and defence counsel play in fulfilling this analysis. In the absence of waiver, the Court stated that it will be “extremely helpful for counsel on both sides to adduce relevant evidence”—in fact, “it is to be expected that counsel will fulfill their role and assist the sentencing judge in this way”.⁹⁷

Sentencing judges must make further inquiries if the record is insufficient

The Court also predicted there would be cases in which a sentencing judge is unable to rely on counsel for relevant evidence regarding an individual’s particular circumstances as an Indigenous person, such as where that individual is unrepresented. In these cases, “it is incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person”.⁹⁸ Sentencing judges are directed to acquire information on existing alternatives to incarceration, whether inside or outside the individual’s Indigenous community. Again echoing the dissenting reasons of Justice Rowles,

95 *Ibid* at para 83.

96 *Ibid*.

97 *Ibid*.

98 *Ibid* at para 84.

the Court made it clear that this duty is engaged regardless of whether an individual resides in an urban context, a rural setting, or on a reserve. Alternatives in metropolitan areas must also be explored “as a matter of course”.⁹⁹

Relevant information may be obtained through pre-sentence reports and witnesses

The Supreme Court also expected that the presence of an Indigenous person in the court “will require special attention in pre-sentence reports”.¹⁰⁰ Among other sources, it was anticipated that the authors of pre-sentence reports would obtain this information from the “representations of the relevant aboriginal community which will usually be that of the offender”.¹⁰¹ The Court also held that judges “may and should” call witnesses to testify with regards to reasonable alternatives “in appropriate circumstances and where practicable”.¹⁰²

Reasons for sentence and fresh evidence upon appeal will assist in appellate review

The Court stated that appellate courts are also obliged to consider relevant and admissible fresh evidence in an appeal against sentence if the sentencing judge at first instance fails to engage with their obligation under s 718.2(e) “as fully as required”.¹⁰³ In doing so, it endorsed the approach taken by Ms. Gladue in her pursuit of an appeal. The Court also highlighted that “although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given”.¹⁰⁴ This permissive approach to reasons was also revisited by the Supreme Court in *Ipeelee*.

99 *Ibid.*

100 *Ibid.*

101 *Ibid* at para 93(7).

102 *Ibid* at para 84.

103 *Ibid* at para 85.

104 *Ibid.*

Indigenous people must be treated fairly by taking into account their difference

The Court also clarified that s 718.2(e) should not be interpreted as a form of “reverse discrimination” that favours Indigenous people over others.¹⁰⁵ Instead, it aims to reduce Indigenous over-incarceration by “seek[ing] to ameliorate the present situation and to deal with the particular offence and offender and community”.¹⁰⁶ The Court stated that the fundamental purpose of s 718.2(e) is “to treat aboriginal offenders fairly by taking into account their difference”.¹⁰⁷ Characterizing s 718.2(e) in this way tacitly linked it to the concept of substantive equality developed in context to s 15 of the *Charter*.¹⁰⁸

The Court went on to explain that s 718.2(e) does not require “an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal”.¹⁰⁹ Instead, it directs sentencing judges to consider the unique circumstances of Indigenous peoples when weighing the multitude of factors that must be accounted for in a fit sentence. Section 718.2(e) must be considered in the context of the overall scheme of Part XXIII of the *Criminal Code* and the other statutorily mandated considerations within it. The Court stated that “the sentence imposed will depend on all the factors that must be taken into account in each individual case” and the weight to be given to each factor will vary in each case.¹¹⁰ Therefore s 718.2(e) may not always mean a lower sentence for an Indigenous person.

Nevertheless, the Court directed sentencing judges to always bear in mind the mischief that s 718.2(e) was enacted to address:

...it must in every case be recalled that the direction to consider these unique circumstances flows from the staggering injustice currently experienced by aboriginal peoples within the criminal justice system. The provision reflects the reality that

105 *Ibid* at para 86.

106 *Ibid* at para 87.

107 *Ibid*.

108 See for example: *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at paras 66-67, 1997 CanLII 366; *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at paras 25, 36, 46, 72, 1999 CanLII 675.

109 *Gladue*, *supra* note 1 at para 88.

110 *Ibid*.

many aboriginal people are alienated from this system which frequently does not reflect their needs or their understanding of an appropriate sentence.¹¹¹

Section 718.2(e) is applicable to all Indigenous people regardless of where they live

Of particular relevance to Ms. Gladue, the Court affirmed that s 718.2(e) applies to all Indigenous people and not only those who live in rural areas or on a reserve. It agreed with the unanimous view of the British Columbia Court of Appeal that s 718.2(e) is not restricted to Indigenous people who live within a distinctly Indigenous community. It held that s 718.2(e) must “at least” apply to “all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*”.¹¹² It suggested this would include “Indians (registered or non-registered)”, as well as Inuit and Métis.¹¹³

The Court also echoed the concerns expressed by Justice Rowles in her dissent with respect to s 718.2(e)’s application to Indigenous people living in urban areas. It stated that many Indigenous people living in urban areas are closely attached to their culture. It also cited the final report of the Royal Commission on Aboriginal Peoples with regards to how urban Indigenous people’s cultural identity is tied to a land base or ancestral territory “because of the associated ritual, ceremony and traditions, as well as the people who remain there, the sense of belonging, the bond to an ancestral community, and the accessibility of family, community and elders”.¹¹⁴

Alternatives must be explored even in the absence of community support

The Court acknowledged that it will likely be easier to find and impose an alternative to incarceration where an Indigenous community has “a program or tradition of alternative sanctions, and support and

111 *Ibid.*

112 *Ibid* at para 88.

113 *Ibid* at para 90.

114 *Ibid* at para 91.

supervision are available to the offender”.¹¹⁵ In other words, the existence of Indigenous justice initiatives plays an important supportive role in the analysis. And it also clarified that “[f]or all purposes, ‘community’ must be defined broadly so as to include any network of support and interaction that might be available in an urban centre”.¹¹⁶ Yet this does not mean that a judge’s identification of reasonable alternatives is contingent on community input. The Court went on to state “even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative”.¹¹⁷ Even if the Indigenous person being sentenced lives in an urban centre without any support network this will not relieve the sentencing judge of their obligation to find an alternative to imprisonment.

Both the sentencing judge and the majority of the Court of Appeal erred

The Supreme Court made it clear that both the sentencing judge and the majority decision of the British Columbia Court of Appeal were flawed. The trial judge did not appear to have “considered the systemic or background factors which may have influenced the appellant to engage in criminal conduct, or the possibly distinct conception of sentencing held by the appellant, by the victim Beaver’s family, and by their community”.¹¹⁸ He may have also erroneously limited s 718.2(e) to the circumstances of Indigenous people living in rural areas or on reserve. At the same time, the Court also noted that the sentencing judge received “little if any assistance from counsel on this issue”.¹¹⁹

The Court took issue with the apparent failure of the majority of the Court of Appeal to consider many of these factors as well, although it noted that Justice Rowles discussed them in detail in her dissent. Furthermore, it took issue with the majority’s dismissal of Ms. Gladue’s application to adduce fresh evidence. The Court stated that “assuming admissibility and relevance, it was certainly incumbent upon the majority to consider the evidence, and especially so given the failure of the trial judge to do

115 *Ibid.*

116 *Ibid* at para 92.

117 *Ibid.*

118 *Ibid* at para 94.

119 *Ibid.*

so”.¹²⁰ If, on the other hand, that fresh evidence was insufficient, “the proper remedy would have been to remit the matter to the trial judge with instructions to make all the reasonable inquiries necessary for the sentencing of this aboriginal offender”.¹²¹

Nevertheless a new sentencing hearing was not in the interests of justice

The Court noted that an application of these principles to Ms. Gladue’s appeal would be sufficient to justify sending the matter back for a new hearing and it had before it only “very limited evidence” regarding her Indigenous background.¹²² However, the Court accepted that a sentence of three years’ imprisonment for her offence, which the majority described as a “near murder”, was not unreasonable.¹²³ The Court also found, “[m]ore importantly”, Ms. Gladue had been granted day parole after serving six months in a correctional centre, followed by full parole, and was directed to reside with her father, take alcohol and substance abuse counselling, and comply with the requirements of the Electronic Monitoring Program.¹²⁴ It held “the results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the appellant and society”.¹²⁵ In light of all this, a new sentencing hearing was not in the interests of justice.

Conclusion

The distinct framework and methodology for sentencing Indigenous people set out in the *Gladue* decision canvassed a wide range of procedural and substantive issues in context to s 718.2(e)’s brief mention of “the circumstances of Aboriginal offenders”. In doing so, the Supreme Court was building on existing sentencing jurisprudence that had addressed diverse topics ranging from how an Indigenous person’s disadvantaged background can impact their blameworthiness to how distinct community

120 *Ibid* at para 95.

121 *Ibid*.

122 *Ibid* at para 96.

123 *Ibid*.

124 *Ibid* at para 97.

125 *Ibid*.

perspectives and values can be taken into consideration. The Court also adopted the factual conclusions from the reports of various commissions and task forces that preceded this decision, and took into account the legislative debate around s 718.2(e) and Parliament's desire for greater sensitivity to Indigenous justice initiatives, whether in metropolitan cities or remote communities.

To call this sentencing framework ambitious would be to state the obvious. Yet the Court appears to have anticipated an incremental evolution would occur in the jurisprudence as different issues and different conceptions of sentencing would each be addressed in their appropriate context. Just as the Court suggested judicial notice could play a key role in the incremental evolution of challenges to jurors for cause in *Williams*, the Court saw judicial notice playing a role in changing sentencing practices as well. In addition to this, submissions and evidence from counsel on both sides, special attention in pre-sentence reports, and witness testimony could all assist at a procedural level to ensure an individualized approach to sentencing Indigenous people, considering not only the individual's circumstances, but those of Indigenous victims and communities as well.

While the Supreme Court of Canada has never resiled from this framework or any of its basic principles and concepts, it has reiterated them in subsequent decisions in such a way as to provide greater clarity and address the misunderstandings and misconceptions that have arisen within lower court jurisprudence. These warrant equally close attention.

CHAPTER 6: CONDITIONAL SENTENCING OF INDIGENOUS PEOPLE IN *WELLS*

The Supreme Court of Canada revisited and restated the broad principles, concepts, and overarching framework of the *Gladue* analysis in the *Wells* decision issued the following year. By this time the Supreme Court had already provided guidance on the principles governing the use of conditional sentences, which had been made available through Bill C-41 as well. The *Wells* appeal offered an opportunity for the Court to explain how the *Gladue* analysis fits into the conditional sentencing regime in what would be one of many contextual applications of the *Gladue* principles for lower courts to contend with.

In context to this particular form of community-based sentencing, the Court emphasized Indigenous community perspectives and initiatives alongside the more individual-focused impacts that systemic and background factors have on sentencing, which it described as mitigating in nature. Mr. Wells was sentenced to a term of imprisonment and this was upheld by the Alberta Court of Appeal without the benefit of the *Gladue* framework. The Supreme Court nevertheless dismissed this appeal, emphasizing the deference owed to sentencing judges. In light of this outcome, the *Wells* decision may have dampened the influence of the *Gladue* principles on lower court jurisprudence. However, it remains an important restatement of these principles and how they can be implemented in practice.

The factual context and lower court decisions

Mr. Wells sought to have a 20-month custodial sentence for sexual assault converted to a conditional sentence on the basis that the sentencing judge failed to take into account the appropriate considerations required by s

718.2(e) in light of him being an Indigenous person.¹ A jury convicted Mr. Wells of committing a sexual assault against an 18-year-old Indigenous woman at a house party in the victim's own bedroom on the Tsuu T'ina Nation Reserve while she was either asleep or unconscious from the effects of alcohol. The sentencing judge described Mr. Wells' actions as a major or near major sexual assault and held that deterrence and denunciation were the paramount sentencing factors to be considered for such an offence.²

A pre-sentence report was prepared for Mr. Wells that was "generally favourable" and that recommended a conditional sentence.³ He had completed a 28-day treatment program at an Indigenous-focused alcohol treatment centre and he was assessed as posing no threat to the community so long as he abstained from alcohol. While the sentencing judge acknowledged a need to bear in mind s 718.2(e) in light of the fact that Mr. Wells is Indigenous, he nevertheless held that "the necessary elements of deterrence and denunciation would be lacking" if the 20-month sentence were to be served in the community as a conditional sentence.⁴

Mr. Wells appealed this sentence to the Alberta Court of Appeal arguing that s 718.2(e) was not properly considered, but his appeal was dismissed. The Court of Appeal accepted fresh evidence including an application made by Mr. Wells for a second session at the same treatment centre he had previously attended, as well as submissions from the Tsuu T'ina Nation Spiritual Healing Lodge, which was willing to admit Mr. Wells until his admission into a second session of treatment. However, there was also a brochure for the healing lodge indicating that "persons who have a history of violence, child molestation, [or] sexual offences" were considered to be "inappropriate clients".⁵ The Court of Appeal found that the fresh evidence assisted in considering alternatives to prison but was "problematic" in that Mr. Wells was apparently an inappropriate client for the proposed programming.⁶

The Court of Appeal had also provided its own interpretation of s 718.2(e) without the benefit of the Supreme Court's reasons in the Gladue decision. It held that "reasonable" means sentences must be commensurate with the objectives and principles of sentencing set

1 *R v Wells*, 2000 SCC 10 [*Wells*] at para 1.

2 *Ibid* at para 10.

3 *Ibid* at para 11.

4 *Ibid* at paras 11-12.

5 *Ibid* at para 16.

6 *Ibid* at para 17.

out in ss 718 to 718.2, and “circumstances” includes “the gravity and nature of the offence, the record of the accused, impact on victims and community, the need for denunciation and deterrence, the need to maintain proportionality, aggravating and mitigating factors, relevant case law, and the particular circumstances of the accused”.⁷

The Court of Appeal also held that sentencing judges must consider “additional circumstances” when sentencing an Indigenous person, including: “social factors particular to aboriginal Canadians; recognition of the alternative approaches taken to sanctions by aboriginal communities; the geographic availability of alternative sanctions; and community support”.⁸ However, it was of the view that Parliament could not have intended s 718.2(e) to mean the victims of Indigenous people, including Indigenous victims “would receive less protection under the law” or that a sentencing judge would be obliged to “conduct an inquiry as to the circumstances of the aboriginal offender”.⁹ The Court of Appeal’s reference to an “inquiry” was made when distinguishing the unusual circumstances of another contemporary case, *Hunter*, where the sentencing judge relied on s 718.2(e) to order the Crown to investigate and report back on the social conditions of a First Nation, among other topics, prior to the sentencing hearing.¹⁰ Casting doubt on the approach taken in *Hunter*, which Mr. Wells sought to rely on, the Court of Appeal made it clear that this kind of judicially directed inquiry would not become the norm.

The *Gladue* analysis applies at stage two of the conditional sentencing analysis

Justice Iacobucci, writing for a unanimous Supreme Court of Canada, first addressed how and when an Indigenous person’s unique circumstances ought to be considered in relation to the principles governing the availability of a conditional sentence under the *Criminal Code*. The Alberta Court of Appeal’s decision had not only been issued prior to the Supreme Court’s guidance on the sentencing of Indigenous people in *Gladue*, but had also preceded its subsequent guidance on how to approach conditional sentencing under the *Criminal Code* in *Proulx*.¹¹

7 *Ibid* at para 20.

8 *Ibid* at para 21.

9 *Ibid* at paras 22–23.

10 *R v Wells*, 1998 ABCA 109 at paras 58–62 [*Wells* ABCA], citing *R v Hunter* (1997), 11 CR (5th) 156, 1997 CanLII 14834 (Alta QB). See also *R v Hunter*, 1998 ABCA 141 at paras 4–5.

11 *R v Proulx*, 2000 SCC 5 [*Proulx*].

The Supreme Court reiterated that when considering the availability of a conditional sentence the judge must first, at a preliminary stage, exclude the possibilities of either probationary measures or a penitentiary term, without yet determining the “duration and venue of the sentence”.¹² If either a penitentiary or a suspended sentence is appropriate, a conditional sentence should not be imposed. At this first stage the judge must also consider statutory prerequisites for a conditional sentence, including: (i) the absence of a minimum term of imprisonment; (ii) a custodial sentence of less than two years (i.e. not a penitentiary sentence); and (iii) the safety of the community will not be endangered by the sentence being served in the community. Assessing the danger to a community would require consideration of: (i) the risk of re-offending; and (ii) the gravity of damage that could ensue in the event of re-offence.

The Court then described the second “and most substantial” stage of the conditional sentencing analysis as determining whether a conditional sentence would be consistent with the fundamental purpose and principles set out in ss 718 to 718.2.¹³ While the first stage involves a cursory review of these provisions, the second stage requires “a comprehensive consideration of these principles and objectives” in order to determine “(i) whether the offender should serve the sentence in the community or in jail, (ii) the duration of the sentence, and, if a conditional sentence, (iii) the nature of the conditions to be imposed”.¹⁴

It is at this second stage that the judge is required to fully consider and apply s 718.2(e) in deciding on the appropriateness of a conditional sentence, alongside “all of the other principles and objectives set out in ss. 718 to 718.2”.¹⁵ The Court reiterated its analysis in *Gladue*, stating that “whenever a judge narrows the choice to a sentence involving a sentence of incarceration, the sentencing judge is obliged to consider the unique systemic or background circumstances which may have played a part in bringing the particular aboriginal offender before the courts”.¹⁶ In addition, “the judge must consider the types of practicable procedures and sanctions which would be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage”.¹⁷ It also

12 *Wells*, *supra* note 1 at para 27.

13 *Ibid* at para 29.

14 *Ibid*.

15 *Ibid* at para 30.

16 *Ibid*.

17 *Ibid*.

noted that the application of s 718.2(e) does not mean a sentence will “automatically be reduced” as “the determination of a fit sentence requires a consideration of all the principles and objectives set out in Part XXIII”.¹⁸

Conditional sentencing where denunciation and deterrence are paramount

More generally, the Supreme Court stated that a conditional sentence “may be reasonable in circumstances where deterrence and denunciation are paramount considerations”, but this will depend on “the severity of the conditions imposed”.¹⁹ It clarified that while a conditional sentence is “generally better suited to achieve the restorative objectives of rehabilitation, reparations, and promotion of a sense of responsibility in the offender”, the objectives of deterrence and denunciation can also be “well served with a conditional sentence”.²⁰ It also noted that “certain conditions can create more onerous circumstances than those associated with incarceration”.²¹ Echoing the holistic analysis described in its reasons for decision in *Gladue*, the Supreme Court stated that “each conditional sentence needs to be crafted with attention to the particular circumstances of the offence, offender, and the community in which the offence took place”.²²

The Court also reiterated its general guidance in *Proulx* that “the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be”.²³ However, there may be certain circumstances in which the need for denunciation or deterrence “is so pressing that incarceration will be the only suitable way in which to express society’s condemnation of the offender’s conduct”.²⁴ Whether a conditional sentence is available in such circumstances “depends upon the sentencing judge’s assessment of the specific circumstances of the case, including a consideration of the aggravating factors, the nature of the offence, the community context, and the availability of conditions which have the capacity to properly reflect society’s condemnation”²⁵

18 *Ibid.*

19 *Ibid* at para 35.

20 *Ibid* at para 32.

21 *Ibid.*

22 *Ibid* at para 33.

23 *Ibid*, quoting *Proulx*, *supra* note 11 at para 106.

24 *Ibid.*

25 *Ibid* at para 35.

A restatement and summary of the sentencing guidelines set out in *Gladue*

Justice Iacobucci reiterated the guidelines articulated in the *Gladue* decision as follows:

- Section 718.2(e) indicates that a custodial sentence is “the penal sanction of last resort for all offenders”, but sentencing judges must pay particular attention to Indigenous people’s circumstances as they are unique.²⁶
- Section 718.2(e) focuses on restorative justice for all offenders, but also recognizes that “most traditional aboriginal conceptions of sentencing hold restorative justice to be the primary objective”.²⁷
- Section 718.2(e) is intended to remedy the serious problem of Indigenous over-incarceration “to the extent that a remedy [is] possible through sentencing procedures”.²⁸
- Sentencing judges must consider, “at the very least”, both:²⁹
 - (a) “the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender’s conduct”; and
 - (b) “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection”.
- “[T]he alternative of community-based sanctions must be explored” in particular, “given that most traditional aboriginal approaches place a primary emphasis on the goal of restorative justice”.³⁰
- The sentencing judge’s role “is to conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender’s community” when searching for a fit sentence.³¹
- “[I]t is often the case that imposing a custodial sentence on an aboriginal offender does not advance the remedial purpose of s. 718.2(e), neither for the offender nor for his community”, particularly for “less serious or non-violent offences, where the goal of restorative justice will no doubt

26 *Ibid* at para 36.

27 *Ibid* at paras 36-37.

28 *Ibid* at para 37.

29 *Ibid* at para 38 [emphasis added].

30 *Ibid*.

31 *Ibid* at para 39.

be given greater weight than principles of denunciation or deterrence”.³²

- However, “the Court in no way intended to suggest that as a general rule, the greatest weight is to be given to principles of restorative justice, and less weight accorded to goals such as denunciation and deterrence”, as this would “contradict the individual or case-by-case nature of the sentencing process”.³³
- Rather than providing a “single test”, “[s]ection 718.2(e) imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victims and the community”.³⁴
- “[T]o the extent generalizations may be made, the more violent and serious the offence, the more likely it is as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation are accorded increasing significance”.³⁵

Primacy may still be given to denunciation and deterrence for serious crimes

The Court went on to reject Mr. Wells’ argument that the courts below failed to take into account the paramount significance of restorative justice within Indigenous communities by according greater weight to the goals of denunciation and deterrence due to the nature of his offence. It emphasized that s 718.2(e) “requires a different methodology” for assessing a fit sentence for an Indigenous person, but does not necessarily mandate “a different result”.³⁶ It also reiterated its generalization that “as a practical matter, [...] particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders”.³⁷ The Court held that “it was open to the trial judge to give primacy to the principles of denunciation and deterrence in this case on the basis that the crime involved was a serious one”.³⁸

32 *Ibid*

33 *Ibid* at para 40.

34 *Ibid* at para 41.

35 *Ibid* at para 42.

36 *Ibid* at para 44.

37 *Ibid*.

38 *Ibid*.

A categorical approach to the seriousness of an offence would be inappropriate

The Court explained that the seriousness of a crime in any given circumstances is “a factual matter to be determined on a case-by-case basis”.³⁹ However, it was clear that there are no categories of offences “which presumptively exclude the possibility of a non-custodial sentence”.⁴⁰ A categorical approach would fail to show appropriate deference to the initial sentencing decision and “there is no legal basis for the judicial creation of a category of offence within a statutory offence for the purposes of sentencing”.⁴¹ Such an approach would also represent a “partial” and “unbalanced” application of the principle of proportionality, which requires consideration of both “the gravity of the offence and the degree of responsibility of the offender”.⁴² Yet the Court found no error in how the sentencing judge determined the seriousness of the crime on the facts of this case.

The greatest weight may still be accorded to restorative justice for serious crimes

The Supreme Court also made the point that its guidance in *Gladue* does not “foreclose the possibility that, in the appropriate circumstances, a sentencing judge may accord the greatest weight to the concept of restorative justice, notwithstanding that an aboriginal offender has committed a serious crime”.⁴³ It pointed out that s 718.2(e) requires that courts not only take into account the unique circumstances of an Indigenous person being sentenced, “but also to appreciate relevant cultural differences in terms of the objectives of the sentencing process”.⁴⁴ It clarified that its generalization about serious offences in *Gladue*—that the more violent and serious the offence, the more likely it is that similar terms of imprisonment will be imposed to those for a non-Indigenous person—“was not meant to be a principle of universal application”.⁴⁵

39 *Ibid* at para 45.

40 *Ibid*.

41 *Ibid*, citing at *R v McDonnell*, [1997] 1 SCR 948, Sopinka J at paras 32-33, 1997 CanLII 389.

42 *Ibid* at para 46.

43 *Ibid* at para 49.

44 *Ibid*.

45 *Ibid* at para 50.

The Court emphasized that when judges look to the circumstances of the Indigenous person being sentenced this will require consideration of more than just the individual. An Indigenous person's circumstances may "include evidence of the community's decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offences in question".⁴⁶ It reiterated that sentencing "requires an individualized focus, not only of the offender, but also of the victim and community as well".⁴⁷ It also reproduced a passage cited in *Gladue* that emphasized variance between sentences from one community or region to the next is to be expected "as the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred".⁴⁸ However, the Court noted that the evidence in this case suggested that the available Indigenous-specific programming was inappropriate for Mr. Wells and there was no evidence of either the existence of or his participation in any "anti-sexual-assault program".⁴⁹

Judges must conduct a practical inquiry into an Indigenous person's circumstances

The Supreme Court also took the opportunity to clarify the scope of a sentencing judge's duty to inquire into an Indigenous person's unique circumstances in *Wells*. Without the benefit of the Supreme Court's reasons in *Gladue*, the Alberta Court of Appeal found that it would not be practical "to expect the Court, on its own volition, to make inquiries regarding offenders before the Court: aboriginals or otherwise".⁵⁰ Instead, it held that "the onus must rest with the accused to suggest specific alternative sanctions supported by evidentiary submissions to the Court".⁵¹ In contrast, the Supreme Court of Canada had determined in *Gladue* that it is necessary in every case for the sentencing judge to take judicial notice of systemic or background factors that contribute to the difficulties faced by Indigenous people "in both the criminal

46 *Ibid* [emphasis added].

47 *Ibid* at para 51 [emphasis added].

48 *Ibid*, citing *R v M(CA)*, [1996] 1 SCR 500, 1996 CanLII 230 at para 92.

49 *Wells*, *supra* note 1 at para 52.

50 *Wells ABCA*, *supra* note 10 at para 62.

51 *Ibid*.

justice system, and throughout society at large”.⁵² And “[i]n addition, the judge is obliged to inquire into the unique circumstances of aboriginal offenders”.⁵³

The Court reiterated that “[a]t times, it may be necessary to introduce evidence of this nature” to supplement judicial notice.⁵⁴ Rather than placing this obligation solely on the accused, as the Alberta Court of Appeal had done, it stated that “[i]t is to be expected in our adversarial system of criminal law that counsel for both the prosecution and the accused will adduce this evidence”.⁵⁵ Furthermore, it reiterated that the sentencing judge has “an affirmative obligation” to inquire into the relevant circumstances “even where counsel do not provide the necessary information”.⁵⁶ In most cases this obligation can be satisfied by the information contained within pre-sentence reports. However, where this information is insufficient, “s. 718.2(e) authorizes the sentencing judge on his or her own initiative to request that witnesses be called to testify as to reasonable alternatives to a custodial sentence”.⁵⁷

On the other hand, the Court emphasized that the methodology prescribed in *Gladue* was never intended “to transform the role of the sentencing judge into that of a board of inquiry”.⁵⁸ Instead, sentencing judges are only obliged to make inquiries beyond the information contained in the pre-sentence report in “appropriate circumstances” and where such inquiries are “practicable”.⁵⁹ Determinations of whether further inquiries are appropriate or practicable are also to be “accorded deference at the appellate level”.⁶⁰

Conclusion

The *Wells* decision provides a thorough and unanimous reiteration of the core principles and concepts set down in *Gladue* by the Supreme Court of Canada. It is therefore an authoritative lens for interpreting the

52 *Wells*, *supra* note 1 at para 53.

53 *Ibid.*

54 *Ibid* at para 54.

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*

58 *Ibid* at para 55.

59 *Ibid*, citing *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 84.

60 *Ibid.*

distinct sentencing methodology under s 718.2(e). Among other things, the reasons for decision in *Wells* make it clear that an Indigenous person's systemic and background factors can have a mitigating impact on their sentence. In context to the conditional sentencing regime and its focus on community dispositions, the Court also clarifies that cultural differences can have an impact on the relevance and weight to be given to particular sentencing objectives under the *Criminal Code*. The Court also adds nuance to its earlier generalization that the more serious the offence, the more likely it is that a term of imprisonment will be imposed. While the generalization is repeated, the Supreme Court of Canada accepts that in some cases there may be evidence that an Indigenous community has decided to deal with serious offences differently, implying they have the autonomy to do so within the *Gladue* framework.

Above all, the *Wells* decision appears to emphasize that the *Gladue* principles do not provide a single test so much as they provide a distinct framework and methodology that requires sentencing judges, counsel for both sides, and the authors of pre-sentence reports to all turn their minds to the circumstances that make Indigenous people unique. While the Court reiterates the same two categories of unique circumstances that “at the very least” need to be addressed, these may not exhaustively capture all the distinctive circumstances that are relevant when sentencing an Indigenous person. At the same time, this open-ended sentencing framework affords deference to the sentencing judges who deal with the unique circumstances of Indigenous individuals, victims, and communities in any given proceeding.

CHAPTER 7: LONG-TERM OFFENDERS AND MISCONCEPTIONS IN *IPEELEE*

The Supreme Court of Canada did not reassess and clarify the various principles and overarching framework governing the sentencing of Indigenous people for well over a decade after releasing its reasons in *Wells*. The differing roles of judicial notice and case-specific information in the *Gladue* analysis received some clarification in *Spence* in 2005. However, the Supreme Court did not comprehensively address the *Gladue* principles again until its reasons were released in the *Ipeelee* and *Ladue* appeals in 2012.

In *Ipeelee*, the Supreme Court took the opportunity to not only “revisit and reaffirm” the *Gladue* framework but also to explain how this analysis applies in context to sentencing for breaches of long-term supervision orders (“LTSOs”).¹ In this way, *Ipeelee* parallels the *Wells* decision that had also restated the *Gladue* framework and provided guidance on how it fit with the general principles for conditional sentences. Yet by the time the Court revisited this framework for a third time a number of errors and misconceptions had become apparent in the lower court jurisprudence, requiring not only a detailed reaffirmation of the analysis but also the identification of appellate decisions that had fallen into error and should not be followed. For this reason, the *Ipeelee* decision requires careful attention and will be summarized in detail in this chapter, prefaced by a brief discussion of the *Spence* decision that preceded it.

A clarification of the roles of judicial notice and case-specific information in *Spence*

Five years after *Wells*, the Supreme Court of Canada clarified the role of judicial notice in the *Gladue* analysis in its unanimous reasons in *Spence*. Like *Williams*, this decision arose from a trial judge’s refusal

1 *R v Ipeelee*, 2012 SCC 13 at para 1 [*Ipeelee*].

to allow certain questions to be posed to potential jurors in support of challenges for cause. The case involved a Black accused and an East Indian complainant. The trial judge allowed defence counsel to challenge for cause based on the potential bias against a Black accused but refused to extend the challenge to address the race of the complainant, “as he regarded the ‘interracial’ element on the facts of this case to be irrelevant”.² The defence accepted that the ethnicity of the complainant may not aggravate racial bias against a Black accused, but asserted that in “an era of multiracial juries” there is a possibility of “[r]ace-based sympathy” compounding prejudice against his client.³ In upholding the trial court’s decision, the Supreme Court accepted that courts have taken judicial notice of “racial prejudice as a social fact not capable of reasonable dispute” in the past but did not find it to be equally apparent that jurors would have any “natural sympathy” for victims of their own race.⁴ While it accepted that the trial judge could have allowed a broader inquiry on the facts of this case, it did not find any error in the judge “draw[ing] the line where he did”.⁵

In reaching this decision, the Court clarified the requirements for judicial notice. It reiterated that any fact can be “judicially noticed” if it is “so notorious or generally accepted as not to be the subject of debate among reasonable persons” or “capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”.⁶ If the fact at issue is determinative of the matter (such as “the where, when and why of what the accused is alleged to have done”)—referred to as an adjudicative fact—a failure to meet this test will be determinative.⁷ If, however, the fact relates to the reasoning process or broader considerations of social policy—known as social facts or legislative facts—there may be greater flexibility and “the limits of judicial notice are inevitably somewhat elastic”.⁸

The Supreme Court explained that its judicial notice of “the systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout

2 *R v Spence*, 2005 SCC 71 at para 1 [*Spence*].

3 *Ibid* at para 3.

4 *Ibid* at para 5.

5 *Ibid*.

6 *Ibid* at para 53, 61.

7 *Ibid* at para 58, 62.

8 *Ibid* at para 58, 63.

society at large” in *Wells* and *Gladue* was an example of judicial notice of “social fact” evidence.⁹ It explained that social facts refer to “social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case”.¹⁰ It described these facts as general rather than specific to the circumstances of a particular case, but stated that “if properly linked to the adjudicative facts, they help to explain aspects of the evidence”.¹¹

At the same time, the Supreme Court cautioned that the closer social facts approach “the dispositive issue” the greater the weight given to standard criteria for judicial notice.¹² In making this latter point, the Supreme Court pointed to, among other things, the paragraph in *Gladue* that emphasized the value of case-specific information in assisting a judge in determining a fit sentence for an Indigenous person.¹³ As will become clear, the Court expanded on this in *Ipeelee* by emphasizing the importance of case-specific information when this had previously been described in more permissive terms in *Gladue* and *Wells*.

The circumstances of Mr. Manasie Ipeelee

One of the appeals addressed in this decision involved Manasie Ipeelee, an Inuk from Iqaluit, Nunavut. The Court described his individual circumstances as “far removed from the experience of most Canadians”, including being born to an alcoholic mother who froze to death when he was five years old, becoming an alcoholic himself at age 11, and getting involved in the criminal justice system by age 12.¹⁴ The Court noted that by age 39 Mr. Ipeelee had spent a significant proportion of his life in custody or under some form of community supervision. While the majority of his offences were property-related, he had committed violent crimes as well, including aggravated assault and sexual assault.

Mr. Ipeelee was designated a long-term offender in 2001 after committing a second sexual assault. He served a six-year prison term and was released on a 10-year LTSO to a community correctional centre. His LTSO was suspended on four occasions for attitude and

9 *Ibid* note 2 at para 57.

10 *Ibid*.

11 *Ibid*.

12 *Ibid* at para 63.

13 *Ibid* at para 83.

14 *Ipeelee, supra* note 1 at para 2.

behavioural problems. Finally, he was charged for breaching a condition of his LTSO by becoming intoxicated, which led to the sentence under appeal. At first instance he was sentenced to three years' imprisonment less six months of pre-sentence custody. The sentencing judge held that the paramount consideration when sentencing for a breach of an LTSO is the protection of the public, whereas rehabilitation only plays a small role and an Indigenous person's unique circumstances are of "diminished importance".¹⁵ While the Court of Appeal accepted that Mr. Ipeelee's background and the disadvantages he had suffered provided insight into his repeated involvement with the criminal justice system, it held that they should not affect his sentence.

The circumstances of Mr. Frank Ladue

The second appeal involved Frank Ladue, a member of the Ross River Dena of the Yukon Territory. He was initially raised by his grandparents as his parents had severe alcohol abuse problems and died when he was still young. At age 5, he was taken to residential school where he reported suffering serious abuse. He returned to live with his grandparents at age 9 but could no longer speak his language and began drinking and acting out. Mr. Ladue went on to live with foster families, spend time in juvenile detention, and continue drinking heavily throughout his life. He began using heroin, cocaine, and morphine in a federal penitentiary. The Court stated that "Mr. Ladue's life experiences may seem foreign to most Canadians, but they are all too common in Ross River".¹⁶ It outlined some of Ross River's collective community experiences of abuse and trauma, the effects of which "continue to be in the high rates of alcohol abuse and violence in the community".¹⁷ Mr. Ladue's criminal record began at age 16 and included 40 subsequent convictions, including property-related offences, alcohol-related offences, and violent offences.

Mr. Ladue was designated a long-term offender in 2003 after his third conviction for sexual assault. He served a three-year prison sentence and was released on a seven-year LTSO. The LTSO had been suspended on numerous occasions and he had two previous convictions for breaching the condition that he abstain from intoxicants prior to the offence giving rise to this appeal. In 2009 he was released from prison following a suspension of his LTSO and was at first going to be released

15 *Ibid* at para 15.

16 *Ibid* at para 21.

17 *Ibid*.

to housing with culturally relevant support from an Elder. Instead, due to an administrative error by Crown officials, he lost his placement and was placed in downtown Vancouver, in spite of his concern about access to drugs there. Shortly after, Mr. Ladue was charged with breaching a condition of his LTSO when his urine tested positive for cocaine.

The sentencing judge imposed a three-year term of imprisonment, finding isolation to be the most important sentencing objective in the circumstances and apparently concluding that the “tragic aspects” of Mr. Ladue’s history should have no impact on his sentence.¹⁸ However, the British Columbia Court of Appeal allowed his appeal. A majority reduced his sentence to one year of incarceration. Justice Bennett, writing for the majority, discussed s 718.2(e) and the *Gladue* decision in detail and found the sentencing judge failed to give Mr. Ladue’s circumstances “any tangible consideration”.¹⁹ Justice Bennett also held that s 718.2(e) requires “more than a reference to the provision” and “must be given substantive weight, which will often impact the length and type of sentence imposed”.²⁰ The majority concluded a three-year sentence was not proportionate to the gravity of Mr. Ladue’s offence and his degree of responsibility, especially considering his background and how he ended up at the halfway house in Vancouver. The dissent did not take issue with the sentencing judge’s s 718.2(e) analysis but would have reduced the term of imprisonment to two years on other grounds.

The central place of the principle of proportionality in determining a fit sentence

Prior to addressing the role that the *Gladue* principles play in determining a fit sentence for a breach of an LTSO for an Indigenous person, the Supreme Court saw fit to reiterate the principles governing sentencing more generally. It noted that the fundamental purpose of sentencing is to contribute to “respect for the law and the maintenance of a just, peaceful and safe society”, which is accomplished by imposing “just sanctions” that reflect “one or more” of the objectives set out in s 718 of the *Criminal Code*.²¹ It also noted that the fundamental principle of proportionality, codified in s 718.1, “has long been a central tenet of

18 *Ibid* at para 28.

19 *Ibid* at para 30.

20 *Ibid*, citing *R v Ladue*, 2011 BCCA 101 at para 64 [*Ladue*].

21 *Ibid* at para 35.

the sentencing process” and has a “constitutional dimension” both as a principle of fundamental justice under s 7 of the *Charter* and in s 12 of the *Charter*’s constitutional scrutiny of grossly disproportionate sentences.²²

The Court emphasized that the fundamental principle of proportionality must be respected no matter what weight a judge might wish to accord to the various objectives and other principles in the *Criminal Code*: it is “the *sine qua non* of a just sanction”.²³ First, it requires that a sentence reflect the gravity of the offence, which is closely tied to denunciation and promotes “justice for victims” and “public confidence in the system”.²⁴ Second, it ensures a sentence does not exceed what is appropriate in light of the moral blameworthiness of the offender, serving a limiting function that “ensures justice for the offender”.²⁵ A just sanction must reflect both these perspectives on proportionality and “does not elevate one at the expense of the other”.²⁶

The Court also noted that sentencing judges enjoy “broad discretion in the sentencing process” in spite of this fundamental principle.²⁷ Determining a fit sentence, “subject to any specific statutory rules that have survived *Charter* scrutiny”, is “a highly individualized process” in which judges must have sufficient manoeuvrability to tailor sentences to the circumstances of the particular offender and offence.²⁸ However, there are limits to the deference afforded to a sentencing judge and appellate courts have a duty to ensure the sentence under review is “proportionate to both the gravity of *the offence* and the degree of responsibility of *the offender*”.²⁹

The Supreme Court of Canada’s emphasis on the principle of proportionality having two independent variables set the stage for its clarification of how systemic and background factors can impact the latter variable (i.e. someone’s degree of responsibility) regardless of the former (i.e. the gravity of the offence).

22 *Ibid* at para 36.

23 *Ibid* at para 37.

24 *Ibid* at para 37.

25 *Ibid*.

26 *Ibid*.

27 *Ibid* at para 38.

28 *Ibid*.

29 *Ibid* at para 39.

Clarification of the long-term offender regime in general

The Supreme Court also took this pair of appeals as an opportunity to clarify the long-term offender regime more generally. Part XXIV of the *Criminal Code* sets out a process for designating individuals as either dangerous or long-term offenders. The long-term offender designation and LTSOs were introduced in 1997 to address a “lacuna” in the law “whereby serious offenders were denied the support of extended community supervision, except through the parole process”.³⁰ LTSOs were designed to “supplement the all-or-nothing alternatives of definite or indefinite detention”.³¹

Section 753.1 of the *Criminal Code* authorizes a sentencing judge to designate someone a long-term offender if satisfied that: (a) a prison sentence of two years or more would be appropriate for the offence for which they have been convicted; (b) there is a substantial risk that they will reoffend; and (c) there is a reasonable possibility of eventual control of the risk in the community. If someone is found to be a long-term offender, the court must impose a custodial sentence of two years or more and issue an LTSO for a period of 10 years or less. Mandatory conditions for all LTSOs are set out in regulations and the National Parole Board (NPB) may impose further conditions. The NPB may suspend an LTSO if conditions are breached or it is otherwise satisfied that suspension is necessary and reasonable to prevent a breach or protect society. Suspensions are served in a federal penitentiary and failure or refusal to comply with an LTSO is also an indictable offence punishable by up to 10 years’ imprisonment.

Long-term supervision orders serve both public protection & rehabilitation

The Supreme Court interpreted an LTSO’s legislative purpose as “contribut[ing] to the maintenance of a just, peaceful and safe society by facilitating the rehabilitation and reintegration of long-term offenders”.³² The rehabilitation and reintegration of a long-term offender into the community is “the ultimate purpose of an LTSO” but this is

30 *Ibid* at para 43.

31 *Ibid*.

32 *Ibid* at para 47.

“inextricably entwined” with the protection of the public from the risk of reoffence.³³ The Court noted that many lower courts had incorrectly treated rehabilitation as playing “little to no role” for long-term offenders when it is in fact “the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime”.³⁴

There is no distinct sentencing regime or system for a breach of an LTSO

The Supreme Court emphasized that a breach of an LTSO is “not subject to a distinct sentencing regime or system” and “the best guides for determining a fit sentence are the well-established principles and objectives of sentencing set out in the *Criminal Code*”.³⁵ Rehabilitation will not always be the foremost consideration. As in any other sentencing context, the weight accorded to each principle or objective will vary depending on the circumstances of the particular offence and the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Breaches can occur in “an infinite variety of circumstances” and there is no mandatory minimum penalty.³⁶ While there is a 10-year maximum penalty, “it would be too much to suggest that the mere existence of a high statutory maximum penalty dictates that a significant period of imprisonment should be imposed for any breach of an LTSO”.³⁷ The severity of any particular breach requires a contextual analysis that considers “the circumstances of the breach, the nature of the condition breached, and the role that condition plays in managing the offender’s risk of reoffence”.³⁸

A revisiting and reaffirmation of the *Gladue* principles

The Supreme Court went on to reiterate the various ‘social fact’ findings and sentencing guidelines that were first set out in the *Gladue* decision. It restated that the reason for s 718.2(e)’s specific reference to Indigenous

33 *Ibid* at para 48.

34 *Ibid* at para 50.

35 *Ibid* at para 55.

36 *Ibid* at para 54.

37 *Ibid*.

38 *Ibid* at para 55.

people is the fact that they were “sadly overrepresented in the prison populations of Canada” according to former Minister of Justice Allan Rock and the various studies and commissions of inquiry that addressed this in detail prior to 1996.³⁹ The Court also reiterated that s 718.2(e) directs “members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible”.⁴⁰

The Court summarized its overall guidelines in the *Gladue* decision as follows:

The Court held, therefore, that s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).⁴¹

39 *Ibid* at paras 56-7.

40 *Ibid* at para 58, citing *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 64 [*Gladue*].

41 *Ibid* at para 59.

Judicial notice of systemic and background factors provides necessary context

Building on *Spence*, the Supreme Court also saw fit to clarify the role that judicial notice plays in applying s 718.2(e) in light of the Saskatchewan Court of Appeal's resistance to judicial notice in *R v Laliberte*.⁴² It explained that “courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and 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 Indigenous peoples.⁴³ However, these matters “on their own” may not necessarily justify a different sentence for Indigenous people.⁴⁴ Instead, “they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel”.⁴⁵

Case-specific information is required in every case and *Gladue* reports can assist

The Court made it clear that counsel have a duty to bring individualized information before the court “in every case, unless the offender expressly waives his right to have it considered”.⁴⁶ This indicates a shift away from the more permissive approach to case-specific evidence in *Gladue* and *Wells* where the Court had suggested more guardedly that “it may be that some evidence will be required” or “at times, it may be necessary”.⁴⁷ The Court also acknowledged the current practice of bringing case-specific information before the court “by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders”.⁴⁸ It further stated that “[b]ringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*”.⁴⁹

42 *Ibid* at para 60, citing *R v Laliberte*, 2000 SKCA 27.

43 *Ibid*.

44 *Ibid*.

45 *Ibid*.

46 *Ibid* at para 60.

47 *Gladue*, *supra* note 40 at para 83; *R v Wells*, 2000 SCC 10 at para 54 [*Wells*].

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

49 *Ibid*.

Increasing levels of over-incarceration may in part reflect s 718.2(e)'s misapplication

The Supreme Court acknowledged that it would have been naïve to suggest sentencing reform alone would eliminate Indigenous over-incarceration without addressing the root causes of criminality. It pointed out that the reasons for decision in *Gladue* “were mindful of this fact, yet retained a degree of optimism”.⁵⁰ Yet its “cautious optimism” that sentencing judges would play at least a limited role in “remediating injustice against aboriginal peoples” had “not been borne out”.⁵¹ The Court reviewed subsequent statistics to find that “the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened”.⁵² It acknowledged s 718.2(e) of the *Criminal Code* and the *Gladue* decision had not “had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system”.⁵³ While “the *Gladue* principles were never expected to provide a panacea”, the Court also found some indication in academic commentary and the case law that this could be in part attributed to their “fundamental misunderstanding and misapplication”.⁵⁴ For this reason, the Court set out to address a number of existing criticisms, misunderstandings, and misapplications in its reasons.

Sentencing judges play a role in reducing both crime and systemic discrimination

First, the Supreme Court rejected the criticism that “sentencing is not an appropriate means of addressing overrepresentation” as one that had been based on a fundamental misunderstanding of s 718.2(e)'s operation.⁵⁵ Citing the Aboriginal Justice Inquiry of Manitoba and the Royal Commission on Aboriginal Peoples, the Court noted that the available evidence indicates that Indigenous over-incarceration stems from both: (i) the commission of “a disproportionate number of crimes”

50 *Ibid* at para 61.

51 *Ibid* at paras 61-62, citing *Gladue*, *supra* note 40 at para 65.

52 *Ibid* at para 62.

53 *Ibid* at para 63.

54 *Ibid*.

55 *Ibid* at para 64.

by Indigenous people; and (ii) the treatment of Indigenous people within “a discriminatory justice system”.⁵⁶ The Court affirmed that both of these matters fall within “the purview of the sentencing judge”.⁵⁷

Sentencing practices must change if they do not effectively deter and rehabilitate

In response to the first issue, the Court stated that “sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders”—two codified objectives of sentencing.⁵⁸ It emphasized that “[t]o the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities”.⁵⁹ In making this point, the Court endorsed commentary to the effect that the principle of parity should not be a barrier to more effective sentences:

As Professors Rudin and Roach ask, “[if an innovative] sentence can serve to actually assist a person in taking responsibility for his or her actions and lead to a reduction in the probability of subsequent re-offending, why should such a sentence be precluded just because other people who commit the same offence go to jail?”⁶⁰

Judges can ensure systemic factors do not inadvertently lead to discrimination

In response to the second issue, the Court reiterated that “judges can ensure that systemic factors do not lead inadvertently to discrimination in sentencing”.⁶¹ It once again cited Professor Quigley’s explanation of systemic discrimination in the criminal justice system as had been reproduced by Justice Rowles and the Supreme Court itself in *Gladue*:

56 *Ibid* at para 65.

57 *Ibid*.

58 *Ibid* at para 66.

59 *Ibid*.

60 *Ibid*, citing Jonathan Rudin & Kent Roach, “Broken Promises: A Response to Stenning and Roberts’ ‘Empty Promises’” (2002) 65 Sask L Rev 3 at 20.

61 *Ibid* at para 67.

Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.⁶²

The Supreme Court clarified that “[s]entencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure they are not contributing to ongoing systemic racial discrimination”.⁶³ While this directive can be interpreted narrowly in context to the assessment of an Indigenous person’s moral blameworthiness in light of how these factors might have played a role in bringing them before the court, it could also have far broader applications as well.

Reassessing sentencing practices can further the fundamental purpose of sentencing

The Supreme Court clarified that both sentencing innovations and the re-evaluation of unintentionally discriminatory criteria fit with the fundamental purpose of the sentencing process, which is “to promote a just, peaceful and safe society through the imposition of just sanctions that, among other things, deter criminality and rehabilitate offenders, all in accordance with the fundamental principle of proportionality”.⁶⁴ It stated that “[j]ust sanctions are those that do not operate in a discriminatory manner”.⁶⁵ It also quoted the Aboriginal Justice Inquiry of Manitoba’s final report that echoes these dual roles:

62 *Ibid*, citing Tim Quigley, “Some Issues in Sentencing of Aboriginal Offenders” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) at 275-76 [Quigley].

63 *Ibid* at para 67.

64 *Ibid* at para 68.

65 *Ibid*.

Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation.⁶⁶

The *Gladue* principles do not provide a “race-based discount” in sentencing

The Supreme Court of Canada went on to reject critics’ characterization of the *Gladue* principles as inviting sentencing judges “to impose more lenient sentences simply because an offender is Aboriginal”.⁶⁷ It reiterated its statement in *Gladue* that “s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal”.⁶⁸ It further endorsed the Manitoba Court of Appeal’s explanation of this principle in *Vermette*, once again alluding to the concept of substantive equality:

The section does not mandate better treatment for aboriginal offenders than non-aboriginal offenders. It is simply a recognition that the sentence must be individualized and that there are serious social problems with respect to aboriginals that require more creative and innovative solutions. This is not reverse discrimination. It is an acknowledgement that to achieve real equality, sometimes different people must be treated differently.⁶⁹

Both categories of unique circumstances affect what is a fit and proper sentence

The Supreme Court went on to reject the suggestion that, regardless of its purpose, the methodology of s 718.2(e) will inevitably provide “a remission of a warranted period of incarceration” for Indigenous people.⁷⁰ It noted that the *Gladue* methodology focuses on the unique circumstances of an

66 *Ibid* at para 69, citing Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991), vol I at 110-11 [*Aboriginal Justice Inquiry of Manitoba*].

67 *Ibid* at para 70.

68 *Ibid* at para 71.

69 *Ibid*, citing *R v Vermette*, 2001 MBCA 64 at para 39.

70 *Ibid* at para 72.

Indigenous person “which could reasonably and justifiably impact on the sentence imposed”—namely, “(1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal 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 his or her particular Aboriginal heritage or connection”.⁷¹ The Court stated that “[b]oth sets of circumstances bear on the ultimate question of what is a fit and proper sentence”.⁷²

Systemic and background factors may bear on the individual’s culpability

The Supreme Court clarified that systemic and background factors “may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness”.⁷³ It reiterated its clarification in *Wells* that these “are mitigating in nature in that they may have played a part in the aboriginal offender’s conduct”.⁷⁴ The Court pointed out that many Indigenous people “find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development”.⁷⁵ While this may not mean their actions were “not *voluntary* and therefore deserving of criminal sanction,” such constrained circumstances may diminish their moral culpability.⁷⁶ Any failure to take these circumstances into account would violate the principle of proportionality that requires a sentence to be “proportionate to the gravity of the offence *and the degree of responsibility of the offender*”.⁷⁷

Systemic and background factors may impact deterrence and denunciation

The Court pointed out that these systemic and background factors “may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed

71 *Ibid.*

72 *Ibid.*

73 *Ibid* at para 73.

74 *Ibid.*

75 *Ibid.*

76 *Ibid.*

77 *Ibid.*

at punishment *per se*".⁷⁸ It cited the following passages from *Gladue* for this principle:

In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.⁷⁹

Indigenous perspectives and worldviews can impact the effectiveness of a sentence

The Court also clarified that the second category of circumstances addressed in *Gladue*—the types of procedures and sanctions which may be appropriate for someone based on their particular Indigenous heritage or connection—"bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself".⁸⁰ It reiterated the point made in *Gladue* that "for many if not most aboriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of aboriginal people or aboriginal communities".⁸¹ It also reiterated the Royal Commission on Aboriginal Peoples' conclusion that the criminal justice system has been a "crushing failure" for Indigenous peoples due to fundamentally different worldviews "with respect to such elemental issues as the substantive content of justice and the process of achieving justice".⁸²

The Court explained the relevance of this second set of circumstances to the failures of the criminal justice system for Indigenous peoples as follows:

The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the

78 *Ibid.*

79 *Ibid.*, citing *Gladue*, *supra* note 40 at para 69.

80 *Ibid.* at para 74.

81 *Ibid.*

82 *Ibid.*, citing Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) at 309 [*Bridging the Cultural Divide*].

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.⁸³

Crafting a fit and proper sentence requires attention to unique circumstances

The Court reiterated that rather than providing a “race-based discount” or asking courts to remedy Indigenous overrepresentation by “artificially reducing the incarceration rates”, *Gladue* directs lower courts to pay particular attention to the *circumstances* of Indigenous people “in order to endeavour to achieve a truly fit and proper sentence in any particular case”.⁸⁴ Not only is *Gladue* “entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them”, it “affirms this requirement”.⁸⁵ *Gladue* recognizes that “up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process”.⁸⁶ Section 718.2(e) aims to remedy this failure “by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples”.⁸⁷ The Court cautioned that “[n]eglecting this duty would not be faithful to the core requirement of the sentencing process”.⁸⁸

The history of Indigenous peoples is unique and tied to the legacy of colonialism

The Court also rejected the criticism that the *Gladue* principles violate the principle of parity by “creat[ing] unjustified distinctions between offenders who are otherwise similarly situated”.⁸⁹ It noted that this is premised on the mistaken assumption that the circumstances of

83 *Ibid.*

84 *Ibid* at para 75.

85 *Ibid* at para 75.

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Ibid* at para 76.

Indigenous people before the courts “are not, in fact, unique”, which “ignores the distinct history of Aboriginal peoples in Canada”.⁹⁰ The Court again referenced “the various reports and commissions on Aboriginal peoples’ involvement in the criminal justice system” as emanating the “overwhelming message” that “current levels of criminality are intimately tied to the legacy of colonialism”.⁹¹ It noted that non-Indigenous people’s background and systemic factors should also be taken into account, but at the same time the source of many Indigenous people’s “poverty and other incidents of social marginalization” lies in their distinct history.⁹²

Parity allows different sanctions to be justified based on unique circumstances

The Court stated that the interaction between its interpretation of s 718.2(e) in *Gladue* and the parity principle codified in s 718.2(b) “merits specific attention”.⁹³ It noted that while s 718.2(b) requires that “a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances”, similarity “is sometimes an elusory concept”.⁹⁴ The Supreme Court endorsed Professor Jean-Paul Brodeur’s description of circumstances like “unemployment”, “substance abuse”, and “loneliness” as having different meanings in different contexts, such as in relation to isolated reserves or “urban ghettos”.⁹⁵

The Court noted that “[i]n practice, similarity is a matter of degree” and “[n]o two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances”.⁹⁶ It clarified that parity “simply requires that any disparity between sanctions for different offenders be justified”.⁹⁷ If the *Gladue* framework leads to different sanctions for Indigenous people

90 *Ibid* at paras 76–77.

91 *Ibid* at para 77, citing *Bridging the Cultural Divide*, *supra* note 82 at 309.

92 *Ibid* at para 77, citing Mark Carter, “Of Fairness and Faulkner” (2002) 65 Sask L Rev 63 at 71 and *Gladue*, *supra* note 40 at para 69.

93 *Ibid* at para 78.

94 *Ibid*.

95 *Ibid*, citing Jean-Paul Brodeur, “On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts” (2002) 65 Sask L Rev 45 at 49.

96 *Ibid* at para 79.

97 *Ibid*.

in the criminal justice system, “those sanctions will be justified based on their unique circumstances—circumstances which are rationally related to the sentencing process”.⁹⁸

Courts must ensure parity does not undermine s 718.2(e)’s remedial purpose

In addressing how the principle of parity, as codified in s 718.2(b), ought to interact with s 718.2(e), the Court cautioned that “[c]ourts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e)”.⁹⁹ It again cited Professor Quigley, who asserted that “[u]niformity hides inequity, impedes innovation and locks the system into its mindset of jail” and “prevents us from re-evaluating the value of our aims of sentencing and their efficacy”.¹⁰⁰ It also cited how Professor Quigley linked the need to avoid “excessive concern about sentencing parity” with the equality jurisprudence under the *Charter*, since “there is a differential impact from the same treatment” in “an ethnically and culturally diverse society”.¹⁰¹

It is an error to require a causal link between background factors and an offence

The Supreme Court went on to examine the post-*Gladue* jurisprudence in order to identify and correct several errors made by lower courts that had “significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*”.¹⁰² These warrant particularly close attention as the errors are set out in appellate level decisions that undoubtedly impacted the approaches of the courts below in the jurisprudence between *Gladue* and *Ipeelee*. The first error that the Supreme Court identified was the suggestion that the person being sentenced “must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge”.¹⁰³

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*, citing Quigley, *supra* note 62 at 286.

101 *Ibid.*

102 *Ibid.* at para 80.

103 *Ibid.*

In order to clarify this error, the Court provided a specific example in the Alberta Court of Appeal's decision in *Poucette* where the Court of Appeal erroneously held that "*Gladue* requires that [systemic and background factors'] influences be traced to the particular offender" and that the "[f]ailure to link the two is an error in principle".¹⁰⁴ This judgment was described as "display[ing] an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples" and as "impos[ing] an evidentiary burden on offenders that was not intended by *Gladue*".¹⁰⁵ The Supreme Court identified two further examples of what it characterized as the same error—the Alberta Court of Appeal's *Gladue* decision from 1999 and the Saskatchewan Court of Appeal's *Andres* decision from 2002.¹⁰⁶ It is worth noting that not one of these three decisions makes any explicit mention of the need for a "causal" connection, instead insisting on the need for counsel or sentencing judges to trace, link, or tie systemic and background factors to the particular offender or offence.¹⁰⁷

In contrast, the Supreme Court cited the Ontario Court of Appeal's *Collins* decision with approval for that court's clarification that paying attention to an Indigenous person's unique background and systemic factors imposes "a much more modest requirement" than a causal link.¹⁰⁸ In *Collins*, the Court of Appeal insisted that systemic factors must still be taken into account even when they only amount to the background or setting for the commission of the offence.¹⁰⁹ The Supreme Court also cited the British Columbia Court of Appeal's approach to s 718.2(e) in *Jack* with approval.¹¹⁰ There the Court of Appeal found there was no "direct relationship" between the individual circumstances of Mr. Jack, a Cowichan man who had a positive upbringing, and the problems faced by the Cowichan people in general, but *Gladue* factors were nevertheless relevant more generally, including in terms of Mr. Jack's relationship to

104 *Ibid* at para 81, citing *R v Poucette*, 1999 ABCA 305 at para 14 [*Poucette*] [emphasis added].

105 *Ibid* at paras 81-82.

106 *Ibid* at para 81, citing *R v Gladue*, 1999 ABCA 279 [*Gladue* ABCA]; *R v Andres*, 2002 SKCA 98 [*Andres*].

107 *Poucette*, *supra* note 104 at para 14; *Gladue* ABCA, *supra* note 106 at para 5; *Andres*, *supra* note 106 at para 29.

108 *Ipeelee*, *supra* note 1 at para 82, citing *R v Collins*, 2011 ONCA 182 at paras 32-33 [*Collins*].

109 *Collins*, *supra* note 108 at para 33.

110 *Ipeelee*, *supra* note 1 at para 82, citing *R v Jack*, 2008 BCCA 437 [*Jack*].

his community and his prospects for rehabilitation.¹¹¹ In other words, community-level factors are potentially relevant to sentencing even if there is no evidence before the court that an Indigenous person's own moral culpability is diminished by their unique circumstances.

Gladue circumstances and individual offending are intertwined in complex ways

The Court went on to explain that a “direct causal link” between an Indigenous person's unique systemic and background circumstances and their offending would be “extremely difficult” to ever establish as “[t]he interconnections are simply too complex”.¹¹² It cited the Aboriginal Justice Inquiry of Manitoba's explanation of this:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.¹¹³

Gladue circumstances provide necessary context rather than an excuse for crime

The Court also pointed out that there is no logical requirement for this kind of a “simple and direct correlation” or connection since “[s]ystemic and background factors do not operate as an excuse or justification for the criminal conduct”.¹¹⁴ Instead, “they provide the necessary context to enable a judge to determine an appropriate sentence”.¹¹⁵ On the other hand, the Court stated that “[t]his is not to say that those factors need not be tied in some way to the particular offender and offence”.¹¹⁶ An Indigenous person's unique circumstances will only

111 *Jack*, *supra* note 110 at paras 29-30.

112 *Ipeelee*, *supra* note 1 at para 83.

113 *Ibid*, citing *Aboriginal Justice Inquiry of Manitoba*, *supra* note 66 at 86.

114 *Ibid*.

115 *Ibid*.

116 *Ibid*.

influence the ultimate sentence if “they bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized”.¹¹⁷

If interpreted in a vacuum these statements could invite the same line of reasoning that the Supreme Court explicitly rejected in *Ipeelee*. For this reason, it must be remembered that the Supreme Court also concluded that the Alberta Court of Appeal fell into error when it required the sentencing judge to “link” or “trace” the systemic and background factors of the First Nations community of Morley, Alberta to an individual member of that community in the *Poucette* decision.¹¹⁸

It is an error to interpret *Gladue* principles as inapplicable to serious offences

The Supreme Court went on to identify the “irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences” as “[t]he second and perhaps most significant issue in the post-*Gladue* jurisprudence”.¹¹⁹ It cited Professor Roach’s criticism that appellate courts had “attended disproportionately” to the paragraphs in *Gladue* and *Wells* that discuss the relevance of these principles in “serious cases” and compare the sentencing of Indigenous and non-Indigenous people.¹²⁰ The Supreme Court agreed that “unwarranted emphasis” was being placed upon its broad generalization that “the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same”.¹²¹ It stated that “[n]umerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences”.¹²²

The Court also cited an article by Renée Pelletier for her identification of the barriers to carving out exceptions from the *Gladue* principles for serious cases, including the lack of any legal test or statutory direction in the *Criminal Code* to distinguish between serious and non-serious

117 *Ibid.*

118 *Ibid* at para 81, citing *Poucette*, *supra* note 104 at para 14.

119 *Ibid* at para 84.

120 *Ibid*, citing Kent Roach, “One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal” (2009) 54 *Crim LQ* 470 at 472.

121 *Ibid.*

122 *Ibid*, citing *R v Carrière* (2002), 164 C.C.C. (3d) 569, 2002 CanLII 41803 (Ont CA).

crimes, as well as the likelihood of jurisprudential inconsistency in the absence of any such guidance.¹²³ It emphasized that exceptions for serious offences would “deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration”.¹²⁴

The Supreme Court stated that sentencing judges must focus on “the offender standing in front of them”.¹²⁵ It urged that “[t]here is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court”.¹²⁶ In sentencing an Indigenous person, sentencing judges “must consider all the circumstances of that offender, including the unique circumstances described in *Gladue*”.¹²⁷

Failure to apply the *Gladue* principles is an error justifying appellate intervention

The Court pointed out that in spite of any ambiguity in the generalization about serious offences in *Gladue* and *Wells*, both judgments made it clear that “sentencing judges have a *duty* to apply s. 718.2(e)” and that consideration of an Indigenous person’s unique circumstances is not discretionary.¹²⁸ It later reiterated this point, stating that s 718.2(e) imposes a “statutory duty” on sentencing judges to consider Indigenous people’s unique circumstances.¹²⁹ The Court stated that a failure to consider these circumstances “would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality”.¹³⁰ As a result, “application of the *Gladue* principles

123 *Ibid* at para 86, citing Renée Pelletier, “The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons” (2001) 39 Osgoode Hall LJ 469 at 479.

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 *Ibid* at para 85, citing *Gladue*, *supra* note 40 at para 82 & *Wells*, *supra* note 47 at para 50. At the same time, the Court also cited appellate cases in which the “element of duty” in the *Gladue* analysis was given explicit recognition: *R v Kakekagamick* (2006), 214 OAC 127, 2006 CanLII 28549 (Ont CA), leave to appeal to SCC refused, 21826 (10 May 2007); *R v Jensen* (2005), 196 OAC 119, 2005 CanLII 7649 (Ont CA); *R v Abraham*, 2000 ABCA 159.

129 *Ibid* at para 87.

130 *Ibid.*

is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention”.¹³¹

Application to the circumstances of Manasie Ipeelee

The Court held that the lower courts in Mr. Ipeelee’s case made several errors in principle warranting appellate intervention. More specifically, they had erred when they concluded rehabilitation was not a relevant sentencing objective for breach of an LTSO, and they erred again in giving attenuated consideration to his circumstances as an Indigenous person due to their incorrect view that these “play little to no role when sentencing long-term offenders”.¹³²

In re-sentencing Mr. Ipeelee, the Court accepted that his history “indicates a strong correlation between alcohol use and violent offending”, which means “abstaining from alcohol is critical to managing his risk in the community”.¹³³ However, it also pointed out “the conduct constituting the breach was becoming intoxicated, not becoming intoxicated and engaging in violence” and it must “focus on the actual incident giving rise to the breach”.¹³⁴ The Court stated that a fit sentence will seek to manage the risk he continues to pose to the community by addressing his alcohol abuse “rather than punish[ing] him for what might have been”, which “would certainly run afoul of the principles of fundamental justice”.¹³⁵

The Court noted that where Mr. Ipeelee was serving his LTSO there were “few culturally relevant support systems in place” and there was no evidence that he consumed alcohol on any occasion prior to this breach.¹³⁶ Furthermore, the Court noted that in light of Mr. Ipeelee’s history of heavy drinking since age 11, “[r]elapse is to be expected as he continues to address his addiction”.¹³⁷

131 *Ibid.*

132 *Ibid* at para 90.

133 *Ibid* at para 91.

134 *Ibid.*

135 *Ibid.*

136 *Ibid* at para 91.

137 *Ibid* at para 92.

The Court substituted a sentence of one year's imprisonment. It took into account this was his first breach of his LTSO and he pleaded guilty, but that abstaining from alcohol is also crucial to his rehabilitation under the long-term offender regime. The Court was satisfied that a one-year custodial sentence would: denounce his conduct; deter him from consuming alcohol in the future; provide him with sufficient time without access to alcohol to get back on track with treatment; and yet, at the same time, not "suggest to Mr. Ipeelee that success under the long-term offender regime is simply not possible".¹³⁸

Application to the circumstances of Frank Ladue

In the case of Mr. Ladue, the Supreme Court endorsed the British Columbia Court of Appeal's intervention based on the sentencing judge's failure to give his circumstances as an Indigenous person "tangible consideration".¹³⁹ It also agreed that his was a case "in which the unique circumstances of the Aboriginal offender indicated that the objective of rehabilitation ought to have been given greater emphasis".¹⁴⁰ It cited the majority's consideration of Mr. Ladue's desire to succeed, his demonstrated capacity for abstinence, and the fact that "[r]epeated efforts at abstinence are not unusual for those dealing with addiction".¹⁴¹ The Supreme Court also agreed with the majority decision that a three-year prison sentence would not be proportionate, especially in light of the fact that his exposure to the temptation of drugs in Vancouver was "a result of errors made by correctional officials".¹⁴²

Justice Rothstein's partial dissent

In contrast to the Supreme Court of Canada's judgments in *Gladue* and *Wells*, which were unanimous, the *Ipeelee* decision includes a set of partially dissenting reasons from Justice Rothstein. While he stated that he agreed with much of what was written in the majority judgment "in the context of general sentencing principles and application of those principles to Aboriginal offenders", Justice Rothstein disagreed with

138 *Ibid* at para 93.

139 *Ibid* at para 95, citing *Ladue*, *supra* note 20 at para 64.

140 *Ibid*.

141 *Ibid*, citing *Ladue*, *supra* note 20 at para 63.

142 *Ibid* at para 96.

the majority's approach to sentencing Indigenous people for breaching a condition of an LTSO.¹⁴³ In his view, the protection of society is the paramount consideration when it comes to sentencing for such breaches. He agreed s 718.2(e) "is mandatory and must be applied in all cases, including the case of long-term Aboriginal offenders", but was of the view that "alternatives to a significant prison term will be limited" in this context.¹⁴⁴

In his own summary of the *Gladue* principles, Justice Rothstein agreed that s 718.2(e) requires sentencing judges to consider background and systemic factors in crafting a sentence, as well as "all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to Aboriginal offenders".¹⁴⁵ He echoed the majority's clarification that they provide "context for the sentencing judge to determine the appropriate sentence" rather than "an excuse or justification for criminal conduct".¹⁴⁶ He also rejected the way in which they were characterized by critics as a "race-based discount" or mandating the artificial reduction of incarceration rates.¹⁴⁷ Moreover, he agreed the *Gladue* principles require sentencing judges to guard against racial discrimination in sentencing, "such as the propensity of Aboriginal offenders to received unjustifiably longer sentences than non-Aboriginals or imprisonment when non-Aboriginals would not be imprisoned".¹⁴⁸

At the same time, Justice Rothstein asserted that "[t]he role of a sentencing judge in remedying such injustice may most effectively be carried out through alternative sentencing", which "requires that they be presented with viable sentencing alternatives to imprisonment that may play a stronger role 'in restoring a sense of balance to the offender, victim, and community, and in preventing future crime'".¹⁴⁹ He noted that this lies within the discretion of the sentencing judge in their evaluation of the options "with regard to the particular individual, the threat they pose, and their chances of rehabilitation and reintegration".¹⁵⁰

143 *Ibid* at para 99.

144 *Ibid* at para 101.

145 *Ibid*.

146 *Ibid* at para 126.

147 *Ibid*.

148 *Ibid* at para 127.

149 *Ibid* at para 128.

150 *Ibid*.

In light of Justice Rothstein's interpretation of the long-term offender regime having the protection of society as its paramount consideration, he asserted that "alternatives to imprisonment become very limited".¹⁵¹ He did not rule out alternatives but wrote that they "must be viable" and the sentencing judge must be "satisfied that they are consistent with protection of society".¹⁵² Justice Rothstein noted alternatives may include returning Indigenous people to their communities but "this must be done with protection of the public as the paramount concern".¹⁵³ He pointed out that "Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal".¹⁵⁴

In Justice Rothstein's view, where the breach of an LTSO "goes to the control of the Aboriginal offender in the community, rehabilitation and reintegration into society will have faltered, if not failed" and the sentencing judge may have no other alternative but to separate them from society for a significant period of time.¹⁵⁵ However, he stated that their Indigenous status should be taken into account during the period of incarceration "for the purpose of providing appropriate programs that are intended to rehabilitate the offender so that upon release, the substantial risk of reoffending may be controlled".¹⁵⁶

Justice Rothstein would have upheld the three-year prison sentence imposed on Mr. Ipeelee based on deference to the reasons given by the sentencing judge. He would have also upheld the one-year sentence imposed on Mr. Ladue by the majority of the British Columbia Court of Appeal. However, he would have done so based on the Correctional Service of Canada's partial responsibility for his breach by placing him in Vancouver and denying him a realistic opportunity for rehabilitation by "bureaucratic error" rather than any failure of the sentencing judge to properly apply s 718.2(e).¹⁵⁷

151 *Ibid* at para 130.

152 *Ibid* at para 131.

153 *Ibid*.

154 *Ibid*.

155 *Ibid*.

156 *Ibid*.

157 *Ibid* at para 157.

Conclusion

The Supreme Court of Canada's reasons in *Ipeelee* are every bit as nuanced and dense as those provided in the *Gladue* decision. Among other things, the Supreme Court clarified how systemic and background factors can impact an Indigenous person's culpability by shedding light on why they ended up before the court. As this links these factors to one of the two variables that determine the proportionality of any sentence—namely, the degree of responsibility of the offender—the Court clarified that they will be relevant regardless of the gravity or “seriousness” of any particular offence. And as proportionality is not only the fundamental principle of sentencing under the *Criminal Code* but also linked to ss 7 and 12 of the *Charter*, the impacts of systemic and background factors on an Indigenous person's moral blameworthiness are relevant in all sentencing contexts, including the sentencing of long-term offenders. In terms of process, the Supreme Court also endorsed the use of *Gladue* reports and implied that case-specific information would be required in every case going forward, in contrast to the more permissive approach in *Gladue* and *Wells*. In this way, the *Ipeelee* decision appears to incorporate the Supreme Court's earlier clarification of judicial notice in *Spence*.

The Supreme Court also clarified how the *Gladue* principles impact sentencing for breaches of long-term supervision orders in particular, again demonstrating how these principles must be adapted to different statutory contexts under the *Criminal Code*, just as it had done in *Wells*. However, in this particular sentencing context the Court was faced with two long-term offenders who had long since been displaced from their communities, reducing the scope for more innovative sentencing options, as noted by Justice Rothstein. In this context, community-specific perspectives and community justice initiatives were given very little attention in comparison to *Gladue* and *Wells*. This is not to say that any of these principles and considerations were jettisoned from the jurisprudence as the Court made it clear that the different values of Indigenous communities continue to play a role in the *Gladue* framework. However, the legal and factual context in which *Ipeelee* was decided may help explain why Indigenous perspectives and Indigenous community-based programming featured less prominently in *Ipeelee* than in *Gladue* and *Wells*.

Perhaps the most important and challenging consequence of *Ipeelee* is that it upended the approaches that were adopted by several appellate courts almost immediately after the *Gladue* decision was issued. This suggests that the lower court *Gladue* jurisprudence prior to 2012 must

be approached with caution and interpreted through the lens of *Ipeelee*'s clarifications to the law. The Supreme Court of Canada insisted that it is an error in principle to insist on a direct link or connection between the systemic and background factors of an Indigenous community and the person being sentenced, explicitly rejecting the approaches adopted in post-*Gladue* decisions of the Alberta and Saskatchewan Courts of Appeal. However, it also insisted these factors must be rationally related to the sentencing process and "tied in some way" to the particular offender and offence. The gap between these statements is difficult to bridge without reference to the appellate approaches that the Supreme Court either reproached or endorsed in *Ipeelee*. Likewise, the Court clarified that the *Gladue* principles must be considered even when sentencing an Indigenous person for a serious offence, but in doing so it emphasized the length of prison terms in this long-term offender context rather than exploring available alternatives. In short, the *Ipeelee* decision clarifies the Supreme Court's decisions in *Gladue* and *Wells*, but these earlier decisions still provide important independent insight into the relevant considerations under s 718.2(e).

CHAPTER 8: EXTENDING THE *GLADUE* PRINCIPLES BEYOND S 718.2(E)

The Supreme Court of Canada has yet to comprehensively reassess the *Gladue* principles and how they are being applied by lower courts in the wake of its various clarifications in *Ipeelee*. To the degree that the Supreme Court has addressed these principles in context to s 718.2(e) since *Ipeelee* it has done so only in passing. For example, it has addressed how the principles influence dangerous offender applications, albeit not in a matter involving an Indigenous person facing such an application.¹ It has also demonstrated how the *Gladue* principles and s 718.2(e) can factor into constitutional scrutiny under s 12 of the *Charter* in its decision regarding the mandatory victim surcharge in *Boudreault*.² Yet neither case provides much insight into the future direction of the jurisprudence, instead focusing on its contextual relevance in broader constitutional challenges. To the degree that the Supreme Court has indicated new trajectories for the *Gladue* principles—or at least related and analogous considerations—it has done so in a series of cases that explore and demarcate their relevance in contexts that were unlikely to be contemplated when s 718.2(e) was enacted. To date, the Supreme Court has declined to extend the *Gladue* principles so as to provide a broader basis for judicial review of exercises of prosecutorial discretion. However, its core principles have been extended to decision-making within the correctional system. Likewise, they have led to recognition of the disproportionate vulnerability of Indigenous women and girls to crime as a distinct issue within the broader phenomenon of systemic discrimination against Indigenous people in the criminal justice system. Each of these developments will be addressed in turn.

1 See *R v Boutilier*, 2017 SCC 64.

2 See *R v Boudreault*, 2018 SCC 58 at para 83.

The court's non-delegable duty to craft a fit sentence under s 718.2(e) in *Anderson*

In *Anderson*, the Supreme Court of Canada unanimously rejected the proposition that “Crown prosecutors are constitutionally required to consider the Aboriginal status” of an accused when deciding whether or not to seek a mandatory minimum sentence for impaired driving”.³ Mr. Anderson had been charged with impaired driving and brought a *Charter* challenge to a Crown prosecutor’s decision to seek a mandatory minimum sentence of not less than 120 days’ imprisonment against him under s 255 of the *Criminal Code* by reason of five previous impaired driving-related convictions. He successfully challenged the provisions underlying the mandatory minimum penalty at trial on the basis that they violated ss 7 and 15(1) of the *Charter*. The Newfoundland and Labrador Court of Appeal then upheld the decision on the basis that it “renders a sentencing hearing fundamentally unfair” when a prosecutor tenders a notice to seek a mandatory minimum under s 255 without considering an accused’s Indigenous status, leading to a s 7 *Charter* breach.⁴ The Supreme Court, however, allowed an appeal and determined that “there is no principle of fundamental justice to support the existence of such a constitutional obligation”.⁵ The Crown’s decision to seek a greater punishment is instead “a matter of prosecutorial discretion which is reviewable by the courts only for abuse of process”.⁶

The Supreme Court rejected Mr. Anderson’s *Charter* challenge on two bases: (1) it “conflate[d] the role of the prosecutor and the sentencing judge by imposing on prosecutors a duty that only applies to judges—the duty to impose a proportionate sentence”; and (2) the principle of fundamental justice asserted did not meet the test that governs such principles.⁷ While the second basis for allowing an appeal is not directly relevant to the *Gladue* principles, the first basis required greater attention to *Ipeelee*.

3 *R v Anderson*, 2014 SCC 41 at para 1 [*Anderson*].

4 *Ibid* at para 9.

5 *Ibid* at para 1.

6 *Ibid*.

7 *Ibid* at para 20.

Sentencing judges must apply the *Gladue* principles to respect proportionality

The Supreme Court acknowledged that proportionality was described in *Ipeelee* as not only “the *sine qua non* of a just sanction” but also a principle of fundamental justice.⁸ It also reiterated its conclusion that an Indigenous person’s systemic and background factors may bear on “the degree of responsibility of the offender” for the purposes of determining a proportionate sentence “to the extent that they shed light on his or her level of moral blameworthiness”.⁹ The Court pointed out that the “fundamental principle of proportionality” has been codified in s 718.1 of the *Criminal Code* as well.¹⁰ The factors listed in s 718.2, including “Aboriginal status”, were described as factors that sentencing judges “must consider when crafting a fair and just sentence that accords with the fundamental principle of proportionality”.¹¹ The Supreme Court also restated that “the *Gladue* principles bear on the ultimate question of what is a fit and proper sentence and assist the judge in crafting a sentence that accords with the fundamental principle of proportionality”.¹² Nor did it resile from the statement in *Ipeelee* that a sentencing judge’s failure to consider an Indigenous person’s unique circumstances “breaches both the judge’s statutory obligations, under ss. 718.1 and 718.2 of the *Code*, and the principle of fundamental justice that sentences be proportionate”.¹³

The proportionality of a sentence is the judge’s responsibility, not the prosecutor’s

Yet while the Court accepted that proportionality is a fundamental principle of justice, it noted that *Gladue* and *Ipeelee* address “the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders” and make no mention of prosecutorial discretion.¹⁴ It found no support in either decision for the proposition “that *prosecutors* must consider Aboriginal status when making a decision

8 *Ibid* at para 21, citing *R v Ipeelee*, 2012 SCC 13 at paras 36-37 [*Ipeelee*].

9 *Ibid* at para 21, citing *Ipeelee*, *supra* note 8 at paras 39, 73.

10 *Ibid* at para 22.

11 *Ibid*.

12 *Ibid* at para 24.

13 *Ibid*, citing *Ipeelee*, *supra* note 8 at para 87.

14 *Ibid* at para 25.

that limits the sentencing options available to a judge”.¹⁵ In the Court’s view, this argument conflated “the distinct roles” of the judge and the prosecutor in the sentencing process without any basis in law.¹⁶ It stated that it is “*the judge’s* responsibility” to impose sentence and craft a proportionate sentence within the applicable legal parameters.¹⁷ To the extent that a mandatory minimum regime “requires a judge to impose a disproportionate sentence, the regime should be challenged”.¹⁸ In other words, the constitutional implications of the *Gladue* analysis must be addressed head-on rather than by review of Crown decisions.

Gladue has relevance in extradition but does not apply to prosecutorial discretion

Mr. Anderson’s argument in part relied on the *Leonard* decision of the Ontario Court of Appeal in which it had been held that the Minister of Justice was required to consider the “Aboriginal status” of two Indigenous people in deciding whether to surrender them to the United States.¹⁹ The Ontario Court of Appeal had found that “the *Gladue* factors are not limited to criminal sentencing but ... should be considered by all ‘decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system’ (*Gladue*, at para. 65) whenever an Aboriginal person’s liberty is at stake in criminal and related proceedings”.²⁰ The Ontario Court of Appeal found that extradition fits into this “category” of matters to which the *Gladue* principles apply.²¹

The Supreme Court stated that this excerpt from the *Leonard* decision should not be taken out of context.²² It interpreted the Ontario Court of Appeal’s reasons as being premised on the Minister of Justice’s statutory duty to determine whether surrender would be unjust or oppressive, which requires the comparison of likely sentences in the foreign state and Canada—“a task which is impossible to do without reference to *Gladue*

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 *Ibid* at para 25, citing *United States of America v Leonard*, 2012 ONCA 622, leave to appeal to SCC refused, 35086 (7 March 2013) [*Leonard*].

20 *Ibid* at para 26, citing *Leonard*, *supra* note 19 at para 85.

21 *Ibid.*

22 *Ibid* at para 27.

principles”.²³ The Supreme Court therefore rejected Mr. Anderson’s argument that *Leonard* supports a “much broader application of *Gladue*” to exercises of prosecutorial discretion.²⁴ Although in doing so it did affirm *Gladue*’s relevance to extradition.

Routine judicial review of prosecutorial decision-making would be unworkable

The Supreme Court went on to reject Mr. Anderson’s *Charter* argument as asserting a principle that is “contrary to a long-standing and deeply rooted approach to the division of responsibility between the Crown prosecutor and the courts”.²⁵ It held that requiring prosecutors to consider an individual’s “Aboriginal status” before electing to pursue a mandatory minimum sentence “would enormously expand the scope of judicial review of discretionary decisions made by prosecutors”.²⁶ It listed various examples of decisions by prosecutors that could limit a sentencing judge’s options as to be potentially subject to judicial oversight under this principle. The Court held that the Crown’s decision to seek a mandatory minimum “is a matter of prosecutorial discretion” that should not be open to “routine judicial review”.²⁷ This would be “contrary to our constitutional traditions”.²⁸

Judges can still address Crown conduct in court and decisions motivated by prejudice

The Supreme Court of Canada also provided an expansive interpretation of prosecutorial discretion that is not relevant here. It clarified that only conduct constituting an abuse of process will provide a basis for judicial review of prosecutorial discretion. Yet it did note that “Crown decisions motivated by prejudice against Aboriginal persons would certainly meet this standard”.²⁹ The Court also affirmed that judges have an implicit power to govern their own process, which can allow for judicial

23 *Ibid.*

24 *Ibid* at para 28.

25 *Ibid* at para 30.

26 *Ibid* at para 31.

27 *Ibid* at para 32.

28 *Ibid.*

29 *Ibid* at para 50.

intervention into a prosecutor’s “tactics and conduct before the court” in the absence of any abuse of process.³⁰

While the Supreme Court’s decision in *Anderson* makes it clear the *Gladue* principles are not free-standing constitutional principles that displace the constitutional separation of powers or the adversarial nature of criminal proceedings, it has not prevented these principles from being applied in contexts beyond the strict application of s 718.2(e). The most notable example would be the Court’s subsequent decision in *Ewert* which expanded their ambit to the correctional system through a purposive interpretation of a wholly distinct legislative provision and regime.

The need for Indigenous difference to be accommodated within corrections in *Ewert*

In *Ewert*, the Supreme Court of Canada concluded the Correctional Service of Canada (CSC) was statutorily obliged to validate psychological and actuarial risk assessment tools for use on Indigenous people before relying on them.³¹ Mr. Ewert, who identifies as Métis, argued at trial that the CSC breached its enabling statute and his rights under ss 7 and 15 of the *Charter* by relying on five psychological and actuarial risk assessment tools to conduct needs and risk assessments on him while incarcerated. He argued that the tools had been developed and tested on predominately non-Indigenous populations, had not been validated for application to Indigenous people, and could be culturally biased.

The Federal Court agreed that the CSC breached its duty to “take all reasonable steps to ensure that any information about an offender that it uses is as accurate ... as possible” under s 24(1) of the *Corrections and Conditional Release Act (CCRA)*³² when it relied on these tools in spite of long-standing concerns over their validity when applied to Indigenous people.³³ This was also found to be a breach of Mr. Ewert’s rights under s 7 of the *Charter* as these tools were used in making decisions related to his security classification, his suitability for parole, temporary absence requests, and in labelling him a psychopath.³⁴ The Federal Court of Appeal allowed an appeal on the basis that Mr. Ewert had failed to prove

30 *Ibid* at para 61.

31 *Ewert v Canada*, 2018 SCC 30 at para 6 [*Ewert*].

32 *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*].

33 *Ewert*, *supra* note 31 at para 18.

34 *Ibid* at para 19.

the tools were *inaccurate* on a balance of probabilities.³⁵ Yet upon further appeal, a majority of the Supreme Court agreed with the trial judge that the CSC had breached its statutory obligation, while dismissing his *Charter* claims.³⁶

The Correctional Service of Canada must advance substantive equality in corrections

As the *Ewert* decision arises in a prison law context rather than a sentencing matter it is not a case where the *Gladue* principles could apply by virtue of the statutory direction to sentencing judges in s 718.2(e). Instead, this decision is focused on the interpretation of other provisions within an entirely different statute. Nevertheless, the majority decision makes it clear that the same deeper concerns that underlie Parliament's statutory direction to courts in s 718.2(e) are reflected in Parliament's direction that the CSC must ensure "correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of [...] aboriginal peoples" in s 4(g) of the *CCRA*. The Supreme Court characterized this as "a direction from Parliament to the CSC to advance substantive equality in correctional outcomes for, among others, Indigenous offenders".³⁷ Furthermore, it represents Parliament's acknowledgement of the long-standing concern over "the systemic discrimination faced by Indigenous persons in the Canadian correctional system".³⁸

Ameliorating systemic discrimination in corrections requires differential treatment

The Supreme Court's prior decisions in *Gladue* and *Ipeelee* allude to substantive equality in addressing how s 718.2(e) furthers equality by sentencing Indigenous people in a way that accommodates their differences, but this precise phrase is never used in either case. In *Ewert*, however, the Court clarifies the relationship between the *problem* of systemic discrimination in the criminal justice system and the role of

35 *Ibid* at paras 23-24.

36 *Ibid* at para 27.

37 *Ibid* at para 53.

38 *Ibid*.

substantive equality in its *solution*. The Court points out that the statutory obligation imposed on the CSC to respect Indigenous difference and respond to Indigenous people's special needs, among others, "reflects the long-standing principle of Canadian law that substantive equality requires more than simply equal treatment and that, indeed, 'identical treatment may frequently produce serious inequality'".³⁹ This was also found to reflect Parliament's view that Indigenous people "are among the most vulnerable to discrimination in the correctional system".⁴⁰ The *CCRA*'s legislative history corroborated this view as well.

Indigenous alienation and systemic discrimination are not limited to sentencing

The Supreme Court found that s 4(g) of the *CCRA* aims to remedy "at least in part, the troubled relationship between Canada's criminal justice system and its Indigenous peoples".⁴¹ It noted that "[t]he alienation of Indigenous persons from the Canadian criminal justice system has been well documented".⁴² And while this issue has in the past been most extensively discussed by the Supreme Court in context to s 718.2(e) and its application in sentencing, "it is clear that the problems that contribute to this reality are not limited to the sentencing process".⁴³ The Court went on to reiterate its judicial notice of the fact that "discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice systemic, including the prison system".⁴⁴

The Court then equated s 4(g) of the *CCRA* with s 718.2(e) of the *Criminal Code* more directly. It found Parliament has recognized "an evolving societal consensus that these problems must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views".⁴⁵ Whereas s 718.2(e) embodies this recognition

39 *Ibid* at para 54, citing *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 1989 CanLII 2.

40 *Ibid*.

41 *Ibid* at para 57.

42 *Ibid*.

43 *Ibid*.

44 *Ibid*, citing: *Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at paras 61-65, 68 [*Gladue*]; *Ipeelee*, *supra* note 8; *inter alia*.

45 *Ibid* at para 58.

in sentencing, the same “broader problem” underlies Parliament’s direction in s 4(g) of the *CCRA*.⁴⁶

A fair and effective criminal justice system requires the accommodation of difference

The Supreme Court also found that the correctional system’s statutory objectives cannot be fully achieved without accommodating the differences specifically addressed in s 4(g). The CSC is statutorily directed to provide for the humane custody of offenders, use only necessary and proportionate measures, and assist in rehabilitation and reintegration into the community to contribute to the maintenance of a just, peaceful, and safe society.⁴⁷ The Court noted that achieving these objectives for Indigenous people requires the CSC to “ensure its policies and programs are appropriate for Indigenous offenders and responsive to their needs and circumstances, including needs and circumstances that differ from those of non-Indigenous offender populations”.⁴⁸

The Court pointed out that the accommodation of the unique circumstances, cultures, and worldviews of Indigenous peoples is critical to corrections but not limited to this aspect of the criminal justice system. In doing so, it rephrased one of its statements in *Ipeelee*:

[...] For the correctional system, like the criminal justice system as a whole, to operate fairly and effectively, those administering it must abandon the assumption that all offenders can be treated fairly by being treated the same way.⁴⁹

Systemic discrimination against Indigenous people in corrections has not improved

The Supreme Court went on to find that the situation faced by Indigenous people in the correctional system has not improved since s 4(g) was enacted two and a half decades earlier. Instead, it found that recent reports indicate the gap between Indigenous and non-Indigenous people “has continued to widen on nearly every indicator of correctional

46 *Ibid.*

47 *Ibid* at para 59, citing *CCRA*, *supra* note 32, ss 3, 3(a), 3.1, 4(c).

48 *Ibid.*

49 *Ibid.* See *Ipeelee*, *supra* note 8 at para 74.

performance”.⁵⁰ It identified five different examples of disparities between Indigenous and non-Indigenous people in corrections in the reports it reviewed: (i) Indigenous people are more likely to receive higher security classifications; (ii) Indigenous people are more likely to spend more time in segregation; (iii) Indigenous people are more likely to spend more of their sentence in prison before first release; (iv) Indigenous people are under-represented in community supervision populations; and (v) Indigenous people are more likely to return to prison on revocation of parole.⁵¹ The Court therefore concluded that the concerns leading to s 4(g)’s enactment in the early 1990s are “no less relevant today” and the provision must be given meaningful effect in the face of these ongoing disparities.⁵²

The Supreme Court’s conclusion that systemic discrimination against Indigenous people within the correctional system has not improved since the early 1990s may be relevant to sentencing and the application of s 718.2(e) in that it reinforces the Court’s earlier finding in *Gladue* that incarceration has a disproportionately adverse impact on Indigenous people and they are less likely to be rehabilitated by a custodial sanction. While the practices of the CSC may have changed since then, the disparities clearly persist.

Yet in *Ewert*, the Supreme Court’s attention is squarely on the discretionary decision-making of the CSC and its duty to further substantive equality in correctional outcomes. It again imports language from *Gladue* and *Ipeelee* into this distinct statutory context:

Although many factors contributing to the broader issue of Indigenous over-incarceration and alienation from the criminal justice system are beyond the CSC’s control, there are many matters *within* its control that could mitigate these pressing and societal problems[.]⁵³

50 *Ibid* at para 60.

51 *Ibid*, citing: Canada, Office of the Correctional Investigator, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Final Report* (2012); Canada, Office of the Correctional Investigator, *Annual Report 2015-2016* (2016); Canada, Office of the Auditor General, *2016 Fall Reports of the Auditor General of Canada: Report 3—Preparing Indigenous Offenders for Release—Correctional Service Canada* (2016).

52 *Ibid* at para 61.

53 *Ibid*. See: *Gladue*, *supra* note 44 at para 65; *Ipeelee*, *supra* note 8 at para 69.

Concerns over cultural bias in actuarial risk assessment tools need to be addressed

The Supreme Court agreed with the trial judge that the CSC's failure to confirm the validity of the actuarial risk assessment tools impugned in this case was contrary to its statutory duty to respect the cultural and linguistic differences of Indigenous people in s 4(g).⁵⁴ The trial judge found the tools were susceptible to cultural bias and the CSC's failure to address this concern meant the information generated by these tools, which influences many of the CSC's decisions, "may be less accurate in the case of Indigenous inmates".⁵⁵ This failure to inquire into their validity also risked undermining the broader purposes of the *CCRA* as the scores they generated were considered in decisions relating to Mr. Ewert's security classification, escorted temporary absences, and parole, all of which are areas where "Indigenous inmates reportedly lag behind non-Indigenous inmates".⁵⁶

The Court held that the risk that these actuarial tools may overestimate the risk posed by Indigenous people could unjustifiably contribute to disparities in correctional outcomes in a variety of areas where Indigenous people are already disadvantaged, potentially leading to harsher prison conditions, higher security classifications, unnecessary denial of parole, reduced access to rehabilitative opportunities, and reduced access to Indigenous specific-programming.⁵⁷ As a result, *any* overestimation of the risk posed by Indigenous people would not only undermine the promotion of substantive equality in correctional outcomes for Indigenous inmates, it would also frustrate the CSC's statutory purposes of providing humane custody, and assisting in the rehabilitation of offenders and their reintegration in the community as well.⁵⁸

In this final respect, the *Ewert* case has additional relevance to sentencing proceedings if the same or similar actuarial tools are applied by court experts and probation officers, and their outcomes are in turn relied upon by the courts. To the degree that existing disparities for Indigenous people in corrections might be perpetuated by the overestimation of

54 *Ibid* at para 63.

55 *Ibid.*

56 *Ibid* at para 64.

57 *Ibid* at para 65.

58 *Ibid.*

risk this may reinforce the finding in *Gladue* that incarceration is a less appropriate or useful sanction for Indigenous people as well.

Yet the *Ewert* case arises from a civil action against the CSC in the Federal Court system and its findings are structured around guiding the future actions of that particular federal agency. While the Supreme Court of Canada does not expressly describe its analysis as an extension of the *Gladue* principles to the CSC, several of the basic principles it does articulate can be found within *Gladue* and *Ipeelee* and they appear to have been imported *mutatis mutandis* into the distinct statutory context of the *CCRA*. The Court's subsequent decisions indicate even broader horizons for the applicability of these basic principles by relating them to the circumstances of Indigenous victims, particularly women and girls.

Addressing biases, prejudices, and stereotypes against Indigenous women in *Barton*

In *Barton*, the Supreme Court of Canada allowed an appeal from the jury's decision to acquit a non-Indigenous man, Mr. Bradley Barton, for manslaughter of an Indigenous woman, Ms. Cindy Gladue.⁵⁹ The decision largely turned on the trial judge's failure to comply with s 276 of the *Criminal Code*, which governs the admissibility of evidence about a complainant's prior sexual activities. The facts of this case are well-known and most of its legal principles are well beyond the scope of this publication. However, the Supreme Court's reasons in *Barton* do touch on some of the deeper principles underlying the *Gladue* analysis, such as the pervasive impacts of widespread bias against Indigenous people throughout the criminal justice system, as well as the systemic and background factors that impact Indigenous people as victims as well as offenders.

Building on its prior decision in *Williams*, the Supreme Court held that "trial judges, as gatekeepers, play an important role in keeping biases, prejudices, and stereotypes out of the courtroom".⁶⁰ One of the tools at their disposal is their ability to provide instructions to the jury that are crafted to expose these biases, prejudices, and stereotypes and that

59 *R v Barton*, 2019 SCC 33.

60 *Ibid* at para 197.

can encourage jurors to discharge their duties fairly and impartially.⁶¹ The Court also took into account the systemic and background factors impacting Indigenous people, which stem from “a long history of colonialism, the effects of which continue to be felt”.⁶² In this case, these serious injustices, including the high rates of sexual violence against Indigenous women, provided an important historical, cultural, and social context.⁶³ After canvassing its prior findings of racism and discrimination in the criminal justice system in *Williams*, *Gladue*, *Ipeelee*, and *Ewert*, the Supreme Court acknowledged that “when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done”.⁶⁴

After setting out this broader context for the development of the criminal law, the Court concluded that reasonable steps need to be taken “to address systemic biases, prejudices, and stereotypes against Indigenous persons—and in particular Indigenous women and sex workers—head-on”.⁶⁵ The Supreme Court concluded that it would be advisable in future cases where the complainant is an Indigenous woman or girl for the trial judge to provide an express instruction aimed at countering prejudice against Indigenous women and girls that moves beyond more generic instructions to reason impartially and without sympathy or prejudice.⁶⁶ The Court advised that this could include “explaining to the jury that Indigenous people in Canada—and in particular Indigenous women and girls—have been subjected to a long history of colonization and systemic racism, the effects of which continue to be felt”.⁶⁷ In other words, the trial judge can alert the jury to the systemic and background factors Indigenous complainants face. The Court also advised that the trial judge can dispel the troubling stereotypical assumptions about Indigenous women who perform sex work, listing pervasive beliefs about their sexual availability, the inherent risk of engaging in sex work, and their lesser credibility, among others.⁶⁸

61 *Ibid.*

62 *Ibid* at para 198.

63 *Ibid.*

64 *Ibid* at para 199.

65 *Ibid* at para 200.

66 *Ibid.*

67 *Ibid* at para 201.

68 *Ibid.*

The Supreme Court proceeded to link the value of these instructions to “several core concepts upon which our justice system rests, including substantive equality, which represents the animating norm of s. 15 of the *Charter*”.⁶⁹ In keeping with this, the Court described the instructions as “better ensur[ing] that Indigenous women and girls receive the full protection and benefit of the law in sexual assault cases” by “address[ing] biases, prejudices, and stereotypes against Indigenous women and girls openly, honestly, and without fear”.⁷⁰ In other words, equal protection and benefit of the law can be achieved by recognition of how Indigenous women and girls are differently situated in light of the biases, prejudices, and stereotypes they face in the criminal justice system.

Building on *Ewert*, the Court’s decision in *Barton* demonstrates how the systemic and background factors faced by Indigenous people, including racism and discrimination in the criminal justice system itself, have contextual relevance far beyond sentencing. Here the same broad judicial notice of social facts that informed *Williams*, *Gladue*, *Ipeelee*, and *Ewert* has informed a further development of the law in jury instructions for sexual assault trials. Just as the constitutional principle of substantive equality supported the extension of these considerations to decision making in the corrections system, here it supported their extension to evidentiary protections at trial.⁷¹ The Supreme Court also pointed out how systemic and background factors can make Indigenous women and girls vulnerable, linking them to disproportionate rates of victimization. This last point has been further developed in the Supreme Court’s subsequent decision in *Friesen*.

Addressing the heightened vulnerability of Indigenous children as victims in *Friesen*

In *Friesen*, the Supreme Court of Canada provided detailed guidance on various topics of relevance to sentencing in general, including the appropriate role of appellate courts, the limits that appellate deference imposes on sentencing ranges and starting points, and the wrongfulness of sexual offences committed against children.⁷² Most of the conclusions in *Friesen* have only peripheral relevance to the focus of this book, but the

69 *Ibid* at para 202, citing *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 2.

70 *Ibid* at para 204.

71 Similar considerations could conceivably inform the credibility assessments of a judge as trier of fact as well: *R v AS*, 2016 ONSC 6965 at paras 67-68.

72 *R v Friesen*, 2020 SCC 9.

Court does reach several conclusions about the heightened vulnerability of Indigenous children to sexual violence and how this can “perpetuate the disadvantage they already face”.⁷³

The Court took note of statistical evidence that Indigenous people experience childhood sexual violence at a disproportionate level.⁷⁴ It also acknowledged that the conditions that place many Indigenous children and youth at a heightened risk of being victims of sexual violence are in part consequences of “Canadian government policies, particularly the physical, sexual, emotional, and spiritual violence against Indigenous children in Indian Residential Schools”.⁷⁵ Furthermore, over-representation of Indigenous children and youth in the child welfare system was recognized as making them “especially vulnerable to sexual violence”.⁷⁶ The Supreme Court accepted on this basis that both the racialized nature of an offence where an Indigenous child is the victim and the overall sexual victimization of Indigenous children can be considered by sentencing judges.⁷⁷

In doing so, the Court has taken into account the systemic and background factors that Indigenous children and youth face as victims and indicated that they have relevance to sentencing as well. It has once again cast these considerations in the language of equality jurisprudence by pointing out how they perpetuate disadvantage for Indigenous children and youth as victims. At the same time, the Supreme Court also clarified that the *Gladue* principles nevertheless must be applied to the individual being sentenced for the offence if they are also Indigenous, even in “extremely grave cases of sexual violence against children”.⁷⁸ In other words, the relevance of systemic and background factors to the vulnerability of an Indigenous victim does not nullify the relevance of systemic and background factors to the moral blameworthiness of an Indigenous offender or the effectiveness of alternative sanctions. Yet the *Friesen* decision does demonstrate how

73 *Ibid* at para 70.

74 *Ibid*, citing Statistics Canada, “Victimization of Aboriginal people in Canada, 2014”, by Jillian Boyce (Ottawa: Minister of Industry, 2016).

75 *Ibid*, citing British Columbia, Representative for Children and Youth, *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care* (Victoria: Representative for Children and Youth, 2016).

76 *Ibid*.

77 *Ibid*, citing Tracey Lindberg, Priscilla Campeau & Maria Campbell, “Indigenous Women and Sexual Assault in Canada”, in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press, 2012).

78 *Ibid* at para 92.

these factors can be relevant to sentencing in a variety of ways, just as *Ewert* and *Barton* demonstrate their relevancy beyond the confines of the sentencing process itself.

Conclusion

Several of the Supreme Court of Canada's decisions since *Ipeelee* indicate how the broader context it acknowledged when interpreting s 718.2(e)—namely, Indigenous peoples' alienation from the justice system and the pervasive systemic discrimination they face within it—have relevance to the evolution of Canadian law in other contexts. Likewise, the same systemic and background factors of Indigenous people that must be taken into account when sentencing them as offenders can have similar relevance to their needs in a correctional setting, the risks they face of prejudice and stereotyping in jury trials, and their vulnerability as victims of criminal offences. In this way, the principles have clear application beyond s 718.2(e), at least if interpreted broadly as a call for the recognition and accommodation of several specific forms of Indigenous difference.

On the other hand, the *Gladue* principles are not free-standing constitutional principles that compel courts to abandon other constitutional traditions like the adversarial process and prosecutorial independence, as confirmed in *Anderson*. They can have constitutional implications by virtue of their relationship with the principle of proportionality and the principle of substantive equality. When tethered to these broader constitutional concepts, the *Gladue* principles may be imported into other contexts, ranging from extradition proceedings to correctional decisions. These evolutions have been guided by the social context of Indigenous alienation, systemic discrimination, and the devastating legacies of colonialism as well. However, they are also grounded in the specific statutory provisions and legal context before the courts in each specific case.

PART C: THE UNIQUE AND CASE-SPECIFIC CIRCUMSTANCES OF INDIGENOUS INDIVIDUALS AND COLLECTIVES

While the Supreme Court of Canada's jurisprudence provides authoritative statements on the framework to be applied whenever an Indigenous person is sentenced, it has done so by way of broad principles rather than articulating a single test. The *Gladue* framework directs the attention of sentencing judges, counsel for both sides, and the authors of pre-sentence reports towards the unique circumstances of Indigenous people, but does so without purporting to exhaustively describe all the circumstances that might arise. The framework also requires modifications to the sentencing process itself to ensure these circumstances are carefully explored, but without precisely prescribing how this is to be accomplished in practice. As summarized earlier in this publication, a long line of task forces and commissions of inquiry preceded the *Gladue* decision, they were the source for its factual foundations, and they can clarify the social facts that must now inform any sentencing proceeding involving an Indigenous person. However, lower courts have been left to determine how this broader social context impacts the adjudicative facts on which each sentencing decision turns. What follows in the next three chapters is a synthesis of the most commonly explored unique circumstances based on the jurisprudence to date, as well as a summary of the ways in which sentencing procedures have been modified to ensure these circumstances are thoroughly canvassed. The cases and their factual findings in this part of the book provide data points as much as they do precedents.

No one judgment, checklist, or publication can address every possible circumstance that might distinguish Indigenous offenders, victims, and communities from others in context to an individualized approach to sentencing. The *Gladue* analysis must be applied when sentencing individuals whose culture, heritage, upbringing, language, experiences, and community connections will vary widely from one case to the next. It is a sentencing methodology that is equally mandatory in Toronto, Ontario and Kugluktuk, Nunavut, sentencing circles and specialized courts, and with sensitivity to the differing legal, historical, cultural and social contexts in each setting. The *Gladue* framework may also have distinct procedural implications for a bail hearing as compared to a dangerous offender application. By drawing the attention of counsel, the courts, and authors of court reports to the many circumstances that make Indigenous people unique, the *Gladue* principles act as a centrifugal force that expands the ambit of sentencing considerations even as the criminal justice system's recognition of these circumstances consolidates over time. The modest ambition of the next three chapters is to facilitate this process by identifying some of the most commonly discussed examples in the reported cases to date, as well as procedural modifications to ensure they are explored in practice.

CHAPTER 9: UNIQUE SYSTEMIC AND BACKGROUND FACTORS

The first of the two categories of “unique circumstances” that judges must pay particular attention to when sentencing an Indigenous person has been summarily described by the Supreme Court of Canada as “[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts”.¹ These are frequently referred to as an Indigenous person’s “*Gladue* factors”.² While convenient, this term can be deceiving in its simplicity. As should be apparent from the preceding chapters, an Indigenous person’s systemic and background factors describe their circumstances when viewed through a prism of judicially-noticed social facts about the legacies of settler colonialism and systemic discrimination that contribute to Indigenous over-incarceration.³ These factors are often personal to the individual being sentenced, but the systemic and background factors of their broader communities also provide important context.⁴ Furthermore, these factors represent only one of two categories of unique circumstances that must be taken into account, “at the very least”, whenever an Indigenous person is being sentenced.⁵

The Supreme Court has insisted that this first category of circumstances requires the courts to bear in mind both the history of Indigenous peoples’ maltreatment in Canada and the legacy of that treatment in terms of disproportionate rates of social and economic marginalization and systemic discrimination in the criminal justice system. In the words of Justice LeBel in *Ipeelee*, sentencing judges must take judicial notice

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 66 [*Gladue*].

2 *Sbeck v Canada (Minister of Justice)*, 2019 BCCA 364 at para 73.

3 *R v Ipeelee*, 2012 SCC 13 at para 77 [*Ipeelee*].

4 See for example: *R v Jack*, 2008 BCCA 437 at paras 29-30, 45-46; *R v Collins*, 2011 ONCA 182 at para 33 [*Collins*].

5 *R v Wells*, 2000 SCC 10 at para 38.

of: (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”.⁶ The Aboriginal Justice Inquiry of Manitoba describes these same factors as the “intertwined and interdependent factors” of “[c]ultural oppression, social inequality, the loss of self-government and systemic discrimination”.⁷

Taken together, these factors “provide the necessary *context* for understanding and evaluating case-specific information presented by counsel”.⁸ Sources of case-specific information will be addressed in greater detail in a subsequent chapter. For now, it is worth simply noting that this contextualized approach to an Indigenous person’s case-specific circumstances has potential relevance to questions of moral blameworthiness, the effectiveness of incarceration as a sanction, and the relevance and priority of restorative sentencing principles in relation to other sentencing goals, among other things.⁹

The Supreme Court has never drawn a clear line between what it views as *background* factors and what it views as *systemic* factors, nor are these concepts easily disentangled. In *Gladue*, however, the Court specifically referred to “background factors” as a way of describing how “[y]ears of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation”.¹⁰ In *Ipeelee*, on the other hand, the Supreme Court described “systemic factors” as facially neutral socioeconomic characteristics like an individual’s employment status, level of education, and family situation that play a role in systemic discrimination in the criminal justice system.¹¹

These two sets of factors are closely related and overlap in complex ways. Nevertheless, it may be helpful to recognize that systemic and background factors include both: (i) various events, policies, and processes that make Canada’s maltreatment of Indigenous peoples distinct and

6 *Ipeelee*, *supra* note 3 at para 60.

7 *Ibid* at para 83.

8 *Ibid* at para 60.

9 *Gladue*, *supra* note 1 at para 69; *Ipeelee*, *supra* note 3 at para 73.

10 *Ibid*.

11 *Ipeelee*, *supra* note 3 at para 67.

underpin disproportionate rates of social and economic deprivation and marginalization among Indigenous peoples; and (ii) how these enduring legacies of settler colonialism, displacement, and cultural oppression fuel compounding and often unintentional systemic discrimination within the criminal justice system.

Due to the complex relationships between the systemic and background factors canvassed in *Gladue*, *Ipeelee*, and subsequent jurisprudence, this chapter draws attention to some of the most common factors addressed in the case law to date, while highlighting how they have come together in unique constellations for particular individuals in past cases.

Colonialism provides a historical and conceptual link between various factors

First, it is worth reiterating what makes the circumstances of Indigenous people unique for the purposes of sentencing. The Supreme Court has directed sentencing judges to take judicial notice of a broad range of discrete events, policies, and processes that make Canada's treatment of Indigenous peoples distinct, with a particular focus on the pervasive legacies of settler colonialism and discrimination against Indigenous individuals and collectives.

Many of these factors have been thoroughly researched and documented in the reports and commissions of inquiry canvassed in Chapter 2. These included commissions with a national scope, such as the Royal Commission on Aboriginal Peoples, and those with a regional focus, such as the Cariboo-Chilcotin Justice Inquiry. Their findings illustrate that in spite of the diversity of ways in which Indigenous nations, communities, and individuals have been impacted by settler colonialism and discrimination, the legacies of these histories are distressingly consistent, as seen in disproportionate rates of socioeconomic deprivation and marginalization for Indigenous peoples across the country, as well as in other settler colonial states.

In the words of the Royal Commission on Aboriginal Peoples, it is “[t]he relationship of colonialism [that] provides an overarching conceptual and historical link in understanding much of what has happened to Aboriginal peoples”.¹²

12 Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) at 47 [*Bridging the Cultural Divide*].

Each Indigenous nation or community has its own unique history and factors

In spite of the common legacies that settler colonialism and discrimination have left among Indigenous peoples across Canada, many sentencing judges are nevertheless sensitive to the unique histories and experiences of specific Indigenous nations and communities in their analyses. To illustrate the diversity of contextual factors that may be considered in sentencing decisions it is worth considering a few specific examples:

- In *Dantimo*, the Ontario Superior Court of Justice canvassed how the Ojibway, Odawa, and Pottawatomi of Manitoulin Island were historically displaced and divided into different reserves to accommodate non-Indigenous settlement on the island, how their resultant land claims have remain unsettled for several decades, and how these circumstances might feed into systemic issues on the island, as well as their alienation from the justice system.¹³
- In *Ladue*, the British Columbia Court of Appeal took into account how the Kaska of Ross River in the Yukon face intergenerational impacts from sexual and physical abuse and violence at the hands of members of the United States Army during the construction of a pipeline through their territory during the 1940s.¹⁴
- In *Drysdale*, the Saskatchewan Court of Queen’s Bench considered how an adopted individual’s birth parents were two of the “tent village people” who lived in crowded, uninsulated polyethylene tents outside of Lynn Lake, Manitoba until the mid-1980s.¹⁵ They lived without power or water service, they were unable to either enter Lynn Lake without a police escort or enrol their children in local schools, their homes were forcibly relocated away from Lynn Lake on multiple occasions, and many of their children were apprehended.¹⁶
- In *Wabason*, the Ontario Superior Court of Justice considered how Whitesands First Nation in northern Ontario experienced significant upheaval after being flooded out in the 1940s, forcing community members to relocate and rebuild elsewhere.¹⁷

13 *R v Dantimo*, [2009] OJ No 655 (QL), 2009 CanLII 6627 (Ont Sup Ct) at paras 8, 22-42.

14 *R v Ladue*, 2011 BCCA 101 at para 6 [*Ladue*].

15 *R v Drysdale*, 2016 SKQB 312 at para 14 [*Drysdale*].

16 *Ibid* at paras 15-17.

17 *R v Wabason*, 2016 ONSC 349 at para 82, rev’d on other grounds 2018 ONCA 187.

- In *Tukkiapik*, the Quebec Superior Court considered how the way of life of the Inuit of Kuujuaq was impacted by government practices and policies resulting in community relocations, the rapid introduction of a sedentary lifestyle, and the slaughter of Inuit sled dogs in the 1950s and 1960s, as well as the introduction of the residential school system to Nunavik.¹⁸
- In *Wolfeg*, the Alberta Court of Appeal considered how the Siksika of southern Alberta were impacted by the arrival of missionaries, smallpox, and decreased bison populations in the mid-19th century, as well as the arrival of the CP rail in the 20th century, and how these contextualize their contemporary situation.¹⁹

Unpacking the history of colonialism, displacement, and residential schools

In addition to regional or community-specific factors, sentencing judges are often faced with more generalizable experiences of colonialism and systemic discrimination across the country, especially those that reflect government policies applied to all First Nations, as well as Métis and Inuit in many instances. The residential school system is likely the best-known example. In addition, sentencing judges have acknowledged the impacts of day schools, the *Indian Act*, and the Sixties Scoop, both on individuals and communities, in myriad sentencing decisions. In order to better demonstrate how these events, policies, and processes have left a legacy of economic and social deprivation for Indigenous peoples, several common examples will be explored in greater detail.

Intergenerational and direct impacts from attendance at residential schools

Many sentencing judges have taken judicial notice of either the direct or intergenerational impacts of the residential school system.²⁰ While the residential school system was not explicitly referenced in the guidance set

18 *R c Tukkiapik*, 2018 QCCS 5938 at paras 167-182 [*Tukkiapik*].

19 *R v Wolfeg*, 2018 ABCA 222 at paras 82-83, leave to appeal to SCC refused, 38542 (13 June 2019) [*Wolfeg*].

20 See for example: *R v Charlie*, 2012 YKTC 5 at paras 6-10 [*Charlie*]; *R v Gabriel*, 2013 MBCA 45 at paras 27-28; *R v Charles*, 2015 SKQB 302 at paras 16, 33; *R v Denny*, 2016 NSPC 83 at para 8; *R v Jourdain*, 2016 ONSC 7890 at paras 18, 54, 56 [*Jourdain*]; *R v Calliboo*, 2017 ABPC 40 at paras 14, 17, 40-42, 44, 65 [*Calliboo*]; *Wolfeg*, *supra* note 19 at paras 82-84.

out in *Gladue*, it was linked to Canada's overall history of colonialism in *Ipeelee* and has become a common and well-accepted factor in sentencing decisions since then.

In order to make the scope and content of these impacts clear, many sentencing decisions cite former Prime Minister Stephen Harper's apology to the survivors of the residential school system in 2008.²¹ In that apology, the harms of the residential schools were described as including: forcibly removing children from their homes and communities; leaving many inadequately fed, clothed, and housed; depriving all of the care and nurturing of their parents, grandparents, and communities; prohibiting the use of Indigenous languages and cultural practices; and leaving a damaging impact on Indigenous culture, heritage, and language.²² The apology also acknowledged that many children died while attending residential schools and many others returned with tragic accounts of emotional, physical, and sexual abuse, neglect, and separation from powerless families and communities.²³

Former Prime Minister Stephen Harper described the policy objectives of the residential schools as follows:

...Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption that Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.²⁴

Several sentencing judges have also referred to the extensive findings of the Truth and Reconciliation Commission, as set out in its 2015 final report, in order to clarify the various impacts of which they have taken judicial notice.²⁵ Among other things, the Truth and Reconciliation

21 See for example: *R v Quock*, 2015 YKTC 32 at para 113 [*Quock*]; *R v Armitage*, 2015 ONCJ 64 at para 26; *R v Andrew*, 2017 BCSC 2288 at para 74-75 [*Andrew*].

22 As cited in *Quock*, *supra* note 21 at para 113.

23 *Ibid.*

24 *Ibid.*

25 See for example: *Quock*, *supra* note 21 at paras 114-118; *R v Nashkewa*, 2016 ONCJ 729 at para 42 [*Nashkewa*]; *Andrew*, *supra* note 21 at para 76; *Denis-Damée c R*, 2018 QCCA 1251 at para 40; *R v Keenatch*, 2019 SKPC 38 at paras 41-42.

Commission canvassed the *intergenerational* nature of the many harms caused by the residential schools:

The impacts of the legacy of residential schools have not ended with those who attended the schools. They affected the Survivors' partners, their children, their grandchildren, their extended families, and their communities. Children who were abused in the schools sometimes went on to abuse others.²⁶

The Truth and Reconciliation Commission found that residential school survivors “not only lost their connections to parents, but also found it difficult to become loving parents”.²⁷ Due to the low expectations that principals and teachers had for Indigenous students at these schools, they also received a “poor-quality education [that] led people into chronic unemployment and underemployment”.²⁸ The Commission found that residential school survivors are more likely to live in low-income households and to have experienced income insecurity than Indigenous people who did not attend the schools.²⁹ Poverty and a lack of employment opportunities are in turn linked to domestic violence and lower educational attainment for one's children, demonstrating how these impacts are not limited to the former attendees themselves.³⁰

Intergenerational and direct impacts from attendance at day schools

The direct and intergenerational impacts of attendance at “day schools”—schools Indigenous students were compelled to attend but without residing there—may be less widely known than those of the residential schools. Nevertheless, various abuses and impacts from day school attendance have often been recognized as relevant factors in sentencing decisions to date, the majority of which parallel those suffered by residential school survivors.³¹ While there is not yet an equivalent

26 As cited in *Nashkewa*, *supra* note 25 at para 42.

27 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy*, The Final Report of the Truth and Reconciliation Commission of Canada, vol 5 (Montreal & Kingston: McGill-Queen's University Press, 2015) at 4.

28 *Ibid* at 61.

29 *Ibid* at 233.

30 *Ibid*.

31 See for example: *R v Anderson*, 2016 MBPC 28 at para 13; *R v Hall*, 2019 ABQB 343

report to that of the Truth and Reconciliation Commission to explain the systemic impacts of day school attendance on Indigenous peoples, class action litigation has thoroughly addressed this topic to date.

In 2019, the Federal Court approved a settlement agreement for a class action brought on behalf of former day school students, in addition to their spouses, children, and grandchildren.³² The Court described the action as addressing “allegations of assault, abuse and mistreatment”, as well as “mockery, belittlement, and physical, sexual, cultural and emotional abuse”.³³ In the settlement agreement, the Government of Canada “acknowledges that children were divided from their families and culture and were denied their heritage” and “[m]any were physically, emotionally and sexually abused”.³⁴

The Federal Court pointed out that the principle difference between residential schools and day schools was that day school students went home at night, but many of the same abuses recognized in the residential school settlement were inflicted on those attending day schools as well.³⁵ Attendance at the day schools was compulsory and truancy resulted in punishment for children and their parents.³⁶ In spite of these parallels with the impacts faced by residential school survivors, “Indian Day School survivors were largely left out of [that] earlier settlement”.³⁷

The Federal Court also summarized the following impacts of the day schools:

These schools had profoundly negative effects on many of their students. The representative plaintiffs were exposed to a program of denigration, psychological abuse and physical violence often for such simple things as speaking their own language to others of their community at the schools. This experience had a deep and lasting impact on the representative plaintiffs, impairing

at para 70 [Hall]; *R v Bellegarde*, 2019 SKPC 22 at paras 72, 74; *R v Dusome*, 2019 ONCJ 444 at para 14; *R v Smith*, 2019 BCSC 2084 at paras 24, 27 [Smith]; *R v CGG*, 2017 MBQB 61 at paras 6, 20.

32 *McLean v Canada*, 2019 FC 1075. An application for leave to exercise the right of appeal of the representative plaintiff was dismissed in *Ottawa v McLean*, 2019 FCA 309.

33 *Ibid* at paras 1-2.

34 *Ibid* at para 7.

35 *Ibid* at paras 6, 8.

36 *Ibid* at paras 14-15.

37 *Ibid* at para 23.

their sense of self-worth and impeding their relationships with others and leading to personal issues with substance abuse among the many ills that resulted from that abuse.³⁸

Intergenerational and direct impacts of child apprehension and out-adoption

Numerous sentencing decisions have recognized either direct or intergenerational impacts of Indigenous children being apprehended or adopted out of their Indigenous families and communities as relevant factors.³⁹ These impacts are summarized in various court cases, including those issued in multiple class actions brought on behalf of Indigenous children taken from their families and communities during the “Sixties Scoop”.⁴⁰

At least one sentencing decision cites the Royal Commission on Aboriginal Peoples for its conclusions regarding the impacts of cross-cultural foster placements and adoptions on Indigenous children:

The removal of Aboriginal children from their communities through cross-cultural foster placement and adoption is a [...] major cause of family disruption. Children removed from their families are severed from their roots and grow up not knowing what it is to be Inuit, Métis or a First Nations member. Yet they are set apart from their new families and communities by visible difference and often made to feel ashamed of their origins. At the same time, their home communities and extended families are robbed of part of the next generation.⁴¹

In addressing the merits of a Sixties Scoop class action in Ontario, Justice Belobaba of the Ontario Superior Court of Justice stated summarily that “the Sixties Scoop happened and great harm was done”.⁴² He described

38 *Ibid* at para 19.

39 See for example: *R v Nicholls*, 2015 ONSC 8136 [*Nicholls*]; *R v Lawson*, 2015 ONSC 5315 at para 44; *R v AE*, 2017 ONCJ 511 at para 24; *R v Baldwin*, 2017 ONSC 5040 at para 25; *R v Loutitt*, 2018 ABCA 428 at para 8; *R v TL*, 2018 ONCJ 107 at para 81 [*TL*]; *R v Spence*, 2019 MBQB 136 at para 13; *Smith*, *supra* note 31 at para 27; *R v Paul*, 2019 SKQB 142 at para 12.

40 See *Brown v Canada (Attorney General)*, 2013 ONSC 5637 at paras 1, 3 [*Brown*].

41 *Nicholls*, *supra* note 39 at 11. For the source text see Government of Canada, “Highlights from the Report of the Royal Commission of Aboriginal Peoples: People to People, Nation to Nation”, online: *Crown-Indigenous Relations and Northern Affairs Canada* <<https://www.rcaanc-cirnac.gc.ca/eng/1100100014597/1572547985018>>.

42 *Brown*, *supra* note 40 at para 4.

this harm as including children losing contact with their families and losing their Indigenous language, culture, and identity, and no information being provided to children or their foster or adoptive parents about their Indigenous heritage or the various educational and other benefits they were entitled to receive.⁴³ He found on “uncontroverted evidence” that the loss of Indigenous identity experienced by these children left them “fundamentally disoriented, with a reduced ability to lead healthy and fulfilling lives”, resulting in “psychiatric disorders, substance abuse, unemployment, violence and numerous suicides”.⁴⁴

Justice Belobaba noted that some researchers argue the Sixties Scoop were even “more harmful than the residential schools”, reproducing the following quote:

Residential schools incarcerated children for 10 months of the year, but at least the children stayed in an Aboriginal peer group; they always knew their First Nation of origin and who their parents were and they knew that eventually they would be going home. In the foster and adoptive system, Aboriginal children vanished with scarcely a trace, the vast majority of them placed until they were adults in non-Aboriginal homes where their cultural identity and legal Indian status, their knowledge of their own First Nation and even their birth names were erased, often forever.⁴⁵

In approving a Canada-wide settlement of class actions on behalf of Indigenous children apprehended during the Sixties Scoop, Justice Shore of the Federal Court described the various harms inflicted on these individuals as follows:

The loss of cultural identity of children taken from their traditional homes led to a loss of cultural belonging. Loss of culture, language and identity led to a loss of personal and collective essence for vulnerable children who were “scooped” from 1951 to 1991. The loss of belonging took away the reason and purpose for life of individuals who lost the direction for a life journey before it could even begin. It also led to a sense of

43 *Ibid* at para 6.

44 *Ibid* at para 7.

45 *Ibid* at para 8, citing Suzanne Fournier & Ernie Crey, *Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver BC: Douglas & McIntyre, 1998), as cited in Lori Chambers, *A Legal History of Adoption in Ontario, 1921-2015* (University of Toronto Press, 2016) at 120.

not being able to identify, thus, a loss of persona. The attempt to commit “cultural genocide” of entire Indigenous nations, as stated by former Chief Justice Beverley McLachlin, is that which she defined as “the worst stain in Canada’s human rights record”.⁴⁶

In a more contemporary child apprehension context, Justice Chappel of the Ontario Superior Court of Justice has identified connections between the residential school system, the Sixties Scoop, and continuing high rates of apprehension for Indigenous children in Canada.⁴⁷ She identified a “growing body of evidence indicating that the negative effects of the Residential Schools experience and the Sixties Scoop, coupled with prejudicial attitudes towards Aboriginal peoples and their parenting, have led to an ongoing over-representation of Aboriginal children in foster care, mostly in non-Aboriginal homes”.⁴⁸ She also pointed to the Truth and Reconciliation Commission’s conclusion that the current overrepresentation of Indigenous children in foster care indicates “Canada’s child welfare system has simply continued the assimilation that the residential school system started”.⁴⁹

The Federal Court of Appeal has likewise expressed concern over the disproportionate rate at which Indigenous children continue to end up in foster care with non-Indigenous caregivers in Canada, as well as the importance of Indigenous children “maintain[ing] some connection with [their] culture, heritage and, ideally, territory, to help foster a sense of belonging and pride”.⁵⁰ The Court pointed out that the significance of this kind of connection for Indigenous children is explicitly set out in Article 30 of the *United Nations Convention on the Rights of the Child* and has been acknowledged by the Standing Senate Committee on Human Rights.⁵¹ The Court also emphasized the

46 *Riddle v Canada*, 2018 FC 641 at para 5. An application for leave to exercise the right of appeal of the representative plaintiff was dismissed in *Frame v Riddle*, 2018 FCA 204.

47 *Catholic Children’s Aid Society of Hamilton v GH*, 2016 ONSC 6287 at para 68.

48 *Ibid.*

49 *Ibid.*, citing Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Montreal & Kingston: McGill-Queen’s University Press, 2015) at 138.

50 *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 86, citing Statistics Canada, *Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under* (April 13, 2016), Catalogue no. 75-006-X at 6-7, 10.

51 *Ibid* at paras 86-87, citing *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 at art 30 & Standing Senate Committee on Human Rights, *Children:*

“profound nature” of the “connection to culture, heritage and territory that is likely important and desirable for an indigenous person to maintain”.⁵²

Justice Campbell of the Ontario Superior Court of Justice has also drawn attention to the victimization of Indigenous children in state care. He described the child welfare system as “failing the most vulnerable of our population”—namely, Indigenous children.⁵³ He took note of how “[y]oung teenagers (children really, in newly developed adult bodies) are warehoused in motel rooms in Winnipeg and Vancouver because there are not enough Foster parent homes or groups homes available anywhere in Canada that can meet the volume of children in care”.⁵⁴ Justice Campbell also noted how these children “are removed from their parents, their community and their culture” and “when living in hotels in large cities [they] become easy prey for the predators that seek them out ... and these needy, damaged teens are easy to identify and exploit”.⁵⁵

In light of such concerns, it may not be surprising to find that many sentencing decisions recognize an Indigenous person’s direct and intergenerational experiences with the child welfare system as a *Gladue* factor regardless of whether these experiences fit within the particular time period known colloquially as the Sixties Scoop.⁵⁶ The disproportionate rate at which Indigenous children are apprehended may have other implications for sentencing as well, such as collateral consequences for Indigenous parents who are being sentenced or the magnification of harm to Indigenous complainants who risk triggering child apprehensions when they report offences against their children.⁵⁷

The Silenced Citizens—Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children (April 2007).

- 52 *Ibid* at para 91. See also the discussion of a Cree child’s interest in cultural immersion in *CLR v KTC Child and Family Services (Director)*, 2019 ABQB 986 at paras 159-166.
- 53 *CAS of the RM of W v CT*, 2017 ONSC 1022 at para 2, rev’d on other grounds 2017 ONCA 931.
- 54 *Ibid* at para 4.
- 55 *Ibid* at para 5.
- 56 See for example: *Drysdale*, *supra* note 15 at paras 9, 62, 64; *R v Catcheway*, 2018 MBPC 49 at paras 11, 17; *R v Leigh*, 2018 ONCJ 776 at paras 26, 35-37, 41-42, 49, 81-83; *R v Dakin*, 2020 ONCJ 202 at paras 7, 31.
- 57 See for example: *R v AL*, 2018 NSPC 61 at para 21; *R v S(D)*, 2020 MBQB 163 at paras 57-59 [*S(D)*].

Loss of collective and individual autonomy through legislation and policies

Several sentencing decisions have also recognized intergenerational impacts stemming from various laws and government policies that undermined Indigenous peoples' individual and collective autonomy, especially the imposition of the *Indian Act* and the reserve system on First Nations.⁵⁸ As the relationships among these common factors and sentencing proceedings can be complex and nuanced, it warrants further exploration.

According to the Ontario Court of Appeal, the *Indian Act* “is widely recognized for controlling virtually everything that touches Indian people” and it “has long been universally labeled as paternalistic and a relic of past colonial practices”.⁵⁹ Part of the original intent and purpose of this legislation was “the assimilation of Indians into mainstream non-Indian society”.⁶⁰

The imposition of the *Indian Act* on First Nations also reflects the Canadian government's historic intention to treat the members of First Nations as having the legal status of “minors”, “wards” or “children of the State” under the guardianship or “tutelage” of the federal government until assimilated into non-Indigenous society.⁶¹ While there have been several amendments to the *Indian Act* since 1876, it still delegates “meaningful management of reserve lands” and “broad discretionary powers over the implementation of the Act as well as the daily lives of Indians on reserves” to federal ministers rather than First Nations themselves.⁶²

58 See for example: *R v RKD*, 2013 BCPC 436 at para 10; *Callihoo*, *supra* note 20 at para 40; *R v Morrissette*, 2017 ONCJ 307 at paras 34-39 [*Morrissette*]; *R v Cardinal*, 2018 ONCJ 253 at para 23; *R v Hilbach*, 2018 ABQB 526 at para 35, *aff'd* in part 2020 ABCA 332; *R v McKay*, 2020 MBQB 106 at paras 10-11 [*McKay*].

59 *Tyendinaga Mohawk Council v Brant*, 2014 ONCA 565 at para 43, citing Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996) at 256-57. Note that the Court of Appeal's use of the term “Indian” rather than “Aboriginal” or “First Nations” in its reasons was solely to avoid confusion by using the language of the *Indian Act* in analyzing the history of that legislation (para 2).

60 *Ibid* at para 65.

61 *Ibid* at paras 67-69.

62 *Ibid* at paras 73, 76.

As noted in a decision authored by Justice Grammond of the Federal Court, the *Indian Act* and related policies also sought to undermine and displace both the traditional leadership of First Nations and their distinct legal traditions:

Despite the occasional recognition of Indigenous law by Canadian courts, the overall tendency was, for a long period, one of denial and suppression[.] [...] As early as 1869, Parliament enacted provisions allowing the government to suppress traditional systems of governance and replace them with elected councils to govern the affairs of communities (*An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, SC 1869, c 6, s 10*).⁶³

As noted by Justice Gibson of the Ontario Court of Justice, the *Indian Act* and related policies allowed the federal government to closely control the daily lives of First Nations through the appointment of Indian agents who were “automatically appointed as justices of the peace with full authority to conduct trials anywhere in the country involving Indians charged with violating the *Indian Act* and certain crimes under the *Criminal Code*”.⁶⁴ Justice Gibson also quotes the Aboriginal Justice Inquiry of Manitoba’s description of the broad impacts of Indian agents and the *Indian Act* on the autonomy of First Nations and their members:

In every aspect of life, from criminal law to education to religious expression, from hunting to agriculture, from voting to the use of lawyers, Aboriginal people ran into regulations that restricted their freedom. Traditional systems of government were replaced by a restricted and illusory form of democracy in which only adult men had a voice and a vote. All real power rested with the Indian agent who supervised voting, chaired the meetings, kept the official records, decided when, where and if chief and council would meet and controlled council’s agenda.⁶⁵

As a further example, Justice Phelan of the Federal Court has canvassed evidence of Canada’s historic “starvation policy” that was imposed in the Prairies following the collapse of the bison hunt.⁶⁶ This included

63 *Pastion v Dene Tha’ First Nation*, 2018 FC 648 at para 9.

64 *Morrisseau*, *supra* note 58 at para 36, citing Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Province of Manitoba, 1991), vol I [*Aboriginal Justice Inquiry of Manitoba*] at 70.

65 *Ibid* at para 35, citing *Aboriginal Justice Inquiry of Manitoba*, *supra* note 64 at 64.

66 *Watson v Canada*, 2020 FC 128 at para 27.

the limiting of rations to get First Nations to leave certain areas, the provision of substandard rations, and a Work for Rations Program to provide limited rations in exchange for Indigenous labour on home farms.⁶⁷ Justice Phelan also accepted evidence to the effect that “Prime Minister John A. Macdonald said it was bad policy to feed bands well, in support of the continued provision of starvation allowances”.⁶⁸ Furthermore, he accepted evidence of an Indian agent being “specifically instructed to give as little rations as possible to able bodied Indians who would not or were not at work” in the Crooked Lakes area of what is now southern Saskatchewan.⁶⁹

As a broader example of the *Indian Act* and related policies’ impacts on Indigenous autonomy, Justice Martineau of the Federal Court has canvassed how these displaced Indigenous peoples’ traditional mechanisms for policing and the collective regulation of social order.⁷⁰ He noted how s 104 of the *Indian Act* stipulated that “[a]ny constable may, without process of law, arrest any Indian or non-treaty Indian whom he finds in a state of intoxication, and convey him to any common gaol, house of correction, lock-up or other place of confinement, there to be kept until he is sober”.⁷¹ He also took note of Indian agents’ broad discretion to impose fines and imprison both status and non-status individuals under earlier versions of this legislation.⁷²

Justice Martineau also addressed how the history of the Royal Canadian Mounted Police (RCMP) intersects with the history of the *Indian Act* and various related policies. Of particular note, the RCMP (formerly known as the North West Mounted Police) enforced “infamous measures such as compulsory school attendance for Indian children and the placement of Indian children in residential schools, the prohibition of traditional spiritual practices, which became offences under the *Indian Act* (see former section 114), and the pass system under which residents of reserves had to obtain written permission to leave the reserve”.⁷³

67 *Ibid.*

68 *Ibid* at para 208.

69 *Ibid.*

70 *Picard v Canada (Attorney General)*, 2018 FC 747 at paras 55-58, aff’d *Quebec (Attorney General) v Picard*, 2020 FCA 74, leave to appeal to SCC refused, 39210 (26 November 2020).

71 *Ibid* at para 57, citing the *Indian Act*, RSC 1886, c 43.

72 *Ibid.*

73 *Ibid* at para 58.

Contextual and historical facts such as these may help illuminate why the Royal Commission on Aboriginal Peoples' concluded in 1996 that "[i]t has been through the law and administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism".⁷⁴

Loss and denial of status and band membership under the *Indian Act*

In spite of the harmful legacies of the *Indian Act* on the autonomy of First Nations and their members, courts have also acknowledged adverse impacts on those excluded from its provisions. That is to say that several decisions recognize that loss or denial of status or band membership under the *Indian Act*, either for the individual being sentenced, their family members, or their ancestors, can also be a relevant factor in sentencing.⁷⁵ This is linked to a long and complex history of laws, policies, and practices aimed at restricting the number of individuals who are recognized as "Indians" in Canada, which will be briefly summarized here for ease of reference.

Registration (or status) under the *Indian Act* may carry with it a number of tangible benefits, "such as extended health benefits, financial assistance with post-secondary education and extracurricular programs, and exemption from certain taxes", as well as intangible benefits in terms of "acceptance within the aboriginal community".⁷⁶ Registration under the *Indian Act* is often closely linked to band membership as well, which determines one's right to reside in that community and vote for its leaders.⁷⁷

Historic versions of the *Indian Act* included "enfranchisement" provisions to encourage members of First Nations to give up their status and band membership, as well as their ability to pass these on to future generations, in exchange for such incentives as Canadian citizenship, the right to vote in Canadian elections, and property rights.⁷⁸ These were

74 *Ibid* at para 56, citing *Bridging the Cultural Divide*, *supra* note 12 at 57.

75 See for example: *R v Florence*, 2015 BCCA 414 at paras 29-30; *Collins*, *supra* note 4 at paras 15-16; *Hall*, *supra* note 31 at paras 69-70; *R v Brennan*, 2020 ONCJ 128 at paras 47-51, 53.

76 *McIvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 at para 70, leave to appeal to SCC refused, 33201 (5 November 2009).

77 *Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 12 [*Larkman*].

78 *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 at para 11 [*Canada (HRC) v Canada (AG)*], aff'd 2018 SCC 31.

“designed to encourage Aboriginal people to renounce their heritage and identity, and to force them to do so if they wished to take a full part in Canadian society”.⁷⁹ Individuals also automatically lost their status under the *Indian Act* after receiving higher education, or becoming doctors, lawyers, or ministers.⁸⁰ Those who served in the two World Wars were required to enfranchise along with their entire families, and anyone who left Canada for more than five years without permission lost their status as well.⁸¹ The Federal Court of Appeal has described this enfranchisement policy as “one of the most oppressive policies adopted by the Canadian government in its history of dealings with Aboriginal peoples”.⁸²

There is also a long history of legislation depriving First Nations women of status under the *Indian Act*, dating back to as early as 1857.⁸³ Up until 1985, the rules under the *Indian Act* governed the passing of status on to children with “a patrilineal concept of descent that was foreign to many indigenous traditions”, relying almost entirely on the status of a child’s father.⁸⁴ Furthermore, prior to 1985 women lost their status upon marriage to a man without status, making their children ineligible for registration under the Act.⁸⁵ The only exemption to this patrilineal rule was in relation to “illegitimate children”.⁸⁶ The provisions governing status under the *Indian Act* have since been subject to multiple successful *Charter* challenges and subsequent amendments aimed at addressing this legacy of gender discrimination against Indigenous women.⁸⁷

The Supreme Court of Canada itself has recognized how the various enfranchisement provisions under the *Indian Act* have “often led to the denial of status and the severing of connections between band members and the band”.⁸⁸ Many individuals whose families and ancestors were

79 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at para 88, 1999 CanLII 687, L’Heureux-Dubé J, concurring [Corbiere].

80 *Ibid.*

81 *Ibid.*

82 *Larkman*, *supra* note 77 at para 10.

83 *Corbiere*, *supra* note 79 at para 86.

84 *Canada (HRC) v Canada (AG)*, *supra* note 78 at para 13

85 *Gehl v Canada (Attorney General)*, 2017 ONCA 319 at para 7.

86 *Ibid* at para 8.

87 *Ibid* at paras 10-17. See also *Descheneaux c Procureure générale du Canada*, 2017 QCCS 3645.

88 *Corbiere*, *supra* note 79 at para 89.

directly affected by these policies “are now living away from reserves, in part, because of them”.⁸⁹ While more recent amendments to the *Indian Act* attempt to address the legacy of discrimination against First Nations women by reversing some forms of enfranchisement, status alone may not reverse the severing of community connections. The Supreme Court has recognized that First Nations people living off-reserve are vulnerable and disadvantaged, and they may be stereotyped as “less Aboriginal” and “less valuable members of their bands”.⁹⁰

In light of all these circumstances, loss or denial of status under the *Indian Act* can be linked to community and cultural dislocation, loss of social, economic, and community supports for those with status, and, in some cases, a legacy of discrimination that is unique to First Nations women and their descendants.

Constellations of constraining socio-economic factors as a legacy of colonialism

There are complex relationships between Canada’s history of colonialism and systemic discrimination against Indigenous peoples, the disproportionate rates of economic and social marginalization that Indigenous peoples face, and the individual circumstances of any one Indigenous person who might find themselves before the courts, not to mention the circumstances of communities and victims. This can make the *Gladue* principles challenging to conceptualize and apply in practice.

The Supreme Court of Canada has been clear that sentencing judges must take judicial notice of more than just the fact that government actions and policies like community relocations and the residential school system have negatively impacted Indigenous individuals, their families, and their communities. They must also take judicial notice of how these impacts are reflected in the contemporary statistical and demographic reality in which many Indigenous individuals and collectives find themselves, including higher rates of substance abuse, suicide, and unemployment, and disproportionately less income and formal education.⁹¹

89 *Ibid.*

90 *Ibid* at paras 91-92.

91 *Ipeelee, supra* note 3 at para 60.

The constrained socio-economic circumstances that affect many Indigenous people can in turn shed light on their moral blameworthiness.⁹² These circumstances may be relevant to sentencing in other ways as well.⁹³ Several socio-economic circumstances that are commonly considered as part of the application of the *Gladue* principles have been outlined below for greater clarity.

Individual, familial, and collective experiences of racism and discrimination

Numerous sentencing decisions have recognized an individual's experiences of racism as a relevant factor for sentencing, whether these have occurred in school, employment, foster care, out-adoption, specific communities, or Canadian society at large.⁹⁴ These experiences can be relevant to moral blameworthiness and sentencing principles in nuanced and compounding ways that may warrant close examination.

Experiences of racism often appear to illuminate an individual's circumstances in ways that are integrally linked with other systemic factors. For example, several sentencing judges have considered the circumstances of Indigenous people whose formal education in non-Indigenous schools was impacted or cut short due to racism, racially motivated bullying, and related behavioural problems when this has led to conflicts with teachers or other students, thus linking it to lower educational attainment.⁹⁵ Experiences of racism in the workplace may provide a link to unemployment or lower salaries.⁹⁶ Other sentencing decisions have

92 *Ibid* at para 73.

93 *R v Crazyboy*, 2012 ABCA 228 at para 32.

94 See for example: *R v AJ*, 2015 SKQB 156 at paras 34-35, 64 [*AJ*]; *R v Thomas*, 2016 ONSC 7944 at para 22; *Jourdain*, *supra* note 20 at paras 14, 54, 56; *R v Syliboy*, 2018 NSPC 83 at paras 27-28; *R c Diabo*, 2018 QCCA 1631 at paras 18-19, 24, 94 [*Diabo*]; *R v Bear*, 2019 SKQB 22 at paras 17, 72; *R v Ahpay*, 2018 SKQB 147 at para 13 [*Ahpay*]; *R v Grandinetti*, 2020 ABQB 416 at paras 30-31, 33-35 [*Grandinetti*]; *R v McCaragar*, 2020 ONSC 5464 at para 15; *R v Heimbecker*, 2020 SKQB 304.

95 See for example: *R v SL*, 2012 MBPC 22 at para 94; *R v TMB*, 2013 ONSC 4019 at para 16 [*TMB*]; *R c Iserhoff*, 2014 QCCQ 1961 at para 84; *R v Smoke*, 2014 MBCA 91 at para 47; *R v O'Connor*, 2014 ABPC 264 at paras 23, 34 [*O'Connor*]; *R v Sutherland-Cada*, 2016 ONCJ 650 at paras 9, 41; *R v Laliberte*, 2017 SKPC 82 at para 60; *R v Dennis*, 2018 BCPC 270 at paras 13, 24, 29, 33; *R v Arcand*, 2019 SKQB 131 at para 80; *R c Lavoie*, 2020 QCCQ 2319 at paras 29-33.

96 See for example: *AJ*, *supra* note 94 at para 34; *R v Okemabwasin*, 2015 SKPC 71 at para 9; *R v Burke*, 2018 SKPC 43 at para 22; *R v Tremblay*, 2018 ABQB 400 at para 26

considered how racism leads some Indigenous people and their families to conceal or deny their heritage and community connections, linking this to other factors like loss of culture and displacement.⁹⁷

Racism may also play a part in family breakdown or an individual's difficulties in foster care, out-adoption, or families of mixed heritage.⁹⁸ Depending on its source, it could colour how an individual views authority figures.⁹⁹ Or it could nudge them towards involvement in street gangs, which one sentencing judge described as exploiting the “righteous anger” of Indigenous youth and “manipulat[ing] it into petty criminality”.¹⁰⁰ Some decisions have considered how Indigenous people of mixed heritage can grow up facing discrimination or bullying from Indigenous and non-Indigenous peers, leading to cultural dislocation and negative impacts on their sense of self-esteem and self-worth.¹⁰¹

Individual and collective experiences of racism may likewise shed light on a particular offence—for example, when that offence reflects underlying racial tensions. In *Skead*, Justice Gibson of the Ontario Court of Justice discussed how the long-standing treatment of Indigenous peoples in northwest Ontario provided context for a violent assault by two Anishinaabe men against a non-Indigenous man who made it clear they were unwelcome at a party and may have made “some disrespectful comments” towards them when asking them to leave.¹⁰² Justice Gibson saw this as an example of how unconscious racial tensions “play out over and over again, fuelled by old resentments”.¹⁰³

Racism can also shed light on an individual's history of involvement in the justice system. As addressed earlier in this publication, the Supreme Court of Canada has repeatedly acknowledged the detrimental impacts

[*Tremblay*]; *Diabo*, *supra* note 94 at paras 19, 94.

97 See for example: *R v Bannon*, 2011 ONSC 3000 at para 42; *R v Rondeau*, 2017 ONCJ 644 at para 40; *R v Norman*, 2018 ONSC 2872 at paras 55-58, 64; *R v Hamilton*, 2020 SKPC 19 at para 44.

98 See for example: *R v Alton*, 2012 ONSC 5500 at para 52; *R v Crawford*, 2013 BCSC 2121 at paras 101, 107; *R v Pouce Coupe*, 2014 BCCA 255 at para 11; *R v Zaworski*, 2020 BCPC 46 at paras 79, 84, 86-87 [*Zaworski*]; *Grandinetti*, *supra* note 94.

99 *R v Wolfe*, 2016 SKQB 11 at para 66.

100 *R v Skead*, 2015 ONCJ 790 at 13-14 [*Skead*].

101 See for example: *R v Brown*, 2018 ABQB 469 at para 20; *R v Jacko*, 2017 ONSC 5584 at para 26; *R v RB*, 2019 ONCJ 567 at para 47; *Zaworski*, *supra* note 98 at paras 79, 84, 86-87.

102 *Skead*, *supra* note 100 at 5.

103 *Ibid* at 14.

of widespread racism and systemic discrimination against Indigenous people throughout the criminal justice system itself, which includes biases, stereotypes, and assumptions about their credibility, worthiness, and criminal propensity, overtly racist attitudes, and culturally inappropriate practices.¹⁰⁴

Similarly, experiences of racism in policing may help contextualize someone's attitude towards the justice system, while also casting light on other systemic factors they face. For instance, the Supreme Court has acknowledged the impacts of the disproportionate policing of racialized and low-income communities, including practices such as street checks and carding.¹⁰⁵ The Court accepted that this “takes a toll on a person's physical and mental health”, “impacts their ability to pursue employment and education opportunities”, “contributes to the continuing social exclusion of racial minorities, encourages a loss of trust in the fairness of our criminal justice system, and perpetuates criminalization”.¹⁰⁶

Gang involvement and exposure

Several judgments have considered either a person's own involvement in gangs or their exposure to high rates of gang activity in their community as relevant *Gladue* factors.¹⁰⁷ This is often connected with an individual's other systemic and background factors, such as early exposure to substance misuse, family histories of criminal involvement, and cognitive deficits from conditions like Fetal Alcohol Spectrum Disorder (FASD), with the result that their involvement in gangs and violence “should not be surprising to anyone”.¹⁰⁸ Gangs may be able

104 See *R v Barton*, 2019 SCC 33 at para 199, citing: *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782 at paras 54, 58 [*Williams*]; *Gladue*, *supra* note 1 at para 65; *Ipeelee*, *supra* note 3 at paras 59-60, 67; *Ewert v Canada*, 2018 SCC 30 at para 57.

105 *R v Le*, 2019 SCC 34 at paras 89-97.

106 *Ibid* at para 95, citing: Michael H. Tulloch, *Report of the Independent Street Checks Review* (Toronto: Queen's Printer for Ontario, 2018) at 42; Naomi Nichols, “The Social Organization of Access to Justice for Youth in ‘Unsafe’ Urban Neighbourhoods” (2018) 27 *Social & Legal Studies* 79 at 86; Ontario Human Rights Commission, *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (Toronto: Ontario Human Rights Commission, 2017) at 31-40.

107 See for example: *R v JKM*, 2013 SKPC 154 at para 5; *R v Laliberte*, 2013 SKQB 25 at para 9; *R v BR*, 2016 MBPC 74 at para 23; *R v Okimaw*, 2016 ABCA 246 at para 77 [*Okimaw*]; *R v Neapetung*, 2017 SKPC 43 at para 31; *R v Sellars*, 2018 BCCA 195 at para 35 [*Sellars*]; *R v Boyssis*, 2019 ABQB 437 at para 59; *Germa c Tremblay*, 2019 QCCS 1764 at para 97.

108 *R v Roulette*, 2019 MBQB 111 at para 31.

to exploit experiences of racism and alienation of Indigenous youth.¹⁰⁹ At the same time, it is also an aggravating circumstance for an offence to have been committed “for the benefit of, at the direction of or in association with a criminal organization”, as set out explicitly in s 718.2(a)(iv) of the *Criminal Code*.¹¹⁰

In *Okimaw*, the Alberta Court of Appeal clearly articulated the relevance of a Cree man’s exposure to gang culture in its *Gladue* analysis, treating this as one of several constrained circumstances that reduced his moral blameworthiness:

Okimaw chose gang life. It is entirely understandable that he might seek the comparative structure, companionship, personal protection and safety of a gang over the chaos, disharmony and violence of his home life. Okimaw conformed to gang culture expectations throughout his formative teenage years and into young adulthood. We emphasize that we are talking about the realities of Okimaw’s existence, not approving his choices. Gang participation was one of the worst things that could have happened to him: its re-enforcement of anti-social thinking and its withering of empathy dragged him further into anti-social behaviour. Providing more positive options for disoriented youth is a compelling social need that unfortunately the criminal justice system cannot meet. But the criminal justice system, as *Gladue* teaches, cannot be oblivious to the cumulative distortive effects of a lack of pro-social options, and the resultant bad choices of individuals. It is very difficult to break cycles, once ingrained.¹¹¹

In *Sellars*, the British Columbia Court of Appeal demonstrates how high rates of gang violence in a particular community and an individual’s own gang affiliation can have relevance to several competing sentencing principles and provisions.¹¹² The Court of Appeal found that gang-related gun violence in the community of Williams Lake and its surrounding Indigenous communities highlighted the relevance of denunciation and deterrence in sentencing Mr. Sellars for unauthorized possession of a

109 See *Skead*, *supra* note 100 at 13-14.

110 *R v Jimmy*, 2009 SKQB 124 at para 32; *R v Harper*, 2016 MBCA 64 at para 59; *R v Nillovu*, 2017 MBQB 157 at para 22, *aff’d* 2018 MBCA 113; *Ahpay*, *supra* note 94 at para 92.

111 *Okimaw*, *supra* note 107 at para 77.

112 *Sellars*, *supra* note 107.

loaded handgun.¹¹³ At the same time, the Court found that his moral blameworthiness was mitigated by his background circumstances, which included how he was pressured and socialized into a gang as a youth by older males in his community, which in turn was linked to other factors like early exposure to substance use, mental and physical health issues, suicide attempts, and deaths among family and friends.¹¹⁴ Furthermore, Mr. Sellars consciously disassociated from gang involvement, which required him to move away from his community, and this made his past gang involvement relevant once more as one of several exceptional rehabilitative initiatives to be considered in sentencing.¹¹⁵

Similarly, in *MacLeod*, the Saskatchewan Court of Appeal addressed how an individual's frank disclosure of his background as "an actively-involved gang member" to a pre-sentence report writer required nuanced attention in sentencing.¹¹⁶ The Court insisted that someone's history of active gang involvement cannot elevate their sentence if doing so amounts to punishing them for "offences that have gone uncharged", but accepted that such a background might indicate an offence "was not entirely out of character".¹¹⁷ At the same time, the Court of Appeal held that it would be an error to treat someone's frank and voluntary disclosure of past criminal behaviour—in this case, made "in an effort to demonstrate to the sentencing court that he had abandoned the gang lifestyle"—as elevating moral blameworthiness.¹¹⁸ The Court emphasized the importance of thorough and quality information for individualized sentencing, urging that "offenders must not be deterred from putting the necessary evidence before the sentencing court".¹¹⁹ It also found that Mr. MacLeod's post-offence conduct, which included participation in anti-gang programming, was mitigating to the degree it indicated his receptiveness to rehabilitation and promoted a sense of responsibility and acknowledgment of harm.¹²⁰

113 *Ibid* at paras 6, 27.

114 *Ibid* at paras 10-11, 27.

115 *Ibid* at paras 11-12, 27.

116 *R v MacLeod*, 2018 SKCA 1.

117 *Ibid* at para 41.

118 *Ibid* at para 42.

119 *Ibid*.

120 *Ibid* at paras 7, 43.

Geographic challenges such as community isolation and remoteness

Many judgments have considered geographic factors like isolation or the remoteness of an Indigenous community as relevant to sentencing, echoing the earliest jurisprudence on accommodative sentencing of Indigenous people canvassed in Chapter 1.¹²¹ Often a community's geographic remoteness will shed light on an Indigenous person's moral blameworthiness through its relationship with other systemic factors, such as high rates of unemployment, crime, violence, substance abuse, or FASD, overcrowding and inadequate housing, or limited access to recreational resources, social services, or health services.¹²² These same factors may also have relevance to other sentencing principles to the degree they make community members more vulnerable to criminal offences.¹²³ This may require sentencing judges to balance the rehabilitative value of an individual's community connection against a remote community's own safety concerns.¹²⁴

Multiple systemic and background factors may overlap and compound in some isolated communities. In *Black*, for example, Justice Harris of the Ontario Court of Justice provided the following bleak description of the Ojibway community of Pikangikum First Nation, which is only accessible by expensive flights or a seasonal ice road:

Geographic isolation has translated into depreciated opportunity for access to standard health care, steady employment and functioning public services, leading to a higher than average poverty rate amongst most residents of the community over multiple generations. Housing conditions are generally poor with broken windows and graffiti being prevalent around the community. Sanitary running water and sewage for homes are improving slowly, however, many homes do not have access

121 See for example: *R v Jimmie*, 2009 BCCA 215 at paras 9, 12; *R v Strongquill*, 2016 SKQB 397 at para 18; *R v TRJ*, 2015 BCSC 352 at para 31; *R v Casimir*, 2016 BCSC 65 at paras 20, 47; *R v McLeod*, 2018 MBQB 73 at para 34.

122 See for example: *R v JNJ*, 2004 BCSC 1007 at paras 4-5; *R v Audy*, 2010 MBPC 55 at para 4; *R v Obed*, 2006 NLTD 155 at paras 14, 67 [*Obed*]; *R v Masakayash*, 2015 ONCJ 655 at paras 9, 21, 23-24; *R v Wesley*, 2016 ONSC 408 at paras 62-63 [*Wesley*], aff'd 2018 ONCA 636; *R v Pete*, 2019 BCCA 244 at para 91 [*Pete*]; *R c Carrier*, 2020 QCCQ 110 at paras 28-29, 44.

123 *Obed*, *supra* note 122 at para 16; *Wesley*, *supra* note 122 at paras 138, 142; *R v Criddle*, 2014 BCPC 108 at paras 17-21, 29.

124 See for example: *R v Schafer*, 2019 YKTC 41 at paras 14-15, 18, 31-35, 42.

to these services and many are compromised by deficient or unreliable home heating and electricity during winter months. It is not uncommon to have several families living in one home or sharing any available space for shelter.¹²⁵

Geographic isolation may also negatively impact how community members perceive the criminal justice system. In *Itturiligag*, for example, Justice Bychok of the Nunavut Court of Justice pointed out how the remoteness of Nunavut's hamlets and their reliance on circuit courts exacerbate Inuit alienation from the justice system:

As I explained in *Anugaa*, this court travels to all 25 of our territory's far-flung and remote communities. Many months may pass in the smallest hamlets between court sittings. By the time cases are dealt with in court, many parties have already reconciled and have moved on with their lives. Resentment and stress are triggered when the justice system insists these proceedings continue to a legal resolution. Resentment, stress and anger often arise when offenders are sent to jail outside the community against the express wishes of the victim, family and sometimes the community.¹²⁶

With regards to Indigenous people living in urban centres, the remoteness of their community of origin may factor into their experiences of isolation, displacement, and cultural loss. For example, an Indigenous man from the St. Teresa Point First Nation in northern Manitoba who grew up in Winnipeg was described as follows in *Taylor*:

Mr. Taylor has gone through experiences that he has encountered through the “main stream” process of the non-aboriginal society. In the early years of his education Mr. Taylor left home at an early age to get “proper” education in the City of Winnipeg. Throughout his displacement in an alien environment he began to lose contact with his home due to the geographic remoteness of his home. It was at this point he started experiencing the social distractions of the city. Mr. Taylor has [...] faced negative social barriers that he has had to struggle with and through his tribulations he has managed to keep himself focused on the road to good health.¹²⁷

125 *R v Black*, 2014 ONCJ 236 at paras 52-53.

126 *R v Itturiligag*, 2018 NUCJ 31 at para 120 [*Itturiligag*], rev'd on other grounds 2020 NUCA 6, citing *R v Anugaa*, 2018 NUCJ 2.

127 *R v Taylor*, 2008 MBPC 21 at para 17.

Individuals who grew up in remote communities may be particularly ill-prepared for urban life, which can make them vulnerable to negative influences, homelessness, street involvement, and victimization.¹²⁸ Likewise, individuals whose childhoods are divided between remote communities and urban settings may face culture shock, social deprivation, and “profound difficulties adjusting”—for example, someone who has been apprehended as a child, adopted into a non-Indigenous family, and then repatriated to a remote community with which they are wholly unfamiliar and disconnected.¹²⁹

Furthermore, the geographic isolation of a community, whether due to its location or its infrastructure deficits, may shed light on the appropriateness or impact of particular conditions or sanctions. For example, a driving prohibition may have a greater adverse impact on someone from a remote community who relies on driving to make a living.¹³⁰ Similarly, constrained transportation options in a community may affect someone’s ability to comply with certain probation or bail conditions, as well as their ability to access the courts to have these conditions amended or reviewed.¹³¹ The lack of transportation alternatives in remote areas may even have contextual relevance to the circumstances of an impaired driving offence.¹³²

Many sentencing judges have also recognized the additional hardships that Indigenous people from northern communities face if they are sent to penitentiaries in southern Canada, echoing the early cases addressed in Chapter 1.¹³³ For example, Justice Bychok of the Nunavut Court of Justice has pointed out that the lack of a federal penitentiary in Nunavut means “Inuit must serve their federal prison time in the south where they are forced to live in isolation from their culture, family and social networks”.¹³⁴ For a “traditionally raised Inuk” who is “intimately connected to his land—the land of his ancestors”, this can mean that the negative impact of incarceration is “multiplied”.¹³⁵

128 See for example: *R v Okemow*, 2016 MBQB 240 at para 16; *R v Traverse*, 2019 MBPC 15 at 13-14; *R c Benjamin*, 2018 QCCS 5937 at paras 149-151, 269-272.

129 *R v Maytwayashing*, 2016 MBPC 23 at paras 7-8.

130 *R v Calliou*, 2019 ABCA 365 at paras 11, 13.

131 *R v Rowan*, 2018 ABPC 208 at paras 38, 44.

132 *R v Patrick*, 2017 BCPC 223 at para 57.

133 *R v Cooper-Flaherty*, 2017 NUCJ 11 at para 51; *R c Gunner*, 2017 QCCQ 12563 at para 112; *R v Kakfwi*, 2018 NWTSC 13 at para 99.

134 *Itturiligag*, *supra* note 126 at para 116.

135 *Ibid* at para 111.

In *Iserhoff*, Judge Ladouceur of the Court of Quebec considered the hardships associated with detention in a southern facility as collateral consequences in the sentencing of two Cree men from northern Quebec, noting that they resulted from Quebec's failure to implement the terms of a land claims agreement.¹³⁶ Judge Ladouceur found that a Cree inmate would be held in a detention centre "far away from his family and community, making it more difficult to receive visits from his loved ones and maintain a connection with his culture".¹³⁷ He also noted that a Cree inmate "would be imprisoned in a cultural environment that is fundamentally different from his Aboriginal culture and where he is demographically unrepresented, which contributes to making his imprisonment a more difficult challenge".¹³⁸ He also found a Cree inmate would be statistically less likely to be granted temporary absence in preparation for conditional release and release on parole.¹³⁹

For some northern communities there may be sentencing options provided for in the *Criminal Code* that are simply unavailable due to a lack of resources or their remoteness. In *Sequaluk*, for example, Justice Grenier of the Superior Court of Quebec heard an appeal from sentence in which it was argued that an intermittent sentence had been denied an Inuk woman from Nunavik on a discriminatory basis.¹⁴⁰ Counsel for both parties agreed intermittent sentences are *never* imposed in Nunavik as they would need to be served at distant detention centres.¹⁴¹ Justice Grenier held that this violated the equality rights of the Inuit and other inhabitants of Nunavik.¹⁴² The sentence was varied so as to be served intermittently and suspended until the Quebec government designates adequate facilities in Nunavik for intermittent sentences. The Quebec Court of Appeal subsequently overturned this decision based on the procedural ground that a notice of constitutional question was never served on the Attorney General of Quebec.¹⁴³ However, this type of systemic factor within the justice system may still be relevant in

136 *R c Iserhoff*, 2019 QCCQ 2339.

137 *Ibid* at para 172.

138 *Ibid*.

139 *Ibid*.

140 *Sequaluk c R*, 2018 QCCS 4853, rev'd on other grounds 2019 QCCA 1209 [*Sequaluk QCCA*].

141 *Ibid* at para 4.

142 *Ibid* at paras 32-40.

143 *Sequaluk QCCA*, *supra* note 140.

sentencing proceedings.¹⁴⁴ Notably, Justice Gibson of the Ontario Court of Justice came to a similar conclusion in the *Turtle* decision where he concluded that the practical unavailability of intermittent sentences for members of the Pikangikum First Nation in Ontario breached s 15 of the *Charter*.¹⁴⁵

Experiences and cycles of abuse, violence, and victimization/criminalization

Many sentencing decisions have recognized an individual's exposure to violence or abuse, whether sexual, physical, psychological, emotional, or spiritual, as a relevant *Gladue* factor.¹⁴⁶ An individual's exposure to violence or abuse, whether as a direct victim or a witness, may cast light on their difficulties forming healthy relationships, their learned behaviours, their issues with anger management, their lack of insight into their own difficulties, or other factors like substance abuse.¹⁴⁷ In some cases it may be linked to more specific mental health conditions like post-traumatic stress disorder.¹⁴⁸ It may even provide context for better understanding an individual's actions or statements.¹⁴⁹

Often an individual's experiences of violence and abuse may be traceable back to the intergenerational impacts of other factors like the residential school system.¹⁵⁰ In one particularly compelling but unusual example, *TG*, Judge Philp of the Provincial Court of Alberta was faced with a Cree man convicted of assault causing bodily harm as a result of the "aggressive and unusual punishments of both a physical and psychological nature"

144 *R c Mianscum*, 2019 QCCQ 3829 at para 60.

145 *R v Turtle*, 2020 ONCJ 429.

146 See for example: *Ladue*, *supra* note 14 at para 7; *R v Flett*, 2013 MBQB 124 at para 17; *R v Brimmer*, 2016 ABCA 349 at para 14; *R v Kennedy-Money*, 2016 ONSC 7051 at 12, 43; *R v Jourdain*, *supra* note 20 at para 36; *R v Potvin*, 2017 ONCJ 429 at paras 21-23, 33; *Tremblay*, *supra* note 96 at paras 14, 26; *Pete*, *supra* note 122 at para 91; *R v Brick*, 2019 ABCA 351 at para 6; *S(D)*, *supra* note 57 at para 72.

147 See for example: *R v Agqiaruq*, 2009 NUCJ 26 at para 23; *R v Peters*, 2010 ONCA 30 at paras 7-8 [*Peters*]; *R v Tourville*, 2011 ONSC 1677 at para 14; *R v Keller*, 2012 SKQB 240 at paras 9-10, 66; *TMB*, *supra* note 95 at para 16; *R v Green*, 2013 ONCJ 423 at para 11; *R v LM*, 2018 NWTTC 13 at paras 28-29, 31-33, 36.

148 *R v VK*, 2006 SKPC 79 at paras 28, 52; *R v Schinkel*, 2015 YKCA 2 at para 29; *R v Smith*, *supra* note 31 at para 49; *R v Ward*, 2019 NBQB 68 at para 48.

149 See for example: *R v Campbell*, 2017 ABCA 147 at paras 2-3.

150 See for example: *R v Bull*, 2015 ABPC 256 at para 56; *R v Cragg*, 2018 BCPC 134 at paras 124-125, 128; *TL*, *supra* note 39 at paras 30-36.

that he inflicted on his step-daughter, including biting various parts of her body.¹⁵¹ Judge Philp explained how T.G.'s own experience of abusive discipline as a child linked his offence back to the residential school experiences of past generations:

Parenting is learned behaviour, often passed down from generation to generation. The residential schools which Aboriginal Canadians were forced to attend are generally known to have been institutions where abuse and neglect were rampant. Both T.G.'s grandfather and father attended residential school. It is not difficult to accept that the abuse which T.G. faced as a child was a result of abuse his grandfather and father faced in this school system. A chain of learned abuse from "disciplinarian" to child passed down from residential school to T.G.'s grandfather and father, to T.G., to [the victim] L.T. While T.G. must still be held responsible for his actions, the moral culpability of his conduct is reduced by the fact that this offence has roots firmly planted in the abuse inflicted on Aboriginals forced into residential schools.¹⁵²

Experiences of violence and abuse may have particular relevance to the moral culpability of Indigenous women who have been recognized as "amongst the most vulnerable segments of our population".¹⁵³ An Indigenous woman's vulnerability due to systemic issues and past victimization may make her vulnerable to coercive exploitation and recruitment into criminal conduct like drug trafficking.¹⁵⁴ Her past victimization and experiences of violence may also help contextualize her own violent offences.¹⁵⁵ This has been described as a "victimization-criminalization continuum" in which "*Gladue* factors will be intertwined" and "[v]ictimization is often [...] reproduced as violence".¹⁵⁶

In some cases, victims may even be unwilling to rely on the criminal justice system for their own protection due to a fear of being criminalized

151 *R v TG*, 2012 ABPC 251 at paras 1-3.

152 *Ibid* at para 17.

153 See *Nashkewa*, *supra* note 25 at para 44. See also: *R v AS*, 2017 ONSC 802 at para 33(iv); *R v Sharma*, 2018 ONSC 1141 at para 184, rev'd in part on other grounds 2020 ONCA 478 [*Sharma*]; *R v Berg*, 2019 ABQB 541 at paras 64-67.

154 *Nashkewa*, *supra* note 25 at para 44; *Sharma*, *supra* note 153 at paras 25-26, 184.

155 *R v TLC*, 2019 BCPC 314 at paras 55-58, 70-71.

156 *Ibid* at para 62, citing Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 87-91.

themselves. This is very clearly illustrated in one decision of the Nunavut Court of Justice where an Inuk woman was charged with breaching a no-alcohol bail condition after she called the RCMP to report she was being assaulted by her stepfather.¹⁵⁷ The Justice of the Peace sentenced her to an absolute discharge and expressed the concern that the RCMP's actions could dissuade victims like her from reporting crime and seeking the RCMP's assistance.¹⁵⁸ He pointed out that he had been faced with a very similar case one-year prior when an Inuk woman was charged with breaching a no-alcohol bail condition after she reported being assaulted by her boyfriend.¹⁵⁹ The Justice of the Peace highlighted various reports detailing the reluctance of Indigenous women in general, as well as Inuit women specifically, to call the police when they face violence due to such negative experiences, including the Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.¹⁶⁰

Personal, familial, and community-level impacts of alcohol and drug misuse

Countless sentencing decisions have accepted personal, familial, or community-level alcohol or drug abuse as relevant to the application of the *Gladue* principles.¹⁶¹ This is rarely contentious, perhaps due to the Supreme Court of Canada's explicit references to high rates of substance abuse in both *Gladue* and *Ipeelee*.¹⁶² In many cases sentencing judges have been able to clearly link an individual's offence and their own difficulties with drugs or alcohol back to personal, familial, and historic trauma.¹⁶³ Such linkages may nevertheless be worth illustrating through examples.

157 *R v A(M)*, 2020 NUCJ 4.

158 *Ibid* at paras 26-30.

159 *Ibid* at paras 5-8, 12-15. See *R v K(M)* (19 December 2018), Iqaluit 08-18-879 (Nu Ct J) [transcript on file with author].

160 *Ibid* at paras 19, 25.

161 See for example: *Peters*, *supra* note 147 at paras 7-8; *R v Swite*, 2012 BCSC 1755 at para 30; *R v Newman*, 2014 BCPC 410 at paras 8-12, 16; *R v Menicoche*, 2016 YKCA 7 at paras 22, 26; *R v Swampy*, 2017 ABCA 134 at paras 30, 37; *R v Hagwood*, 2017 YKSC 48 at para 31; *R v Altiman*, 2019 ONCA 511 at paras 110-112, 133-134; *R v RC*, 2019 SKPC 51 at paras 57, 65; *R v Keeewasin*, 2019 ONSC 3516 at para 48; *S(D)*, *supra* note 57 at para 72.

162 *Gladue*, *supra* note 1 at para 69; *Ipeelee*, *supra* note 3 at para 60.

163 See for example: *R v Stone*, 2013 ONCJ 490 at 16-19; *R c Beauvois*, 2015 QCCS 6208 at paras 20, 24, 26, 44; *Okimarw*, *supra* note 107 at paras 76-83; *R v Russell*, 2019 BCSC 1039 at paras 86-87.

In *Brown*, Justice Belobaba of the Ontario Superior Court of Justice found an Inuk's long-standing alcohol addiction, his background of family alcoholism, and his related developmental disorders were mitigating factors in a case involving an unprovoked assault while intoxicated.¹⁶⁴ He noted that Mr. Brown's parents turned to heavy drinking after surviving government relocation, leading to his own FASD, as well as his placement in government care and with physically and emotionally abusive adoptive parents.¹⁶⁵ This "turbulent childhood full of physical and emotional abuse and instability" in turn "contributed to his use and abuse of alcohol at an early age and to further addiction problems as an adult".¹⁶⁶ Mr. Brown's addiction "affected every aspect of his life including emotional and vocational stability", and he was only able to overcome these difficulties for short periods of time.¹⁶⁷ Alcohol abuse was a way in which he would attempt to cope with life pressures, but he would become a "fighter" when intoxicated.¹⁶⁸ At the same time, he took steps to seek treatment and counselling, indicating positive prospects for rehabilitation.¹⁶⁹

In *Charles*, Justice Albright of the Saskatchewan Court of Queen's Bench took into account intergenerational and community-level alcohol abuse in northern Saskatchewan when sentencing a Cree man for a sexual assault committed at a party.¹⁷⁰ He accepted that Mr. Charles had "learned about human sexuality in an alcohol-fueled environment" and had "himself suffered sexual abuse in an alcohol environment".¹⁷¹ These circumstances appear to have factored into Mr. Charles' overall "disadvantaged background" that was "the most significant mitigating factor" in this case.¹⁷²

In *Willier*, Justice Greckol of the Alberta Court of Queen's Bench (as she then was) sentenced a young Cree man who had been drinking since age 12, who was a "chronic heavy user" of Percocet/OxyContin, and who had pleaded guilty to various charges including possession of

164 *R v Brown*, [2009] OJ No 979 (QL), 2009 CanLII 9760 (Sup Ct) at para 45.

165 *Ibid* at paras 16-17, 27.

166 *Ibid* at para 25.

167 *Ibid*.

168 *Ibid* at para 28.

169 *Ibid* at paras 30, 45.

170 *R v Charles*, 2015 SKQB 302 at para 43.

171 *Ibid* at para 42.

172 *Ibid* at para 51.

drugs and guns.¹⁷³ She found that Mr. Willier learned “drug trafficking as a way of life” from both “father figures in his life”: his father who was involved in the drug trade in Edmonton, and his grandfather who was involved in the drug trade on reserve.¹⁷⁴ It was also clear that he was “the inheritor of colonialism and the Aboriginal school legacy” as his maternal grandparents were both residential school survivors, both became addicted to alcohol, and his grandfather became addicted to marijuana.¹⁷⁵ That same grandfather, who participated in his upbringing, “was violent towards his wife and others and kept guns in his home”.¹⁷⁶ Justice Greckol found that all these factors contributed to why Mr. Willier was before her for sentencing.¹⁷⁷

Fetal Alcohol Spectrum Disorder as a *Gladue* factor

One particularly challenging legacy of high rates of alcohol misuse in many Indigenous communities is its link to correspondingly high rates of FASD, which has been recognized as a “*Gladue* factor” where its presence is associated with intergenerational or community-level alcohol misuse.¹⁷⁸ Several sentencing cases summarize extensive evidence regarding the ramifications of FASD for an individual involved in the criminal justice system.¹⁷⁹ For ease of reference, this section summarizes several potential implications of FASD for sentencing that have received detailed and explicit judicial consideration. This summary includes both legal conclusions and factual findings. This is not to suggest past expert evidence and courts’ associated findings of fact should be uncritically invoked and relied upon as though they were precedents.¹⁸⁰ Instead what

173 *R v Willier*, 2016 ABQB 241 at paras 2, 57.

174 *Ibid* at paras 108-111.

175 *Ibid* at para 108.

176 *Ibid*.

177 *Ibid* at para 110.

178 See for example: *Charlie*, *supra* note 20 at para 37; *Drysdale*, *supra* note 15 at paras 62, 64; *R v MG*, 2017 ABCA 163 at para 5; *R v McDonald*, 2018 BCPC 244 at para 85; *R v Charlie*, 2018 YKTC 44 at para 52, *aff’d* 2020 YKCA 6; *R v Blackplume*, 2019 ABPC 273 at para 62; *R v JP*, 2020 SKCA 52 at paras 43-45 [JP]; *McKay*, *supra* note 58 at paras 14, 27; *R v Paquette*, 2020 ABPC 173 at paras 148-149; *R v Head*, 2020 ABPC 211 at paras 59-63.

179 See for example: *R v WALD*, 2004 SKPC 40 at paras 40-41; *R v Harper*, 2009 YKTC 18 at paras 24-27; *R v FD*, 2016 ABPC 40 at paras 7-8.

180 See *R v Fead*, 2017 ABCA 222, *Berger & Greckol JJA* at paras 15, *Slatter JA* at para

follows is an overview of several broad social facts relating to FASD, the relevance of which will depend on the evidentiary record before the court in a given case.

FASD has been described as “a non-clinical umbrella term that refers to a range of cognitive deficits associated with disabilities incurred when a mother uses alcohol during her pregnancy”.¹⁸¹ The potential relevance of this permanent disability to sentencing is readily apparent from some of its symptoms, which could include “poor memory, impulsiveness, [and an] inability to appreciate fully the consequences of one’s actions”.¹⁸² Where FASD leads to cognitive deficits that undermine an individual’s ability to restrain their urges and impulses, to appreciate their actions are morally wrong, or to comprehend the causal link between court-ordered punishment and the crime for which they are convicted, they may lessen the relevance of deterrence and denunciation and mitigate moral blameworthiness.¹⁸³ Individuals with this condition also “generally do poorly in prison and are often victimized by other inmates”.¹⁸⁴

The cognitive deficits associated with FASD will vary from one individual to the next and for this reason they are ordinarily established through expert evidence like medical reports.¹⁸⁵ However, constraints on the availability of FASD assessments may qualify as a systemic factor that could contribute to Indigenous over-incarceration.¹⁸⁶ In *McKay*, Judge Devine of the Provincial Court of Manitoba took into account the observations of senior professionals who suspected Mr. McKay—an Oji-Cree man from a remote and under-resourced northern community—suffers from FASD and related deficits.¹⁸⁷ While she did not have any medical reports before her, Judge Devine held that

24, interpreting *R v Daley*, 2007 SCC 53 at para 86; *Alberta Report v Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 1081 at paras 21, 27-28, interpreting *Williams*, *supra* note 104 at para 54.

181 *R v Ramsay*, 2012 ABCA 257 at para 15 [*Ramsay*], citing Kent Roach & Andrea Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing” (2009) 42 UBC L Rev 1.

182 *Ibid.*

183 *Ibid* at paras 20-25.

184 *R v JMR*, 2004 BCCA 617 at paras 6-8.

185 *Ramsay*, *supra* note 181 at paras 15, 20. See also *R v Okemow*, 2017 MBCA 59 (*sub nom R v JMO*) at paras 72-73; *R v Quash*, 2019 YKCA 8 at paras 55-57, leave to appeal to SCC refused, 38708 (31 October 2019); *R v Scofield*, 2019 BCCA 3, Fisher JA at paras 104-106, dissenting.

186 *R v McKay*, 2019 MBPC 11 at para 39.

187 *Ibid.*

disregarding the information she did have available to her “would put an unfair burden on Mr. McKay who by virtue of the very same *Gladue* factors that have impacted his criminal offences, cannot produce medical reports”.¹⁸⁸ She also highlighted Mr. McKay’s demeanour and language during sentencing, which were “extremely emotionally immature, unable to grasp the gravity of what he did, and able to convey information in only a very rudimentary way”.¹⁸⁹

In *Mumford*, Justice Kiteley of the Ontario Superior Court of Justice accepted expert evidence establishing the following general facts regarding the complex implications of FASD for the criminal justice system:

- The majority of individuals with FASD do not have all the associated facial features, but this does not mean they are only partially affected (para 115);
- FASD is “grossly under diagnosed and misdiagnosed” (para 116);
- As many as 95% of those with FASD may have “mental problems” and yet it is “rarely diagnosed” (para 118);
- Individuals with FASD develop a range of secondary disabilities which can be ameliorated with appropriate interventions, including “mental health problems, disrupted school experience, trouble with the law, confinement/incarceration, inappropriate sexual behaviour, alcohol and drug problems, dependent living and problems with employment” (para 119);
- As many as 40-50% of juvenile and adult offenders have FASD and “[r]ecidivism, probation and parole violations are inevitable” (para 120);
- Individuals with FASD typically struggle with concrete thinking, disorganized narration, and difficulties processing what is said to them, which “often leads to misunderstandings and accusations of lying” (para 121);
- 90% of individuals with FASD have “an average or higher IQ”, whereas “all have a significantly lower AQ (Adaptive Abilities) than would be expected” and these are “needed to perform the daily activities required for personal and social sufficiency” (para 122); and

188 *Ibid.*

189 *Ibid.*

- FASD “cannot be cured” but “cognitive therapy and drugs are used to respond to symptoms”, which include attention deficit issues, mood issues, and mood and cognitive stability (para 124).¹⁹⁰

As described by Judge Trueman in *CJM*, the deficits associated with FASD can greatly impact an individual’s day-to-day experiences of the world:

A person whose brain has been compromised by FAS can be seen as resistant and defiant when they are not. They may not be able to connect institutional rules and their own behaviour. They may react inconsistently, in accordance with their own immediate needs. Misunderstanding a person with FAS can result in inappropriate punishment. If punishment is a regular occurrence, the individual with FAS will be categorized accordingly. Given that they could not foresee this possibility in the beginning, so as to avoid it, it is unrealistic to expect them to be able to resolve it successfully on their own. It simply will not happen without understanding and help.¹⁹¹

As Judge Trueman later described in *Gray*, the majority of those who suffer from FASD “will look normal, have normal physical development, and test in the normal range for intelligence” while nevertheless suffering from “an organic brain disorder”.¹⁹² It is thus often a “hidden disability” that goes undiagnosed but leaves individuals both “cognitively damaged” and “damaged further, psychologically, by being expected to perform above their level of social ability and punished for their failure when they cannot”.¹⁹³ This condition may lead to learning disabilities, depression, and even suicide and “reveals itself over time in low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, and poor living conditions”, as well as criminal acts.¹⁹⁴

Furthermore, as noted by Justice Groves of the Provincial Court of Alberta in *O’Connor*, the impact of this disorder on an individual’s ability to anticipate consequences and control impulses means it may shed light on their criminal record and history of breach convictions.¹⁹⁵ Whereas

190 *R v Mumford*, 2007 CanLII 46702 (Ont Sup Ct) at paras 115-124.

191 *R v CJM*, 2000 BCPC 199 at 9.

192 *R v Gray*, 2002 BCPC 58 at 22.

193 *Ibid* at para 26.

194 *Ibid* at para 29.

195 *R v O’Connor*, *supra* note 95 at para 34.

these might be interpreted as “a wanton disregard for Court orders, with an FASD offender such an interpretation may be harsh”.¹⁹⁶ Likewise, as FASD is a permanent disability, the prospects of rehabilitation for an individual afflicted with this condition may need to be understood broadly as available treatment may be limited to structured modification and management of their behaviour.¹⁹⁷

These impacts of FASD are by no means specific to Indigenous people, nor do all these cases involve the sentencing of Indigenous people. Nevertheless, they demonstrate how FASD can result in its own systemic issues within the criminal justice system that in turn overlap and compound with other factors outlined in this chapter. Furthermore, as pointed out by the Saskatchewan Court of Appeal in *JP*, FASD can be difficult to disentangle from other systemic and background factors when an Indigenous person is prenatally exposed to alcohol due to the equally constrained circumstances of their birth mother.¹⁹⁸

Loss of identity, culture, language, values, traditions, and ancestral knowledge

As discussed earlier, numerous sentencing decisions have acknowledged how various government policies and programs such as residential schools, the reserve system, community relocations, child apprehensions, and out-adoption have impacted individuals, their families, and their communities through loss of identity, culture, language, values, traditions, and ancestral knowledge.¹⁹⁹ However, the relevance of these impacts to other systemic factors, criminal conduct, and sentencing has been contentious at times and therefore warrants closer consideration.

Judge Bouchard of the Court of Quebec has canvassed the systemic impacts of language and culture loss through the residential school system in *Mequish*.²⁰⁰ He noted how residential school survivors were not only “uprooted from their surroundings” but “also deprived of traditional

196 *Ibid.*

197 *JP*, *supra* note 178 at paras 54-61.

198 *Ibid* at paras 43-45.

199 See for example: *R v Viscount*, 2014 BCPC 83 at paras 21, 53; *R v Sanderson*, 2014 BCSC 2566 at para 58; *R v Solomon*, 2015 CanLII 92840 (Ont Sup Ct) at 5; *R v Watts*, 2016 ABPC 57 at para 12; *Tukkiapik*, *supra* note 18 at para 180; *R v Eddy*, 2019 BCSC 2151 at para 26; *R v Vaneltzi*, 2019 YKTC 1 at para 18.

200 *R c Mequish*, 2016 QCCQ 2200 at para 76.

knowledge and their native tongue, which created a generational gulf” and made it hard for survivors “to join either white or Aboriginal communities because they had been isolated from both for so many years”.²⁰¹ This in turn was linked to “a number of social consequences in the community such as the predominance of drug and alcohol addiction, a high family violence rate, major relationship issues, sexual assaults, low self-esteem, high unemployment rates, low levels of education, and high suicide and incarceration rates”.²⁰²

Justice Baird of the British Columbia Supreme Court has similarly commented on the impacts of “cultural deracination” in *Athey*, pointing to the intergenerational effects of Mr. Athey’s grandmother’s attendance at residential school such as loss of cultural identity, community disconnection, and loss of language, culture and traditions.²⁰³ Mr. Athey stated “that he did not feel he belonged in either world, meaning his aboriginal community or the non-aboriginal world outside it”.²⁰⁴ Justice Baird rejected the Crown’s suggestion that this community disconnection could lessen the relevance of *Gladue* considerations. On the contrary, he found a “direct link between the accused and the circumstances of his life, and the grim history of cultural deracination and cruelty to which his grandmother was subjected by official federal policy”.²⁰⁵

Justice March of the Ontario Court of Justice has pointed out how cultural loss and dislocation may play into criminality among individuals who were apprehended as children in *Kebokee*.²⁰⁶ In sentencing an Indigenous man who was taken into state care at age two and passed through numerous foster homes during his childhood, Justice March described Mr. Kebokee as a “prime example” of how “[w]hen taken from their homes and communities, aboriginal children, of course, lose their connection to their people and culture” and “become, in so many ways, lost and adrift”.²⁰⁷ The Court noted Mr. Kebokee’s own view that “his upbringing did not instil in him such basic lessons of right from wrong” and found him still struggling to learn these lessons as an adult.²⁰⁸

201 *Ibid.*

202 *Ibid* at para 77.

203 *R v Athey*, 2016 BCSC 1449 at paras 43-44, 53, aff’d 2017 BCCA 350.

204 *Ibid* at 45.

205 *Ibid* at 53.

206 *R v Kebokee*, 2018 ONCJ 173.

207 *Ibid* at para 194.

208 *Ibid* at para 195.

Similarly, Justice Horkins of the Ontario Court of Justice canvassed the “all too familiar picture of a culturally dislocated Aboriginal young man” apprehended and adopted at a young age in *Karp-Johnson*.²⁰⁹ He noted that Mr. Karp-Johnson’s adoptive parents provided him with “an affluent and very supportive home”, but he still “struggled with trying to fit into essentially their world, and has not succeeded”, instead turning to criminal activity and drug abuse.²¹⁰ This out-adoption left Mr. Karp-Johnson with “very little appreciation of Aboriginal history and culture” and a constant feeling that “he did not ‘fit in’ in the different life experiences that were presented to him”.²¹¹ In Justice Horkins’ view, this is “all too typical of many of the Aboriginal offenders that come before this court” and “all too typically, it leads to turning to alcohol, drugs, and criminal activity”.²¹²

The Ontario Court of Appeal’s decision in *Kreko* also addresses how cultural identity loss can be relevant to moral blameworthiness, albeit more summarily.²¹³ In this case, the Court of Appeal held that the sentencing judge erred in treating Mr. Kreko’s Indigenous heritage as irrelevant in light of his adoption into a non-Indigenous family and his lack of awareness of his Indigenous heritage until his late teens. The Court of Appeal accepted that Mr. Kreko struggled with his identity and his adoption upon learning of it as a teenager, leading to “feelings of abandonment, resentment, and a sense that he was unwanted”.²¹⁴ It also found this “dislocation and loss of identity” could be “traced to systemic disadvantage and impoverishment extending back to his great-grandparents”.²¹⁵ It also took note of studies indicating a higher failure rate for adoptions of Aboriginal children by non-Aboriginal parents in coming to these conclusions.²¹⁶

The Ontario Court of Appeal’s decision in *Kreko* has been criticized by the Alberta Court of Appeal and treated with caution by other appellate courts, perhaps due to the Court of Appeal’s limited reasons

209 *R v Karp-Johnson*, 2017 ONCJ 314 at 7.

210 *Ibid* at 8.

211 *Ibid* at 15.

212 *Ibid*.

213 *R v Kreko*, 2016 ONCA 367.

214 *Ibid* at para 9.

215 *Ibid* at para 24.

216 *Ibid*.

with respect to how these factors were interrelated.²¹⁷ Yet the factual findings in subsequent class action lawsuits on behalf of the Sixties Scoop survivors may provide clearer links for courts to consider when sentencing Indigenous people who have been adopted and raised by non-Indigenous parents in the future.²¹⁸

Conclusion

The decisions canvassed in this chapter illustrate the range of systemic and background factors that may need to be addressed in context to the sentencing of Indigenous people, as well as how these factors often interrelate, overlap, and compound. As the Supreme Court of Canada outlined in *Gladue*, an individual's systemic and background factors can be relevant to sentencing where they shed light on why that individual is before the court, which links back to the fundamental principle of proportionality and the need to assess moral culpability. Likewise, they can shed light on whether incarceration will impact them more adversely than others, and whether prison is likely to deter or denounce their conduct in a way that is meaningful to their community, among other things. As detailed throughout Part B of this book, the Supreme Court has made it clear that close attention to an Indigenous person's systemic and background factors is meant to assist the courts in avoiding the perpetuation of systemic discrimination in the sentencing process.

At the same time, the systemic and background factors faced by Indigenous communities and collectives have relevance to the appropriateness of community-based dispositions and the need for broader social healing as well. Furthermore, Indigenous people who are victims of crime also have systemic and background factors that may be relevant to both their vulnerability to particular crimes and the potential need for reconciliation between the victim and offender.²¹⁹ The need for closer attention to

217 See *R v Laboucane*, 2016 ABCA 176 at paras 65-68, leave to appeal to SCC refused, 37177 (22 December 2016); *R v Rennie*, 2017 MBCA 44 at para 20, leave to appeal to SCC refused, 37632 (9 November 2017); *R v Bennett*, 2017 NLCA 41, Hoegg JA at para 79, dissenting.

218 See *Brown*, *supra* note 40, as addressed earlier in this chapter.

219 See for example: *R v Morris*, 2004 BCCA 305 at paras 62-63, 68; *R v Suarak*, 2007 NLTD 5 at para 74; *R v Ledesma*, 2012 ABPC 10 at para 39; *R v Atkinson*, 2012 YKTC 62 at para 33; *R v PJB*, 2015 BCPC 390 at paras 22, 27-28; *R v Woodford*, 2016 MBQB 72 at para 21; *R v Johnny*, 2016 BCCA 61 at para 21; *R v AD*, 2019 ABCA 396 at paras 26-30.

Indigenous women and children's vulnerability to victimization has not only been directed by the Supreme Court of Canada, it is now subject to explicit statutory direction from Parliament as well.²²⁰

For all these reasons, this category of unique circumstances will likely thwart any attempt at a comprehensive list or discrete set of rules purporting to fully and definitively address their potential relevancy. However, since s 718.2(e) directs the judiciary to sentence Indigenous people differently, the recognition of these differences forms a necessary starting point, and it is hoped that this chapter will assist in such an endeavour.

220 See for example: *R v West*, 2020 BCSC 352 at paras 34-36; *R v Iqalukjuaq*, 2020 NUCJ 15 at paras 26-38; *R c LP*, 2020 QCCA 1239, Ruel JA at paras 71-101; *R v Kolola*, 2020 NUCJ 28 at paras 56-67.

CHAPTER 10: CULTURALLY APPROPRIATE PROCEDURES AND SANCTIONS

The second set of unique circumstances requiring particular attention in the sentencing of an Indigenous person is analytically distinct from systemic and background factors. The Supreme Court of Canada has consistently framed this second category as “[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection”.¹ Similar to the first category of circumstances canvassed in Chapter 9, a great deal of nuance and ambiguity is packed into this summary description. At a broader level, it calls for attention to any Indigenous community-specific values and cultural differences as a relevant measure for the appropriateness of particular sentencing procedures and sanctions. This is both apparent from the overall discussion of these unique circumstances in *Gladue* and implied by the direction that an Indigenous person’s “particular aboriginal heritage or connection” assists in determining what sanctions and procedures will be appropriate for them. On a more procedural level, it requires the exploration of any culturally relevant or community-specific sentencing options that might be available for the Indigenous person before the court.

This chapter will first reiterate some of the broader principles set out by the Supreme Court in relation to these circumstances and then provide a detailed synopsis of lower court jurisprudence regarding common examples of culturally relevant sentencing procedures and sanctions that have been brought into the *Gladue* framework to date.

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 66 [*Gladue*].

Indigenous perspectives, community views, and cultural differences guide the inquiry

In terms of broader principles, it is worth remembering the Supreme Court's direction in *Wells* that section 718.2(e) requires sentencing judges "to appreciate relevant cultural differences in terms of the objectives of the sentencing process".² Sentencing judges are instructed to both "conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community".³ This may require sentencing judges to consider an Indigenous community's decision to address criminal activity associated with social problems with a restorative focus, for example.⁴

In *Ipeelee*, the Court further explained that culturally appropriate sentencing procedures and sanctions bear "on the effectiveness of the sentence itself".⁵ They respond to the direction in *Gladue* that courts must "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".⁶

Where available and appropriate, community-based sanctions are more likely to coincide with distinct Indigenous conceptions of sentencing and the needs of Indigenous people and communities, whereas Indigenous people and communities are generally not well served by incarceration, especially for less serious or non-violent offences.⁷ Sentencing disparities for similar crimes will be a natural consequence of an individualized approach focused on the particular circumstances of the offence, the offender, and the community in which it took place, and this is particularly apt when sentencing Indigenous people.⁸ While community-based sanctions may not always be suitable, "in all instances" it will be appropriate for the court to attempt to craft the sentencing process and the sanctions imposed in accordance with the relevant "Aboriginal perspective".⁹

2 *R v Wells*, 2000 SCC 10 at para 50 [*Wells*].

3 *Ibid* at para 39 [emphasis added].

4 *Ibid* at para 50.

5 *R v Ipeelee*, 2012 SCC 13 at para 74 [*Ipeelee*].

6 *Ibid*.

7 *Gladue*, *supra* note 1 at para 74.

8 *Ibid* at paras 76-77.

9 *Ibid* at para 74. As summarized in Chapter 2 and noted in Chapter 5, the phrase

Assuming these statements from the Supreme Court amount to more than mere verbiage, each Indigenous community's conception of sentencing and their understanding of the meaningfulness of particular sanctions ought to be explored. Consistent with this view, the British Columbia Court of Appeal has described the *Gladue* framework as requiring attention to the: (i) distinct worldviews of Indigenous peoples, including the substantive content of justice and the process of achieving justice; and (ii) their different cultural values and experiences.¹⁰ Presumably, culturally relevant and appropriate sentencing procedures and sanctions assist sentencing judges in tackling these difficult tasks.

While these broad statements of principle are no doubt challenging to actualize in individual cases, the Supreme Court has highlighted examples of culturally appropriate sentencing procedures and sanctions for Indigenous people. In *Gladue*, for instance, the Court referenced the then “relatively recent evolution of innovative sentencing practices, such as healing and sentencing circles, and aboriginal community council projects” when discussing this second set of unique considerations.¹¹ The Court suggested that finding and imposing an alternative sentence will be facilitated where an Indigenous community “has a program or tradition of alternative sanctions, and support and supervision are available to the offender”.¹² It also held that Parliament's intention was for 718.2(e) to reduce the use of prison as a sanction and expand restorative justice sentencing principles “with a sensitivity to aboriginal community justice initiatives”.¹³

In *Wells*, the Court accepted that the availability of Indigenous-specific addictions treatment programming and a healing lodge could be responsive to this branch of the analysis under s 718.2(e).¹⁴ Similarly, in

“Aboriginal perspective” is used in some of the reports that were before the Supreme Court of Canada in the *Gladue* appeal to describe Indigenous peoples' distinct worldviews, cultural values, and legal traditions so as to distinguish their perspectives from those implicit in the criminal justice system. See especially Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, vol I (Edmonton: Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, 1991) at 9-1. The phrase “Aboriginal perspective” is also frequently used by the Supreme Court as short-hand for evidence of an Indigenous people's distinct customs, practices, traditions, and laws. See for example: *R v Van der Peet* [1996] 2 SCR 507, 1996 CanLII 216 at para 49; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 at paras 112, 147-149.

10 *R v Sellars*, 2018 BCCA 195 at para 30 [*Sellars*].

11 *Gladue*, *supra* note 1 para 74.

12 *Ibid* at para 92.

13 *Ibid* at para 48.

14 *Wells*, *supra* note 2 at para 52.

Ipeelee, the Court concluded that the lack of reliable access to culturally relevant supports, programming, and resources for two long-term offenders helped explain why they ended up breaching their long-term supervision orders—in other words, the absence of culturally appropriate programming helped shed light on why their prior sentences were ultimately ineffective.¹⁵

Various lower court decisions have contributed their own insight to how culturally appropriate sanctions and sentencing procedures fit into the analysis. They have also expanded on the list of available procedures and sanctions that warrant close consideration when sentencing Indigenous people. For example, some appellate courts have pointed to “traditional forms of societal control”, such as peacemaking, sentencing circles, the input of Elders, and temporary community banishment.¹⁶ In other contexts they have insisted that sentencing judges must canvass any “programming, services and controls available in relation to Aboriginal offenders in particular”, whether these exist in correctional institutions or in the community.¹⁷ Each will be summarized in turn.

Urban networks of support and programming must be considered

At the same time, it is also important to recall that the *Gladue* decision itself involved the sentencing of a Cree woman from Alberta living in an urban centre on Vancouver Island, far from her Indigenous community of origin. In this factual context, the Supreme Court of Canada made it abundantly clear that alternatives to incarceration must be taken into account “[w]hether the offender resides in a rural area, on a reserve or in an urban centre”, including those existing in “metropolitan areas”.¹⁸ As the Court noted, many Indigenous people in urban centres still remain closely attached to their culture.¹⁹

The Supreme Court held that the meaning of “community” when it comes to exploring alternatives under s 718.2(e) includes “any network of support and interaction that might be available in an urban centre”.²⁰ Consistent

15 *Ipeelee*, *supra* note 5 at paras 92, 96.

16 *CP and JA v R*, 2009 NBCA 65 at para 26 [*CP and JA*]

17 *R v Ewenin*, 2013 SKCA 50 at para 28.

18 *Gladue*, *supra* note 1 at para 84.

19 *Ibid* at para 91.

20 *Ibid* at para 92.

with this view, the Court pointed to a lack of culturally relevant supports in the urban centres of Kingston and Vancouver in *Ipeelee* as being relevant to why both Mr. Ipeelee and Mr. Ladue had breached their long-term supervision orders. The second branch of the analysis of s 718.2(e) was not rendered inoperative by the mere fact that they were serving these sentences far from their Indigenous communities of origin in Nunavut and Yukon, respectively. In any event, even the absence of an urban support network for Indigenous people will not relieve a sentencing judge of their duty to try to find alternatives to imprisonment.²¹

Specific examples of culturally appropriate sentencing procedures and sanctions

The remainder of this chapter focuses on highlighting the nuanced relationships between broader cultural differences and Indigenous perspectives and some existing examples of culturally appropriate sentencing procedures and sanctions that can be incorporated into the determination of a fit and proper sentence. In doing so, it is important to note at the outset that sentencing is a highly time-sensitive process given the liberty interests at stake in these proceedings. For this reason, it appears to be the exception rather than the rule for sentencing judges to explicitly address how culturally relevant procedures and sanctions link back to the distinct perspectives and needs of Indigenous peoples.

In some cases, however, sentencing judges make these connections overt in their reasons. In *Calliboo*, for instance, Judge Krinke of the Provincial Court of Alberta pointed out how the Kainai Peacemaking Project on the Blood Reserve finds its roots in pre-contact Blackfoot society.²² Prior to contact, “the Blackfoot were self-sufficient, living off the land and governing themselves”, including through “a well-developed justice system, based on Kainai peacemaking” that provided “an effective judicial model for addressing all aspects of community life”.²³ Judge Krinke found that the contemporary Kainai peacemaking project reflects this “traditional” restorative model of justice by focusing on problem-solving and restoration of harmony through restitution and reconciliation.²⁴ This type of community initiative may reflect an Aboriginal perspective

21 *Ibid.*

22 *R v Calliboo*, 2017 ABPC 40.

23 *Ibid* at para 38.

24 *Ibid* at para 45.

regarding the objectives under the *Criminal Code* and the effectiveness of particular sanctions in achieving those objectives, thereby favouring community-based dispositions.²⁵ Judge Krinke's reasons for decision in *Callihoo* demonstrate how lower courts can further the jurisprudence by addressing different conceptions of sentencing in their appropriate context, just as the Supreme Court of Canada appears to have anticipated in *Gladue*.

In most decisions the links between the *Gladue* analysis, Indigenous community justice initiatives, and Indigenous-specific programming have received less overt attention. Still, these connections are readily apparent when the jurisprudence is examined in aggregate. Sentencing circles have garnered the most attention in the case law in terms of alternative sentencing procedures that aim to meet the unique needs and perspectives of Indigenous peoples. Other accommodations and innovations have also been addressed in the case law to date, including Indigenous justice committees, family group conferences, and Elder panels. The common threads among these alternative processes help to highlight the many connections between culturally appropriate procedures and more effective outcomes for Indigenous offenders, victims, and communities.

Of particular note, all these alternative sentencing mechanisms share a restorative justice focus that blurs the dividing line between procedure and sanction. In the words of Judge Barry Stuart of the Yukon Territorial Court (as he then was), it is often the case that “process is product” in this context.²⁶ For example, by incorporating a broader set of voices, restorative justice practices ensure the accused directly faces the community they let down and this in turn may influence “the ownership of, and commitment to the response”.²⁷ These processes can also serve a therapeutic function for victims who have an opportunity to tell their story beyond the confines of victim impact statements.²⁸

As a result, the distinction between culturally relevant procedures and culturally relevant sanctions is not always clearcut. In some cases, alternative procedures may provide a forum for problem-solving and the design of innovative sanctions or healing plans for sentencing. In others, participation in a restorative justice process has been imposed as a condition for a community-based disposition, effectively treating it as part of the sanction imposed. In spite of these fuzzy boundaries, culturally

25 *Ibid* at paras 68-86.

26 *R v Elias*, 2001 YKTC 501 at para 92.

27 *Ibid*.

28 *R v Bullen*, 2001 YKTC 504 at para 44.

appropriate procedures will first be addressed, followed by a summary of sanctions and programming with a less procedural focus. What follows are several common examples of procedures and sanctions that are responsive to this second category of circumstances. They are by no means exhaustive.

Justice committees

Justice committees are one well-established mechanism through which the members of an Indigenous community can inform sentencing judges about the unique perspectives, needs, and conditions of their community, as well as any community decisions that might have relevance to sentencing. Several of the commissions of inquiry leading up to the enactment of s 718.2(e) strongly endorsed justice committees as a way for Indigenous communities to participate in the overall administration of justice.²⁹ These ideally include a full-time coordinator and a diverse cross-section of community members who collectively assist with sentencing.³⁰ They may be equipped to: provide sentencing recommendations or advice to prosecutors and judges; assist with the preparation of pre-sentence reports; initiate healing or sentencing circles; facilitate and supervise alternative measures for diversion, supervised probation, and conditional release orders, such as community work programs, mediation, and offender reintegration; and otherwise contribute to culturally appropriate processes and sanctions for Indigenous people who enter the criminal justice system.³¹

Many courts have expressed support for Indigenous justice committees playing a role in the s 718.2(e) analysis.³² Justice Cameron of the Saskatchewan Court of Appeal stated in *Lemaigre* that justice committees

29 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision.

30 *Ibid.* See especially Quebec, *Justice for and by the Aboriginals: Report and Recommendations of the Advisory Committee on the Administration of Justice in Aboriginal Communities* (Sainte-Foy, Que: Advisory Committee on the Administration of Justice in Aboriginal Communities, 1995) at 44, 50-51.

31 *Ibid.* See also *R c Charlish*, 2020 QCCQ 2438 at para 25(1), citing Québec, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Final Report* (Québec: Gouvernement du Québec, 2019) at 305.

32 See for example: *R v Laliberte*, 2000 SKCA 27 at para 59; *R v John*, 2004 SKCA 13 at para 26 [*John*]; *R v Lemaigre*, 2004 SKCA 125 at para 52 [*Lemaigre*]; *R c Pópabano*, 2005 CanLII 48584 (CQ) at para 21, rev'd in part on other grounds 2006 QCCA 536 [*Pópabano*]; *R c Diamond*, 2006 QCCQ 2252 at para 22 [*Diamond*]; *R c Amitook*, 2006 QCCQ 2705 at paras 38, 55, 85, 127 [*Amitook*]; *R v Arcand*, 2010 ABCA 363 at para 263 [*Arcand*]; *R v Lazore*, 2015 ONSC 1090 at para 12; *R c Gunn*, 2018 QCCQ 1846 at para 55; *R c Icebound*, 2019 QCCQ 7986 at para 116; *R c Kanaterwat*, 2020 QCCQ 3293 at paras 56, 77, 83, 85, 89, 109, 135, 139-141 [*Kanaterwat*].

“often wield significant influence in controlling anti-social behaviours within their reach”.³³ Judge Bonin of the Quebec Court noted that their input into sentencing builds bridges between the judiciary and Indigenous communities and helps judges render more appropriate sentences for the members of those communities.³⁴ They can offer sentencing judges “the benefit of a recommendation by a neutral and independent group that reflects the community’s interest and understanding about the sentence to be rendered”.³⁵ They can also provide information “about the support that could be given to the accused for reintegration into the community or other measures that would help restore peace in the community”.³⁶ According to Justice Berger of the Nunavut Court of Appeal in *Ippak*, they can provide alternatives that better reflect Indigenous perspectives and legal traditions as well.³⁷

The roles and capacities of justice committees vary from one community to the next. Some may be able to provide traditional counselling, guidance, and the supervision of a wide variety of community-specific rehabilitative measures and judicially-imposed conditions, including land-based programs.³⁸ Others may offer specific programs for anger management, victim services, and wellness.³⁹ Some are able to produce reports that detail the unique circumstances of the community and the individual being sentenced in support of the *Gladue* analysis.⁴⁰ They may

33 *Lemaigre*, *supra* note 32 at para 52.

34 *Pépabano*, *supra* note 32 at para 21.

35 *Ibid.*

36 *Diamond*, *supra* note 32 at para 22. See also *R c Georgekish*, 2019 QCCQ 2341 at paras 55-56.

37 *R v Ippak*, 2018 NUCA 3 at para 92.

38 See for example: *R v Pudlat*, 2000 CanLII 2423 (Nu Ct J) at para 54 [*Pudlat*]; *R v TJS*, [2001] SJ No 908 (Sask Prov Ct) at para 41 [*TJS*]; *R c Novalinga*, 2003 CanLII 30505 (CQ) [*Novalinga*]; *Amitook*, *supra* note 32 at paras 83, 85, 110-111, 121; *R v Craft*, 2006 YKTC 19 at paras 30, 59 [*Craft*]; *R v Fobister*, [2009] OJ No 2576 (QL), 2009 CanLII 31987 (Sup Ct) [*Fobister*]; *R c Palliser*, 2011 QCCQ 1475 at para 75; *R c Labbé*, 2012 QCCQ 2794 at paras 39-40, 44; *R c Kawapit*, 2013 QCCQ 5935 at paras 26, 99 [*Kawapit*]; *R v PJB*, 2015 BCPC 390 at para 32 [*PJB*]; *R c Gunner*, 2017 QCCQ 12563 at para 107; *R c VB*, 2018 QCCQ 3870 at paras 74-76; *R c Stewart*, 2019 QCCQ 1557 at para 53; *R c Spencer*, 2019 QCCQ 1821 at paras 15, 42, 47 [*Spencer*]; *R c Iserhoff*, 2019 QCCQ 2339 at paras 42, 197-198, 203-204, 208; *R c Mianscum*, 2019 QCCQ 3829 at para 18 [*Mianscum*]; *Kanatewat*, *supra* note 32 at paras 56, 80, 139; *R c Sala*, 2020 QCCQ 3903 at para 24.

39 *John*, *supra* note 32 at para 33.

40 See for example: *R c Annabatak*, 2007 QCCQ 7788 at para 27 [*Annabatak*]; *Alasuaq c R*, 2012 QCCA 1999 at paras 2-3; *Kawapit*, *supra* note 38 at paras 18, 63, 72; *R c Weizineau*, 2014 QCCQ 8283 at paras 12-13, 15-17; *R c Appaqaq*, 2016 QCCQ 7765

also assist in organizing healing or sentencing circles.⁴¹ Some assist with other forms of victim/offender reconciliation.⁴² As contemplated by past commissions of inquiry, some offer recommendations for sentencing on behalf of their communities.⁴³ Likewise, they may be in a position to organize and support specific restorative justice measures such as public speaking or writing aimed at other members of the community, which can further the sentencing goals of denunciation and deterrence.⁴⁴

The composition of a justice committee can vary from one community to the next as well. These variations may reflect Indigenous peoples' unique cultures and traditions, or the unique circumstances of particular communities. For example, justice committees may be comprised of Elders who are respected and who demand respect in a certain Indigenous community.⁴⁵ They may also be comprised of the hereditary and elected leadership of a First Nation, in addition to community members who lead social development, education, and justice initiatives.⁴⁶ A justice committee might even include Indigenous and non-Indigenous members if this better reflects the particular community's demographics.⁴⁷

Courts have occasionally addressed procedural considerations when justice committees participate in the administration of justice as well. For example, counsel for both parties have been urged to be open and transparent about any contact they have with members of these committees as there is a risk that undisclosed representations "could serve to defeat the whole purpose of obtaining the honest, impartial

at para 17 [*Appaqag*]; *Mianscum*, *supra* note 38 at para 18.

41 *R v Taylor* (1997), [1998] 2 CNLR 140, 1997 CanLII 9813 (*sub nom WBT*) (Sask CA) at paras 51, 60 [*Taylor*]; *John*, *supra* note 32 at para 33; *Craft*, *supra* note 38 at para 30; *R v Brooks*, 2008 NSPC 58 at para 35 [*Brooks*]; *R v Pauchay*, 2009 SKPC 4 at paras 28, 55-56 [*Pauchay*]; *Kawapit*, *supra* note 38 at paras 25-26; *Appaqag*, *supra* note 40 at para 67; *R c Hester*, 2017 QCCS 5622 at para 100, *aff'd* 2019 QCCA 858.

42 See for example: *R v Evaloardjuk*, [1999] Nu J No 11 (QL), 1999 CanLII 1156 (Ct J) at paras 43, 45 [*Evaloardjuk*]; *Pudlat*, *supra* note 38 at paras 53-54; *R v CA*, 2015 NUCJ 31 at para 42(d); *R c Neeposh*, 2020 QCCQ 1235 at para 104.

43 See for example: *R v Nattar*, [1999] Nu J No 7 (QL), 1999 CanLII 2440 (Ct J); *TJS*, *supra* note 38 at paras 32, 41, 43; *R v Reid*, 2002 BCCA 268 at paras 22-23 [*Reid*]; *Annahatak*, *supra* note 40 at paras 25-27; *Kawapit*, *supra* note 38 at paras 26-32, 72, 79, 90; *Arcand*, *supra* note 32 at paras 259, 263.

44 *Appaqag*, *supra* note 40 at para 67.

45 *Novalinga*, *supra* note 38 at para 7; *Amitook*, *supra* note 32 at paras 82-83; *Arcand*, *supra* note 32 at para 259.

46 *Reid*, *supra* note 43 at para 22.

47 *R v LTB*, 2000 ABPC 42 at paras 24-25 [*LTB*].

response desired”.⁴⁸ The Alberta Court of Appeal has also urged justice committees to be transparent with respect to how their deliberations provide victims with a voice in the proceedings since “a one-sided inquiry can compromise the credibility and utility of that process”.⁴⁹

Sentencing and healing circles

Sentencing and healing circles provide another well-known procedural mechanism through which Indigenous communities can inform the sentencing process. The use of these circles in the sentencing of Indigenous people pre-dates the enactment of s 718.2(e) by several years. However, these processes quickly came to be recognized as a key way in which this provision could be actualized.⁵⁰ Sentencing circles were also endorsed by the Royal Commission on Aboriginal Peoples, as well as other contemporaneous commissions of inquiry in the early 1990s.⁵¹

While a distinction between sentencing circles and healing circles is not always clearly drawn in judicial decisions, the former may be viewed as a modification of the ordinary sentencing process to approximate or accommodate the latter. As noted by Chief Justice Bayda of the Saskatchewan Court of Appeal (as he then was) in *Morin*, “[t]he sentencing circle has its genesis in the healing circle which from time immemorial has been a part of the culture of many First Nations of Canada and of the indigenous people of other countries”.⁵² Healing circles may be used to facilitate conflict resolution in a wide variety of contexts, including governance disputes, child and family services matters,

48 *TJS*, *supra* note 38 at para 32.

49 *Arcand*, *supra* note 32 at para 263.

50 See for example: *R v Morin*, [1995] 4 CNLR 37, Sherstobitoff JA at 52, 1995 CanLII 3999 (Sask CA) [*Morin*]; *R v Manyfingers*, [1996] AJ No 1025 (QL), 191 AR 342 (Prov Ct) at paras 116, 119-120, 123-126 [*Manyfingers*]; *R v HR*, [1997] AJ No 816 (QL), 1997 CanLII 24699 (Prov Ct) at para 61; *R v McDonald*, [1997] SJ No 117 (QL), 1997 CanLII 9710 (CA) at para 132; *R v Peters*, 1998 CanLII 13351 (Sask Prov Ct) at paras 28-29 [*Peters*]; *R v Paul (D)* (1998), 203 NBR (2d) 243, 1998 CanLII 28731 (Prov Ct) at para 5. See also the summary of the legislative debate on Bill C-41 set out in Chapter 3 of this publication.

51 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996) at 109-116 [*Bridging the Cultural Divide*].

52 *Morin*, *supra* note 50 at 66.

and labour relations.⁵³ They can even provide a process for addressing the trauma, anxiety, and stress associated with the trial process itself.⁵⁴ And the many applications of healing circles are by no means limited to the mainstream justice system. In contrast, sentencing circles have been described as not so much an example of an Indigenous practice as they are a tool “to allow members of Indigenous communities to share information with the sentencing judge”.⁵⁵

Nonetheless, if an Indigenous community has a tradition of using healing circles to resolve conflicts this may reflect their distinct conception of sentencing and their view of the appropriate response to wrongdoing. As Chief Justice Bayda stated in *Morin*:

The circle was premised on two fundamental notions: first, the wrongful act was a breach of the relationship between the wrongdoer and the victim and a breach of the relationship between the wrongdoer and the community, and second, the well-being of the community and consequently the protection of its members and the society generally depended not upon retribution or punishment of the wrongdoer, but “healing” of the breaches of the two relationships. The emphasis was primarily, if not entirely, upon a restorative or healing approach as distinct from a retributive or punitive approach.⁵⁶

Sentencing circles may thus provide a partial accommodation of Indigenous peoples’ distinct conceptions of sentencing and legal perspectives, particularly if sensitivity is shown to the diversity of customs, traditions, and laws that distinguish one Indigenous society from another.⁵⁷ This in turn can demonstrate the judiciary’s appreciation of “the importance of incorporating Aboriginal methods of dispute resolution and the value of encouraging community involvement in

53 See for example: *Larocque v Waterhen First Nation*, [1998] CLAD No 626 (QL), 1998 CanLII 18537; *DDL v SRLP*, 2001 SKQB 370 at paras 22–23; *LD v Dilico Anishinabek Family Care (CFSAs s 61)*, 2009 CFSRB 75 at para 63; *Chief Gayle Strikes With a Gun v Piikani First Nation*, 2014 FC 908 at paras 97–98, 163, 170; *AB v Brant Family and Child Services (CFSAs s 144)*, 2017 CFSRB 26 at paras 31, 50.

54 *R v BB*, 2017 BCPC 364 at para 115.

55 *R v EO*, 2019 YKCA 9 at para 60, citing Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner’s Handbook* (Toronto: Emond, 2019) at 208, leave to appeal to SCC refused, 38742 (28 November 2019) [EO].

56 *Morin*, *supra* note 50 at 66–67.

57 See *Taylor*, *supra* note 41 at paras 12–13; *Brooks*, *supra* note 41 at para 38.

these cases”.⁵⁸ As Judge Barry Stuart of the Yukon Territorial Court articulated in *Moses*:

The circle has the potential to accord greater recognition to Aboriginal values, and to create less confrontational, less adversarial means of processing conflict. Yet the circle retains the primary principles and protections inherent to the justice system. The circle contributes the basis for developing a genuine partnership between Aboriginal communities and the justice system by according the flexibility for both sets of values to influence the decision making process in sentencing.⁵⁹

A sentencing or healing circle furthers this partnership by giving a voice to an Indigenous person’s community members, family members, and other supports—as well as victims and their own supports—when determining a fit sentence and crafting a community-based disposition.⁶⁰ This is true even where the sentencing or healing circle takes place “separately and independent of the judicial system”.⁶¹ In other words, sentencing judges have been willing to accept the recommendations of sentencing or healing circles that operate outside the courtroom and without their direct participation so long as they are kept fully informed of the process and outcome.⁶² This is consistent with the role a circle plays in generating new ideas and a more detailed base of information than might otherwise be available to the sentencing judge.⁶³ It is also consistent with the central focus of these circles on healing at both an individual and a community level.⁶⁴ As some decisions point out, in order for sentencing and healing circles to be effective they will need to

58 *R v Rope*, [1995] 2 CNLR 209 at 216, 1995 CanLII 4084 (Sask QB), aff’d [1995] 4 CNLR 98, SJ No 494 (CA) [*Rope*].

59 *R v Moses*, [1992] 3 CNLR 116 at 140, 1992 CanLII 12804 (Y Terr Ct) at 130 [*Moses*].

60 *R v Webb*, [1992] YJ No 144 (QL), [1993] 1 CNLR 148 (Terr Ct) at 153 [*Webb*]; *R v Sellon*, [1996] NJ No 172 (QL), 1996 CanLII 11618 (SC) at para 17 [*Sellon*]; *Peters*, *supra* note 50 at paras 9, 23, 29, 30; *R v Gregoire*, 2009 NLTD 21 at paras 43, 46 [*Gregoire*]; *R v McNabb*, 2014 MBPC 10 at paras 15-16, 21 [*McNabb*]; *R v MI*, 2018 NSPC 56 at para 5.

61 *Manyfingers*, *supra* note 50 at para 121(1).

62 See for example: *R v Rich (S) et al (No 1)*, [1994] 4 CNLR 167 at 172, 1994 CanLII 10459 (NLTD) [*Rich*]; *R v Rich (S) et al (No 2)*, [1994] 4 CNLR 174 at 175, 1994 CanLII 10342 (NLTD); *Manyfingers*, *supra* note 50 at para 51; *Sellon*, *supra* note 60 at paras 15, 17; *Gregoire*, *supra* note 60 at para 45; *R v Petiquay*, 2006 QCCQ 506 at paras 3-4, 25-29, 98; *R v Jacko*, 2010 ONCA 452 at paras 32, 81, 92.

63 *Moses*, *supra* note 59 at 124; *EO*, *supra* note 55 at para 60.

64 *Taylor*, *supra* note 41 at para 70.

be driven by Indigenous communities and the values, beliefs, concerns, and desires of those communities must be respected by the criminal justice system.⁶⁵

Several sentencing judges have articulated criteria they consider when assessing whether it is appropriate to seek guidance from a sentencing or healing circle.⁶⁶ In *Joseyounen*, Judge Fafard of the Saskatchewan Provincial Court suggested that the utility of the circle depends in part on whether the accused and the victim (or an appropriate proxy) are both willing to participate.⁶⁷ Judge Fafard also urged that “[t]he accused must have deep roots in the community in which the circle is held and from which the participants are drawn” so as to ensure participants know their background, culture, strengths, and weaknesses.⁶⁸ Likewise, they ought to include Elders or community leaders who will not exercise political influence to the detriment of either the accused or the victim.⁶⁹ In some cases, special supports for the victim may need to be made available.⁷⁰ And as the circles are not necessarily designed for fact finding, disputed facts ought to be resolved in advance.⁷¹ Finally, the sentencing judge should be willing to take a calculated risk and depart from the usual sentencing range given that the focus of these circles is often on reintegration, rehabilitation, and restoration of harmony in the community.⁷² Yet these guidelines are not “carved in stone” and exceptions may “not be difficult to find”.⁷³

Appellate courts have been reluctant to impose their own definitive criteria on sentencing judges in terms of defining the precise circumstances in which sentencing circles will be most appropriate.⁷⁴ A decision to seek guidance from a sentencing circle is “largely a matter of discretion for the

65 *Webb*, *supra* note 60 at 160-161; *R v Nicholas*, [1996] NBJ No 214 (QL), 1996 CanLII 18909 (Prov Ct) at para 19.

66 See for example: *R c Alaku*, [1993] JQ No 2381, 1993 CanLII 9323 (CQ); *R v Cheekineew*, [1993] 3 CNLR 172, 1993 CanLII 8895 (Sask QB) [*Cheekineew*]; *Rich*, *supra* note 62; *R v Joseyounen* (1995), [1996] 1 CNLR 182, 1995 CanLII 10830 (Sask Prov Ct) [*Joseyounen*]; *Manyfingers*, *supra* note 50; *R v WM*, [1997] OJ No 2778 (QL) (CJ).

67 *Joseyounen*, *supra* note 66 at paras 16-19, 28-31.

68 *Ibid* at para 20.

69 *Ibid* at para 24.

70 *Ibid* at para 32.

71 *Ibid* at paras 33-35. See also *R v BL*, 2002 ABCA 44 at para 41 [*BL*].

72 *Ibid* at paras 36-44.

73 *Ibid* at paras 2, 28.

74 See for example: *Morin*, *supra* note 50, Sherstobitoff JA at 47; *BL*, *supra* note 71 at paras 30, 58.

trial judge”.⁷⁵ Likewise, a certain amount of flexibility may be necessary “in order to ensure that sentencing circles can be employed in the varied circumstances of particular cases, which will always involve offenders, victims, and communities with their own needs and experiences”.⁷⁶ For example, a victim’s voice may be crucial in some circumstances, but it may not always be necessary.⁷⁷ In many cases, Indigenous organizations or justice committees will have their own procedures and may conduct their own feasibility or eligibility assessments.⁷⁸ To the degree that appellate courts have provided guidance to date, they have largely echoed or paraphrased the criteria set out in *Joseyounen* and a certain amount of flexibility has been retained.⁷⁹ Yet appellate courts have shown concern over the composition of these circles in terms of their participants, especially in circumstances where they indicate power imbalances or a lack of independence.⁸⁰

According to Judge Wolf of the Provincial Court of British Columbia, sentencing circles will typically involve multiple procedural steps, including:

- 1) An application by the offender to participate in the circle process;
- 2) A healing circle for the victim;
- 3) A healing circle for the offender;
- 4) A sentencing circle to develop consensus on the elements of a sentencing plan, which may incorporate commitments by the system, community, and family members, as well as by the offender; and
- 5) Follow-up circles to monitor the progress of the offender.⁸¹

Judge Wolf also summarized several goals that guide sentencing circles:

- Promoting healing for all affected parties.
- Providing an opportunity for the offender to make amends.
- Empowering victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive resolutions.

75 *R v Munson*, 2003 SKCA 28 at para 70. See also *R v Stick*, 2001 SKQB 99 at para 6.

76 *EO*, *supra* note 55 at para 59.

77 *Ibid*, citing Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice Canada, 1997) at 11.

78 *Taylor*, *supra* note 41 at paras 51, 60; *EO*, *supra* note 55, citing *R v Gingell*, [1996] YJ No 52 (QL), 50 CR (4th) 326 (Terr Ct) [*Gingell*]. See also: *Craft*, *supra* note 38 at paras 30-31; *Brooks*, *supra* note 41 at para 44; *Pauchay*, *supra* note 41 at paras 23, 55-56; *R v Elliot*, 2014 NSPC 110 at paras 50-59 [*Elliot*]; *R v Syliboy*, 2018 NSPC 83 at para 18.

79 *Elliot*, *supra* note 78 at paras 21-23.

80 See for example: *BL*, *supra* note 71 at paras 46-57; *EO*, *supra* note 55 at paras 64-64.

81 *R v SR*, 2020 BCPC 227 at para 31 [*SR*].

- Addressing the underlying causes of criminal behavior.
- Building a sense of community and its capacity for resolving conflict.
- Promoting and sharing community values.⁸²

The emphasis placed on community connections in the early jurisprudence of northern courts should not be taken to mean sentencing circles have limited applicability in urban centres.⁸³ Interpreting their availability in this way would distinctly disadvantage urban Indigenous people in spite of the fact that dislocation to urban centres is often itself a by-product of Canada's colonial history.⁸⁴ Sentencing circles may be useful in an urban setting so long as they include participants who are still willing and able to supervise a community-based disposition.⁸⁵ As the Saskatchewan Court of Queen's Bench stated in *Cheekineew*, "the term 'community' ought to receive a wide and liberal construction".⁸⁶ Likewise, Justice Sherstobitoff of the Saskatchewan Court of Appeal encouraged the urban Métis community of Saskatoon to take part in sentencing circles in *Morin*.⁸⁷ In *Gladue*, the Supreme Court of Canada endorsed urban networks of Indigenous support and interaction as a form of "community" for the purposes of its sentencing framework, providing further support for urban sentencing circles.⁸⁸ As set out in Chapter 3, the legislative debate for s 718.2(e) included discussion of the success of a sentencing circle in the City of Saskatoon in the early 1990s as a precedent worthy of this explicit statutory backing.

If past sentencing ranges indicate a lengthy penitentiary sentence will be appropriate, this may be perceived as a barrier to the use of sentencing circles.⁸⁹ Yet if participation in a circle still advances the sentencing

82 *Ibid.*

83 See for example *R v SEH*, [1993] BCJ No 2967 (QL) (Prov Ct).

84 *Elliot*, *supra* note 78 at paras 40, 46. See also *R v Lavergne*, 2018 ONCJ 901 at para 39, citing Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Publishing, 2019) at 217 [*Lavergne*].

85 See: *Elliot*, *supra* note 78 at paras 34-40, citing: *Cheekineew*, *supra* note 66; *R v McDonald*, 2012 SKQB 158 at para 25, aff'd 2013 SKCA 38. See also: *Rope*, *supra* note 58; *Lavergne*, *supra* note 84 at paras 46-50.

86 *Cheekineew*, *supra* note 66 at para 25. Note that this passage appears to be misquoted in *R v JJ*, 2004 NLCA 81 at para 28 & *Elliot* at paras 37, 42.

87 *Morin*, *supra* note 50 at 57.

88 *Elliot*, *supra* note 78 at paras 42-45, citing *Gladue*, *supra* note 1 at para 92.

89 See for example: *Morin*, *supra* note 50, Sherstobitoff JA at 52; *R v Kinistino*, 2006 SKPC 46 at paras 8-18; *R v Favel*, 2009 SKQB 225 at para 16; *R v Louie*, 2013 SKQB 307 at paras 39-40.

objectives under the *Criminal Code* and highlights mitigating factors it could justify a shorter custodial sentence.⁹⁰ The circle could also support individual and community awareness, reconciliation, and healing regardless of whether the ultimate disposition involves custody.⁹¹ On the other hand, the initiation of a sentencing circle for the sole purpose of setting the length of a custodial sentence could run contrary to the participants' intentions and might further contribute to Indigenous alienation from the criminal justice system in this way.⁹²

Sentencing and healing circles play both procedural and substantive roles in sentencing. On a procedural level, they can provide insight into the circumstances underlying the offence, including individual, family, and community dynamics.⁹³ They can indicate whether someone has support from family, community members, or the victim moving forward.⁹⁴ They can bridge cultural and linguistic barriers.⁹⁵ They can contribute to crime prevention by facilitating more cooperation between professionals and Indigenous community members.⁹⁶ Yet in the words of Chief Justice Bayda of the Saskatchewan Court of Appeal (as he then was), “[a] sentencing circle is much more than a fact-finding exercise with an aboriginal twist”.⁹⁷ A circle “permits not only a release of information but a purging of feelings, a paving of the way for new growth, and a reconciliation between the offender and those he or she has hurt”.⁹⁸ The notion of healing in this context also extends to the fact that the community to which the offender has accounted is assuming “an authority over and responsibility for the offender”.⁹⁹

90 See: *Morin*, *supra* note 50, Bayda CJS at 73; *BL*, *supra* note 71 at para 58; *R v Poker*, 2006 NLTD 154 at paras 76-78, 81 [*Poker*].

91 *Joseyounen*, *supra* note 66 at paras 45-46; *BL*, *supra* note 71 at para 58.

92 *R v Holmes*, 2018 ABQB 916 at para 5 [*Holmes*].

93 See for example: *R v Naappaluk*, [1993] QJ No 888 (QL), [1994] 2 CNLR 143 (CS) at 155 [*Naappaluk*]; *R v Caron*, [1997] OJ No 5661 (QL) (Ct J) at paras 22-23 [*Caron*]; *R v VK*, 2006 SKPC 79 at paras 62, 66 [*VK*]; *McNabb*, *supra* note 60 at paras 30, 64; *R v McGill*, 2016 ONCJ 138 at paras 20-22 [*McGill*]; *R v Francis-Simms*, 2017 ONCJ 402 at paras 19-30 [*Francis-Simms*].

94 See for example: *McNabb*, *supra* note 60 at para 13, 16, 29; *McGill*, *supra* note 93 at paras 20, 23-26.

95 See for example: *Naappaluk*, *supra* note 93 at 153; *Poker*, *supra* note 90 at 3, 47, 54.

96 *R v JKE*, [1999] YJ No 119 (QL) (Terr Ct) at paras 64-66.

97 *Taylor*, *supra* note 41 at para 70.

98 *Ibid.*

99 *Ibid.*

Framing these substantive outcomes in the language of the *Criminal Code*, an Indigenous person's participation, apologies, and expressions of remorse within a circle may indicate if the sentencing objectives of specific deterrence, rehabilitation, taking responsibility, and acknowledgement of harm are being achieved.¹⁰⁰ Participation in the circle may indicate they are addressing the issues underlying their offending, such as addictions, trauma, and cultural disconnection, with clear relevance to rehabilitation.¹⁰¹ It can also support victim/offender reconciliation and community reintegration.¹⁰²

Bearing all this in mind, it should not be surprising to find that healing circles will at times form part of a community-based disposition that takes place post-incarceration or in the absence of a prison sentence.¹⁰³ In other words, these circles provide both culturally appropriate procedures *and* sanctions in advancing the *Gladue* analysis.

Family group conferencing

Family group conferencing provides another means by which an Indigenous person's family and community members can play a key role in the sentencing process. Similar to sentencing circles, family group conferencing was developed from Indigenous practices. In child protection matters, family group conferences bring extended family members together with parents to discuss their underlying issues and dynamics and to formulate a plan of extrajudicial measures so their children can safely return to family care.¹⁰⁴ Indigenous family and

100 See for example: *Gingell*, *supra* note 78 at paras 117-118, 121-122; *Sellon*, *supra* note 60 at paras 15, 17; *Peters*, *supra* note 50 at para 15; *VK*, *supra* note 93 at para 62; *R v SDR*, 2012 BCPC 414 at paras 19, 40; *Poker*, *supra* note 90 at para 81.

101 See for example: *Gingell*, *supra* note 78 at paras 54-56; *Caron*, *supra* note 93 at paras 22-27; *R v Jack*, 2008 BCPC 332 at paras 59, 74, *aff'd* 2008 BCCA 437; *R v Michel*, 2008 NWTSC 1 at 3; *Francis-Simms*, *supra* note 93 at para 48; *R v Therieault*, 2019 BCSC 357 at para 14.

102 *John*, *supra* note 32 at paras 32-33; *Gregoire*, *supra* note 60 at paras 42-46; *Craft*, *supra* note 38 at para 48; *Fobister*, *supra* note 38 at paras 55-56, App. A.

103 See for example: *R v Fineday*, 2007 SKPC 2 at Sch. 2; *Kawapit*, *supra* note 32 at para 25; *R v LWT*, 2017 BCPC 65 at para 83; *R v RR*, 2018 ONSC 6083 at para 46; *R v Johnson*, 2018 NSSC 10 at paras 14, 43-44.

104 See for example: *SP and JP, children of EP and FP*, 1998 CanLII 18705 (NLSC) at para 12; *Family & Children's Services of St. Thomas & Elgin v AC*, 2013 ONCJ 453 at para 139; *Children's Aid Society of Toronto v AG*, 2015 ONCJ 331 at paras 101-104; *New Brunswick (Social Development) v JT*, 2016 CanLII 81051 (NBQB) at paras 22-24; *Mi'kmaq Family and Children Services v MW*, 2016 NSFC 18 at paras 41-42; *PL v MD*, 2017 NBQB 79 at paras 10-11.

community members may participate in these processes to facilitate cultural connections and continuity within a kinship network as well.¹⁰⁵ These same principles can be incorporated into the sentencing process in a roughly analogous manner, especially for Indigenous youth.

Family group conferencing was first developed in New Zealand in order to accommodate Māori culture and traditions in child protection proceedings and the sentencing of youths, and the idea was subsequently imported into Canada.¹⁰⁶ In *R v MM*, Judge Cohen of the Ontario Court of Justice gave a brief outline of how these conferences offer a restorative justice approach to sentencing:

In family group conferencing, a meeting is convened with the offender, the victim, their families and supporters in a facilitated but informal setting. The purpose of the conference is to “give an opportunity for those affected by the crime—the offender, his or her family members and the victim—to reach a solution in a supportive environment” (see: “13th Report of the Standing Committee on Justice and Legal Affairs”, Chapter 6, pp. 4-7).¹⁰⁷

Judge Cohen went on to state that young people are particularly likely to benefit from restorative justice processes like family group conferencing. These conferences offer the possibility of having young people confront those directly affected by their actions, providing an opportunity to better understand the harm they have caused “in an immediate, concrete and hence meaningful way”.¹⁰⁸ Like other restorative justice processes, family group conferences can also result in “specific and individualized proposals to remedy the harm” that may have a more significant impact than other sanctions available to the sentencing judge.¹⁰⁹

Statutory authority for conferencing has since been incorporated into the *Youth Criminal Justice Act* as a sentencing tool for young people. The Act authorizes youth court judges to convene conferences to obtain

105 See for example: *Children’s Aid Society of the County of Bruce v J(D)*, 2013 ONSC 717 at paras 36, 95, 97; *SSMB v British Columbia (Children and Family Development)*, 2014 BCSC 662 at paras 22-24; *Alberta (Child, Youth and Family Enhancement Act, Director) v CL*, 2020 ABPC 23 at paras 33-38, 216-218.

106 See *R v McKay*, [1997] AJ No 552 (QL), 203 AR 77 (Prov Ct) at para 6 [*McKay*]; *R v M(B)*, 2003 SKPC 83 at para 54 [*M(B)*]; *R v MAM*, 2004 BCPC 438 at para 6 [*MAM*]; *R v Quash*, 2014 BCSC 198 at para 56.

107 *R v MM*, [2001] OJ No 2844 (QL) at para 10, 46 CR (5th) 173 (Ct J).

108 *Ibid* at para 15.

109 *Ibid*.

their advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, and reintegration plans.¹¹⁰ Conferences initiated pursuant to the Act have been recognized as a valuable tool for obtaining relevant *Gladue* information regarding an Indigenous young person and alternatives to incarceration that might not have been available otherwise.¹¹¹ They also provide for open and effective communication among a wider circle of individuals concerned with the offending behaviour and circumstances of the young person than would be possible in a formal court proceeding.¹¹² Furthermore, they can provide an opportunity for the victim and offender to meet face-to-face and come away with a greater sense of each other's humanity.¹¹³

Similar to sentencing circles, family group conferences can have both procedural and substantive relevance to sentencing. In terms of process, they facilitate information sharing and problem solving.¹¹⁴ In terms of substance, the conference can also provide a vehicle through which responsibility and reparations are addressed, and community and family connections are identified in support of the young person's rehabilitation and reintegration into a more stable family environment.¹¹⁵ Family group conferences aim to both explore how people have been affected by the offence in question and work toward repairing the harm that has resulted.¹¹⁶ According to Judge Reilly of the Alberta Provincial Court (as he then was), they make constructive use of a person's shame as a motivation for them to come to an agreement to repair the harm they have done so they can get back into the community—Judge Reilly termed this “re-integrative shame”.¹¹⁷

While family group conferences were originally modelled from the Indigenous culture and traditions of Māori in New Zealand, they could provide a more culturally relevant process for Indigenous peoples in

110 *Youth Criminal Justice Act*, SC 2002, c 1 at s 19; *MAM*, *supra* note 106 at para 6, citing Nicholas Bala, “Diversion, Conferencing, and Extrajudicial Measures for Adolescent Offenders” (2003) 40 *Alta L Rev* 991.

111 *R v TDP*, 2004 SKPC 57 at paras 21, 28-29, 45 [*TDP*]; *R v CJA*, 2005 SKPC 10 at paras 9-10 [*CJA*].

112 *TDP*, *supra* note 111 at para 21.

113 *Ibid* at para 22. See also *CJA*, *supra* note 111 at paras 10-11, 15-16.

114 *M(B)*, *supra* note 106 at para 55. See also *CJA*, *supra* note 111 at paras 30-32.

115 *M(B)*, *supra* note 106 at para 55. See also *CJA*, *supra* note 111 at paras 12-15, 17.

116 *McKay*, *supra* note 106 at para 12.

117 *Ibid* at para 13. See John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).

Canada as well. For example, these conferences can be conducted in a circle format that has important symbolism for many Indigenous peoples in Canada, thereby creating a safe environment for the participants to openly share their views.¹¹⁸ In some cases, respected Elders from an Indigenous community will participate.¹¹⁹ Conferencing has been included within probation orders as well.¹²⁰

Elder panels and participation

Elders may be able to provide input into the sentencing process in various ways, including through advisory panels, *viva voce* evidence, sentencing circles, conferences, support letters, and interviews for *Gladue* reports. In fact, most specialized sentencing processes for Indigenous people appear to favour the involvement of Elders. Indigenous societies often entrust Elders with important decision-making powers and accord them significant respect.¹²¹ As stated by the Royal Commission on Aboriginal Peoples:

Elders are generally, although not exclusively, older members of the community. They have lived long and seen the seasons change many times. In many Aboriginal cultures, old age is seen as conferring characteristics not present in earlier years, including insight, wisdom and authority. Traditionally, those who reached old age were the counsellors, guides and resources for the ones still finding their way along life's path.¹²²

Consistent with this view, many of the commissions of inquiry preceding the enactment of s 718.2(e) called for the creation of Elder advisory panels or other mechanisms for Elder input into the sentencing process.¹²³ In some parts of the country, judges appear to have echoed these calls.¹²⁴

118 *M(B)*, *supra* note 106 at paras 55-57.

119 See *CJA*, *supra* note 111 at paras 10, 14, 33, 43.

120 See for example: *R v AGA*, 1998 ABQB 60 at para 65 [*AGA*].

121 *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 24-26 [*Pastion*]; *R v Morrisseau*, 2017 ONCJ 307 at paras 90-95 [*Morrisseau*].

122 *Pastion*, *supra* note 121 at para 25, citing Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 4, *Perspectives and Realities* (Ottawa: Supply and Services Canada, 1996) at 103.

123 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially *Bridging the Cultural Divide*, *supra* note 51 at 109-116.

124 See for example *R v Badman*, 1993 ABCA 155 at para 1.

Canadian courts have since recognized that involving Elders in the sentencing process can be responsive to Parliament's direction to pay particular attention to Indigenous peoples' unique circumstances.¹²⁵

Elders may be given a voice in the sentencing process through the establishment of advisory panels or councils. For example, Elder councils were created in Attawapiskat and Sandy Lake in the early 1990s to propose alternative measures, sit with sentencing judges as advisory panels, and assist in the design and supervision of community-based dispositions.¹²⁶ In Nunavut, a sentencing judge on circuit can sit with a panel of Elders who will "make observations about the offender, sometimes in the fashion of a lecture or encouragement to the person to do better for themselves, their family and their community".¹²⁷ In this way, Elder involvement in sentencing can be a restorative process in and of itself.¹²⁸ The traditional guidance of these Elders also helps ensure the Nunavut courts are familiar with each community and its needs.¹²⁹ The input of Elder panels has therefore been likened to the information on an individual's background factors and sentencing options that is more often sought by way of pre-sentence reports.¹³⁰

In some cases, Elders' input into the sentencing process might take place in the absence of a formalized justice initiative. For example, they might be called as witnesses to give evidence during the sentencing hearing with respect to the personal circumstances and rehabilitation prospects of the accused, the values and traditions of the community, or their views on an appropriate disposition or conditions.¹³¹ Similar to the Elder panels in Nunavut's hamlets, they may directly admonish the individuals being sentenced in some cases.¹³² The views and proposals of community Elders

125 See for example: *R v Wells*, 1998 ABCA 109 at para 47; *CP and JA v R*, *supra* note 16 at para 26; *R v Oakoak*, 2011 NUCA 4 at para 24 [*Oakoak*]; *Morrisseau*, *supra* note 121 at paras 101-103; *R v Leigh*, 2018 ONCJ 776 at para 76 [*Leigh*].

126 *R v Willocks*, [1992] OJ No 3029 (QL), [1994] 1 CNLR 167 (Ct J) at 170-171, *aff'd* [1995] OJ No 342 (QL), 37 CR (4th) 131 (Gen Div) [*Willocks*].

127 *R v Egeesiak*, 2010 NUCJ 10 at para 54.

128 See for example: *R v Kootoo*, [2000] Nu J No 10 (QL), 2000 CanLII 4442 (Ct J) at paras 37-39 [*Kootoo*]; *R v Caza*, [2000] Nu J No 9 (QL), 2000 CanLII 3756 (Ct J) at para 14 [*Caza*].

129 *R v BT*, 2007 NUCA 3 at paras 10, 12-15.

130 *Willocks*, *supra* note 126 at 173; *Oakoak*, *supra* note 125 at paras 25-26.

131 See for example: *R v Ootova*, [1991] NWTJ No 118 (QL) (SC) at para 25; *R v LLJ*, 1999 CanLII 15162 (BCSC) at para 9; *R v Roper*, 2016 BCSC 977 at para 114; *R v SA*, 2016 ONSC 5355 at paras 19-22, 45.

132 See *R v Arey and Meyook*, 2006 YKTC 105 at para 14.

may be brought to the attention of the sentencing judge through a *Gladue* report as well.¹³³ Elders have provided input by way of sentencing submissions or letters filed in court in some cases.¹³⁴ Similar to the role of Elder panels, the submissions and testimony of Elders help ensure the courts are alive to both the unique circumstances of the person being sentenced and the perspectives of the community to which they might eventually return.¹³⁵

Finally, it is worth noting that Elders also play a role in culturally relevant sanctions and dispositions. For example, many community-based sentences for Indigenous people have included conditions for participation in specific programming guided by Elders or Elder counselling in the community.¹³⁶

Specialized sentencing courts

Another way in which the sentencing process has been modified to accommodate Indigenous peoples' unique circumstances and perspectives is through the development of specialized courts. Examples range from a peacekeeping court that sits on the Tsuu T'ina Reserve in southern Alberta to a "*Gladue* court" in downtown Toronto, and they share the goal of facilitating healing and rehabilitation, working closely with community members, and finding different routes through which the principles of sentencing can be achieved.¹³⁷ Their approach tends to be lengthy, difficult, ongoing, and holistic, and in some cases it will incorporate traditional practices and values.¹³⁸ In other words, these specialized courts frequently embody restorative justice practices.

As noted by Judge Schmidt of the British Columbia Provincial Court, "[t]he intensity of the process itself shows offenders that the community

133 See for example: *R v JN*, 2013 ONCA 251 at paras 27, 50; *R v DG*, 2014 BCCA 84 at para 31 [*DG*]; *R v Carter*, 2014 SKPC 150 at para 11 [*Carter*]; *R v TRJ*, 2015 BCSC 352 at para 15; *R v Stonechild*, 2017 SKQB 138 at paras 32-33, 71.

134 See for example: *R v Jack*, [1993] YJ No 52 (QL) (SC) at paras 3, 8, 12; *R v Stimson (Gallegos)*, 2008 ABPC 48 at paras 12-13, 25 [*Stimson*]; *R v Wells*, 2009 ABPC 108 at para 3; *R v Campbell*, 2013 MBPC 19; *R v Johnson*, 2013 YKSC 126 at para 31; *R v Lamontagne*, 2019 BCSC 1251 at paras 23-24; *R v Charlie*, 2020 YKCA 6 at para 64.

135 See for example: *Stimson*, *supra* note 134 at paras 23-25; *R v Aulotte*, 2015 ABPC 37 at para 7.

136 See for example: *Peters*, *supra* note 50 at para 30(11); *R v Youngman*, 2006 ABPC 28 at para 58; *R v Betsidea*, 2007 NWTSC 85 at 25; *Kawapit*, *supra* note 38 at para 26; *Spencer*, *supra* note 38 at paras 15, 47; *R v Sark*, 2020 PECA 9 at para 53.

137 *R v Williams*, 2004 BCPC 459 at paras 34-39.

138 *Ibid* at para 40.

decidedly denounces the conduct” and “[t]he offender cannot simply enter a guilty plea, and submit to the sentence of the court”.¹³⁹ In this way, specialized courts can have both procedural and substantive implications for sentencing akin to sentencing circles, conferences, and Elder panels.

One early example of a specialized court tailored to meet the distinct needs of Indigenous peoples is the unified court operating in Nunavut. As the vast majority of Nunavut’s residents are Inuit, Justice Bychok of the Nunavut Court of Justice has often described this single-level trial court as a “*Gladue* court” that “must account for the unique circumstances of Inuit, their culture, history and society”.¹⁴⁰ The Court of Justice has long been attentive to both the systemic and background factors that many Inuit face and the unique cultural perspectives that Inuit hold.¹⁴¹ In doing so, many of its decisions acknowledge and engage with Inuit law, traditional justice, and societal values.¹⁴² The Nunavut Court of Appeal has accepted that Inuit social values, precepts, and concepts of justice are relevant to sentencing proceedings of the Nunavut Court of Justice so long as there is an adequate record for their case-specific application.¹⁴³

Among other accommodative features, Elder panels and justice committees facilitate restorative justice approaches and community-based dispositions before the Nunavut Court of Justice.¹⁴⁴ Lay Inuit court workers facilitate the administration of justice in a territory with unique cultural and linguistic needs, including by obtaining information on an individual’s systemic and background factors and conducting

139 *Ibid* at para 41.

140 See for example: *R v Holland*, 2017 NUCJ 3 at para 13 [*Holland*]; *R v Apak*, 2018 NUCJ 1 at para 23 [*Apak*]; *R v Kippomee*, 2018 NUCJ 8 at para 26, rev’d on other grounds 2019 NUCA 3; *R v Jaypoody*, 2018 NUCJ 36 at para 99 [*Jaypoody*].

141 See for example *Evaloardjuk*, *supra* note 42 at paras 18–26; *R v Attutwoaa*, 2013 NUCJ 10 at paras 27–29; *R v Bracken*, 2016 NUCJ 3 at para 42; *R v Mikijuk*, 2017 NUCJ 2 at paras 17–22.

142 See for example: *R v Sala*, 1999 CanLII 1738 (Nu Ct J); *R v Iqaluit (City)*, [2002] Nu J No 1 (QL), 2002 CanLII 53331 (Ct J) at paras 2–5; *Holland*, *supra* note 140 at para 26; *Apak*, *supra* note 140 at para 38; *R v Anugaa*, 2018 NUCJ 2 at paras 39–43; *Jaypoody*, *supra* note 140 at paras 75, 94–99.

143 See *R v Itturiligaq*, 2020 NUCA 6 at paras 74–78. The term Inuit Qaujimajatuqangit appears to be used interchangeably with Inuit “social justice concepts”, “social (justice) precepts”, and “social value[s]” in this case. Note that the term is also incorporated into various territorial statutes in Nunavut, including the *Wildlife Act*, SNu 2003, c 26 where it is defined as “traditional Inuit values, knowledge, behaviour, perceptions and expectations” (s 2).

144 See for example: *Kootoo*, *supra* note 128 at paras 37–39; *Caza*, *supra* note 128 at para 14; *R v S(KG)*, 2009 NUCJ 9 at paras 1, 4; *R v JN*, 2015 NUCJ 22 at paras 37, 72.

bail hearings.¹⁴⁵ There are also community justices of the peace who contribute experience and knowledge of their communities by “sit[ting] in judgment of their fellow community members”.¹⁴⁶ These unique attributes help ensure sentencing judges have adequate and sufficient information to carry out the analysis under s 718.2(e), supplemented by pre-sentence reports and other evidence as needed.¹⁴⁷

There are also specialized courts that facilitate the implementation of s 718.2(e) for Indigenous people living in urban areas. One of the best-known examples would be the *Gladue* courts operating in several cities in Ontario, first piloted in Toronto in 2001 through the joint efforts of judges, academics, and community agencies.¹⁴⁸ These dedicated courts were developed as a direct response to the over-incarceration of Indigenous people in order “to give effect and meaning to *Gladue*”.¹⁴⁹

The *Gladue* courts address Indigenous peoples’ unique circumstances in both bail and sentencing hearings.¹⁵⁰ They give meaning and effect to *Gladue* by reviewing extensive materials and programming assessments, involving Indigenous court workers, and using both *Gladue* reports and sentencing circles in appropriate cases.¹⁵¹ The *Gladue* courts also have access to specialized *Gladue* aftercare workers to provide input, support, and supervision of conditions following the sentencing hearing itself.¹⁵² According to Judge Nakatsuru of the Ontario Court of Justice (as he then was), their proceedings see “much cooperation between the Crown and the defence”, including in assembling as much information as possible regarding an Indigenous person’s unique circumstances.¹⁵³ Likewise, the direct participation of the individual being sentenced may contribute to their level of insight and understanding, consistent with restorative justice practices.¹⁵⁴

145 *R v Ivarluk*, 2005 NUCJ 5 at para 38; *R v Etuangat*, 2009 NUCA 1 at paras 33-34; *Chwyl v Law Society of Nunavut*, 2014 NUCJ 9 at para 192; *R v EA*, 2017 NUCJ 16 at para 48; *R v GH*, 2020 NUCJ 21 at paras 11-12 [*GH*].

146 *R v Korwtak*, 2019 NUCJ 3 at para 37.

147 *Oakoak*, *supra* note 125 at paras 19-26; *GH*, *supra* note 145.

148 *R v Kokopenace*, 2013 ONCA 389 at para 140, rev’d on other grounds 2015 SCC 28.

149 *R v George*, 2012 ONCJ 756 at para 12.

150 See for example: *R v Sledz*, 2017 ONCJ 151.

151 See for example: *R v Dayfoot*, 2007 ONCJ 332; *R v E(K)*, 2015 ONCJ 68; *McGill*, *supra* note 93; *Francis-Simms*, *supra* note 93.

152 See: *R v Tourville*, 2011 ONSC 1677 at para 34; *R v Rondeau*, 2017 ONCJ 644 at paras 64, 67, 69; *R v Parent*, 2019 ONCJ 523 at paras 96-97 [*Parent*].

153 *R v Armitage*, 2015 ONCJ 64 at paras 6, 14 [*Armitage*].

154 *R v Al-Saedi*, 2017 ONCJ 204 at para 17.

Similar to Ontario's *Gladue* courts, in British Columbia there are several specialized courts known as First Nations Courts that facilitate the implementation of s 718.2(e), among other things. They have also been described with more inclusive language as Indigenous Community Courts.¹⁵⁵ Their sentencing process has been referred to as a "healing plan", their proceedings may commence with a prayer or smudge, and they have often involved specialized probation officers, counsellors, Elders, and advisors who are able to liaise with Indigenous communities.¹⁵⁶ In short, they provide a more culturally appropriate sentencing process that addresses systemic barriers otherwise limiting access to justice for Indigenous victims and offenders alike.¹⁵⁷

First Nations Courts facilitate restorative justice and victim/offender reconciliation by encouraging the direct victims of offences, their family members, friends, and community representatives to attend and speak to an offence's impacts.¹⁵⁸ Often participants "speak to the circumstances in the context of the effects of colonization and the assimilation policies" and "serve to assist the court in developing a better understanding of the perceptions and points of view of the Indigenous persons or Indigenous communities impacted by the offences".¹⁵⁹ In addition to direct testimony of this kind, *Gladue* reports are frequently used in their proceedings as well.¹⁶⁰

The First Nations Courts have also applied the following unique guidelines to their sentencing proceedings:

...with the application of Canadian laws, to promote respect for the person, family and community; to recognize culture and language; to acknowledge the importance of education and healing; to take a holistic approach to problem-solving; to recognize the importance of healthy people, families and communities; and, to acknowledge the need for a safe and peaceful community.¹⁶¹

155 *SR, supra* note 81 at paras 28-30.

156 *R v O*, 2012 BCCA 129 at para 23.

157 *SR, supra* note 81 at para 30.

158 *R v Fisher*, 2017 BCPC 92 at para 39.

159 *Ibid.*

160 *R v CJHI*, 2017 BCPC 121 at para 24.

161 *R v CGO*, 2011 BCPC 145 at para 2.

Gladue reports as restorative process

One further adaptation of the sentencing process has been the development and use of specialized pre-sentence reports to better reflect the unique circumstances and needs of Indigenous peoples—namely, *Gladue* reports. Several commissions and studies that addressed Indigenous over-incarceration in the lead up to the enactment of s 718.2(e) had identified the need for improvements to the pre-sentence reports used when sentencing Indigenous people, including more consistent use of these reports, the incorporation of community perspectives, and greater detail, cultural sensitivity, and attention to the other unique circumstances of Indigenous peoples.¹⁶² The Supreme Court itself anticipated pre-sentence reports would incorporate *Gladue* factors, including representations from the relevant Indigenous communities.¹⁶³ Following the release of the *Gladue* decision, *Gladue* reports came to be piloted in several jurisdictions across Canada, starting in Ontario, where Aboriginal Legal Services first developed these reports.

Similar to other sentencing innovations for Indigenous people, *Gladue* reports are designed to be “restorative in nature”, providing the individual being sentenced with an opportunity for introspection and critical contemplation of their own personal history, “situat[ing] it in the constellation of family, land and ancestry that informs identity and worth”.¹⁶⁴ In keeping with this goal, sentencing judges have occasionally made mention of an individual obtaining insight into their own circumstances and treatment needs by participating in the preparation of a *Gladue* report and reviewing the final product.¹⁶⁵

Where an Indigenous agency, justice committee, or program oversees the preparation of *Gladue* reports they may directly reflect Indigenous perspectives and community views, including support for

162 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 77-78.

163 *Gladue*, *supra* note 1 at para 93(7).

164 *R v Sand*, 2019 SKQB 18 at para 47, citing Justice Melvyn Green, “The Challenge of Gladue Courts” (2012) 89 CR (6th) 362. See also *R v TLC*, 2019 BCPC 314 at para 47.

165 See for example: *R v Stump*, 2015 BCSC 1891 at paras 29, 47; *Leigh*, *supra* note 125 at para 76; *R v Assinerwai*, 2019 ONCJ 281 at para 53.

community-based dispositions and supervision.¹⁶⁶ Where they are prepared by outside writers they often still canvass these community perspectives by interviewing numerous community collaterals, such as hereditary and elected leaders, Elders, community counsellors, and family members.¹⁶⁷

Some *Gladue* reports may canvass the unique circumstances of Indigenous victims as well.¹⁶⁸ Typically, the diverse voices from collateral interviews are reflected in direct quotes that ensure they are “not being filtered or interpreted by the writer”, providing a “valuable substitute to the speaker coming to court and saying it in person”.¹⁶⁹ As a *Gladue* report requires the interrogation of underlying factors and incorporates diverse perspectives of family and community collaterals, it can be a difficult process for the person being sentenced and not everyone is willing to undergo this level of inquiry.¹⁷⁰

Community banishment and land-based isolation

In terms of culturally relevant sanctions for sentencing Indigenous people, one frequently discussed but highly controversial example is the imposition of a period of banishment. Several of the commissions of inquiry and studies leading up to s 718.2(e)'s enactment identified banishment as a traditional sanction within many Indigenous societies, while distinguishing it from the way in which imprisonment results in *de facto* banishment but without community control over the terms of reintegration.¹⁷¹ A number of Canadian courts have likewise

166 See for example: *R v McDonald*, 2018 ONSC 4275 at para 14 [*McDonald*]; *Mianscum*, *supra* note 38 at paras 18, 40(10), 65; *Parent*, *supra* note 152 at paras 85-86.

167 See for example: *Carter*, *supra* note 133 at para 11; *DG*, *supra* note 133 at para 31; *R v Johnny*, 2015 BCSC 615 at para 28, rev'd on other grounds 2016 BCCA 61 [*Johnny*]; *R v Legere*, 2016 PECA 7 at para 23; *R v BS*, 2018 BCSC 2044 at para 56; *R v Baptiste*, 2019 BCSC 2339 at paras 30-32; *R v Mills*, 2019 ABQB 683 at paras 35-36; *R v Crier*, 2020 ABQB 475 at para 34.

168 See for example: *R v Quock*, 2015 YKTC 32 at paras 104-107; *R c Neashish*, 2016 QCCQ 10775 at para 135; *R v DBS*, 2018 YKSC 16 at para 25.

169 *Armitage*, *supra* note 153 at para 21.

170 See for example: *R v Pelletier*, 2016 ONCJ 628 at para 8; *R v James*, 2020 YKCA 11 at paras 13, 15.

171 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially *Bridging the Cultural Divide*, *supra* note 51 at 22, 60, 259-260.

acknowledged temporary or even permanent banishment as having roots in the traditional justice practices of Indigenous peoples.¹⁷² In practice the term banishment has been used to describe functionally distinct sentencing conditions ranging from a period of land-based isolation within an Indigenous nation's traditional territory to a "no go" condition of probation preventing re-entry into the community.

Community banishment continues to be practised by some Indigenous communities in Canada today, often drawing on the legal authority of the *Indian Act*, self-government agreements and statutes, or Indigenous laws and traditional practices.¹⁷³ This form of community decision generally takes place outside the confines of the sentencing process, possibly constituting a collateral consequence in some cases.¹⁷⁴ Yet in what appears to be a comparatively rare practice, sentencing judges have also crafted probationary banishment conditions under the *Criminal Code*, including at an Indigenous community's express request. As the latter practice is controversial it warrants closer examination here.

Just as the sanction of banishment has deep roots within many Indigenous societies, this practice has a long but controversial history in both British and Canadian law.¹⁷⁵ More recently, appellate courts have urged that this sanction must be used sparingly.¹⁷⁶ In 1968, for example, Justice Dickson of the Manitoba Court of Appeal (as he then was) called for restraint in the use of banishment conditions on public policy grounds:

In Canada communities are interdependent and relations between them should be marked by mutual respect and understanding. A practice whereby one community seeks to rid

172 See for example: *Saila v R*, [1983] NWTJ No 46 (QL), [1984] 1 CNLR 173 (SC) at 176 [*Saila*]; *Taylor*, *supra* note 41 at para 32; *R v Morris*, 2004 BCCA 305 at paras 29, 63; *CP and JA*, *supra* note 16 at para 26.

173 See for example: *Gamblin v Norway House Cree Nation Band*, [2000] FCJ No 2132 (QL), 2000 CanLII 1661 (TD); *Band (Eeyouch) c Napash*, 2014 QCCQ_10367 at para 12; *R v Hayes*, 2007 ONCA 816; *Solomon v Garden River First Nation*, 2019 FC 1505.

174 See Chapter 16 for a discussion of collateral consequences in context to the sentencing of Indigenous people. See especially *R v RRM*, 2009 BCCA 578 at para 39.

175 See: *R v Maheu*, [1995] OJ No 2312 (QL), 28 WCB (2d) 203 (Ct J) at paras 6-7, citing: *Newsome v Bowyer* (1729), 24 ER 959 at 960 (Ch); *R v Fitzpatrick* (1915), 25 CCC 42 (Man KB); *R v Skinner*, 2002 CanLII 23568 (NL Prov Ct) at para 57, citing *The Transportation Act of 1784*, 24 Geo III, c 56, aff'd 2002 NFCA 44; *R v Deering*, 2019 NLCA 31 at para 13, citing *Removal of Criminal Offenders from this Colony*, CSN 1872, c 44 [*Deering*].

176 See for example: *R v Kebijekonaham*, 2008 SKCA 105 at para 12; *R v Etifier*, 2009 BCCA 292 at para 17 [*Etifier*]; *R v GN*, 2019 NUCA 5 at para 18 [*GN*].

itself of undesirables by foisting them off on other communities violates this basic concept of consideration for the rights of others and should not be tolerated.¹⁷⁷

In another leading decision from 1982, *Malboeuf*, the Saskatchewan Court of Appeal echoed this caution against the overuse of banishment conditions in context to a Métis community in northern Saskatchewan where “a cultural background exists for a form of punishment through banishment”.¹⁷⁸ While expressing this caution, the Court of Appeal left open the possibility that this could be justified in exceptional circumstances, such as where evidence is presented regarding predictable circumstances and predetermined controls, arrangements between communities, or the likelihood of rehabilitation.¹⁷⁹ Subsequent decisions have further fleshed out the unique circumstances in which these orders may be appropriate, as well as the need for a thorough evidentiary basis.

In 1997, for example, the Saskatchewan Court of Appeal upheld a temporary banishment condition requiring a Cree man to spend six months in isolation on a remote island in northern Saskatchewan.¹⁸⁰ This condition was proposed during a sentencing circle and administered by the La Ronge Indian Band’s justice committee. The Court was satisfied that the central purpose of the condition was rehabilitative—“for self-discipline, self-treatment, introspection, self-examination of one’s goals, one’s place in the scheme of life, and such other notions designed to produce a better person”.¹⁸¹ Isolation would also involve a measure of punishment through deprivation of mobility, amenities, and intimate personal contact, but this did not undermine its primary purpose of “influencing the offender’s future conduct and securing his good behaviour”.¹⁸² While it is difficult to find references to similar examples of land-based isolation in subsequent jurisprudence, it is possible that some communities continue to facilitate this kind of sanction.¹⁸³

It is important to point out that the *Criminal Code* stipulates that the period of isolation or community banishment must be “desirable... for protecting society and for facilitating the offender’s successful

177 *R v Fuller* (1968), 2 DLR (3d) 27, 67 WWR 78 (Man CA) at 30-31.

178 *R v Malboeuf*, [1982] 4 CNLR 116, 1982 CanLII 2540 (Sask CA) at para 8.

179 *Ibid.*

180 *Taylor*, *supra* note 41.

181 *Ibid.*, Bayda CJS at para 37.

182 *Ibid.*

183 See for example *PJB*, *supra* note 38 at paras 11, 32.

reintegration into the community”.¹⁸⁴ Prior to 1996, the *Code*’s equivalent statutory language mandated that it be “desirable... for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences”.¹⁸⁵ In keeping with these legislative directives, courts have repeatedly insisted that banishment orders must be “protective rather than punitive”.¹⁸⁶ Likewise, there must be a nexus with the offender, protection of the community, and community reintegration.¹⁸⁷ In other words, it “cannot be used simply to punish an offender in the abstract”.¹⁸⁸

Banishment conditions have been deemed appropriate in cases where they were used to protect a victim from further interaction with the accused or to facilitate rehabilitation, so long as their geographic scope can be justified.¹⁸⁹ Likewise, this kind of condition may be appropriate if the accused consents to the restrictions in question or they facilitate a victim’s recovery from the trauma of an offence.¹⁹⁰ At the same time, the condition must be crafted with care and restraint, requiring attention to the accused’s ties to the area, the level of hardship they will face from displacement, its proportionality with the offence in question, and the reasonableness of its outer boundaries.¹⁹¹ As these conditions are rare and have significant consequences, the accused ought to be given an opportunity to make submissions or lead evidence before such a condition is imposed.¹⁹²

Courts are also attentive to the views of Indigenous communities in determining whether a period of banishment from their territories will be justified. In *Saila*, for instance, Justice Weerd of the Northwest Territories Supreme Court upheld a Justice of the Peace’s decision to

184 *R v Rowe*, [2006] OJ No 3738 (QL), 2006 CanLII 32312 (CA) at para 5, citing *Criminal Code*, RSC 1985, c C-46, s 731.2(3)(h) [*Rowe*].

185 *R v Voong*, 2015 BCCA 285 at para 27.

186 *R v Klein*, 2011 SKQB 94 at para 25; *R v Battisti*, 2019 ONSC 4091 at para 91.

187 *R v Shoker*, 2006 SCC 44 at para 13.

188 *Deering*, *supra* note 175 at para 18.

189 *Ibid*; *Rowe*, *supra* note 184 at para 6; *R v Adam*, 2014 BCSC 1943 at paras 50-54; *R v Forner*, 2020 BCCA 103 at paras 59-61.

190 *R v Dunn*, [1993] BCJ No 2254 (QL), 1993 CanLII 2357 (CA), Wood JA at para 11 [*Dunn*]; *R v Leasak*, 2007 ABCA 38, Martin JA at paras 43-44.

191 *R v Cardinal*, 1999 ABQB 323 at paras 13-20; *Rowe*, *supra* note 184 at paras 7-8; *Etifier*, *supra* note 176 at paras 15-16; *R v White*, 2015 BCSC 2383 at paras 31-32; *Deering*, *supra* note 175 at para 21; *R c Proctor*, 2019 QCCQ 5877 at paras 182-186.

192 *R v Beal*, 2011 ABCA 35 at para 18; *GN*, *supra* note 176 at para 18.

order someone not to return to a high arctic community for one year following his release from prison. He found that both the Justice of the Peace and the accused shared an Inuit cultural background, ostracism is a well-known means of dealing with wrongdoing in Inuit traditions, and the condition recognized the fact that in the eyes of the community his presence would not be welcome until that time had elapsed.¹⁹³ Several other courts have taken into account whether banishment has been sought by the members or leadership of an Indigenous community in assessing its appropriateness.¹⁹⁴ Yet a community's views may not be determinative if the banishment condition is aimed at securing the protection of specific individuals within the community in question.¹⁹⁵ This is consistent with the dual bases on which these conditions might be justifiable—namely the rehabilitation of the accused *or* the protection of victims.

Courts have also expressed concern over the risk that banishment conditions have the potential to interfere with rather than further an Indigenous person's prospects for rehabilitation and reintegration into their home community. In *Cardinal*, for example, the Alberta Court of Appeal struck out a probation condition that banished a Dene man from his home reserve in spite of the fact that the *Gladue* report before the sentencing judge indicated Mr. Cardinal had employment prospects and access to unofficial counselling there.¹⁹⁶ Rather than requiring him to avoid re-integration with his First Nation, the Court amended the probation order to provide for "a more structured chance to re-engage with his community".¹⁹⁷ Providing for discretionary exceptions to banishment may help balance the rehabilitative needs of the accused against protection of their victims and their home community.¹⁹⁸ If someone is likely to eventually return, the community will have a clear interest in facilitating their long-term reintegration and rehabilitation.¹⁹⁹

193 *Saila*, *supra* note 172 at 176-177.

194 See for example: *Dunn*, *supra* note 190 at paras 6, 8; *R v Williams*, [1997] BCJ No 2101 (QL), 1997 CanLII 3219 (CA) at para 12; *R v RHGM*, 2010 BCPC 434 at paras 27, 45-47; *R v Schafer*, 2019 YKTC 41 at paras 14-18, 32 [*Schafer*].

195 *R v Felix*, 2002 NWTSC 63 at para 32.

196 *R v Cardinal*, 2017 ABCA 396 at para 13, 43, 45.

197 *Ibid* at paras 43-44.

198 See for example: *Dunn*, *supra* note 190 at para 10; *R v Emile*, 2019 NWTTC 9 at paras 38-41.

199 *Schafer*, *supra* note 194 at para 42.

Community service orders

Many sentencing judges have sought to actualize s 718.2(e) by requiring an Indigenous person to perform community service hours in a conditional sentence or probation order. This can achieve deterrence as well as restorative justice objectives such as community reintegration, rehabilitation, and reparations, especially where the community service takes place in the area where the offence was committed, whether this is in a rural or urban area.²⁰⁰ Community service can also be framed around culturally relevant activities, such as chopping wood for Elders, harvesting and distributing country foods, or otherwise assisting with events, projects, or ceremonies in the community.²⁰¹ It is generally appropriate to build on an individual's particular skills and talents in this regard as well.²⁰²

A community service order can also facilitate community input and reintegration by having it supervised and administered through an Indigenous justice committee, a First Nation's Band manager, a caseworker, or some other community representative.²⁰³ So long as the accused is agreeable, it can also be crafted around underlying systemic and background factors, such as having someone speak publicly in the community regarding their experiences within the residential school system.²⁰⁴ Likewise, it can be linked to the offence—for example, by having someone counsel young people on the dangers or harms

200 See for example: *R v Poucette*, 1999 ABCA 305 at Sch A (2)(f); *R v Skani*, 2002 ABQB 1097 at paras 67, 69; *Gregoire*, *supra* note 60 at para 58; *R v Moosomin*, 2010 SKPC 182 at paras 63, 65; *R v Meechas*, 2012 MBPC 53 at paras 84-95; *R v McCook*, 2015 BCPC 1 at para 182; *R v RJN*, 2016 YKTC 55 at para 49; *Sellars*, *supra* note 10 at para 39(h); *R v MI*, 2018 NSPC 56 at para 23; *R v Diabo*, 2018 QCCA 1631 at paras 98-99; *R v Luke*, 2019 ONCJ 514 at paras 59, 69; *R v Charlie*, 2019 YKTC 32 at para 49(10); *R v Denneby*, 2019 ABQB 912 at para 60.

201 See for example: *AGA*, *supra* note 120 at para 61; *Reid*, *supra* note 43 at para 33; *John*, *supra* note 32 at para 59(c); *R v Pastivet* (2008), [2009] 4 CNLR 301, 2008 CanLII 82921 (NL Prov Ct) at Sch A, 17(a); *Kawapit*, *supra* note 38 at para 99; *R v Felix*, 2017 SKCA 16 at para 39; *R c Hester*, 2017 QCCS 5622 at para 99, aff'd 2019 QCCA 858.

202 See for example: *R v Richards*, [1979] OJ No 1030 (QL), 49 CCC (2d) 517 (CA) at 527; *R v Travers*, [2001] MJ No 250 (QL), 2001 CanLII 17782 (Prov Ct) at para 54(8) [*Travers*]; *R v Wainwright*, 2016 ONSC 7723; *Appaqaq*, *supra* note 40 at para 67.

203 See for example: *Sellon*, *supra* note 60 at para 19; *R v AJJ*, [1999] SJ No 917 (QL), 1999 CanLII 13993 (Sask Prov Ct) at para 60; *John*, *supra* note 32 at para 59(c); *R v C(K)*, 2011 ONCJ 364 at para 65(10).

204 *R v PBK*, 2013 ONSC 427 at para 74(10).

associated with their criminal conduct.²⁰⁵ Often the precise details of culturally appropriate and community-specific proposals will be outlined in *Gladue* reports.²⁰⁶

Indigenous programming provided in the correctional system or the community

While s 718.2(e) explicitly directs sentencing judges to consider all available sanctions *other than* incarceration that are reasonable in the circumstances, the task of canvassing culturally appropriate sentencing procedures and sanctions may still require attention to the Indigenous programming available within correctional institutions, as well as what is available for transitioning back into the community. The options available in custody may include Indigenous-specific units, Indigenous inmate liaison officers, opportunities for participation in pipe ceremonies, sweat lodges, healing circles, and smudging, and access to Elders and family members.²⁰⁷ There are also healing lodges, community-based residential facilities, and community correctional centres that are designed to facilitate an Indigenous person's reintegration post-incarceration.²⁰⁸

Questions regarding the suitability, eligibility, or availability of these programs will sometimes be addressed in *Gladue* reports, which can inform the sentencing judge's own non-binding recommendations.²⁰⁹ In some cases, sentencing judges will order the clerk to forward a *Gladue* report or at least its recommendations to the attention of

205 See for example: *R v Logan*, [1999] OJ No 3411 (QL), 1999 CanLII 927 (CA) at para 62(6); *LTB*, *supra* note 47 at para 38(8), 39(8); *Travers*, *supra* note 202 at para 54(8); *Gregoire*, *supra* note 60 at para 58; *R v WJN*, 2012 ONSC 5917 at para 54(h); *R v Kutsukake*, [2006] OJ No 3771 (QL), 2006 CanLII 32593 (CA) at para 24; *R v Small-Buffalo*, 2009 ABQB 353 at para 14 [*Small-Buffalo*]; *Appaqaq*, *supra* note 40 at para 67; *R v Heimbecker*, 2020 SKQB 304 at paras 83, 93, 95.

206 See for example: *Appaqaq*, *supra* note 40 at para 67; *McDonald*, *supra* note 166 at para 58(v).

207 See for example: *R v Land*, 2013 ONSC 6526 at paras 66-76 [*Land*]; *R v C(OE)*, 2013 MBCA 60 at paras 18-19; *R v Ewenin*, 2014 SKQB 131 at paras 149-150, 152, 162-201, 233-238; *Johnny*, *supra* note 167 at para 31; *R v Terriak*, 2019 NSPC 40 at paras 38-44.

208 See for example: *R v Kebokee*, 2018 ONCJ 173 at paras 122-124; *Holmes*, *supra* note 92 at para 16; *R v Bird*, 2019 SCC 7 at paras 157-163.

209 See for example: *R v Prevost*, [2008] OJ No 3609 (QL), 2008 CanLII 46920 (Sup Ct) at paras 48, 52; *R v Cardinal*, 2015 BCSC 2536 at paras 57-59; *R v Shearer*, 2015 ONSC 3890 at para 80; *R v Loon*, 2020 ONSC 619 at paras 24, 54.

correctional officials so as to inform their subsequent decision-making.²¹⁰ At the same time, the accused may request that some or even all of the information set out in the *Gladue* report should be withheld to ensure it does not jeopardize their classification in custody.²¹¹ This appears to reflect concerns over the use of risk assessment tools in the correctional system, as canvassed in the *Ewert* decision summarized in Chapter 8.

In attending to an Indigenous person's prospects for rehabilitation, sentencing judges may wish to be provided with detailed evidence addressing whether they are likely to have the opportunity to benefit from culturally relevant programming options "available on paper" as these may not be available, accessible, or beneficial in practice.²¹² Likewise, specific and up-to-date information regarding the availability and timing for access to culturally appropriate programming in custody may be needed in order to "weigh the programs that are available to a particular offender within the institutional setting against the services that could be provided outside the institution".²¹³

A sentencing judge can also benefit from information regarding an Indigenous person's history of access to and success in culturally relevant programming in custody as this can shed light on whether a federal sentence or a provincial sentence is more likely to further their rehabilitation.²¹⁴ Past success in culturally relevant programming and treatment during custody can also be highly relevant in dangerous offender and long-term offender proceedings for Indigenous people.²¹⁵ Likewise, evidence that the accused has already successfully engaged in culturally appropriate programs during remand—such as participation in healing circles or Elder counselling—may help the

210 See for example: *R v Kennedy-Money*, 2016 ONSC 7051 at para 47; *R v Quinn*, 2016 ABPC 121 at para 67; *R v Anderson*, 2018 BCSC 2528 paras 5, 79; *R v Fraser*, 2019 NSSC 368 at para 63; *R v Hartwick*, 2019 ONSC 3958 at para 25; *R v Louie*, 2019 BCSC 368 at paras 44-46.

211 *R v Spence & Debassige*, 2017 ONSC 4749 at paras 43, 57.

212 *R v Charlie*, 2018 YKTC 44 at paras 56-58, aff'd 2020 YKCA 6, citing *R v Taylor*, 2017 YKTC 3 at paras 115-143, 151-152. See for example: *Land*, supra note 207 at paras 64-65, 69, 76; *R v Dusome*, 2019 ONCJ 444 at paras 38-44.

213 *R v Wilson*, 2008 ABQB 588 at para 116, rev'd on other grounds 2009 ABCA 257. See also *R v Drysdale*, 2016 SKQB 312 at paras 20-49.

214 *R v Morin*, 2020 MBQB 4 at paras 9-18, 21, 49-50.

215 See for example *R v Monias*, 2014 ABQB 147 at paras 56-61, 65, 68-70. See Chapter 14 for a more detailed discussion of how the *Gladue* principles have been applied in context to Dangerous Offender proceedings.

judge determine whether they are a good candidate for rehabilitation and community supervision.²¹⁶

Sentencing judges may also wish to compare the Indigenous-specific programming offered within the correctional system against Indigenous-specific programming available in the community. For instance, residential treatment centres like the Poundmaker's Lodge Treatment Centre in Alberta integrate Indigenous cultural values and spirituality with other forms of therapy and treatment, providing a common option for community-based dispositions.²¹⁷ Other community-based rehabilitative options for counselling, treatment, and support may be offered in urban centres or within specific Indigenous communities.²¹⁸ Due to the broad diversity among the available sentencing options and the many potential contingencies regarding what will be suitable and who will be eligible, a thorough and meaningful analysis of culturally appropriate sanctions and procedures is likely to be an information-intensive one.

Conclusion

The case law canvassed in this chapter shows both divergence and commonalities among the common alternative sentencing procedures and sanctions that courts have considered under s 718.2(e) to date. As the Supreme Court of Canada has directed sentencing judges to consider the needs, values, and decisions of particular Indigenous communities, the available sentencing options in each case may reflect this diversity. Sentencing judges must also consider what would be appropriate in the particular circumstances of a range of different offences by individuals with distinct strengths and needs. Likewise, the needs and perspectives of those who have been harmed or who form part of the support network of the person being sentenced may be relevant. This is the nature of an individualized approach to sentencing that requires attention to a wide variety of circumstances, including but not limited to the unique circumstances of Indigenous people.

216 See for example: *R v Sharkey*, 2011 BCSC 1541 at paras 56, 90; *R v Dickson*, 2015 YKTC 13 at para 54, aff'd 2015 YKCA 17; *R v HSS*, 2016 BCPC 430 at paras 33-35, 46; *R v Powder*, 2018 ABQB 1028 at paras 49, 84.

217 *Small-Buffalo*, *supra* note 205, at para 14.

218 See for example: *R v Poitras*, 2016 SKQB 367 at paras 22, 42, 44(1)(g); *AGA*, *supra* note 120 at para 65.

Yet there are many common threads binding culturally sensitive tools for sentencing like *Gladue* reports with the examples of sentencing circles, family group conferences, and Elder panels first piloted in the early 1990s. As pointed out in the *Gladue* decision itself, there is a common emphasis on restorative approaches and community-based sanctions among the legal and cultural traditions of Indigenous peoples across Canada. Where alternative procedures and sanctions assist in addressing criminal wrongdoing in a more holistic way—whether this is by incorporating the perspectives of family and community members or addressing the needs of victims—they are more likely to find consonance with Indigenous peoples’ distinct perspectives and traditional concepts of sentencing. At the same time, the Supreme Court has also emphasized the need to merge judicial notice of this general approach with case-specific information, which can ensure Indigenous perspectives and traditions are reflected with greater accuracy and specificity. This could mean attention to 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 the Cree of northern Quebec.²¹⁹ In other words, the *Gladue* framework can be applied in a way that is attentive to the distinctions between Indigenous peoples and their distinct perspectives. Questions around the sources and sufficiency of this kind of case-specific information will be addressed in the following chapter.

219 See for example: *Kawapit*, *supra* note 38 at paras 25-31; *R v EJTM*, 2016 BCSC 356 at paras 11-12, 15.

CHAPTER 11: THE NEED FOR CASE-SPECIFIC INFORMATION

The Supreme Court of Canada has long insisted that a sentencing judge needs to have the “fullest possible information” regarding the background of the individual before them in order to be in a position to craft a fit and proportionate sentence.¹ The Court has made it equally clear that paying attention to the unique circumstances of an Indigenous person places particularly weighty informational demands on the day-to-day functioning of the courts. This is moderated by directing sentencing judges to always take judicial notice of the broader systemic and background factors that impact Indigenous peoples, as well as the restorative approach to sentencing that generally has greater relevance to them.² Yet the case law to date illustrates a great diversity of systemic and background factors with potential relevance to the sentencing of an Indigenous person.³ The same is true of community-based, culturally relevant sentencing procedures and sanctions that might be appropriate and available in any given case.⁴ Perspectives on sentencing and justice also vary among Indigenous nations, communities, groups, and individuals.⁵ In short, “[t]he unique circumstances of aboriginal offenders are both general and specific in nature”.⁶ It is therefore expected that sentencing judges will explore both general, community-level factors and those particular to the individual being sentenced.⁷

1 *R v Gardiner*, [1982] 2 SCR 368 at 414, 1982 CanLII 30 [*Gardiner*].

2 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 83 [*Gladue*].

3 See the detailed discussion of unique systemic and background factors in Chapter 9.

4 See the detailed discussion of culturally appropriate procedures and sanctions in Chapter 10.

5 See for example: *R v Morris*, 2004 BCCA 305 at paras 62-70 [*Morris*]; *R v Elliot*, 2015 BCCA 295 at paras 12-13, 16, 24; *R v Ippak*, 2018 NUCA 3, Berger JA at paras 87-89, concurring.

6 *R v Harry*, 2013 MBCA 108 at para 61 [*Harry*]. See also: *R v Jack*, 2008 BCCA 437 at paras 29-30; *R v Gilliland*, 2014 BCCA 399 at para 15 [*Gilliland*].

7 See for example *R v GH*, 2020 NUCA 16 at paras 23-26.

Focusing on these unique circumstances, this chapter outlines the most common sources of case-specific information, as well as the differing roles played by sentencing judges, counsel for both parties, and the state in ensuring an adequate record is before the court whenever an Indigenous person is sentenced. Prior to summarizing the jurisprudence of lower courts to date, however, it is worth briefly reiterating the principles articulated by the Supreme Court of Canada in this regard.

In *Gladue*, the Supreme Court clearly anticipated that case-specific information would be adduced by “counsel on both sides”.⁸ Sentencing judges have a duty to seek further information if counsel fail to adequately address this need.⁹ Furthermore, whenever an Indigenous person is the subject of a pre-sentence report, both categories of their unique circumstances will require “special attention”.¹⁰ The Supreme Court anticipated that authors of pre-sentence reports would seek representations from the relevant Indigenous community, “which will usually be that of the offender”.¹¹ Sentencing judges are also empowered to call witnesses to testify regarding reasonable alternatives “in appropriate circumstances and where practicable”.¹² Appellate courts, for their part, should consider any relevant and admissible fresh evidence that is made available in a sentence appeal.¹³ At the same time, the Supreme Court later cautioned in *Wells* that this should not “transform the role of the sentencing judge into that of a board of inquiry”, further inquiries will be limited to appropriate circumstances and where practicable, and these determinations by the sentencing judge should be given deference on appeal.¹⁴

In *Ipeelee*, the Supreme Court gave renewed attention to the importance of case-specific information. Beyond taking judicial notice of broader social facts underlying Indigenous over-incarceration, “additional case-specific information will have to come from counsel and from the pre-sentence report”.¹⁵ Sentencing judges must take judicial notice of the generalizable circumstances of Indigenous people in Canada as “the necessary context for understanding and evaluating the case-specific information presented

8 *Gladue*, *supra* note 2 at para 83.

9 *Ibid* at para 84.

10 *Ibid* at paras 84, 93(7).

11 *Ibid* at para 93(7).

12 *Ibid* at para 84.

13 *Ibid* at para 85.

14 *R v Wells*, 2000 SCC 10 at para 55 [*Wells*].

15 *R v Ipeelee*, 2012 SCC 13 at para 59 [*Ipeelee*].

by counsel”.¹⁶ The Court also noted it had become “current practice” by 2011 to obtain case-specific information in a *Gladue* report—“a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders”.¹⁷ Bringing this information before the court “in a comprehensive and timely manner” was said to be “indispensable to a judge in fulfilling his duties under s 718.2(e) of the *Criminal Code*”.¹⁸

As this chapter demonstrates, a complex jurisprudence has arisen in response to these directives. Courts across the country have grappled with fundamental questions around the level of case-specific information needed in any given context, the most efficient means of collecting, collating, and placing it before the courts, and the distinct roles sentencing judges, counsel, and the state play in fulfilling the promise of s 718.2(e). While lingering questions remain unanswered, existing case law provides a demanding but flexible framework to guide the work of sentencing judges, counsel, and state actors.

Sources of case-specific information

One of the most contentious issues in the jurisprudence to date has been the debate over the best way for sentencing judges to obtain case-specific information with respect to an Indigenous person’s unique circumstances. Counsel will play a crucial role in ensuring an adequate record. Likewise, alternative sentencing procedures such as justice committees, sentencing circles, family group conferences, and Elder panels can all contribute relevant case-specific information. However, it is *Gladue* reports and pre-sentence reports that receive the most attention from courts as more commonplace sentencing tools.

Specialized *Gladue* reports were developed shortly after the Supreme Court stated that it expected pre-sentence reports to pay special attention to the unique circumstances faced by Indigenous peoples in the *Gladue* decision. When the utility of *Gladue* reports was first explicitly recognized by the Supreme Court in *Ipeelee*, they gained greater national attention and some decisions went so far as to suggest they would become mandatory in all future sentencing proceedings for Indigenous people.¹⁹ The headnote for *Ipeelee* in the *Supreme Court Reports* accorded

16 *Ibid* at para 60.

17 *Ibid*.

18 *Ibid*.

19 See for example: *R v Gouda*, 2013 ABQB 121 at para 1 [*Gouda*]; *R v Mattson*, 2014

with this view, where Justice LeBel's endorsement of *Gladue* reports is paraphrased in more absolute terms:

A *Gladue* report is an indispensable tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.²⁰

However, most jurisprudence has articulated a more flexible position on this issue. In the words of Justice Pomerance of the Ontario Superior Court in *Corbiere*:

There is no magic in a label. A “*Gladue* Report” by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value *does* hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context.²¹

The British Columbia Court of Appeal reiterated this view in *Lawson*, holding that it is the information ordinarily contained within a *Gladue* report that is indispensable rather than its particular source.²² This more flexible approach was summarized as follows:

A *Gladue* report may be provided by a variety of people of diverse experience and background who have access to, or can obtain, information that is reliable and relevant. A formal *Gladue* report is not necessary to provide the court with *Gladue* information; *Gladue* information may also be provided to the Court through a pre-sentence report.²³

Counsel also play an important part in supplementing gaps in the record. As stated by Chief Judge Cozens of the Yukon Territorial Court (as he then was) in *Blanchard*:

In the absence of a true *Gladue* report, it is critical that pre-sentence reports contain some details about an offender's aboriginal status and circumstances. Where the pre-sentence

ABCA 178 at para 50 [*Mattson*]; *R v Napesis*, 2014 ABCA 308 at para 8 [*Napesis*].

20 *Ipeelee*, *supra* note 15 at 435. See also *R v McNeil*, 2020 ONCA 595 at para 36.

21 *R v Corbiere*, 2012 ONSC 2405 at para 23 [*Corbiere*].

22 *R v Lawson*, 2012 BCCA 508 at para 26 [*Lawson*].

23 *Ibid* at para 27.

report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence.²⁴

In other words, the adequacy of *Gladue* information before the sentencing judge will be measured by an assessment of its content and level of detail, and sentencing judges will neither defer to the label a report is given nor the agency that provides it.²⁵ In part this could reflect the lack of national standards and the diversity of approaches applied in the preparation of *Gladue* reports and pre-sentence reports from one jurisdiction or agency to the next.²⁶ Regardless of its underlying rationale, this focus on substance over form imposes a greater burden on the judges who are tasked with scrutinizing the materials before them and assessing their sufficiency prior to sentencing an Indigenous person. Likewise, counsel for both parties bear their own obligations, as does the state. Prior to addressing each of these actor-specific obligations in detail, the typical sources of relevant case-specific information warrant closer attention.

Sentencing submissions and evidence adduced by counsel

Submissions from counsel can play an important role in ensuring an Indigenous person's unique circumstances are properly explored during sentencing. Sentencing hearings are not governed by "the formalities and technicalities characteristic of the normal adversary proceeding", such as the strict rules of evidence applied at trial.²⁷ As set out in s 726.1 of the *Criminal Code*, sentencing judges must consider any relevant information placed before them, "including any representations or submissions made by or on behalf of the prosecutor or the offender".²⁸ Likewise, s 724(1) authorizes the courts to accept "any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor

24 *R v Blanchard*, 2011 YKTC 86 at para 25 [*Blanchard*], cited with approval in *Lawson*, *supra* note 22 at para 27.

25 See for example: *Harry*, *supra* note 6 at para 63; *R v Legere*, 2016 PECA 7 at para 13 [*Legere*]; *R v Burwell*, 2017 SKQB 375 at para 81; *R v Wolfleg*, 2018 ABCA 222 at para 52, leave to appeal to SCC refused, 38542 (13 June 2019) [*Wolfleg*].

26 See for example *R v Gamble*, 2019 SKQB 327 at paras 44-52, 74-77 [*Gamble*].

27 *Gardiner*, *supra* note 1 at 414.

28 *Criminal Code*, RSC 1985, c C-46, s 726.1.

and the offender”.²⁹ In this context, factual assertions from counsel and the accused “acquire the force of evidence unless challenged”.³⁰

Comprehensive submissions from counsel will be particularly important when the time required for the preparation of a pre-sentence report or a formal *Gladue* report might prejudice the accused.³¹ For example, if the preparation of a *Gladue* report will take several weeks, the parties are proposing far shorter periods of custody, and the accused will remain in pre-trial custody during the report’s preparation, the accused should not be forced to surrender days if not weeks of their life just to have the *Gladue* principles fully considered.³² In such time-constrained circumstances, the sentencing judge may be in a position to instead engage in “meaningful dialogue” with counsel with respect to the *Gladue* principles and any appropriate sentencing options that might be available.³³

If the factual assertions counsel make in their submissions are disputed, they will need to be proven through some form of admissible evidence, which can include credible and trustworthy hearsay.³⁴ Relevant and reliable evidence with respect to community perspectives, culturally appropriate sanctions and procedures, and both individual and collective systemic and background factors can be garnered from a wide variety of sources. Such details have been addressed by hearing directly from witnesses in past cases, including Elders, Indigenous court workers, family members, community leaders, community members, and community-based support workers.³⁵ They have also been addressed through written statements and letters obtained from community members, family members, existing court-ordered reports and assessments, child welfare records, corrections records, and adjudicated decisions from the Independent Assessment Process pursuant to the Indian Residential Schools Settlement Agreement.³⁶

29 *Ibid*, s 724(1).

30 *R v FJH*, 2017 BCSC 181 at paras 28-29.

31 See for example *R v Gruben*, 2013 NWTSC 59 at 2.

32 *R v Contreras*, 2019 ONSC 3152 at para 25.

33 *Ibid* at para 31.

34 *R v Pabl*, 2016 BCCA 234 at para 54.

35 See for example: *R v LLJ*, [1999] BCJ No 2016, 1999 CanLII 15162 (SC) at para 3; *R v Skani*, 2002 ABQB 1097 at paras 18-26, 66-67; *R v Betsidea*, 2007 NWTSC 85 at 3-5; *R v JRS*, 2010 SKQB 33 at paras 69-77; *R v Johnnie*, 2016 BCPC 96 at paras 56-73; *R v Ryan*, 2019 NSPC 35 at paras 40-54; *R v Lerat*, 2020 SKPC 30 at paras 17, 37; *R c Charlish*, 2020 QCCQ 2438 at para 25; *R v Leclair*, 2020 ONCJ 260 [*Leclair*]; *R v Heimbecker*, 2020 SKQB 304 at paras 60-63 [*Heimbecker*].

36 See for example: *R v WJN*, 2012 ONSC 5917 at para 24; *R v GEW*, 2014 BCSC 2597 at paras 22-23; *R v Paul*, 2014 BCCA 81 at paras 26-33 [*Paul*]; *Mattson*, *supra* note 19

The Indigenous person undergoing sentencing will be an obvious source for relevant information about their own circumstances.³⁷ That said, it is worth recalling that the *Gladue* principles mandate the consideration of these individual circumstances within a broader systemic and background context that could involve circumstances beyond their personal knowledge, and some may struggle to even meaningfully articulate their own personal situation depending on the nature of their constrained circumstances.³⁸

Some sentencing judges may caution against reliance on submissions from counsel as a substitute for a *Gladue* report.³⁹ Others have been satisfied that the record adduced by counsel is so extensive they essentially have “the equivalent of a *Gladue* report” before them.⁴⁰ If so, they may determine no further reports are needed.⁴¹ Yet amassing an equivalent record to a *Gladue* report in every case would impose a considerable burden on counsel that may go unremunerated and for which they may not be adequately trained.⁴² If nothing else, submissions from counsel can assist in filling gaps in the record whenever a court-ordered report would be too impractical.⁴³

Pre-sentence reports authored by probation officers

Information regarding an Indigenous person’s unique circumstances can also be obtained through a pre-sentence report authored by a probation officer. Section 721(1) of the *Criminal Code* expressly authorizes sentencing judges to order the preparation of these reports. The *Code* also prescribes their basic content and authorizes the enactment of more

at para 45; *R v Aulotte*, 2015 ABPC 37 at para 7 [*Aulotte*]; *R v HGR*, 2015 BCSC 681 at paras 28-32; *R v Ahpay*, 2018 SKQB 147 at paras 5-11; *R v Morgan*, 2020 BCSC 1397 at paras 22-23.

37 *Gamble*, *supra* note 26 at paras 67-68.

38 See for example: *R v Lewis and Lewis*, 2014 BCPC 93 at paras 16-17 [*Lewis and Lewis*]; *R v CJHI*, 2017 BCPC 121 at para 29 [*CJHI*]; *Peepetch v R*, 2019 SKQB 132 at paras 17, 56 [*Peepetch*]; *R v Chappell*, 2020 BCSC 536 at paras 15-16, 64.

39 See for example *R v Rich*, 2020 CanLII 32237 (NL Prov Ct) at para 7.

40 *Aulotte*, *supra* note 36 at para 7.

41 *Ibid.*

42 *Lewis and Lewis*, *supra* note 38 at para 15; *CJHI*, *supra* note 38 at paras 27-29; *R v Parent*, 2019 ONCJ 523 at paras 72, 78-86, 147 [*Parent*]; *R v TLC*, 2019 BCPC 314 at para 41 [*TLC*].

43 See for example *R v Kuliktana*, 2020 NUCA 7 at para 33.

detailed regulations in each jurisdiction.⁴⁴ While probation officers have not been statutorily directed to canvass Indigenous peoples' circumstances in the *Criminal Code*, sentencing judges are empowered to specify what each report ought to contain.⁴⁵ A pre-sentence report's overall purpose is to provide "a context against which the principles of sentencing can be more accurately applied".⁴⁶ If the report is prepared for an Indigenous person, their unique circumstances will no doubt form a crucial part of that context.

Since the *Criminal Code* authorizes provincial governments to adopt differing approaches to the content, format, and structure of pre-sentence reports from one jurisdiction to the next, generalizations should be approached with caution. Current jurisprudence suggests that in at least some instances, pre-sentence reports have been a useful and reliable source of case-specific information for the analysis required by s 718.2(e). They are intended to provide "an accurate, independent, and balanced assessment of an offender, [their] background and [their] prospects for the future".⁴⁷ An independent report has certain advantages over submissions from counsel, especially when the factual assertions of the person being sentenced can be verified or corroborated through collateral interviews.⁴⁸ Yet the case law to date makes it equally clear that the level of *Gladue* information in these reports can vary greatly from one to the next. Moreover, the process through which *Gladue* information is collected, collated, and presented to the court in risk-focused pre-sentence reports can be problematic for the contextual analysis required by s 718.2(e).

In favour of their use, Saskatchewan case law to date suggests sentencing judges in that province have been generally satisfied with the level of *Gladue* information they provide, especially when amplified by counsel's own contributions to the record.⁴⁹ This could reflect the specific training probation officers in Saskatchewan are receiving on how to include Indigenous peoples' circumstances in their reports.⁵⁰ This is not to say that obtaining *Gladue* information through court-ordered pre-sentence

44 *Criminal Code*, RSC 1985, c C-46, ss 721(2), (3).

45 *Ibid*, s 721(3).

46 *R v Carrera-Vega*, 2015 ONSC 4958 at para 20.

47 *R v Junkert*, 2010 ONCA 549 at para 59.

48 *R v Choken*, 2012 MBPC 44 at para 36; *R v Morgan*, 2014 YKTC 57 at paras 41-45.

49 See for example: *R v Desjarlais*, 2019 SKQB 6 at paras 30, 33 [*Desjarlais*]; *R v Sand*, 2019 SKQB 18 at para 48 [*Sand*]; *R v Angus*, 2020 SKQB 205.

50 *Desjarlais*, *supra* note 49 at para 13.

reports has always proceeded smoothly in Saskatchewan based on reported case law.⁵¹ However, in the absence of a formal process or dedicated funding for *Gladue* reports, sentencing judges appear to accept pre-sentence reports as their default source for this key information.⁵² The Chief Justice of Nunavut has adopted a similar position in the absence of any formal and publicly funded process for obtaining *Gladue* reports in that territory.⁵³

On the other hand, sentencing judges in several other jurisdictions have described the level of *Gladue* information in pre-sentence reports in far less flattering terms. In *Noble*, for example, Judge Joy of the Provincial Court of Newfoundland and Labrador portrayed sentencing judges in Labrador as being “served up the thin gruel” of pre-sentence reports with a “*Gladue* Perspective” authored by probation officers with neither adequate time nor training to properly address the information required by s 718.2(e).⁵⁴ In *Derion*, Judge Giardini of the British Columbia Provincial Court described a pre-sentence report’s treatment of an Indigenous person’s unique circumstances as “woefully inadequate” and “of absolutely no assistance” when only two paragraphs were dedicated to this topic.⁵⁵ In *Awashish*, Judge Ladouceur described the *Gladue* information in pre-sentence reports as being “but the tip of the iceberg” in most cases.⁵⁶ Similarly, Justice Monnin of the Manitoba Court of Appeal criticized pre-sentence reports that merely purport to address *Gladue* factors while providing nothing more than “a short history of the accused’s home community and the general loss of culture and identity that has afflicted aboriginal communities generally”.⁵⁷ Judicial rebukes of this sort may have encouraged reforms in some of these jurisdictions.⁵⁸

51 See for example: *Sand*, *supra* note 49 at paras 50-51; *Peepeetch*, *supra* note 38 at paras 45-50, 54-55; *Gamble*, *supra* note 26 at paras 72-73.

52 *Desjarlais*, *supra* note 49 at paras 15-16, 26; *Sand*, *supra* note 49 at para 7; *Peepeetch*, *supra* note 38 at para 10.

53 See *R v GH*, 2020 NUCJ 21.

54 *R v Noble*, [2017] 3 CNLR 135, 2017 CanLII 32931 (NL Prov Ct) at para 52 [*Noble*].

55 *R v Derion*, 2013 BCPC 382 at paras 6-7 [*Derion*]. See also: *R v KLL*, 2012 BCPC 273 at paras 35-36; *R v AAHN*, 2013 BCPC 425 at para 30; *Lewis and Lewis*, *supra* note 38 at para 20; *R v Keitlah*, 2014 BCPC 202 at para 35.

56 *R c Awashish*, 2020 QCCQ 3614 at para 19 [*Awashish*].

57 *R v LLDG*, 2012 MBCA 106 at para 30 [*LLDG*]. See also *R v C(OE)*, 2013 MBCA 60 at para 29.

58 See for example *Harry*, *supra* note 6 at para 83.

One key barrier for probation officers tasked with eliciting *Gladue* information for pre-sentence reports arises from their overall role in the administration of justice and how they may be perceived by their interviewees as a result. As Judge Challenger of the British Columbia Provincial Court succinctly states in *Lewis and Lewis*:

Gathering information from offenders about the impact of the *Gladue* factors on their families and their lives is a difficult task and probation officers are not well positioned to do so effectively. The experiences of First Nations people often involve significant trauma and often involve egregious conduct by family and community members. Most people would be very reluctant or unable to share intimate and disturbing information about the trauma they have experienced with a person who is not independent and whose role includes investigating and reporting criminal charges against them.⁵⁹

Concerns have also been raised with the use of pre-sentence reports as a source of *Gladue* information in light of how they employ actuarial risk assessment tools. Some sentencing judges have suggested that the prediction of future risk of recidivism in these reports tends to distract from the task of crafting a proportionate sentence.⁶⁰ Likewise, if a pre-sentence report is prepared with a focus on obtaining risk-scoring data, the author may be steered away from the kinds of contextual information that the court requires.⁶¹ When a pre-sentence report is ordered for an Indigenous person, tensions between their predicted risk of recidivism and the proportionality of their sentence will be heightened, as will the tension between the gathering of risk scoring data and the need for a more contextual inquiry into their unique circumstances. This is because many of the risk factors that are assessed through actuarial tools—such as a personal history of substance abuse, family violence, or unemployment—overlap with the systemic and background factors that have been identified in *Gladue* and *Ipeelee* and related jurisprudence.

59 *Lewis and Lewis*, *supra* note 38 at para 14. See also: *Parent*, *supra* note 42 at paras 59-64, 85; *Awashish*, *supra* note 56 at para 19. See for example: *R v Galloway*, 2004 SKQB 130 at para 29; *R v Derby*, 2013 ONSC 6366 at para 33; *R v DKDB*, 2013 BCSC 2321 at paras 61-62.

60 See for example: *R v Elliott*, 2004 NSPC 71 at paras 17, 20-22; *R v MDD*, 2004 SKPC 106 at paras 38-43; *R v SMR*, 2004 SKPC 131 at paras 45-52. For similar concerns expressed in other contexts see: *R v Legere* (1995), 22 OR (3d) 89 at 101, 1995 CanLII 1551 (CA); *R v Boutilier*, 2017 SCC 64, Karakatsanis J at para 118, dissenting.

61 *R v CJA*, 2005 SKPC 10 at para 43.

To understand this concern, it is worth recalling that the Supreme Court of Canada has directed sentencing judges to ensure that systemic factors do not inadvertently lead to discrimination in *Ipeelee*.⁶² This can occur when facially neutral socioeconomic factors like employment status are relied upon to justify incarceration since doing so will have a disproportionate impact on Indigenous people due to overall lower employment rates.⁶³ As Judge Pollack of the Manitoba Provincial Court points out in *Nepinak*, this direction may be difficult to reconcile with the use of actuarial tools that inevitably classify Indigenous people with prominent *Gladue* factors in a higher risk category.⁶⁴ Judge Pollack is by no means the only sentencing judge urging caution in relying on risk scores in pre-sentence reports for Indigenous people so as to avoid perpetuating systemic discrimination.⁶⁵ It is important to note that this concern is related but somewhat distinct from the uncertainty recognized by the Supreme Court of Canada in *Erwert* as to whether all of these actuarial tools have been adequately and scientifically validated for use on Indigenous people.⁶⁶

As stated in *Quock* by Chief Judge Cozens of the Yukon Territorial Court (as he then was), the overlap between systemic factors and risk factors makes it important for a sentencing judge to understand the context in which each risk factor exists and then assess whether a plan can be identified to significantly reduce the risk factor, such as Indigenous-specific treatment methods.⁶⁷ This may raise questions about the way in which pre-sentence reports are prepared and whether their methodology facilitates this kind of contextualized analysis for Indigenous people, in contrast to specialized *Gladue* reports.⁶⁸ While pre-sentence reports always contain some personal history regarding the accused, they remain primarily focused on assessing their risk of recidivism.⁶⁹

62 *Ipeelee*, *supra* note 15 at para 67.

63 *Ibid.*

64 *R v Nepinak*, 2017 MBPC 62

65 See for example: *R v Knott*, 2012 MBQB 105 at paras 22-32, 40; *R v Quock*, 2015 YKTC 32 at paras 92-97 [*Quock*]; *R v Head*, 2020 ABPC 211 at para 32 [*Head*].

66 See *Erwert v Canada*, 2018 SCC 30 at paras 49-50, 63-67.

67 *Quock*, *supra* note 65 at para 96. See also *R v Hamilton*, 2020 SKPC 19 at para 52.

68 See for example: *Corbiere*, *supra* note 21 at para 22, citing Kelly Hannah-Moffat & Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 *Punishment & Society* 262; *R v HGR*, 2015 BCSC 681 at para 10; *Sand*, *supra* note 49 at paras 44-46, citing Debra Parkes, "Ipeelee and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 *For the Defence* 22.

69 *Sand*, *supra* note 49 at para 44; *Arwashish*, *supra* note 56 at para 18.

Nevertheless, appellate courts in several provinces have accepted that a pre-sentence report can be a source of case-specific information for sentencing judges to rely on in fulfilling their obligations under s 718.2(e).⁷⁰ While some appellate decisions still find pre-sentence reports wanting in this regard, this has tended to reflect the inadequacy of their content rather than any explicit categorical concerns with their source.⁷¹

Gladue reports

As the Supreme Court recognized in *Ipeelee*, *Gladue* reports have become a common means for sentencing judges to obtain information on an Indigenous person's unique circumstances over the past two decades. As summarized in Chapter 10, these specialized reports were first piloted in Ontario by Aboriginal Legal Services immediately following the Supreme Court's call for special attention to Indigenous peoples' circumstances in pre-sentence reports in *Gladue*. They are also responsive to recommendations in the studies and reports considered by the Supreme Court of Canada in *Gladue*, especially with respect to the need for cultural sensitivity in the preparation of pre-sentence reports and greater inclusion of community perspectives.⁷² In contrast to the risk-focused pre-sentence reports that are prepared by probation officers, the methodology underlying the preparation of *Gladue* reports has been described as "restorative in nature", incorporating self-reflection, the diverse perspectives of family and community members, and broader inter-generational contexts and histories.⁷³

Section 721 of the *Criminal Code* clearly authorizes sentencing judges to order probation agencies to prepare pre-sentence reports in the form of *Gladue* reports.⁷⁴ Yet there is no equivalent statutory provision to order

70 See for example: *Lawson*, *supra* note 22 at para 27; *R v Park*, 2016 MBCA 107 at para 27 [*Park*]; *R v Matchee*, 2019 ABCA 251 [*Matchee*].

71 See for example: *R v Kakekagamick* (2006), 214 OAC 127, 2006 CanLII 28549 (CA) [*Kakekagamick*]; *R v Chickekoo*, 2008 ONCA 488 [*Chickekoo*]; *Legere*, *supra* note 25; *R v Moyan*, 2017 BCCA 227 [*Moyan*]; *Wolffeg*, *supra* note 25; *R v Zoe*, 2020 NWTCA 1 [*Zoe*].

72 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 77-78.

73 *Sand*, *supra* note 49 at para 47; *TLC*, *supra* note 42 at para 47.

74 See for example: *R v Knockwood*, 2011 ONSC 5004 at para 1; *R v Bill*, 2014 BCCA 60 at para 7.

other agencies or individuals to prepare them.⁷⁵ This has led to divergent practices across the country depending on whether a formalized process has been established for the preparation of *Gladue* reports in each jurisdiction. For example, when sentencing judges in British Columbia have ordered *Gladue* reports, the specific arrangements have often been left up to counsel and British Columbia's legal aid organization.⁷⁶ In the absence of any equivalent process in Saskatchewan, the courts have concluded that they have an inherent or implied power to compel the provincial government to commission the preparation of *Gladue* reports as necessary.⁷⁷ In both provinces *Gladue* reports have been privately funded by the accused as well.⁷⁸

Regardless of the source of funding for *Gladue* reports, they are often treated analogously to conventional pre-sentence reports in that the same general requirements of balance and objectivity apply.⁷⁹ *Gladue* reports are not meant to be conveying the personal opinions of their authors nor should they strongly recommend specific sentences, although they may include suggestions or proposals for restorative or rehabilitative options.⁸⁰ In other words, *Gladue* report writers should not be effectively providing sentencing submissions, nor should they be expected to.⁸¹ *Gladue* reports are not expert reports either, though the writer's training and background may influence the weight they are assigned.⁸² The authors of *Gladue* reports should also be independent of the parties "to avoid the risk of the author straying into advocacy".⁸³ Likewise, the objective and independent status of *Gladue* reports ought to be reflected in how they are administered and provided to the court in the sense that they should not be "in the control" of the defence.⁸⁴

Courts have often recognized *Gladue* reports as a useful means by which the details of an Indigenous person's unique circumstances can be placed before

75 *Desjarlais*, *supra* note 49 at para 30.

76 See for example: *R v McCook*, 2015 BCPC 1; *CJHI*, *supra* note 38.

77 *Sand*, *supra* note 49; *Peepeetch*, *supra* note 38; *Gamble*, *supra* note 26.

78 See for example: *R v FDW*, 2018 BCPC 374 at para 30; *Heimbecker*, *supra* note 35 at para 2.

79 *Lawson*, *supra* note 22 at para 28.

80 *Ibid.* See also *R v Cappo* (No.2), 2014 ABPC 267 at paras 14-16; *R v Stonechild*, 2017 SKQB 138 at para 72.

81 See for example: *R v Okimaw*, 2016 ABCA 246 at para 76 [*Okimaw*]; *R v JP*, 2020 SKCA 52 at paras 33-34 [*JP*].

82 *Lawson*, *supra* note 22 at paras 30-32.

83 *R v Sparrow and Grant*, 2018 BCPC 53 at para 40.

84 *R v DR*, 2000 BCSC 136 at para 23.

the court.⁸⁵ Some have gone so far as to describe them as the “preferable” way to obtain this information.⁸⁶ In comparison to submissions, *Gladue* reports may have similar advantages to pre-sentence reports, such as verifying and corroborating factual assertions through collaterals.⁸⁷ Yet they are often distinguished from pre-sentence reports by their broader scope and greater level of detail.⁸⁸ Their authors may conduct in-depth research into the subject’s unique circumstances by reviewing their personal records and past reports about them.⁸⁹ In some cases, *Gladue* reports will draw a sentencing judge’s attention to secondary source materials that expand on the systemic and background factors of which they are obliged to take judicial notice.⁹⁰ They often present information differently as well, using direct quotes from interviews rather than paraphrasing, summarizing, or otherwise interpreting what they are told by their interviewees.⁹¹

Gladue reports also differ from pre-sentence reports in their underlying methodology. They are typically prepared by an “empathetic peer” who conducts a series of in-person interviews with the subject and collaterals.⁹² As *Gladue* report writers are independent from the criminal justice system and typically Indigenous people themselves, they may be better positioned to develop a rapport with interviewees so they can have candid and detailed discussions about sensitive topics.⁹³ As noted by Judge Wolf of the British Columbia Provincial Court in *TLC*, this was one of the conclusions from a study that compared the value of pre-sentence reports to *Gladue* reports in that province.⁹⁴

85 See for example: *R v DAH*, 2010 BCPC 313 at paras 31-33; *R v Sutherland*, 2010 ONCJ 103 at para 41; *R v Sam*, 2013 ABCA 174 at para 35; *R v Sidney*, 2013 YKTC 61 at para 47; *R v Nippi*, 2015 SKQB 90 at para 6; *R v Denny*, 2016 NSSC 76 at para 62; *R v Demmons*, 2016 BCPC 363 at para 23; *R v Hall*, 2019 ABQB 343 at para 68.

86 See for example: *R v Magill*, 2013 YKTC 8 at para 28; *R v Fontaine*, 2014 BCCA 1 at para 34; *R v Quinn*, 2016 ABPC 121 at para 45; *Wolfeg*, *supra* note 25 at para 52.

87 *Derion*, *supra* note 55 at para 13; *R v Lilley*, 2016 YKTC 56 at para 16.

88 See for example: *R v Brown*, [2009] OJ No 979 (QL), 2009 CanLII 9760 (Sup Ct) at para 27; *R v Sunshine*, 2014 BCCA 318 at paras 14-17; *Noble*, *supra* note 54 at para 55; *R v Pantherbone*, 2018 ABPC 142 at para 15.

89 See for example: *R v Leigh*, 2018 ONCJ 776 at para 26; *TLC*, *supra* note 42 at para 53.

90 See for example: *R v Sutherland-Cada*, 2016 ONCJ 650 at para 39; *R v Broadfoot*, 2018 ONCJ 215 at para 18; *R v Laverigne*, 2018 ONCJ 902 at para 10; *TLC*, *supra* note 42 at paras 62-63.

91 *R v Armitage*, 2015 ONCJ 64 at para 21.

92 See: *Sand*, *supra* note 49 at para 47; *Parent*, *supra* note 42 at para 149.

93 See for example: *Lewis and Lewis*, *supra* note 38 at para 14; *R v Bernard*, 2017 NSSC 129 at para 13; *Parent*, *supra* note 42 at paras 59-64, 85; *Awashish*, *supra* note 56 at paras 18-19.

94 *TLC*, *supra* note 42 at para 43.

The frank discussions that go into *Gladue* reports can bring to light crucial information that might otherwise remain undiscovered, such as an accused's Fetal Alcohol Spectrum Disorder.⁹⁵ In *RDF*, for instance, an Indigenous youth's mother admitted to a *Gladue* report writer that she had consumed significant amounts of alcohol during her pregnancy with the accused whereas she had previously denied any prenatal alcohol use during her telephone interviews with court experts.⁹⁶ One of those experts later testified that it would not be unusual for a mother to be less than forthcoming about alcohol use during pregnancy due to feelings of guilt, shame, or fear.⁹⁷ It appears that the accused in *RDF* would not have been diagnosed without this candid admission from his mother.⁹⁸

Nevertheless, sentencing judges have found deficiencies in some *Gladue* reports, just as they have in some pre-sentence reports. Some *Gladue* reports put before the courts have been criticized for verging on advocacy, employing leading questions, taking a “cut-and-paste” approach, or otherwise lacking in objectivity or specificity.⁹⁹ Some information provided via *Gladue* reports has been given little to no weight when inconsistencies with other evidence went unaddressed or the subject's self-reporting on contested topics went uncorroborated.¹⁰⁰ This could reflect a lack of national standards or varying approaches from one writer or agency to the next.¹⁰¹ If nothing else, it underlines why the sentencing judge and counsel play key roles in assessing, clarifying, and supplementing the record regardless of the particular source of case-specific information in any given case.

95 See: *Okimaw*, *supra* note 81 at para 42; *R v Cardinal*, 2017 ABCA 396 at para 40; *R v Milligan*, 2018 ONCJ 614 at para 6; *R v Taniskishayinew*, 2018 BCSC 296 at para 32; *R v JP*, 2018 SKQB 96 at paras 26-41, rev'd in part on other grounds 2020 SKCA 52; *Head*, *supra* note 65 at para 15.

96 *R v RDF*, 2019 SKCA 112 at paras 121, 126, 130, 197-201.

97 *Ibid* at para 198.

98 *Ibid* at para 200.

99 See for example: *Lawson*, *supra* note 22 at para 33; *R v Soloway*, 2012 ABQB 554 at para 22; *R v Land*, 2013 ONSC 6526 at para 31 [*Land*]; *R v Taylor*, 2016 BCSC 1326 at paras 44-49; *R v Heppner*, 2017 BCSC 2433 at paras 73-75.

100 See for example: *R v Toerws*, 2013 BCSC 2474 at para 24; *R v CMC*, 2016 ABQB 196 at para 28; *R c Morrissette*, 2018 QCCQ 8868 at paras 50-56; *R v Shaw*, 2019 ABCA 106 at para 24; *Head*, *supra* note 65 at para 37.

101 See *Gamble*, *supra* note 26 at paras 31, 34-35, 45-50, 74-77.

The obligations placed on sentencing judges

In keeping with the Supreme Court of Canada's guidance, appellate courts have often emphasized that s 718.2(e) imposes an affirmative statutory duty on sentencing judges to consider the unique circumstances of any Indigenous person appearing before them.¹⁰² Crown and defence counsel have their own obligations to place sufficient case-specific information before the court, but when they fail to do so adequately the sentencing judge will be obliged to take further action, such as requesting that additional evidence be adduced via witness testimony.¹⁰³ Likewise, judicial notice can play a more pronounced role when the record before the sentencing judge has gaps with respect to an Indigenous person's unique circumstances.¹⁰⁴ According to the Alberta Court of Appeal in *Okimaw*, the sentencing judge's duty to consider case-specific information and how it impacts an Indigenous person's moral blameworthiness is a responsibility that cannot be delegated to either a *Gladue* report writer or to counsel for the parties.¹⁰⁵

This is also reflected in *Anderson*, where the Supreme Court of Canada emphasized that it is the judge alone who is constitutionally obliged to craft a proportionate sentence for an Indigenous person that accounts for their unique circumstances.¹⁰⁶ This duty is one that must not be conflated with the distinct roles that counsel play in sentencing:

It is *the judge's* responsibility to impose sentence; likewise, it is *the judge's* responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged.¹⁰⁷

This onerous duty placed upon sentencing judges under s 718.2(e) requires close scrutiny of the information set out in the reports before

102 See for example: *Kakekagamick*, *supra* note 71 at paras 37, 39-40; *Park*, *supra* note 70 at para 24; *Wolfleg*, *supra* note 25 at paras 54-55; *R v McInnis*, 2019 PECA 3 at para 36 [*McInnis*].

103 *Kakekagamick*, *supra* note 71 at paras 45-46; *Park*, *supra* note 70 at para 32; *Wolfleg*, *supra* note 25 at para 61.

104 See for example: *R v Wilson*, 2018 BCSC 1405 at paras 76-81; *R v Stevens*, 2020 BCPC 104 at para 37; *R v Kanatsiak*, 2020 QCCS 1523 at paras 96-100, 108 [*Kanatsiak* QCCS]; *R v JNP*, 2020 BCSC 570 at para 30.

105 *Okimaw*, *supra* note 81 at para 66. See also *JP*, *supra* note 81 at paras 33-34.

106 *R v Anderson*, 2014 SCC 41 at para 24.

107 *Ibid* at para 25.

them to determine whether supplementary reports or other evidence will be required before sentencing proceeds.¹⁰⁸ As Justice Clackson of the Alberta Court of Queen's Bench observed in *Gouda*, sentencing judges are obliged to fashion a proportionate sentence and it is difficult to fathom how this could be achieved “when the fundamental characteristics of the offender and her circumstances are unknown”.¹⁰⁹

Judicial notice and independent research

The Supreme Court has made it abundantly clear that sentencing judges must take judicial notice of a complex set of generalizable social facts about the legacies of settler colonialism, racism, and systemic discrimination that Indigenous peoples face in the criminal justice system and Canadian society more broadly. They cited various studies and reports as a basis for the substantive content of this judicial notice in *Gladue* and *Ipeelee*. These judicially noticed facts are the very antithesis of case-specific information within the *Gladue* analysis, but the topic still warrants attention here in order to explore how courts have drawn links between the Supreme Court's generalizable statements and the individualized, case-specific information before them in any given matter.

In *Ipeelee*, the Supreme Court encouraged lower courts not to hesitate in taking judicial notice of contextual factors, but clarified how they serve to provide a framework for deeper understanding and analysis of case-specific information.¹¹⁰ In doing so, lower courts have at times drawn on more precise factual conclusions in the reports of past commissions of inquiry when addressing how systemic and background factors cast light on the adjudicative facts before them.¹¹¹ They have not always limited themselves to the specific reports before the Supreme Court in *Gladue* and *Ipeelee* either.¹¹² Some judges have also followed the Supreme

108 *Kakekagamick*, *supra* note 71 at paras 52-55; *Gouda*, *supra* note 19 at para 1; *Legere*, *supra* note 25 at paras 18-24; *Wolfleg*, *supra* note 25 at paras 81, 109-127.

109 *Gouda*, *supra* note 19 at para 4.

110 *Ipeelee*, *supra* note 15 at para 60. A similar approach to distinguishing between social facts and adjudicative facts regarding Fetal Alcohol Spectrum Disorder can be found in *R v Ramsay*, 2012 ABCA 257.

111 See for example *R v Paulson*, 2020 ONCJ 86 at para 32, citing “False Assumptions and a Failed Relationship” in Canada, Royal Commission on Aboriginal People, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996).

112 See for example *TLC*, *supra* note 42 at paras 64-67, citing Canada, National Inquiry

Court's lead by relying on academic publications to accomplish this task.¹¹³ Others have made more general reference to concepts within the social sciences that appear to corroborate the social facts judicially noticed in the *Gladue* analysis, perhaps to point out potential avenues for counsel to explore in the factual record in future cases or simply to further corroborate these judicially noticed facts.¹¹⁴

In some cases, sentencing judges have referenced information sources such as up-to-date statistics, academic literature, or government reports addressing either the current state of Indigenous over-incarceration or circumstances of specific Indigenous communities.¹¹⁵ Likewise, in cases where sentencing judges regularly sit in Indigenous communities, this could enrich their ability to take judicial notice of generalizable local circumstances and available sentencing options.¹¹⁶ However, this kind of generalizable firsthand knowledge does not displace the need for individualized information about the particular Indigenous person who is before the court for sentencing.¹¹⁷

These cases appear to reflect the general principle that sentencing proceedings can be more informal and broader in scope than trials, and the strict rules of evidence do not apply in this context.¹¹⁸ However, the greater latitude afforded to judicial notice in sentencing proceedings will still be constrained by the parties' respective procedural fairness rights.¹¹⁹

into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: 2019).

- 113 See for example *R v Drysdale*, 2016 SKQB 312 at para 3, citing David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways" (2014) 47 UBC L Rev 1025 [*Drysdale*].
- 114 See for example: *R v BR*, 2016 MBPC 74 at para 23; *R v JW*, 2017 NWTTC 20 at para 25; *R v Schafer*, 2019 YKTC 41 at para 38; *R v MLC*, 2020 ABQB 293 at paras 65-69.
- 115 See for example: *R c Tremblay*, 2010 QCCA 272 at paras 21-29; *R c Weizineau*, 2012 QCCQ 5670 at paras 54-64 [*Weizineau*]; *R v Denny*, 2016 NSPC 83 at paras 11-18; *R v Moore*, 2018 NSPC 48 at paras 66-77; *R c Dubé*, 2019 QCCQ 7985 at para 33 [*Dubé*]; *R v McKay*, 2020 SKPC 24 at paras 42-43; *R v James*, 2020 YKCA 11 at para 37; *R v Kopolak*, 2020 NWTTC 12 at paras 66, 69-70.
- 116 *R v Oakoak*, 2011 NUCA 4 at paras 24-25; *Weizineau*, *supra* note 115 at para 65; *Park*, *supra* note 70 at paras 33-34; *Dubé*, *supra* note 115 at para 33; *R c Tremblay*, 2020 QCCQ 2668 at para 69.
- 117 See *R v Ehaloak*, 2017 NUCA 4 at paras 43-45.
- 118 *R v BL*, 2002 ABCA 44 at para 25, citing *Gardiner*, *supra* note 1. See also *R v Lacasse*, 2015 SCC 64, Gascon J at para 159, dissenting [*Lacasse*].
- 119 *Lacasse*, *supra* note 115, Wagner J at para 94, Gascon J at paras 160-163, dissenting.

Further judicial inquiries

The Supreme Court has consistently held that sentencing judges have a duty to make further inquiries when there are gaps in an Indigenous person's case-specific information, so long as doing so is practicable and appropriate. In *Sim*, Justice Sharpe of the Ontario Court of Appeal characterized this directive as “requir[ing] the criminal justice system to alter its procedure and adopt a more inquisitorial approach when sentencing an aboriginal offender”.¹²⁰ The Alberta Court of Appeal appears to echo this view when stating that “[t]here is no onus on the offender to bring his aboriginal person circumstances into the framework of relevance for sentencing purposes”, pointing out that “[t]hese facts can be relevant in more than one way and even judicial notice is available”.¹²¹

On the other hand, several appellate decisions have still insisted that sentencing remains adversarial in context to s 718.2(e) and counsel still bear “the primary responsibility for assembling the evidence”.¹²² More broadly, the role of the sentencing judge is that of “a neutral, passive arbiter” and sentencing hearings are “basically adversarial”.¹²³ In light of this, the obligations imposed on sentencing judges under s 718.2(e) should not be seen as a call for judicial advocacy. Instead, as noted by the British Columbia Court of Appeal in *Shanoss*, “[w]hat matters is that a judge has an adequate record”.¹²⁴

As a matter of basic practice, sentencing judges may need to ask if the individuals before them identify as Indigenous in order to know if they are entitled to an exploration of their unique circumstances under s 718.2(e).¹²⁵ In *Whitstone*, Justice Zuk of the Saskatchewan Court of Queen's Bench heard an appeal from a self-represented Indigenous woman who had been sentenced without any explicit consideration of her unique circumstances. Neither the Crown nor defence counsel alerted the sentencing judge to the fact that she was Indigenous, although it was made clear that she was a resident of Thunderchild First Nation.¹²⁶ The Court held that her residency

120 *R v Sim* (2005), [2006] 2 CNLR 298, 2005 CanLII 37586 (Ont CA) at para 25 [*Sim*].

121 See: *R v Crazyboy*, 2012 ABCA 228 at para 32 [*Crazyboy*]; *R v Laboucane*, 2016 ABCA 176 at para 71, leave to appeal to SCC refused 37177 (22 December 2016) [*Laboucane*].

122 *R v Bonnetrouge*, 2017 NWTCA 1 at para 24 [*Bonnetrouge*]. See also *R v Edmonds*, 2012 ABCA 340 at para 15; *R v Heiney*, 2018 BCCA 313 at para 48 [*Heiney*].

123 *R v Hamilton*, [2004] OJ No 3252 (QL), 2004 CanLII 5549 (CA) at paras 66-67.

124 *R v Shanoss*, 2019 BCCA 249 at para 32.

125 See: *Gouda*, *supra* note 19 at para 3; *R v Whitstone*, 2018 SKQB 83 at paras 1-2 [*Whitstone*].

126 *Whitstone*, *supra* note 125 at paras 2, 7.

“ought to have drawn the sentencing judge’s attention to enquiring if Ms. Whitstone was of aboriginal ancestry”.¹²⁷ Yet even in cases where this is less obvious, Justice Zuk concluded that a sentencing judge’s duty under s 718.2(e) extends to making inquiries to determine whether the person they are sentencing is Indigenous.¹²⁸ While it would be reasonable to expect counsel to make the courts aware of this basic fact in most cases, counsel’s failure to do so did not relieve the sentencing judge of his own duty to make this determination in *Whitstone*.¹²⁹

As for playing a more proactive role, it is worth recalling the Supreme Court’s caution in *Wells* that the analysis under s 718.2(e) does not transform the sentencing judge into a board of inquiry. Placing this in context, Mr. Wells unsuccessfully argued before the Alberta Court of Appeal that it was an error in principle for the sentencing judge to fail to make further inquiries beyond the pre-sentence report.¹³⁰ In support of this position, he cited the Alberta Court of Queen’s Bench decision in *Hunter*, where it was held that a sentencing judge has the statutory power to compel the Crown to investigate and report back on a First Nation’s social conditions in furtherance of s 718.2(e).¹³¹ The Court of Appeal clarified that the power to compel this kind of inquiry is permissive rather than mandatory, and it could not have been Parliament’s intention for sentencing judges to make inquiries of their own initiative in every proceeding involving an Indigenous person.¹³² Clearly there is a limit to the interventions expected of sentencing judges under s 718.2(e), with the investigation ordered in *Hunter* setting a high water mark.

Nevertheless, courts often have taken an active role in ensuring they have sufficient information before them to fulfill the requisite analysis under s 718.2(e). In *Reid*, for example, the British Columbia Court of Appeal allowed a Heiltsuk man’s appeal from sentence on the strength of fresh evidence that the Court of Appeal requested in support of a conditional sentence being served in the community of Bella Bella.¹³³ The Court noted that the sentencing judge had been alive to deficiencies in the information before him, but he did not appear to have turned his

127 *Ibid* at para 36.

128 *Ibid* at para 37.

129 *Ibid* at para 36.

130 *R v Wells*, 1998 ABCA 109 at paras 58-62 [*Wells* ABCA].

131 *R v Hunter*, [1997] AJ No 933 (QL), 1997 CanLII 14834 (QB) [*Hunter* QB].

132 *Wells* ABCA, *supra* note 130 at paras 60-61.

133 *R v Reid*, 2002 BCCA 268.

mind to whether he should make further inquiries to explore the Bella Bella community's willingness to consider Mr. Reid as a candidate for a community-based sentence, or whether he had taken steps to overcome his addiction in support of such a disposition.¹³⁴ The Court of Appeal itself was not satisfied with the level of information placed before it on appeal so it requested that appellate counsel make further inquiries of the Heiltsuk community and it gave significant weight to the results of these further inquiries in its final disposition.¹³⁵

In difficult cases sentencing judges may find they need more information than what is available in a pre-sentence report or a *Gladue* report. In *Drysdale*, for instance, Justice Zarzeczny of the Saskatchewan Court of Queen's Bench was faced with sentencing an Indigenous man convicted of assault who had a lengthy criminal record, significant *Gladue* factors, and cognitive and physical impairments that included FASD.¹³⁶ After a three-day sentencing hearing, the Court imposed a further custodial sentence of 45 days beyond time served followed by three years' probation on the basis that Mr. Drysdale's risk of recidivism would be best managed in the community.¹³⁷ Justice Zarzeczny came to this decision only after hearing from witnesses called by both Crown and defence counsel regarding programs and sentencing options in custody and in the community, in addition to the information set out in a comprehensive *Gladue* report before the court.¹³⁸

These examples are clearly less interventionist than the inquiries that were first made in *Hunter* and later argued for in *Wells*. They may demonstrate how sentencing judges can actively mediate the depth and breadth of case-specific information before them without transforming the proceeding into something akin to a commission of inquiry.

Assessing the adequacy of *Gladue* information

The sentencing judge's function is most often that of a gatekeeper with respect to *Gladue* information. Ultimately, it is their obligation to assess both categories of circumstances identified in *Gladue*. It is therefore

134 *Ibid* at para 17.

135 *Ibid* at para 2.

136 *Drysdale*, *supra* note 113.

137 *Ibid* at paras 69, 72, 75.

138 *Ibid* at paras 21-49.

“axiomatic that, in conducting such an evaluation, the sentencing judge must have access to the necessary information”.¹³⁹ If they proceed without sufficiently detailed information regarding an Indigenous person’s individual background and circumstances that speak to their moral blameworthiness then this may invite appellate scrutiny.¹⁴⁰ Likewise, crafting a sentence without access to information with respect to the availability and practicality of any culturally relevant sanctions and procedures could constitute an error in principle as well.¹⁴¹ Sentencing judges are directed to identify any shortcomings in the information before them, and to order supplementary reports or call for further *viva voce* evidence as needed.¹⁴² Since they are the ones who are ultimately obliged to craft a sentence with s 718.2(e) in mind, they are well-positioned to assess whether they have adequate “individualized information” with an appropriate “richness of detail” to accomplish this task.¹⁴³

In support of this gatekeeping function, some members of the judiciary have developed detailed checklists and questions that sentencing judges should be able to answer in order to craft a proportionate sentence for an Indigenous person. For instance, Judge Mary Ellen Turpel-Lafond of the Provincial Court of Saskatchewan (as she then was) provided a detailed list of factors to consider in an article published in the *Criminal Law Quarterly* in 2000, which has since been cited by courts across the country:

- A. Is the offender an Aboriginal person? “Aboriginal person” is defined according to s. 35 of the *Constitution Act*, 1982, as being Indian, Metis (of mixed ancestry) or Inuit.
 - If the answer is yes, determine what community or band the defendant is from.
 - Does the defendant reside in a rural area, on a reserve or settlement land, or in an urban centre?
- B. What unique circumstances have played a part in bringing this offender before the courts? The sentencing judge must consider some of the following issues/factors and query counsel or unrepresented offenders.

139 *Peepeetch*, *supra* note 38 at para 40.

140 See for example *Wolfleg*, *supra* note 25 at paras 50, 81, 113, 115, 119.

141 See for example *R v Macintyre-Syrette*, 2018 ONCA 259 at paras 2, 14, 19-24 [*Macintyre-Syrette*].

142 *Macintyre-Syrette*, *supra* note 141 at para 24.

143 *Peepeetch*, *supra* note 38 at para 50, citing: *Lawson*, *supra* note 22; *Corbiere*, *supra* note 21.

- has this offender been affected by substance abuse in the community?
- has this offender been affected by poverty?
- has this offender been affected by overt racism?
- has this offender been affected by family or community breakdown?
- has this offender been affected by unemployment, low income and a lack of employment opportunity?
- has this offender been affected by dislocation from an Aboriginal community, loneliness and community fragmentation?

A pre-sentence or pre-disposition report might be of great benefit to the court in canvassing some of these issues. In order to sensibly ask these questions, it is helpful if counsel, or the judge as the case may be, understands the historical and societal context of these questions. For example, has a community been relocated? Has a significant proportion of the Aboriginal community moved to urban centres? Have many of the members of this community been affected by abuses at Residential Schools? What are the reasons for these developments? Many of these issues have been thoroughly studied by the Royal Commission on Aboriginal Peoples, the reports from which are a valuable educational resource for those unfamiliar with the broader context.¹⁴⁴

In *Laliberte*, Justice Vancise of the Saskatchewan Court of Appeal cited this same article with approval and articulated a very similar framework that has since been adopted by the Ontario Court of Appeal:

- 1) Whether the offender is aboriginal, that is, someone who comes within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act*, 1982;
- 2) What band or community or reserve the offender comes from and whether the offender lives on or off the reserve or in an urban or rural setting. This information should also include particulars of the treatment facilities, the existence of a justice committee, and any alternative measures or community-based programs.

144 See *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 CLQ 34. See also: *R v Laliberte*, 2000 SKCA 27 at para 60 [*Laliberte*]; *Morris*, *supra* note 5 at para 51; *R v Denny*, 2016 NSPC 83 at para 37.

- 3) Whether the offender has been affected by:
 - a) substance abuse in the community;
 - b) alcohol abuse in the community;
 - c) poverty;
 - d) overt racism;
 - e) family or community breakdown.
- 4) Whether imprisonment would effectively deter or denounce crime in the subject community. Within this heading it would be useful for the Court to determine whether or not crime prevention can be better served by principles of restorative justice or by imprisonment.
- 5) What sentencing options exist in the community at large and in the offender's community. For example, does an alternative measures program exist in the offender's community if he lives on a reserve?¹⁴⁵

Finally, Judge Whalen of the Nova Scotia Provincial Court has provided her own detailed list of questions that sentencing judges ought to be in a position to answer in *Rose*:

- (i) Does the community support the offender and think that he/she is capable of change?
- (ii) What are the main social issues affecting the community?
- (iii) How has the community addressed those issues?
- (iv) Is there a willingness and capability of the community to assume responsibility for providing restorative approaches to criminal behaviour?
- (v) Does the community have a program or tradition of alternative sanctions?
- (vi) What culturally relevant alternatives to incarceration can be set in place that are healing for the offender and all others involved, including the community as a whole?
- (vii) Does the community have resources to assist in supervision of the offender?
- (viii) What is the offender's understanding of and willingness to participate in traditional Aboriginal justice, whether through the identified Aboriginal community or local First Nations support agencies?
- (ix) What mainstream/non-traditional healing resources are available to the offender?

145 *Laliberte*, *supra* note 144 at para 59; *Macintyre-Syrette*, *supra* note 141 at para 15.

- (x) What is the quality of the offender's relationship with family and extended family?
- (xi) Who comprises the offender's support network: spiritual, cultural, family, community?¹⁴⁶

In addition to these lists, guidance on how to assess the adequacy of the case-specific information in the record can be found in cases where courts have closely scrutinized pre-sentence reports or *Gladue* reports to determine whether further information was needed. To date, this has most often occurred in cases where an application is made to admit a *Gladue* report as fresh evidence on appeal.¹⁴⁷ However, a similar analysis can be found in cases where courts canvass whether supplementary reports ought to be ordered prior to the sentencing of an Indigenous person.¹⁴⁸

In *Legere*, for instance, the Prince Edward Island Court of Appeal carefully contrasted the contents of a pre-sentence report against those of a *Gladue* report.¹⁴⁹ It concluded that the court below erred in sentencing a Mi'kmaw man without adequate information regarding his unique circumstances. The pre-sentence report was "detailed and apparently thorough", it canvassed his Indigenous heritage and connection, and it provided "a snap shot of Legere's unhappy life".¹⁵⁰ However, it failed to address the unique systemic or background factors that played a role in bringing Mr. Legere before the courts, and it also failed to detail the "particular programming which may be appropriate to this Aboriginal offender".¹⁵¹ A *Gladue* report was therefore admitted as fresh evidence. This report canvassed the harms done to Mr. Legere's mother by the residential school system and other policies, the effects of inter-generational and multi-generational trauma, and how these all were linked to his mother's alcoholism and his own pain and suffering.¹⁵² The Court of Appeal further noted that the *Gladue* report writer spoke to counsellors and employment opportunities in the Mi'kmaq community on Lennox Island, interviewing several community members as well as Mr. Legere's non-Indigenous relatives.¹⁵³ In contrast, the only members

146 *R v Rose*, 2013 NSPC 99 at para 31.

147 See for example: *Chickeko*, *supra* note 71; *Moyan*, *supra* note 71; *Zoe*, *supra* note 71.

148 See for example *R v Karau*, 2014 ONCJ 207.

149 *Legere*, *supra* note 25.

150 *Ibid* at paras 20-23.

151 *Ibid* at paras 21.

152 *Ibid* at para 22.

153 *Ibid* at para 23.

of the Indigenous community that the pre-sentence report's authors had spoken to were Mr. Legere himself and his brother.¹⁵⁴

The Alberta Court of Appeal provides similar guidance in *Wolfleg*.¹⁵⁵ A *Gladue* report was admitted as fresh evidence to fill informational gaps in the materials before the court below, including a pre-sentence report.¹⁵⁶ The *Gladue* report canvassed historical and contemporary issues facing Mr. Wolfleg's community in detail.¹⁵⁷ It also addressed the continuing inter-generational trauma his immediate family has suffered, including abuse in residential schools, racism and further abuse in non-residential schools, sexual abuse in the family, domestic violence, his father's incarceration, and physical and emotional violence from his brother.¹⁵⁸ In contrast, the information in the pre-sentence report before the Court of Appeal was described as cursory and incomplete, failing to address the historical, systemic, background, and individual circumstances that the sentencing judge needed to properly assess Mr. Wolfleg's moral blameworthiness.¹⁵⁹

In *Macintyre-Syrette*, the Ontario Court of Appeal provides guidance on the level of information needed to assess alternative sanctions and procedures.¹⁶⁰ It held that the court below erred by proceeding in spite of gaps in the materials, which included both a pre-sentence report and a *Gladue* report.¹⁶¹ The Court of Appeal took issue with the *Gladue* report's recommendations being prepared without interviewing anyone outside the accused's own family.¹⁶² Nor was there any indication of engagement of the broader community, or any explanation for this omission.¹⁶³ Without these details, the sentencing judge could not possibly understand with any specificity what might be done "to promote reconciliation within that community and other goals of restorative justice".¹⁶⁴ Both reports indicated the community was divided over the accused yet failed to

154 *Ibid.*

155 *Wolfleg*, *supra* note 25.

156 *Ibid* at paras 108-112.

157 *Ibid* at para 110.

158 *Ibid* at para 111.

159 *Ibid* at para 112.

160 *Macintyre-Syrette*, *supra* note 141.

161 *Ibid* at para 19.

162 *Ibid* at para 21.

163 *Ibid* at para 21.

164 *Ibid.*

address how he might reconcile himself with his First Nation.¹⁶⁵ The Court of Appeal anticipated a more detailed proposal that thoroughly addressed the specific institutions and ceremonies in the community, the individuals who would need to be involved, and any relevant community practices that might reconcile Mr. Macintyre-Syrette with his community.¹⁶⁶

One challenge courts face in assessing the adequacy of the record is that these evidentiary gaps are not always apparent without the benefit of hindsight once a more detailed report is admitted as fresh evidence on appeal.¹⁶⁷ However, appellate guidance can still assist at first instance, as demonstrated in the reasons for decision of Justice Kalmakoff of the Saskatchewan Court of Queen's Bench (as he then was) in *Peepetch*.¹⁶⁸

In addressing an application for a court order for a state-funded *Gladue* report, Justice Kalmakoff closely scrutinized the pre-sentence report already before him. This report canvassed personal information, including references to Mr. Peepetch's family and significant current relationships, his health history, his education and employment history, and his criminal record.¹⁶⁹ It also touched on his First Nations ancestry, briefly mentioned his mother's attendance at residential school, and discussed his experiences of being subjected to racism.¹⁷⁰ However, it failed to "venture much below the surface with respect to any of the areas particular to Mr. Peepetch's Aboriginal heritage", providing little detail about his childhood and failing to explore either the intergenerational impact of his mother's residential school experience or the history and pattern of alcohol abuse and drinking and driving in his family.¹⁷¹ It also failed to provide details regarding the resources available in the First Nations to which Mr. Peepetch is connected or to give any insight on how they might form part of a viable sentencing alternative.¹⁷²

Each of these cases makes it abundantly clear that an Indigenous person's unique circumstances need to be given sustained and in-depth attention within sentencing proceedings. However, the level of detail

165 *Ibid* at para 22.

166 *Ibid* at para 23.

167 See for example *Chickeko*, *supra* note 71 at para 12.

168 *Peepetch*, *supra* note 38.

169 *Ibid* at para 47.

170 *Ibid* at para 48.

171 *Ibid* at para 49.

172 *Ibid*.

required may vary depending on the context.¹⁷³ Likewise, in at least some jurisdictions, appellate courts have been reluctant to adopt the same exacting standards set out in the cases summarized above.¹⁷⁴ This may reflect an ongoing dialogue between the judicial and executive branches of government in light of the fiscal implications of deeper access to case-specific information.¹⁷⁵ Case law that has emerged to date with respect to state obligations will be addressed later in this chapter.

Addressing waiver of case-specific information

If an Indigenous accused does not wish to have detailed, individualized information regarding their unique circumstances collected and presented to the court, they are entitled to waive this right so long as the waiver is “express and on the record”.¹⁷⁶ According to the Ontario Court of Appeal, waiver must be “clear and unequivocal, made with full knowledge of the right that is surrendered and of the effect of waiver of that right”.¹⁷⁷ These safeguards reflect the general principle that applies whenever a party waives a procedural right enacted for their benefit.¹⁷⁸ This gives rise to yet another gatekeeping role for sentencing judges as they may have a paramount right to “require compliance notwithstanding a desire to waive”, and it will ultimately be up to them to determine what safeguards must be respected “in order to protect the certainty and the integrity of the judicial process”.¹⁷⁹ At a minimum, sentencing judges ought to clarify whether reliance on *Gladue* circumstances has been intentionally waived rather than presuming this to be so based on the limited attention they may be paid by counsel.¹⁸⁰

173 See for example Chapter 13 for a summary of case law addressing the application of the *Gladue* principles in bail hearings and the need for a more flexible approach to case-specific information in that specific context.

174 See for example: *R v Bennett*, 2017 NLCA 41 at paras 28-36 [*Bennett*]; *Jackson v R*, 2019 NBCA 37 at paras 24-25 [*Jackson*].

175 See for example: *Sand*, *supra* note 49 at paras 40-43; *Peepeetch*, *supra* note 38 at paras 22-28; *Perley v R*, 2019 NBCA 88 at para 18 [*Perley*].

176 *Kakekagamick*, *supra* note 71 at para 44.

177 *R v Pelletier*, 2012 ONCA 566 at para 142.

178 *Ibid*, citing *Korponay v Canada (Attorney General)*, [1982] 1 SCR 41 at 49, 1982 CanLII 12 [*Korponay*].

179 *Korponay*, *supra* note 178 at 48.

180 See for example: *Park*, *supra* note 70 at paras 28, 47; *Bennett*, *supra* note 174 at paras 20-22, 26, 68.

Sentencing judges should also clarify whether an Indigenous accused wishes to waive their right to have a full *Gladue* report prepared rather than entirely waiving their right to have their unique circumstances considered under s 718.2(e). In *Gilliland*, the British Columbia Court of Appeal found that a sentencing judge erred by failing to distinguish between waiver of the consideration of (1) the systemic factors that affect Indigenous people generally and (2) case-specific, individualized information.¹⁸¹ When only the latter right has been waived, the sentencing judge must still take judicial notice of the former.¹⁸² Mr. Gilliland waived the preparation of an individualized *Gladue* report but still provided the sentencing judge with detailed submissions on his life experiences. The Court of Appeal held that these submissions therefore needed to be reviewed against the broader social facts that are subject to judicial notice under s 718.2(e).¹⁸³

Other appellate courts have likewise held that a sentencing judge's obligation to consider case-specific information and apply s 718.2(e) persists even when the accused waives the preparation of a *Gladue* report.¹⁸⁴ In *Matchee*, for example, the Alberta Court of Appeal held that the sentencing judge erred by failing to recognize the connection between Mr. Matchee's circumstances and the attendance of his mother and grandmother at residential schools.¹⁸⁵ While Mr. Matchee waived his right to have a *Gladue* report prepared, the Court of Appeal nevertheless found his moral blameworthiness to be diminished based on the *Gladue* factors canvassed in a pre-sentence report before the sentencing judge at first instance.¹⁸⁶ Waiver of the preparation of a full *Gladue* report clearly did not relieve the sentencing judge of the need to give s 718.2(e) a robust application in any event.

Sentencing judges are thus placed in a challenging position of having to reconcile their duty to craft a fit and proportionate sentence—which requires attention to an Indigenous person's unique circumstances—with the right of the accused to make strategic choices, often motivated by time constraints. Many sentencing judges explicitly address whether sufficient information is available by other means or whether other circumstances

181 *Gilliland*, *supra* note 6 at paras 14-15.

182 *Ibid* at para 15.

183 *Ibid* at para 16. See also *Kanatsiak QCCS*, *supra* note 104 at paras 98-108.

184 See for example: *R v ERC*, 2016 MBCA 74; *R v House*, 2016 ABCA 414 at paras 8, 10; *Matchee*, *supra* note 70.

185 *Matchee*, *supra* note 70 at paras 26-29.

186 *Ibid* at paras 36-44.

explain the waiver, making it transparent that the choice was an informed one.¹⁸⁷ Where there is no formal waiver but the accused declines to cooperate with the preparation of a *Gladue* report, a similar approach can provide transparency as to why sentencing proceeded in its absence.¹⁸⁸ In some cases, a sentencing judge might go a step further by requesting that a *Gladue* report still be prepared out of an abundance of caution, effectively overriding the accused's election.¹⁸⁹ However, the Supreme Court and several appellate courts have all confirmed that an Indigenous person is entitled to waive the consideration of their case-specific information so long as the waiver is clear, informed, and on the record.¹⁹⁰

Ensuring adequacy of reasons for sentence

One further consideration with respect to the sufficiency of case-specific information before the court will be how this record clarifies and buttresses their reasons for sentence. Appellate courts take a functional approach when reviewing the adequacy of reasons, examining a lower court's reasons in context to the record and submissions that were before them.¹⁹¹ Less detailed reasons may be acceptable where there is an extensive evidentiary record that still permits meaningful appellate review.¹⁹² When an appeal is heard with respect to the application of s 718.2(e), an appellate court therefore reviews the reasons for sentence in light of the submissions and all other sources of case-specific information before the court, including any *Gladue* reports or pre-sentence reports.¹⁹³

This is not to say that an extensive record will be sufficient without more. In *Gladue*, the Supreme Court merely urged sentencing judges to provide “at least brief reasons” that explain how they have paid attention

187 See for example: *R v ONM, SM & CWS*, 2011 BCPC 97 at paras 145-147; *R v MSI*, 2011 MBPC 26 at para 17; *R v Penashue*, [2017] NJ No 301 (QL), 2017 CanLII 52760 (Prov Ct) at paras 9-10; *R v Morris*, 2018 BCSC 803 at paras 42-45; *R v Simpson*, 2019 ABQB 174 at para 28; *Leclair*, *supra* note 35 at para 38; *R v Decaire*, 2020 ABPC 25 at para 11.

188 See for example *R v Louie*, 2018 BCSC 937 at paras 9-10.

189 See for example *Jackson*, *supra* note 174 at paras 27-30, 36.

190 *Ibid.*

191 *R v REM*, 2008 SCC 51 at paras 15-17, 37-41 [*REM*].

192 *Ibid* at para 40; *Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 101.

193 See for example *R v Good*, 2012 YKCA 2 at paras 25-33.

to the circumstances of Indigenous people, finding no statutory duty to do so.¹⁹⁴ Yet in *Ipeelee* the Court revisited this topic by endorsing appellate intervention when the sentencing judge fails to give “tangible consideration” to an Indigenous person’s circumstances in their reasons, indicating reasons may no longer be optional.¹⁹⁵ Many appellate decisions have since insisted that sentencing judges must *explicitly* address Indigenous people’s unique circumstances in their reasons, as well as how systemic and background factors contributed to them.¹⁹⁶ This can ensure fair and accurate decision-making by directing their attention to salient issues in the analysis.¹⁹⁷

Nevertheless, having comprehensive *Gladue* information in the record still plays a key part in ensuring reasons for sentence are intelligible and transparent, thereby facilitating meaningful review on appeal.¹⁹⁸ And the intended audience of a judge’s reasons extends beyond appellate courts and the parties to the broader public or community at large.¹⁹⁹

As the Alberta Court of Appeal points out in *Wolfleg*, comprehensive *Gladue* information can play a role in fostering reconciliation in the latter regard:

Proper application of *Gladue* principles by sentencing judges serves the broader public interest, by ensuring transparent judicial method. Moreover, this court’s insistence on the proper application of *Gladue* principles in all sentencing matters involving Aboriginal offenders is essential to ensuring meaningful appellate review of sentences involving Aboriginal offenders. Fidelity to the values underpinning these public interest objectives is instrumental to the advancement of reconciliation with all Indigenous peoples.²⁰⁰

194 *Gladue*, *supra* note 2 at para 85.

195 *Ipeelee*, *supra* note 15 at para 95.

196 See for example: *R v Fontaine*, 2014 BCCA 1 at para 35; *Napesis*, *supra* note 19 at para 8; *Legere*, *supra* note 25 at para 45; *Park*, *supra* note 70 at para 35; *Laboucane*, *supra* note 121 at para 5.

197 *REM*, *supra* note 191 at para 12.

198 See for example: *R v Anderson*, 2018 MBCA 42 at paras 64-67, 90-91; *Wolfleg*, *supra* note 25 at paras 100-102.

199 *REM*, *supra* note 191 at paras 12-13, 23, 37.

200 *Wolfleg*, *supra* note 25 at para 101.

The obligations placed on counsel for both parties

The case law to date also provides guidance on the respective parts played by Crown and defence counsel in amassing case-specific information before the court. It has been clear since the *Gladue* decision that “counsel on both sides” share in this obligation.²⁰¹ Many appellate decisions have since echoed this basic directive, emphasizing that the Crown, the defence bar, and other agencies in the criminal justice system must all work to ensure adequate *Gladue* information is available to the court.²⁰² This may suggest that a more inquisitorial approach to s 718.2(e) is appropriate in the sentencing process.²⁰³ However, in *Wells*, the Supreme Court situated the roles of Crown and defence counsel in adducing case-specific information within “our adversarial system of criminal law”.²⁰⁴ For this reason it may be worth examining the respective obligations of Crown counsel and defence separately, at least to the extent possible based on the limited direction on this topic in the case law to date.

Crown counsel

The role of the prosecution in implementing s 718.2(e) may be best understood in context to the special role the Crown plays in the overall administration of criminal justice. The Crown’s paramount function in a criminal proceeding has been described as a quasi-judicial one in the sense that the Crown must assist the court in the furtherance of justice rather than simply striving for a conviction.²⁰⁵ While this precludes the adoption of “a purely adversarial role towards the defence”, it is still anticipated that Crown counsel will be strong advocates and pursue legitimate results to the best of their ability.²⁰⁶ In other words, the Crown plays a “dual role as both advocate and minister of justice” and must balance strong advocacy against this overriding, quasi-judicial

201 *Gladue*, *supra* note 2 at para 83.

202 *Laliberte*, *supra* note 144 at para 58. See also: *R v CP and JA*, 2009 NBCA 65 at para 6; *Park*, *supra* note 70 at para 31.

203 *Sim*, *supra* note 120 at para 25.

204 *Wells*, *supra* note 14 at para 54 [emphasis added].

205 *Boucher v The Queen* (1954), [1955] SCR 16 at 22-25, 1954 CanLII 3; *R v Roberts* [1973] OJ No 932 (QL), 14 CCC (2d) 368 (CA) at 370.

206 *R v Cook*, [1997] 1 SCR 1113, 1997 CanLII 392 at para 21.

purpose.²⁰⁷ As ministers of justice, prosecutors have “a duty to ensure that the criminal justice system operates fairly to victims of crime, the public and the accused”.²⁰⁸ Among other things, they must do whatever is reasonably required to assist the sentencing judge in avoiding error.²⁰⁹ With these principles in mind it is not surprising to find the Crown assisting the court by presenting case-specific information in support of the *Gladue* analysis in many cases.

As a strong advocate within an adversarial system, the Crown may wish to adduce case-specific information to bolster its own position. For example, filling gaps in the record with respect to *Gladue* information could help ensure the Crown’s expert evidence is as reliable as possible in the sense of properly accounting for these circumstances.²¹⁰ More generally, whenever Crown counsel accounts for an Indigenous person’s circumstances in their submissions on sentence this could support their position as being fair, balanced, reasonable, and persuasive.²¹¹ Detailed case-specific information also helps justify joint submissions on sentence.²¹² Likewise, when the Crown is pursuing an adult sentence for an Indigenous young person, or a dangerous offender or long-term offender designation, they may wish to present evidence of any culturally relevant programming in particular institutions or the community in furtherance of the evidentiary burdens placed on them in these specific sentencing contexts.²¹³ While an Indigenous accused often has an interest in submitting similar evidence, the Crown has its own independent responsibility to ensure a complete evidentiary record in each sentencing proceeding.²¹⁴

207 See for example: *R c Bouchard-Asselin*, [2004] JQ No 1790 (QL), 2004 CanLII 23859 (CA) at para 16; *R v Delchev*, 2015 ONCA 381 at para 64; *R v Ahmed*, 2015 ONCA 751 at para 39.

208 *R v Sobi*, [2005] OJ No 1931 (QL), 2005 CanLII 16599 (Sup Ct) at para 10; *R v Lee*, 2015 ONSC 7932 at para 15.

209 *R v Kravchenko*, 2020 MBCA 30 at para 39.

210 See for example *R v Lewis*, 2012 ONSC 5085 at paras 85-95.

211 See for example: *R v David*, 2017 BCSC 877 at para 9; *R v Huskins*, 2018 ABPC 227 at paras 8, 23.

212 See for example *McInnis*, *supra* note 102 at paras 58-62, 79, 92-93. See also the detailed discussion of this topic in Chapter 12 of this book.

213 See for example: *R v SL*, 2012 MBPC 22 at paras 98-104; *R v Badger*, 2013 SKQB 347 at paras 22-27; *R v KM (A Young Person)*, 2017 NWTSC 26 at paras 126-135; *R v Moise*, 2017 SKQB 372 at paras 201-214; *R v Keenatch*, 2019 SKPC 38 at paras 14-18. See also the detailed discussions of these topics in Chapters 14 and 15 of this book.

214 *R v Montgrand*, 2014 SKCA 31 at para 17.

There are practical limits on the Crown's ability to investigate an Indigenous person's individual circumstances. Most notably, they will not have access to the accused in the same way that defence counsel is in a position to directly elicit case-specific information from their client and others within their support network. Yet, as the Alberta Court of Appeal has pointed out in *Crazyboy*, the *Gladue* analysis requires both an inquiry into the individual's circumstances and an inquiry into the circumstances of their community, and this case-specific information can be relevant in many ways rather than being solely of interest to defence counsel.²¹⁵ As the Crown has obligations to victims and the broader public, they will be well-suited to assist with an inquiry into community circumstances. As one example, the circumstances of Indigenous victims can have some relevance to the *Gladue* analysis.²¹⁶ Several cases have suggested that victim and community impact statements contribute to the court's understanding of Indigenous community perspectives, giving the Crown impetus to seek out this form of case-specific information in support of s 718.2(e).²¹⁷ The Crown can also canvass culturally relevant programming available in custody so the court is fully apprised of all available sentencing options.²¹⁸

While *Gladue* information can often support Crown counsel's role as advocate, their duty to facilitate a complete record of case-specific information is often treated as an overriding obligation more in line with their role as a minister of justice.²¹⁹ As noted earlier in this chapter, one of the earliest interpretations of s 718.2(e)'s procedural implications was provided by Judge Reilly of the Alberta Provincial Court (as he then was) in *Hunter*, where he relied on this provision to order Crown counsel to investigate and report back on the social conditions of the Stoney reserve at Morley, Alberta.²²⁰ In *Kakekagamick*, Justice Laforme of the Ontario

215 *Crazyboy*, *supra* note 121 at para 32, citing *R v Gladue*, 2012 ABCA 118 at para 6.

216 See for example: *R v Ledesma*, 2012 ABPC 10 at para 39; *R v Atkinson*, 2012 YKTC 62 at paras 29-33; *Quock*, *supra* note 65 at paras 104-107; *R v Chanalquay*, 2015 SKCA 141 at para 43.

217 See for example: *R v Flett*, 2005 MBCA 61 at para 22; *R v Robinson*, 2013 BCSC 772 at paras 32-37; *Paul*, *supra* note 36 at para 30; *R v Alec*, 2016 BCCA 347 at para 3; *R v Fisher*, 2017 BCPC 92 at para 39; *R v AS*, 2017 ONSC 802 at paras 19-21, 33(iv); *Heimbecker*, *supra* note 35 at paras 80-83.

218 See for example: *R v Hawk*, 2012 ONSC 4745 at para 50; *R v Nicholls*, 2015 ONSC 8136; *R v Tukkiapik*, 2018 QCCS 5938 at paras 204, 212.

219 *Blanchard*, *supra* note 24 at para 25; *Sand*, *supra* note 49 at paras 2, 32-33.

220 *R v Hunter* (1997), 52 Alta LR (3d) 359, 1997 CanLII 24559 (Prov Ct), rev'd in part *Hunter QB*, *supra* note 131, aff'd 1998 ABCA 141. See further discussion in Chapter 6 of how this precedent came to be indirectly addressed in the *Wells* decision.

Court of Appeal concluded that “[c]ounsel and perhaps *especially* the Crown” could and should have addressed the inadequacy of the pre-sentence report before the court with respect to *Gladue* information in that matter.²²¹ Similarly, when the Ontario Court of Appeal has found the need to obtain supplementary *Gladue* reports on appeal, their orders have been directed to the Crown rather than defence counsel.²²² Furthermore, in *FL*, Judge Ray of the Ontario Superior Court flatly rejected the argument that *Gladue* reports are solely the responsibility of the defence as they pertain to mitigating factors.²²³ Instead, he held that “[t]he Crown, as the representative of the state, has a vested interest in not only ensuring that a defendant is treated fairly, but also in ensuring that *Gladue* Reports are available to sentencing judges when appropriate”.²²⁴ Some appellate courts have gone a step further by characterizing the adequacy of *Gladue* information before the sentencing judge as an issue that speaks to trial fairness in and of itself.²²⁵

More generally, if Crown prosecutors are obliged to assist the court in avoiding errors, they will have a readily apparent interest in ensuring sentencing judges are aware of all their obligations under s 718.2(e), as summarized earlier in this chapter. This could mean letting the court know that the individual being sentenced self-identifies as Indigenous, pointing out gaps or deficiencies within the information before the court regarding their unique circumstances, and ensuring that waiver of any rights pursuant to s 718.2(e) is properly addressed on the record rather than assumed. The public interest is not likely to be served by otherwise avoidable appeals on such bases. The Crown can also test and clarify the facts that are set out in *Gladue* reports and pre-sentence reports before the court so the sentencing judge knows what can be relied upon in crafting a sentence.²²⁶

Where the Crown fails to facilitate an adequate record for the *Gladue* analysis, this could lead to remedies being issued in favour of the accused. In *Carratt*, for instance, Justice Klebuc of the Saskatchewan Court of Queen’s Bench (as he then was) suggested a stay of proceedings could be an effective remedy if the Crown elects not to adduce evidence with

221 *Kakekagamick*, *supra* note 71 at para 53 [emphasis added].

222 *Kakekagamick*, *supra* note 71; *Macintyre-Syrette*, *supra* note 141 at para 25.

223 *R v FL*, 2014 ONSC 38 at para 3, *aff’d* 2018 ONCA 83 [*FL*].

224 *Ibid.*

225 *Wolfleg*, *supra* note 25 at paras 99-102; *Zoe*, *supra* note 71 at para 56.

226 *R v Florence*, 2015 BCCA 414 at para 20; *R v Corbiere*, 2017 ABCA 164 at para 15.

respect to systemic and background factors and makes it difficult for the sentencing judge to meaningfully apply s 718.2(e).²²⁷ While he declined to stay the proceedings given the seriousness of the offence in that case and in light of additional information set out in a “revised and much-improved” pre-sentence report, Justice Klebuc suggested that this remedy could be appropriate in other circumstances for a less serious offence.²²⁸

More recently, the New Brunswick Court of Appeal in *Perley* addressed a request for a stay pursuant to s 24(1) of the *Charter* but held that it was appropriate for the sentencing judge to instead exclude incarceration as an available sanction in the absence of adequate *Gladue* information as a more tempered remedy.²²⁹ Likewise, Judge Wakefield of the Ontario Court of Justice stayed charges in *Parent* when adequate *Gladue* information was not made available to the court.²³⁰ While the latter two cases focus on remedying the failures of provincial governments rather than prosecutors—and will be addressed again under state obligations—they still provide a clear impetus for Crown counsel to facilitate an adequate record of case-specific information to avoid such remedies in the future.

Defence counsel

Defence counsel plays a more intuitive and straightforward role in ensuring adequate *Gladue* information is before the court whenever an Indigenous person is sentenced. In the adversarial process it is expected that defence counsel will advance their client’s best interests. The *Gladue* analysis requires attention to an Indigenous person’s circumstances to determine if their moral blameworthiness is diminished, whether incarceration is a less appropriate or effective sanction for them, and whether restorative sentencing principles might deserve primacy, among other things. It should be self-evident that providing the court with the individualized information it needs to make these inquiries will generally advance the best interests of defence counsel’s Indigenous clients.

As Justice Danyiuk of the Saskatchewan Court of Queen’s Bench highlights in *Gamble*, “[f]rom the outset, the role of counsel in providing *Gladue* information about their clients to the court was seen as an active and

227 *R v Carratt*, 1999 SKQB 116 at paras 30-32.

228 *Ibid* at para 32.

229 *Perley*, *supra* note 175 at para 21.

230 *Parent*, *supra* note 42.

robust role”.²³¹ Among other things, they can request a *Gladue* report or a pre-sentence report that canvasses the unique circumstances of their client, they can provide informal information to the court and address these same circumstances by way of submissions, and they can fill gaps in the reports that are made available by “furnishing the court with the missing pieces”.²³² They can also assist by identifying any gaps within a report before the court so the sentencing judge can assess whether a supplemental report is needed.²³³ Within the adversarial system defence counsel is expected to vigorously advance their client’s interest in having their circumstances explored at first instance rather than leaving this for an appeal.²³⁴

In contrast to the Crown or the sentencing judge, defence counsel have direct access to their client and may be in a position to develop a rapport that facilitates full and candid disclosure of their background and personal history. They can also advise their client why it might be in their best interests to thoroughly discuss sensitive personal history with pre-sentence and *Gladue* report writers in advance of these interviews.²³⁵ Particularly when sentencing follows a full trial, defence counsel will have spent considerable time with their client when they can be eliciting and collating relevant *Gladue* information.²³⁶ In some cases, counsel may even feel comfortable presenting this information without a pre-sentence report or *Gladue* report on this basis, and they may advise their client to waive their right to a report to avoid spending further time in remand.²³⁷ That said, defence counsel may also need to advise their client that this type of tactical decision can limit their ability to argue s 718.2(e) has been given inadequate consideration should the matter go on appeal.²³⁸ When it comes to addressing whether any waiver is informed, defence counsel again play a self-evident role. In sum, defence counsel can help ensure adequate *Gladue* information is before the court both by contributing to the record with thorough evidence and submissions and by properly advising their client about their own role.

231 *Gamble, supra* note 26 at paras 55-56, citing *Ipeelee, supra* note 15 at para 59.

232 *Ibid* at para 58.

233 See for example *Peepetch, supra* note 38 at paras 15-18.

234 *Heiney, supra* note 122 at paras 48. See also: *R v Worm*, 2014 SKCA 94 at paras 140-142; *Bonnetrouge, supra* note 122 at para 48.

235 See *Gamble, supra* note 26 at paras 67-68.

236 *Ibid* at para 54.

237 *R v Friday*, 2012 ABQB 371 at paras 24-25.

238 *R v Rennie*, 2017 MBCA 44 at para 23, leave to appeal to SCC ref'd 37632 (9 December 2017). See also *Bonnetrouge, supra* note 122 at para 24.

The obligations of the state

Several judgments highlight that the *Gladue* analysis requires more than just sustained attention from Crown counsel, defence counsel, and sentencing judges to their respective obligations under s 718.2(e)—it also implicates the resources of provincial and territorial governments and agencies.²³⁹ In *LLDG*, for instance, Justice Monnin of the Manitoba Court of Appeal stated that judges will be unable to discharge their statutory obligations under s 718.2(e) without “the provincial resources to provide the required information to both counsel and the courts”.²⁴⁰ In *Quock*, Chief Judge Cozens of the Yukon Territorial Court (as he then was) described *Gladue* reports as the most efficient means by which case-specific information can be presented to the courts while cautioning that they require sufficient resourcing to make them available as necessary.²⁴¹ Similarly, Justice Danyliuk of the Saskatchewan Court of Queen’s Bench pointed out in *Sand* that if the Government of Saskatchewan maintains their position that probation officers can provide sufficient and timely *Gladue* information through modified pre-sentence reports, it “must provide adequate funding and resources to ensure this can be done on an ongoing basis, as the system demands”.²⁴² While these comments all appear to have been made in *obiter*, they nevertheless provide valuable context for the remedies and procedural protections that have been made available when the state’s obligations go unmet.

If the state fails to ensure adequate case-specific information is available, one legitimate response could be requesting a court order for a *Gladue* report prepared at state expense. This is the specific context in which Justice Danyliuk emphasized provincial obligations in *Sand*. He ultimately dismissed the application for a state-funded *Gladue* report, finding adequate information was available in the pre-sentence report before the court. However, in doing so, he confirmed that the Court of Queen’s Bench has the jurisdiction to order a state-funded, stand-alone *Gladue* report, either as a necessarily incidental power flowing from s 718.2(e) or based on its inherent jurisdiction as a superior court.²⁴³ Sentencing judges in Saskatchewan have since emphasized that this

239 See for example: *Corbiere*, *supra* note 21 at para 28; *Land*, *supra* note 99 at para 31; *Derion*, *supra* note 55 at para 18; *FL*, *supra* note 223 at paras 3-4.

240 *LLDG*, *supra* note 57 at para 35. See also *R v Mason*, 2011 MBPC 48 at para 32.

241 *Quock*, *supra* note 65 at para 109. See also *R v Stewart*, 2012 YKSC 75 at para 3.

242 *Sand*, *supra* note 49 at para 51. See also *Gamble*, *supra* note 26 at paras 72-73.

243 *Ibid* at para 52. See also: *Peepetch*, *supra* note 38 at paras 27-28, 58; *Gamble*, *supra* note 26 at para 43.

jurisdiction must be exercised sparingly and with caution in light of the constitutional implications of the judiciary directing the executive and legislative branches to expend limited government funds.²⁴⁴ However, it has provided an important procedural backstop in the event that probation services fails to provide adequate information in pre-sentence reports in that province.²⁴⁵

Another procedural protection against inadequate resourcing of *Gladue* information may be accommodating for resulting evidentiary gaps by placing greater reliance on judicial notice, inferential reasoning, and attention to systemic factors in the *Gladue* analysis. In *Lewis and Lewis*, Judge Challenger of the Provincial Court of British Columbia adopted this approach to avoid prejudice to the interests of the accused from the state's failure to adequately resource the effective and sensitive gathering of case-specific information.²⁴⁶ She highlighted that the pre-sentence reports prepared in that province would gloss over an Indigenous nation or band's post-contact history, provide very little insight into the personal impacts of assimilation policies and the residential school system on the person being sentenced and their family, make only passing reference to community resources, and rarely reflect community views or specific culturally sensitive justice practices.²⁴⁷ Judge Challenger observed that this paucity of information makes the sentencing judge's task more difficult.²⁴⁸ In order to avoid prejudice to the accused, she emphasized the need to assess the limited information before her to draw inferences with respect to moral culpability.²⁴⁹ She also stressed the role of judicial notice in the sense that she would have to draw on her own knowledge of resources in addition to whatever is suggested by counsel in order to craft appropriate restorative, reparative, and rehabilitative terms.²⁵⁰

In some cases the state's failure to make adequate *Gladue* information available through specialized pre-sentence reports or *Gladue* reports has led to sentencing judges ordering remedies in favour of the accused. While the decisions to date have contemplated a wider variety of

244 *Peepetch*, *supra* note 38 at para 28; *Gamble*, *supra* note 26 at para 59.

245 See *Peepetch*, *supra* note 38 at paras 51-58.

246 *Lewis and Lewis*, *supra* note 38 at para 21. See also *Kanatsiak* QCCS, *supra* note 104 at paras 96-100, 108.

247 *Ibid* at para 20.

248 *Ibid* at para 21.

249 *Ibid* at para 22.

250 *Ibid*.

remedies, including contempt of court proceedings, the state's failure to meet its obligations under s 718.2(e) has so far been addressed by either a reduction of the sentence imposed, a stay of charges, or the elimination of incarceration as an option.

In *Knockwood*, for example, Justice Hill of the Ontario Superior Court of Justice held that Quebec's failure to provide for adequate and timely *Gladue* information rose to the level of state misconduct and entitled Ms. Knockwood to a reduction of her sentence to address the delays she faced as a result.²⁵¹ After Justice Hill issued an order for a *Gladue* report to be prepared prior to sentencing Ms. Knockwood, a Mohawk woman from Kahnawake in Quebec, Quebec's probation services advised they did not complete *Gladue* reports.²⁵² When Justice Hill insisted, the court was provided a four-and-a-half page pre-sentence report written entirely in French for the Anglophone accused, and once translated into English, counsel for both parties agreed it was entirely inadequate and non-compliant.²⁵³ After further adjournments a *Gladue* report was finally prepared by Aboriginal Legal Services.²⁵⁴ In concluding that Quebec's probation services engaged in state misconduct, Justice Hill noted that the *Gladue* decision was decided over a dozen years prior and Ms. Knockwood suffered stress and upset as a result of these delays.²⁵⁵

In *Noble*, Judge Joy of the Provincial Court of Newfoundland and Labrador suggested the authorities who operate Labrador probation services were "likely in contempt of a court order" for providing a form of pre-sentence report entitled "Pre-Sentence Report (Gladue Perspective)" in response to a court order for a *Gladue* report.²⁵⁶ Citing *Knockwood*, he held that this rose to the level of state misconduct since the Province of Newfoundland and Labrador failed to train probation officers or anyone else to prepare *Gladue* reports in the wake of *Ipeelee*, and instead instructed probation officers to change the title of their reports without advising the court of their inadequate training.²⁵⁷ While this systemic issue did not impact the sentencing of Mr. Noble in particular, Judge

251 *R v Knockwood*, 2012 ONSC 2238 at paras 69-73.

252 *Ibid* at para 8.

253 *Ibid* at paras 10-14.

254 *Ibid* at paras 16-18.

255 *Ibid* at para 70.

256 *Noble*, *supra* note 54 at para 39.

257 *Ibid* at paras 50-53.

Joy warned that a wide range of remedies would be available to address such state misconduct in the future, “including significant reduction of sentence, and contempt of court proceedings”.²⁵⁸

In *Perley*, the New Brunswick Court of Appeal addressed the state’s role in context to an application for a stay of proceedings after provincial probation services repeatedly failed to provide adequate case-specific information regarding Ms. Perley, an Indigenous woman. The Court summarized the government’s role as follows:

In the criminal law context, it is the state that seeks to take away an offender’s liberty, whether through imprisonment or by other constraints. It is also the state that has the resources to ensure that information relevant to sentencing is brought before the courts, usually in the form of a pre-sentence report. It is common knowledge that most offenders are represented by legal aid lawyers who do not have resources of the kind available to the state. It would seem to us reasonable to expect that the practice of the state providing resources for the preparation of **proper** reports to address the *Gladue* factors, which has evolved in other provinces, should be universally implemented.²⁵⁹

In this case, the sentencing judge had ordered a pre-sentence report for Ms. Perley but it failed to adequately address her unique circumstances as an Indigenous woman.²⁶⁰ When a more fulsome report was subsequently provided, defence counsel argued that it was still insufficient and sought a stay on this basis.²⁶¹ After hearing expert evidence regarding the preparation of *Gladue* reports, the sentencing judge was satisfied that Ms. Perley’s right to life, liberty, and security of the person under s 7 of the *Charter* was breached by the Crown’s failure to provide the necessary information.²⁶² Ms. Perley’s request for a stay was denied but the court eliminated imprisonment from the available options when sentencing her for aggravated assault, suspended the passing of sentence, and imposed a probation order.²⁶³ The Court of Appeal held that this was “the proper outcome in the circumstances” since the sentencing judge would have erred had he proceeded without “the detailed requisite information”, and

258 *Ibid* at para 108.

259 *Perley, supra* note 175 at para 18.

260 *Ibid* at para 9.

261 *Ibid* at para 10.

262 *Ibid* at para 12.

263 *Ibid*.

he would have also violated the principle of fundamental justice that sentences must be proportionate.²⁶⁴

In *Parent*, Judge Wakefield of the Ontario Court of Justice stayed various charges against an Indigenous man, including assault and mischief, based on issues faced in obtaining a *Gladue* report prior to sentencing. Mr. Parent was initially self-represented and when the court first ordered a *Gladue* report neither he nor the Crown formally requested the report so a second order had to be made at a subsequent appearance.²⁶⁵ After this second order, a letter from a caseworker at Aboriginal Legal Services was brought to the attention of the court advising that a full *Gladue* report would not be prepared as the Crown was only seeking 30 days' incarceration and full reports are restricted to cases where the Crown's position exceeds 90 days.²⁶⁶ Based on additional charges against Mr. Parent the Crown's position was revised to 120 days and the matter was again adjourned for the preparation of a *Gladue* report.²⁶⁷ Aboriginal Legal Services then advised that a *Gladue* report would not be prepared as the specific nature of Mr. Parent's Indigenous ancestry could not be determined.²⁶⁸ At this point, counsel for Mr. Parent brought a successful application for a stay of proceedings. While Aboriginal Legal Services is not an agency within the state, Judge Wakefield held that the procedural failings in this case nevertheless amounted to state misconduct as "it is the state which funds, is responsible for, and arranges for the Report".²⁶⁹ A stay was ordered as proceeding with sentencing would have resulted in "overholding" Mr. Parent well past any period of custody that the Crown would have requested, among other reasons.²⁷⁰

The state's failure to make sufficient provision for access to *Gladue* information can also have an impact on an Indigenous person's right to be tried within a reasonable time under s 11(b) of the *Charter*. In *Hartling*, the Ontario Court of Appeal addressed this *Charter* right in context to the province's failure to provide adequate institutional resources for *Gladue* reports in the Algoma district of Ontario.²⁷¹ The

264 *Ibid* at para 20.

265 *Parent*, *supra* note 42 at para 4.

266 *Ibid* at para 6.

267 *Ibid*.

268 *Ibid* at para 7.

269 *Ibid* at para 160.

270 *Ibid* at para 167.

271 *R v Hartling*, 2020 ONCA 243 [*Hartling*].

Court of Appeal had previously concluded that a delay of five months between verdict and sentence is presumptively unreasonable under the *Charter* and must be justified by the Crown.²⁷² In this case, the Crown sought to justify a fourteen-month post-verdict delay—almost three times what is considered to be presumptively unreasonable—based on a set of allegedly extraordinary circumstances that included the time it took to secure a *Gladue* report.²⁷³

At the time of his sentencing Mr. Hartling was denied funding for a *Gladue* report by court administration services on the basis that Aboriginal Legal Services had no *Gladue* report writers in the Algoma district where the matter was heard.²⁷⁴ He therefore ended up paying for a *Gladue* report “privately out of pocket”.²⁷⁵ The Court of Appeal flatly rejected the Crown’s submission that this was an exceptional circumstance and it reduced Mr. Hartling’s custodial sentence by five months to account for the delay.²⁷⁶ In doing so, the Court emphasized the need for reliable and timely access to *Gladue* reports:

I do not agree that the circumstances are exceptional. It cannot be said that it is exceptional to require a *Gladue* report in the Algoma district where there is a large Indigenous population. *Gladue* reports were created in order to address systemic injustice that uniquely affects Indigenous offenders, and which leads to overrepresentation in the criminal justice system. A long delay undermines the purpose of the *Gladue* report by creating another level of unfairness. Moreover, to submit that the preparation of such a report is exceptional is untenable.

The appellant was entitled to a *Gladue* report, the trial judge ordered it, and subsequently relied on it.²⁷⁷

While the analysis required by s 11(b) of the *Charter* is distinct from how courts address state misconduct in sentencing, it is similarly focused on either the actions or the inaction of the *state* in the administration of justice. In essence, it addresses “whether *the state* has failed to provide an accused with a trial within a reasonable time as guaranteed by the

272 *R v Charley*, 2019 ONCA 726 at paras 86-87.

273 *Hartling*, *supra* note 271 at paras 99-100.

274 *Ibid* at para 97.

275 *Ibid*.

276 *Ibid* at para 124.

277 *Ibid* at paras 102-103.

Charter” and any remedies associated with this right are therefore “a rebuke to state action”.²⁷⁸ In the words of Justice Cromwell (as he then was) in *Jordan*, s 11(b) requires the judiciary to set clear limits around “the point at which the state’s plea of inadequate resources must give way to the constitutionally guaranteed right to be tried within a reasonable time”.²⁷⁹ This has an obvious resonance with cases like *Knockwood*, *Perley*, and *Parent* where the state’s failure to adequately resource the preparation of *Gladue* reports has led to prejudicial delays for the accused. *Hartling* indicates that s 11(b) can provide yet another mechanism by which the state’s failure to meet these responsibilities may be rebuked by the courts at the same time that prejudice to the accused is addressed.

Conclusion

The *Gladue* analysis obliges sentencing judges to explore an Indigenous person’s unique circumstances in every proceeding unless this statutory right has been waived. While it is clear that pre-sentence reports, *Gladue* reports, submissions from counsel for both parties, and witness testimony can all help in fulfilling this task, most of these procedural details have been left up to lower courts to develop. In doing so, the cases summarized in this chapter indicate that sentencing judges play the lead role in ensuring the requirements of s 718.2(e) are met in any given proceeding, and this requires careful assessment of the adequacy of the record before them. The court may need to solicit further information from counsel for both parties to supplement the record or they may wish to order supplementary reports if the information before them appears to be insufficient.

Whenever an Indigenous person is sentenced in the absence of an adequate record—including both categories of unique circumstances—the decision will be vulnerable to appellate intervention. The need for adequate case-specific information has implications for Crown counsel as well as the defence bar. Moreover, it can also have implications for state resources, at times leading to remedies being issued in favour of the accused if they have been prejudiced by institutional delays. In sum, the *Gladue* analysis places considerable demands on all those involved in sentencing to interrogate the unique circumstances of Indigenous individuals and collectives in a meaningful way.

278 *R v Balogh*, 2020 BCCA 96 at para 37 [emphasis added].

279 *R v Jordan*, 2016 SCC 27, Cromwell J at para 262, dissenting.

PART



ELABORATION AND
EXTENSION OF THE
GLADUE PRINCIPLES
BY LOWER COURTS

PART D: ELABORATION AND EXTENSION OF THE *GLADUE* PRINCIPLES BY LOWER COURTS

As the Supreme Court of Canada pointed out in *Barton*, there is still much-needed work to be done before we see truth and reconciliation within the criminal justice system. The Supreme Court has demonstrated how the *Gladue* principles integrate with considerations arising under other provisions of the *Criminal Code*, first in context to the conditional sentencing provisions in *Wells*, and later for breaches of long-term supervision orders in *Ipeelee*. The Supreme Court has also acknowledged that systemic discrimination and Indigenous alienation in the justice system have implications beyond s 718.2(e) in *Erwert*, *Barton*, and *Friesen*. These developments indicate broad relevancy to the systemic and background factors and distinct legal perspectives of Indigenous peoples, but they are only three examples among many others emerging from lower courts across the country. Subsequent chapters address several further applications and elaborations of the *Gladue* principles that have emerged to date. While not all of these jurisprudential trends have been uniformly accepted by lower courts thus far, those selected for inclusion in this publication have all benefitted from thorough and thoughtful consideration.

When the *Gladue* principles are construed broadly as the need for an Indigenous person's unique circumstances to be recognized and accommodated throughout the justice system, their implications are not easily captured in one publication. An Indigenous person's systemic and background factors might conceivably show why they deserve leniency in bringing a civil suit outside a short limitation period.¹ These factors can contextualize the probative value and prejudicial effects of placing an Indigenous person's criminal record before a jury as well.² Likewise, these factors may be relevant when assessing if an Indigenous person's confession was truly voluntary or determining why they might have pleaded guilty.³ There are innumerable instances in which courts exercise discretion with regard to *all* the circumstances before them. There is no obvious a priori limit on the relevancy of the *unique* circumstances of an Indigenous person in the sense contemplated in the *Gladue* decision and its successors. The remaining chapters cannot canvass each and every existing example of the *Gladue* principles extending into new legal contexts, nor can they possibly highlight every single logical possibility for future developments. There are simply too many one-offs and what-ifs to consider. They do, however, synthesize some of the most consistently explored and thoroughly analyzed extensions to date. While the Supreme Court of Canada and other appellate courts have yet to thoroughly develop all these topics, the remaining chapters reflect the current state of the law and may assist in principled applications and development of the existing law.

1 See for example *O'Shea v City of Vancouver*, 2015 BCPC 398 at paras 89-101.

2 See for example *R v King*, 2019 ONSC 6851 at paras 27-47, 62.

3 See for example: *R v Camille*, 2018 BCSC 301 at paras 78-80, 87; *R v Wabason*, 2018 ONCA 187 at paras 4, 20; *R v Ceballo*, 2019 ONCJ 612 at paras 10-12, 16.

CHAPTER 12: JOINT SUBMISSIONS ON SENTENCE

To suggest the *Gladue* principles are relevant to joint submissions on sentence is a rather modest addition to the jurisprudence, especially given the role these principles play in the fundamental principle of proportionality. Still, this topic has received limited discussion at the appellate level to date so the existing case law is explored in detail in this chapter. In the *Anthony-Cook* decision in 2016 the Supreme Court of Canada did clarify the role of joint submissions in sentencing more generally, as well as the appropriate legal test to determine whether sentencing judges are entitled to depart from these joint positions.¹ Among other things, the Court emphasized that joint submissions must be thoroughly justified by counsel and an offender's circumstances must be fully accounted for. Prior to the release of *Anthony-Cook* there were already precedents in which it was insisted that counsel must explore an Indigenous person's unique circumstances during the resolution discussions leading up to a joint submission.² In light of the significant clarification of the law in *Anthony-Cook*, this chapter focuses on subsequent decisions where the *Gladue* principles are merged with those set out in *Anthony-Cook* with respect to the justification of joint submissions and the standard that must be met before courts depart from them.

A clarification of the law in *Anthony-Cook*

In *Anthony-Cook*, the Supreme Court determined the legal test that trial judges should apply when deciding whether it is appropriate in a particular case to depart from a joint sentence—"that is, when Crown and defence counsel agree to recommend a particular sentence to the

1 *R v Anthony-Cook*, 2016 SCC 43 [*Anthony-Cook*].

2 See for example: *R v Gouda*, 2013 ABQB 121; *R v Gruben*, 2013 NWTSC 59.

judge, in exchange for the accused entering a plea of guilty”.³ This appeal arose from the sentencing of Mr. Anthony-Cook for manslaughter. He entered a guilty plea on the basis of a joint submission as to sentence. However, the trial judge rejected the joint submission, imposing both a longer custodial sentence than what had been proposed by counsel and a three-year probation order not contemplated by their joint submission. The Court unanimously held that the trial judge erred in principle by imposing a less stringent test than he should have in choosing to depart from the joint submission. The Court clarified the more stringent test that ought to have been followed by the sentencing judge and then applied it to the joint submission for Mr. Anthony-Cook in order to conclude that departure from it was unwarranted.

Writing for a unanimous court, Justice Moldaver described resolution discussions between Crown and defence counsel as “not only commonplace in the criminal justice system” but “essential”.⁴ When “[p]roperly conducted, they permit the system to function smoothly and efficiently”.⁵ He pointed out that joint submissions are a subset of resolution discussions that “are both an accepted and acceptable means of plea resolution”, and are “vital to the efficient operation of the criminal justice system”.⁶ He noted that in most cases joint submissions are “unexceptional” and “readily approved by trial judges without any difficulty”.⁷

At the same time, Justice Moldaver stated that “joint submissions are not sacrosanct” and “[t]rial judges may depart from them”.⁸ He noted that occasionally “a joint submission may appear to be unduly lenient, or perhaps unduly harsh, and trial judges are not obliged to go along with them”.⁹ Prior to this appeal, however, the appropriate test against which to measure the acceptability of a joint submission was contentious among appellate courts across the country. Justice Moldaver resolved this competing jurisprudence in favour of the most stringent test—the public interest test—on the basis that it “best reflects the many benefits that joint submissions bring to the criminal justice system and the

3 *Anthony-Cook*, *supra* note 1 at para 2.

4 *Ibid* at para 1.

5 *Ibid*.

6 *Ibid* at para 2.

7 *Ibid* at para 25.

8 *Ibid* at para 3.

9 *Ibid* at para 25, citing s 606(1.1)(b)(iii) of the *Criminal Code*, RSC 1985, c C-46.

corresponding need for a high degree of certainty in them”.¹⁰ It also “helps keep trial judges focused on the unique considerations that apply when assessing the acceptability of a joint sentence”.¹¹

The public interest test

Justice Moldaver clarified the public interest test as meaning that “a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest”.¹² A joint submission will meet this standard if, “despite the public interest considerations that support imposing it, it is so ‘markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system’”.¹³ He also cautioned that “when assessing a joint submission, trial judges should ‘avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts’”.¹⁴

Justice Moldaver further clarified the “undeniably high threshold” for rejecting a joint submission as follows:

Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system has broken down.¹⁵

10 *Ibid* at para 31.

11 *Ibid*.

12 *Ibid* at para 32.

13 *Ibid* at para 33, citing *R v Druken*, 2006 NCLA 67 at para 29.

14 *Ibid* at para 33, citing *R v BO2*, 2010 NLCA 19 at para 56.

15 *Ibid* at para 34.

The need for joint submissions to be thoroughly justified

Justice Moldaver also provided guidance for trial judges on the approach they should follow if “troubled by a joint submission on sentence”.¹⁶ While most of his guidance falls outside the scope of this publication, Justice Moldaver did point to the need for Crown and defence counsel to thoroughly justify joint submissions, which has been expanded upon by lower courts as a basis for the relevance of *Gladue* information.

According to Justice Moldaver, Crown and defence counsel should “provide the court with a full account of the circumstances of the offender, the offence, and the joint submission” so the trial judge has a proper basis upon which to determine whether it should be accepted.¹⁷ They need to inform the trial judge why the proposed sentence meets the public interest test or “they run the risk that the trial judge will reject the joint submission”.¹⁸ They also need to communicate their considerations to ensure that “a proper record is created for appeal purposes”.¹⁹ In addition, thoroughly justifying a joint submission “has an important public perception component”.²⁰

For similar reasons, Justice Moldaver urged trial judges who remain unsatisfied to “provide clear and cogent reasons for departing from the joint submission”.²¹ Reasons will help explain to the parties why the proposed sentence was unacceptable, may assist them in the resolution of future cases, and will also facilitate appellate review.

Counsel must account for *Gladue* principles when justifying joint submissions

Several sentencing decisions have since directly addressed the role of the *Gladue* principles in the sentencing judge’s determination of whether they have a proper basis upon which to determine if a joint submission should be accepted in keeping with the guidance in *Anthony–Cook*. To date this

16 *Ibid* at para 49.

17 *Ibid* at para 54.

18 *Ibid* at para 55.

19 *Ibid* at para 56.

20 *Ibid* at para 57.

21 *Ibid* at para 60.

has occurred where counsel has not considered the *Gladue* principles in arriving at their joint submission, where detailed case-specific information was not available when the joint submission was prepared, or where the joint submission otherwise contributes to systemic discrimination in the criminal justice system. As a result, sentencing judges have decided not to accept the joint submission in question and they justified their departure in reference to Justice Moldaver's directions in *Anthony-Cook*. These cases indicate that the unique circumstances addressed in *Gladue* are among the circumstances that must be fully accounted for by counsel in order to thoroughly justify their joint submission on sentence for any Indigenous person.

In *Adam*, Judge Harradence of the Saskatchewan Provincial Court was presented with a joint submission of an 18-month conditional sentence order with “lengthy and restrictive conditions” after Ms. Adam pleaded guilty to charges of possession of cocaine and wilfully attempting to obstruct justice, as well as three charges relating to breach of her release document.²² This was a joint submission that Crown counsel candidly admitted “was hefty for an offender with no criminal record”.²³ Judge Harradence expressed concern with the joint submission due in large part to counsel's failure to make any reference to the *Gladue* principles in spite of Ms. Adam appearing to be First Nations.²⁴ Sentencing was adjourned and a pre-sentence report was ordered so as to provide information on Ms. Adam's history and background.

Judge Harradence ultimately applied the directions set out in *Anthony-Cook* to reject the joint submission as “contrary to the public interest”.²⁵ The pre-sentence report for Ms. Adam confirmed that she was from a remote First Nation in northern Saskatchewan and she had experienced family breakdown, family abuse, and economic disadvantage, but she was nevertheless making significant progress in her life and she hoped to attend university.²⁶ Judge Harradence noted that in light of this background he needed to pay careful attention to s 718.2(e) and consider it in context to other sentencing principles. He found no evidence that counsel had “considered *Gladue* factors in arriving at the joint sentence” and held that he therefore did not have

22 *R v Adam*, 2017 SKPC 7 at paras 13-14.

23 *Ibid* at para 5.

24 *Ibid* at para 7.

25 *Ibid* at para 29.

26 *Ibid* at para 18.

“a proper basis on which to determine whether the joint submission should be accepted”.²⁷ In support of his conclusion that *Gladue* factors were not considered, he noted that Ms. Adam’s Indigenous heritage was not confirmed by counsel until a pre-sentence report was ordered.²⁸ He also considered the significant power imbalance between Ms. Adam and Crown counsel in light of her background, her youth, and her “bottom line” of not wanting to go to jail.²⁹ A suspended sentence with 12 months of probation was imposed in place of the conditional sentence jointly presented to the court.

In *Gordon*, Judge Bazin of the Saskatchewan Provincial Court rejected a joint submission of 16 months’ imprisonment for trafficking in hydromorphone and imposed a suspended sentence in its place.³⁰ Crown and defence counsel were both senior respected members of the criminal bar and they jointly submitted that 16 months of imprisonment was “the proper sentence, being lower than the bottom of the range”.³¹ Judge Bazin asked Ms. Gordon whether she had Indigenous ancestry when the joint submission was presented and she indicated that she did and in fact had attended residential school. Counsel “candidly admitted *Gladue* factors were not considered in arriving at the joint submission”.³² Judge Bazin ordered a pre-sentence report canvassing Ms. Gordon’s unique circumstances, as well as her cognitive status, learning disabilities, and the correctional system’s ability to address her multiple medical conditions.³³ Upon receipt of that pre-sentence report, Judge Bazin advised counsel that he had concerns with the joint submission and heard further submissions in support of it.

Judge Bazin ultimately concluded that the joint submission could not stand in light of counsel’s candid admission that they had not considered Ms. Gordon’s *Gladue* factors in arriving at the joint position on sentence. This was described as “a fundamental error that is fatal to a joint submission”.³⁴ Judge Bazin further found that:

27 *Ibid* at para 21.

28 *Ibid* at para 27.

29 *Ibid* at para 28.

30 *R v Gordon*, 2019 SKPC 58 at para 1.

31 *Ibid* at para 5.

32 *Ibid* at para 8.

33 *Ibid* at para 10.

34 *Ibid* at para 19.

A reasonable person, aware of the requirement of s. 718.2(e) and the law as developed in [*Gladue*] and *Ipeelee* would believe that the proper functioning of the justice system had broken down. Equally, I find that an informed and reasonable public would lose confidence in the institution of the courts where, after years of jurisprudence, counsel simply do not consider *Gladue* factors, particularly given the high threshold required to reject a joint submission.³⁵

Judge Bazin went on to consider various factors including the effect of Ms. Gordon's attendance at residential school, her lower cognitive capacity, and her significant health issues in order to conclude that a jail term was not required.³⁶ An 18-month suspended sentence was imposed with 12 months to be served under a 24-hour curfew, but with a 12-month credit granted for the 13 months of house arrest she had already served.³⁷

In *Little*, Judge Corrin of the Manitoba Provincial Court rejected a joint submission of 54 months' imprisonment as a global sentence for possession of cocaine for the purpose of trafficking, possession of a prohibited firearm without a licence, and possession of a prohibited weapon, instead imposing a global sentence of 48 months' with three years of supervised probation. Judge Corrin initially expressed concern over the impact of the proposed lengthy sentence of incarceration on a 22-year-old offender and heard further submissions in support of the sentence. Upon learning that Mr. Little had "Indigenous roots", Judge Corrin adjourned sentencing in order to obtain further *Gladue* information as an appendix to an existing pre-sentence report.³⁸

Judge Corrin was satisfied that the sentence jointly proposed by counsel was within the appropriate range in reference to the circumstances of the offence, but was concerned as to whether it reflected "the influences of the offender's individual circumstances having regard for his age, immaturity, peculiar vulnerabilities and rehabilitative potential".³⁹ Judge Corrin went on to consider Mr. Little's personal circumstances in detail, including his unique circumstances as an Indigenous person and ultimately rejected the proposed sentence in light of "his youth, his

35 *Ibid.*

36 *Ibid* at para 66.

37 *Ibid* at para 67.

38 *R v Little*, 2019 MBPC 60 at para 3.

39 *Ibid* at para 10.

vulnerability, and his *Gladue* factors and s. 718.2(e) factors (which apply to all offenders)”.⁴⁰

In *TLC*, Judge Wolf of the British Columbia Provincial Court rejected a joint submission of an 18 month suspended sentence for an Indigenous woman who pleaded guilty to two assaults on her boyfriend and a breach of bail. Instead, he sentenced her to a conditional discharge with 18 months of probation, in part to spare her from the consequences of a criminal record.⁴¹ After hearing initial submissions from counsel, Judge Wolf requested further information and a *Gladue* report was obtained. While counsel conceded they did not have the benefit of much of the information contained in the *Gladue* report when the joint submission was negotiated, they nevertheless stood by their position even with the benefit of that report.⁴² Judge Wolf accepted that many factors generally weigh in favour of completing sentencing rather than delaying it when presented with a joint submission for a suspended sentence in a case such as this one.⁴³ Nevertheless, he found that he needed more information on this particular accused and relied on what was set out in the *Gladue* report to justify his departure from the joint submission.

Judge Wolf also provided guidance on how the general need for *Gladue* information in sentencing an Indigenous person fits into the overall approach to departures from joint submissions in *Anthony-Cook*:

I believe that another step is necessary. After notifying counsel of my concerns and inviting further submissions, in the case of an Indigenous offender, I must ask myself, do I have enough information to impose a fit sentence that properly considers the Indigenous circumstances of that particular Indigenous accused? I expect a ‘reasonable and informed person’, who is familiar with the social context of Indigenous Peoples and the Canadian Justice System would expect that this question be considered.⁴⁴

In *Laforge*, Justice Marchand of the British Columbia Supreme Court rejected a joint submission for an effective custodial sentence of 27 months time-served followed by three years of probation for a Métis man with schizophrenia who pleaded guilty to one count of mischief by

40 *Ibid* at para 45.

41 *R v TLC*, 2019 BCPC 314 at paras 77-78.

42 *Ibid* at para 17.

43 *Ibid* at paras 35-39.

44 *Ibid* at para 19.

wilfully damaging vehicles and one count of intentionally or recklessly causing damage by fire.⁴⁵ Mr. Laforge had driven his vehicle through the front window of a 7-Eleven convenience store, poured gasoline into the cab, and lit it on fire to bring attention to his struggles, including the delusional belief that he was being interfered with by intrusive brain and perception-altering technologies.⁴⁶ He had already spent 548 days in custody by the date of his sentencing hearing.⁴⁷ The Court concluded that the jointly proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest and ordered an effective time-served custodial sentence of 18 months followed by three years of probation in its place.⁴⁸

While there was no *Gladue* report prepared for Mr. Laforge, Justice Marchand found his circumstances set out in detailed and thoughtful pre-sentence and psychiatric reports.⁴⁹ His father is Métis but knew little about his heritage as a result of being adopted by a non-Indigenous family as an infant.⁵⁰ Mr. Laforge was born to a teenaged mother, raised by his maternal grandmother, and verbally, physically, and sexually abused by the grandmother's former partner.⁵¹ Among other *Gladue* factors, he was bullied in high school due to his Indigenous appearance, began using drugs, and dropped out.⁵² In spite of this case-specific information, Justice Marchand was concerned that Crown counsel had made no mention of *Gladue*, *Ipeelee*, or s 718.2(e)'s relevance to the appropriateness of the joint submission.⁵³ While defence counsel identified a number of *Gladue* factors, there was no meaningful submission as to how these may have played a part in bringing Mr. Laforge before the court, nor were any culturally appropriate supports, programs, or other alternative procedures and sanctions identified.⁵⁴ The joint submission failed to recognize Mr. Laforge's highly reduced moral blameworthiness in light of his traumatic upbringing, community disconnection, addictions, and mental health issues.⁵⁵

45 *R v Laforge*, 2020 BCSC 1269 [*Laforge*].

46 *Ibid* at paras 1-4.

47 *Ibid* at para 3.

48 *Ibid* at paras 87-90.

49 *Ibid* at para 20.

50 *Ibid* at para 23.

51 *Ibid* at para 21.

52 *Ibid* at para 24.

53 *Ibid* at para 83.

54 *Ibid*.

55 *Ibid* at para 89.

Justice Marchand raised the concern that the joint submission was too harsh at an early stage, as well as the concern it “might contribute to, rather than alleviate, the systemic over-incarceration of Indigenous offenders that s. 718.2(e) of the *Code* was designed to address”.⁵⁶ He pointed out that *Gladue* factors feed into disproportionate rates of pre-trial detention faced by Indigenous people, which in turn incentivizes guilty pleas and joint proposals for sentences of time-served that might exceed what would otherwise be appropriate.⁵⁷ He concluded that this could contribute to Indigenous over-incarceration in two ways: (i) by establishing precedents of unduly long sentences for other Indigenous people finding themselves in similar circumstances in the future; and (ii) by signalling to the judge in any future sentencing proceeding for Mr. Laforge the seriousness of his criminal history, which could be relied on to impose a longer period of incarceration.⁵⁸ Justice Marchand was satisfied that a reasonable and informed member of the community would view the joint submission as representing the breakdown of the criminal justice system due to various factors, including: the lack of authority in support of its length given Mr. Laforge’s reduced culpability; the substantial incentive for Mr. Laforge to agree to any time-served sentence after a lengthy period of pre-trial detention; counsel’s failure to meaningfully address the *Gladue* principles in justifying the position; and the joint submission’s contribution to systemic discrimination against Indigenous people in the criminal justice system.⁵⁹ Justice Marchand also reduced the length of a jointly proposed three-year curfew on the basis that its length was excessive and unnecessary, it would risk criminalizing non-criminal behaviour, and it could contribute to Indigenous over-incarceration in a manner analogous to overly restrictive bail conditions.⁶⁰

In *Awashish*, Judge Ladouceur of the Court of Quebec rejected a joint submission of 34.7 months in prison and 24 months of probation for a Cree man who pleaded guilty to theft of a purse and its contents, aggravated assault against his sister, breach of probation for failing to perform community work, and two breaches of recognizance.⁶¹ He informed the parties that he was questioning whether the joint submission complied with the public interest test established in *Anthony-*

56 *Ibid* at para 65.

57 *Ibid* at paras 79-80.

58 *Ibid* at para 81.

59 *Ibid* at para 87.

60 *Ibid* at paras 92-98, citing *R v Zora*, 2020 SCC 14 at para 79.

61 *R c Awashish*, 2020 QCCQ 3614.

Cook, especially in light of the principles set out in *Gladue*, *Ipeelee*, and subsequent jurisprudence from the Quebec Court of Appeal, and he requested additional submissions on the justification and circumstances underlying it.⁶² While both a *Gladue* report and a pre-sentence report were ordered, only a pre-sentence report was ever prepared due to the onset of the coronavirus pandemic, among other circumstances, and Mr. Awashish waived his right to the *Gladue* report's preparation.⁶³

Judge Ladouceur noted that in two prior unrelated sentencing matters for Mr. Awashish no *Gladue* report had been prepared, no *Gladue*-specific submissions had been made, and there was no referral to a justice committee in the probation conditions.⁶⁴ He also highlighted the distinct purpose, source, and process for pre-sentence reports, finding that to the extent they touch on *Gladue* information, "in most cases, it is but the tip of the iceberg".⁶⁵ Nevertheless, Judge Ladouceur was able to determine that Mr. Awashish's childhood was marred by familial alcohol abuse, almost daily domestic violence, and physical abuse that left him hospitalized on at least one occasion.⁶⁶ Mr. Awashish began committing thefts, missing school, and smoking cannabis by age 10, around the time his mother left home and his sister became his maternal figure.⁶⁷ He dropped out of school by age 17, abused alcohol and drugs, attempted suicide twice, and ended up being heavily medicated for depression and panic attacks.⁶⁸ Mr. Awashish acknowledged he needed help to resolve his problems and he was willing to undergo therapy at the Waseskun Center, a provincially and federally accredited healing centre.⁶⁹

Crown and defence counsel had jointly proposed a sentence of exactly two years so as to ensure that a probation order could be rendered after Mr. Awashish served this sentence in a federal penitentiary.⁷⁰ Defence counsel argued that he was more likely to receive care for his mental health issues if given a penitentiary sentence.⁷¹ Judge Ladouceur found little

62 *Ibid* at para 3.

63 *Ibid* at para 14.

64 *Ibid* at paras 15-17.

65 *Ibid* at para 19.

66 *Ibid* at para 20.

67 *Ibid* at para 21.

68 *Ibid* at paras 21-23.

69 *Ibid* at paras 2, 28.

70 *Ibid* at para 36.

71 *Ibid* at para 35.

support for the joint submission in the precedents provided by counsel.⁷² He cited *Laforge* and found that “the proposed sentence would be viewed by reasonable and informed persons as representing a breakdown in the proper functioning of the justice system”.⁷³ He held that the *Gladue* principles must not only be considered during the negotiation of a joint submission, but “[t]his consideration must be reflected concretely in the result submitted to the Court”.⁷⁴ The Crown erred by measuring the proposal against an appropriate sentence for a hypothetical non-Aboriginal person.⁷⁵ The Court also held that the joint submission failed to reflect either Mr. Awashish’s diminished moral culpability or the available alternatives to incarceration in a concrete manner.⁷⁶

Citing *Laforge*, Judge Ladouceur held that the joint submission presented in *Awashish* “perpetuate[d] the problem of the overrepresentation of Aboriginal persons in prison, with respect to both the accused and the precedent it sets” and “would mean opening the doors of the prisons and penitentiaries even wider to incarcerate Aboriginal persons in them”.⁷⁷ In its place, the Court ordered 18 months’ imprisonment less pre-sentence custody for the aggravated assault, 6 months of conditional sentences for the remaining convictions, and thirty months of probation that would include therapy at the Waseskun Center, the involvement of a justice committee, and 150 hours of community service.

In *Head*, Judge Cochard of the Alberta Provincial Court raised concerns with a joint submission of 30 months of incarceration followed by three years of probation for a 26-year-old Aboriginal man who pleaded guilty to 12 separate charges involving assaults, shoplifting, and robbery of a convenience store.⁷⁸ According to the Court, “*Gladue* factors were read in superficially” in support of this joint position.⁷⁹ Counsel advised that Mr. Head wished to waive the preparation of a *Gladue* report and that there were no existing reports on him, but Judge Cochard found a *Gladue* report from a prior sentencing hearing involving Mr. Head after making

72 *Ibid* at paras 42-43.

73 *Ibid* at para 35, citing *Laforge*, *supra* note 45 at para 53.

74 *Ibid* at para 46.

75 *Ibid* at paras 46-48.

76 *Ibid* at paras 49-54, 64.

77 *Ibid* at paras 64-65, citing *Laforge*, *supra* note 45 at para 65.

78 *R v Head*, 2020 ABPC 211.

79 *Ibid* at para 5.

her own independent inquiries.⁸⁰ The *Gladue* report from a previous proceeding indicated that Mr. Head might have been diagnosed with Fetal Alcohol Spectrum Disorder (FASD) so Judge Cochard made some additional inquiries, found a psychiatric assessment prepared for him in a Youth Justice matter that raised the possibility of FASD, and brought all this to the attention of counsel.⁸¹

Counsel abandoned their original joint submission and defence counsel instead sought a sentence of time-served plus probation, providing extensive written submissions on the *Gladue* factors and the possible FASD diagnosis.⁸² However, Judge Cochard noted that this reflected research that was only done once she indicated she was unwilling to accept the joint submission. In the Court's view, "[t]his should have been done prior to the negotiations to resolve matters and prior to presenting a joint submission".⁸³ Judge Cochard went on to confirm that the originally proposed sentence was contrary to the interests of the public and would have brought the administration of justice into disrepute for the same reasons that Judge Ladouceur set out in *Awashish*.⁸⁴ She held that joint submissions should not be accepted where they fail to properly account for *Gladue* factors including FASD, and that "[c]ounsel must be prepared to come to court with the proper information".⁸⁵ Mr. Head had served 252 days in pretrial custody and Judge Cochard sentenced him to time-served followed by three years of probation that include conditions for attendance at the Mental Health Court and an FASD Program.

At the time of writing there appears to be a consensus among sentencing courts that have issued written decisions on this question that the *Gladue* principles must be meaningfully addressed in any joint submissions on sentence for Indigenous accused. There may be differing degrees to which counsel fails to address these principles in their submissions, ranging from a failure to even confirm the Indigeneity of the accused to a more nuanced failure to consider the joint position in the broader context of systemic discrimination against Indigenous peoples, including its impact on sentencing ranges. It is at least clear that more than a perfunctory reference to *Gladue* factors will be expected.

80 *Ibid* at paras 9-14.

81 *Ibid* at paras 9-14.

82 *Ibid* at para 19.

83 *Ibid*.

84 *Ibid* at para 57.

85 *Ibid* at para 58.

In another decision issued by Judge Ladouceur of the Court of Quebec, *Neeposh*, he emphasized that joint submissions are a mechanism through which both the Crown and defence counsel can exert a positive impact on the rate at which Indigenous people are being incarcerated in Canada.⁸⁶ He stated that joint submissions are particularly vital to the efficient operation of the justice system in northern courts, but “we should question ourselves regarding the high frequency of joint submission proposing [a] term of imprisonment”.⁸⁷ In order for the *Gladue* principles to have an impact on incarceration rates—whether in context to joint submissions or otherwise—the unique circumstances of Indigenous people will need to be thoroughly and meaningfully explored by counsel.

Courts must consider *Gladue* principles in how they approach joint submissions

There are also a number of decisions where appellate courts have overturned sentencing decisions departing from joint submissions on sentence without adequately considering the relevance of the *Gladue* principles. These appellate decisions further emphasize the importance of assessing an Indigenous person’s unique circumstances in this context. Just as counsel’s failure to consider the *Gladue* principles has been relied on by sentencing judges as a reason for departing from joint submissions that are too harsh, appellate courts have relied on the failure of sentencing judges to consider the *Gladue* principles in their approach to joint submissions as an error justifying appellate review. In other words, both counsel and the sentencing court have been obliged to ensure the *Gladue* principles are respected in context to joint submissions for the sentencing of Indigenous people.

In *Boyer*, the Saskatchewan Court of Queen’s Bench allowed an appeal from sentence for a conviction of impaired driving and varied the sentence to bring it into conformity with a joint submission of 34 days’ imprisonment, served at the Saskatchewan Impaired Driver Treatment Program, followed by six months’ probation, and a three-year driving prohibition.⁸⁸ The sentencing judge initially expressed concern with the joint proposal based on Mr. Boyer’s two prior drinking-and-driving related convictions, his very high blood-alcohol readings, and his driving

86 *R c Neeposh*, 2020 QCCQ 1235 at paras 57-58.

87 *Ibid* at para 58.

88 *R v Boyer*, 2016 SKQB 352.

on the wrong side of the road, and he invited further submissions and case law in support of it.⁸⁹ Defence counsel pointed to Mr. Boyer's early guilty plea, prior alcohol treatment, and Métis ancestry, among other things.⁹⁰ The sentencing judge invited defence counsel to provide further information regarding Mr. Boyer's Indigenous heritage and counsel made oral submissions regarding how Mr. Boyer's family had endured prejudice and how Mr. Boyer witnessed substance abuse and violence in his home when he was growing up.⁹¹ The joint submission was nevertheless rejected as "unfit and contrary to the public interest" for failing to address the primary sentencing objectives of deterrence and denunciation.⁹²

On appeal, the Court of Queen's Bench acknowledged the jointly proposed sentence was "undoubtedly lenient, in light of Mr. Boyer's criminal record and the circumstances".⁹³ However, it was the product of negotiations between experienced counsel and Mr. Boyer's early guilt plea, rehabilitative steps, and suitability for a treatment program were all relevant factors in support of the Crown's agreement.⁹⁴ The Court noted that defence counsel had raised "Mr. Boyer's difficult upbringing and personal circumstances, which required the sentencing judge to consider s. 718.2(e) of the *Criminal Code*", as well as the Supreme Court's decisions in *Gladue* and *Ipeelee*.⁹⁵ The Court found that these circumstances "clearly suggested that rehabilitation and restraint were factors that should have been given prominence in sentencing".⁹⁶ Instead, the sentencing judge focused "entirely on denunciation and deterrence", failed to give adequate consideration to the principles of rehabilitation and restraint, and failed to give adequate consideration to the public interest considerations that supported the joint submission.⁹⁷

In *McInnis*, the Prince Edward Island Court of Appeal similarly allowed an appeal from a sentencing judge's departure from a joint submission on sentence on the basis that the *Gladue* principles were

89 *Ibid* at para 9.

90 *Ibid* at para 10.

91 *Ibid* at para 11.

92 *Ibid* at para 16.

93 *Ibid* at para 30.

94 *Ibid*.

95 *Ibid* at para 31.

96 *Ibid*.

97 *Ibid* at para 32.

not properly considered and applied.⁹⁸ Mr. McInnis was charged with unlawfully possessing cannabis for the purposes of trafficking at a high school where he was a student. A *Gladue* report was prepared for his sentencing. Upon the report’s finalization, Crown and defence counsel made a joint sentencing submission in support of a lengthy rehabilitative probation order which included conditions set out in the *Gladue* report. The sentencing judge cautioned that she was concerned with the joint sentence and she adjourned sentencing on at least three occasions in order to obtain further documentation and submissions, in part to explain “how and why *Gladue* should apply and why the sentencing judge should accept the joint recommendation”.⁹⁹ She ultimately rejected the joint sentencing submission in a 31-page oral decision.

The Court of Appeal overturned this decision on the basis that the sentencing judge applied the wrong test in departing from the joint submission and failed to consider how the *Gladue* principles supported the joint submission in question. In the Court of Appeal’s view, the sentencing judge concluded that the *Gladue* principles should not be applied in this case essentially due to the fact that Mr. McInnis “had been adopted at a very young age—basically at birth”.¹⁰⁰ In doing so, in spite of having adequate information before her in the *Gladue* report, the sentencing judge erred by refusing to accept that systemic factors applied, holding the appellant to a strict standard of proving causation, and not according any weight to these factors in her decision.¹⁰¹ The Court of Appeal found that the sentencing judge’s rejection of the joint submission was largely a result of this misapplication of the *Gladue* principles.¹⁰²

The Court of Appeal was of the view that the joint submission’s focus on rehabilitation and restorative justice was in keeping with the principles outlined in ss 718.2(d), (e), and (f) of the *Criminal Code* and the unique historic and systemic factors that a sentencing judge must consider when sentencing an Indigenous person.¹⁰³ It accepted that the Crown’s support of the joint submission was premised on the circumstances of

98 *R v McInnis*, 2019 PECA 3.

99 *Ibid*, Murphy JA at paras 10-13.

100 *Ibid*, Murphy JA at para 46.

101 *Ibid*, Murphy JA at paras 50-55.

102 *Ibid*, Murphy JA at para 55, Jenkins CJ at para 88.

103 *Ibid*, Murphy JA at paras 57, Jenkins CJ at paras 74-75, 79, 93.

Mr. McInnis as an Indigenous person.¹⁰⁴ It also held that the sentencing judge erred by focusing on deterrence and denunciation in assessing the sentence's fitness in place of applying the public interest test.¹⁰⁵ Among other things, the Court of Appeal added that "pursuit of parity needs to accommodate the inherently individualized nature of sentencing, such that there is no such thing as a uniform sentence for a particular crime".¹⁰⁶ For all these reasons, the joint submission ought to have been accepted.

In *Whitstone*, Justice Zuk of the Saskatchewan Court of Queen's Bench heard an appeal where neither the Crown nor defence counsel had made the initial sentencing judge aware the accused was Indigenous.¹⁰⁷ Sentencing had proceeded "effectively" as a joint submission.¹⁰⁸ Defence counsel consented to the Crown's application to terminate Ms. Whitstone's existing conditional sentence order due to new charges, as well as the Crown's recommendation of a six-month jail sentence on the two new charges, which related to fraudulently obtaining food.¹⁰⁹ There was no direct reference to Ms. Whitstone's Indigeneity in the transcript from the initial sentencing proceeding, although there were references to her place of residence being the Thunderchild First Nation.¹¹⁰ Justice Zuk noted that references to Ms. Whitstone residing in that community "ought to have drawn the sentencing judge's attention to enquiring if Ms. Whitstone was of aboriginal ancestry".¹¹¹ The Court cautioned that a failure to inquire if an offender is Indigenous, a failure to obtain adequate information on their circumstances as an Indigenous person, or a failure to provide reasons as to how the *Gladue* principles were applied could each place a sentencing decision at risk of appellate review.¹¹² The fact that this proceeding involved a joint position on sentence would not eliminate these obligations on the sentencing judge.

104 *Ibid*, Murphy JA at para 59, Jenkins CJ at paras 79, 92.

105 *Ibid*, Murphy JA at para 59.

106 *Ibid*, Jenkins CJ at para 88, citing *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 77.

107 *R v Whitstone*, 2018 SKQB 83.

108 *Ibid* at para 43. Counsel's joint position on sentence in *Whitstone* may be best characterized as a joint recommendation rather than a joint submission on sentence if it was not the product of resolution discussions between counsel (see for example: *R v Frampton*, 2018 NLCA 23 at paras 20-28; *R v Crier*, 2020 ABQB 475 at paras 17-18).

109 *Ibid* at para 9.

110 *Ibid* at para 7.

111 *Ibid* at para 36.

112 *Ibid* at paras 37-42.

The Court conceded that the role of the *Gladue* principles in assessing a joint position on sentence was not specifically raised or argued in this case and Ms. Whitstone was self-represented.¹¹³ Nevertheless, it provided the following guidance as to the importance of considering *Gladue* information in this context:

...it is my view that any sentencing judge who accepts a joint sentence respecting an aboriginal offender runs a risk of the sentencing decision being open to appellate review where the court fails to address *Gladue* factors in the course of accepting the joint submission. Where there is a joint submission respecting an aboriginal offender and the joint submission fails to provide evidence of *Gladue* factors that enable the sentencing judge to consider the appropriateness of the sentence in light of the offender's aboriginal circumstances, it may render the sentence open to appellate review on the basis that the sentencing judge failed in his or her statutory duty to conduct the inquiry and analysis required by s. 718.2(e).¹¹⁴

Conclusion

There is little suggestion in the case law to date that extending the *Gladue* principles to the justification and assessment of joint submissions has been controversial in terms of the development of the law by the judiciary. However, the above-noted cases suggest that the sentencing practices of counsel may have been slow to adapt. Still, there are far more published judgments in which courts have expressly considered an Indigenous person's unique circumstances and the *Gladue* principles when accepting a joint submission without interference.¹¹⁵ In fact, the relevance of the *Gladue* principles to the justification of joint submissions on sentence has received only passing comment in some cases, suggesting this may be a relatively self-evident proposition.¹¹⁶

113 *Ibid* at para 43.

114 *Ibid*.

115 See for example: *R v JTK*, 2017 NSSC 345; *R v Andrew*, 2017 BCSC 2288; *R v JW*, 2017 NWTTC 20; *R v Dennis*, 2018 YKSC 42; *R v Wells*, 2018 BCSC 738; *R v Stevens*, 2018 QCCS 4285; *R v Anderson*, 2018 BCSC 2528; *R v Syliboy*, 2018 NSPC 83; *R v Rich*, 2019 NLSC 37; *R v MacAusland*, 2019 PESC 54; *R v Tinoco*, 2019 BCPC 68; *R v OD*, 2019 NSSC 411; *R v Blackplume*, 2020 ABPC 90; *R v Stevens*, 2020 BCPC 104; *R v Doucette and Gunanoot*, 2020 BCSC 907 [*Doucette and Gunanoot*]; *R v Ingram*, 2020 BCPC 168 [*Ingram*]; *R v CG*, 2020 YKTC 21 [*CG*]; *R v TMD*, 2020 BCPC 187; *R v Qumuaqtuq*, 2020 NWTSC 35; *R v Quitte*, 2020 NWTSC 36; *R v Racette*, 2020 BCPC 219 [*Racette*]; *R v Heimbecker*, 2020 SKQB 304.

116 See *R v Mantla*, 2020 NWTCA 6 at para 32.

On the other hand, while the doctrinal reasons for a merger of the sentencing guidance in *Anthony-Cook* and the *Gladue* jurisprudence may be straightforward, there are practical details still being worked out by lower courts. As resolution discussions fall outside the direct supervision from the courts, some decisions emphasize the need for counsel to change their practices and some judges may be using the requirement for justification as leverage to bring about these changes. The thorough review of an Indigenous person's unique circumstances may facilitate a "meeting of minds" between Crown and defence counsel in resolution discussions.¹¹⁷ If so, this would presumably be a welcome result. However, court-ordered reports that canvass these circumstances in great detail may not always be feasible, in which case judicial notice and submissions from counsel will need to shoulder the informational requirements.¹¹⁸ And while *Anthony-Cook* speaks to the importance of justification and transparency for joint submissions, counsel should not be routinely sent away to revise their positions since doing risks reintroducing the same inefficiencies and delays that the stricter public interest test was meant to mitigate.¹¹⁹

The power imbalance between the Crown and the accused in resolution discussions may be worth considering through a *Gladue* lens as well. In *Anthony-Cook*, Justice Moldaver urged an asymmetrical approach to this power differential, stating that it may temper the public interest in certainty so as to justify "undercutting" sentences in some limited circumstances, especially where the accused is self-represented or already in custody.¹²⁰ As summarized elsewhere in this publication, the reports and commissions of inquiry that preceded the *Gladue* decision identified a higher rate of guilty pleas among Indigenous people.¹²¹ The Supreme Court of Canada has recognized higher rates of pre-trial custody for Indigenous people as well.¹²² These systemic considerations may reinforce the need to bear in mind the power imbalance leading to joint submissions for Indigenous accused.

117 See for example *R v Kreyger*, 2020 ONCJ 424 at paras 27-29.

118 *R v Kuliktana*, 2020 NUCA 7 at paras 29-47; *R c MP*, 2020 QCCQ 7445 at para 78.

119 *R v Kippomee*, 2019 NUCA 3 at para 50.

120 *Anthony-Cook*, *supra* note 1 at para 52.

121 See also *R v Ceballo*, 2019 ONCJ 612 at para 10, citing Angela Bressan & Kyle Coady, *Guilty pleas among Indigenous people in Canada* (Ottawa: Department of Justice, 2017).

122 *R v Myers*, 2019 SCC 18 at para 26.

There are a few cases where sentencing judges have considered the *Gladue* principles and the circumstances of an Indigenous person before departing from joint submissions and imposing a harsher penalty.¹²³ The *Gladue* principles and the unique circumstances of an Indigenous person are not the sole considerations before the court in any given matter and they are unlikely to be determinative in every case. Joint submissions need to account for various other factors as well, such as the heightened vulnerability of Indigenous female victims, which now has explicit statutory recognition in the *Criminal Code*.¹²⁴ While judges must be alive to the important systemic benefits of joint submissions, this does not mean these negotiated positions are exempt from the general principles of sentencing, including those developed with attention to the circumstances of Indigenous people.

123 *R v IC*, 2017 BCPC 2; *R v Whitefish*, 2019 SKPC 34.

124 *Doucette and Gunanoot*, *supra* note 115 at paras 61-63, 79, 101; *Ingram*, *supra* note 115 at para 27; *CG*, *supra* note 115 at para 20; *R v Taylor*, 2020 NWTTC 10 at paras 16-17; *R v Lucas*, 2020 NWTTC 8 at paras 23-24; *Racette*, *supra* note 115 at paras 19-20, 23; *R v Aklok*, 2020 NUCJ 37 at paras 45-76, 92.

CHAPTER 13: BAIL HEARINGS

A more complex and controversial evolution in the lower court jurisprudence has been the application of the *Gladue* principles to decisions with respect to bail—also known as judicial interim release. The Supreme Court of Canada has yet to provide any guidance on how the *Gladue* principles ought to impact bail decisions. However, the Supreme Court has consistently acknowledged that the bail system has disproportionate adverse impacts on Indigenous people, laying bare several systemic factors of particular relevance to the crisis of Indigenous over-incarceration.

First, in *Gladue* and *Ipeelee* the Supreme Court recognized Indigenous people are more likely to be refused bail and that this contributes to Indigenous over-incarceration.¹ In *Summers*, the Court took note of Indigenous over-representation in remand custody and described Canada’s bail system as “result[ing] in consistently longer, harsher sentences for vulnerable members of society, not based on the wrongfulness of their conduct but because of their isolation and inability to pay”.² This issue was acknowledged again in *Myers* where the Court also took into account the “often dire” conditions individuals face during pre-trial detention, including lockdowns, overcrowding, and limited access to recreation, health care, and other basic programming.³ Likewise, the Court recognized that pre-trial custody has detrimental impacts on an individual’s ability to raise a defence, on their mental and physical

1 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 65 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at para 61 [*Ipeelee*].

2 *R v Summers*, 2014 SCC 26 at para 67 [*Summers*], citing Avani Babooram, “The changing profile of adults in custody, 2006/2007” (2008), 28:10 Juristat 1 (online): <<https://www150.statcan.gc.ca/n1/en/catalogue/85-002-X200801010732>>; Canada, Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, No 14, 2nd Sess, 40th Parl., September 30, 2009, at 27-30.

3 *R v Myers*, 2019 SCC 18 at para 26 [*Myers*], citing: *Summers*, *supra* note 2 at paras 2, 28; Abigail Deshman & Nicole Myers, *Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention* (Canadian Civil Liberties Association and Education Trust, 2014).

well being, and on their families, in addition to other costs such as loss of liberty and loss of livelihood.⁴ Moreover, prolonged pre-trial detention was found to increase the risk of “induced guilty pleas”.⁵ In *Zora*, the Supreme Court acknowledged Indigenous people are “disproportionately affected by unnecessary and unreasonable bail conditions and resulting breach charges” as well.⁶

Many lower courts have sought to respond to these systemic concerns by applying the *Gladue* principles to bail hearings, albeit in modified forms. Most jurisprudence already supported the consideration of Indigenous people’s unique circumstances in context to bail decisions long before Parliament explicitly directed courts to do so.⁷ That said, a few judges had openly questioned this earlier jurisprudence and doubted the relevance of the *Gladue* principles to bail decisions in the absence of clear legislative guidance.⁸ The *Criminal Code* has now been amended to explicitly mandate that particular attention be paid to the circumstances of “Aboriginal accused”, as well as “accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantages in obtaining release”.⁹ Nevertheless, this

4 *Myers*, *supra* note 3, citing: *R v Hall*, 2002 SCC 64 at para 59 [*Hall*]; *Ell v Alberta*, 2003 SCC 35 at para 24; *R v Antic*, 2017 SCC 27 [*Antic*] at para 66.

5 *Myers*, *supra* note 3 at paras 22, 51.

6 *R v Zora*, 2020 SCC 14 at para 79 [*Zora*], citing, *inter alia*, Jillian Rogin, “*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95:2 *Can Bar Rev* 325 [*Rogin*].

7 See for example: *R v Wesley*, 2002 BCPC 717; *R v Pitawanakwat*, [2003] OJ No 5029 (QL), 2003 CanLII 12645 (Sup Ct) [*Pitawanakwat*]; *R v Bain*, [2004] OJ No 6147 (QL) (Sup Ct); *R v Brant* [2008] OJ No 5375 (QL), 89 WCB (2d) 431 (Sup Ct) [*Brant*]; *R v Silversmith*, [2008] OJ No 4646, 2008 CanLII 60168 (Sup Ct) [*Silversmith*]; *R v Neshawabin*, [2008] OJ No 5606 (QL), 2008 CanLII 73617 (Sup Ct); *R v Robinson*, 2009 ONCA 205 [*Robinson*]; *R v Rich*, 2009 NLTD 69 [*Rich*]; *R v Pierce*, 2010 ONSC 6154 [*Pierce*]; *R v Mason*, 2011 MBPC 48; *R v TJ(J)*, 2011 BCPC 155 [*TJ(J)*]; *R v Daniels*, 2012 SKPC 189 [*Daniels*]; *R v Cyr*, 2012 SKQB 534 [*Cyr*]; *R v DD(P)*, 2012 ABQB 229 [*DD(P)*]; *R v Magill*, 2013 YKTC 8 [*Magill*]; *R v Legere*, 2014 ONCJ 604 [*Legere*]; *R v Murphy*, 2014 YKSC 37 [*Murphy*]; *R v Trodd*, 2014 ONSC 3648 [*Trodd*]; *R v Trudeau*, 2015 ONSC 5134 [*Trudeau*]; *R v Duncan*, 2015 BCSC 2688; *R v Chocolate*, 2015 NWTSC 28 [*Chocolate*]; *R v Oakes*, 2015 ABCA 178; *R v Spence*, 2015 ONSC 1692 [*Spence*]; *R v Achmeepineskum*, 2015 ONSC 5700; *R v Pinacie-Littlechief*, 2015 SKQB 397 [*Pinacie-Littlechief*]; *R v McCrady*, 2016 ONSC 1591; *R v Hope*, 2016 ONCA 648 [*Hope*]; *R v Takaknew*, 2017 BCPC 99 [*Takaknew*]; *R v Sledz*, 2017 ONCJ 151 [*Sledz*]; *R v CW*, 2018 ONSC 4783 [*CW*]; *R c Penosway*, 2018 QCCQ 8863 [*Penosway*]; *R v Louie*, 2019 BCCA 257 [*Louie*]; *R v Fuller*, 2019 BCPC 264 [*Fuller*].

8 *R v Sacobie*, [2001] NBJ No 511 (QL), 52 WCB (2d) 453 (QB); *R v Heathen*, 2018 SKPC 29 [*Heathen*]; *R v Jaypoody*, 2018 NUCJ 36 [*Jaypoody*].

9 *Criminal Code*, RSC 1985, c C-46, s 493.2 [*Criminal Code*].

amendment still leaves it up to the judiciary to clarify how these unique circumstances relate to the statutory grounds for pre-trial detention set out in the *Criminal Code*, which has resulted in a continuing role for the earlier jurisprudence on this topic.¹⁰

General legal and constitutional principles governing bail decisions

A review of the broader principles governing bail may be a helpful frame of reference. When someone is charged with an offence, Part XVI of the *Criminal Code* provides “a ladder of increasingly coercive measures” in order to compel their appearance before a court, starting from a summons or an appearance notice issued by a peace officer and increasing in coerciveness up to detention and release on bail.¹¹ The default position in Canadian law is for an accused person to be released from detention before trial on bail—referred to as “judicial interim release” in the *Criminal Code*.¹² And the default form of bail is to release accused persons “based on an undertaking to attend trial, without any conditions restricting their activities or actions”.¹³ This default position is codified in s 515(1) of the *Criminal Code*. According to the Supreme Court of Canada, this permissive approach to bail decisions “rests on the cornerstone of Canadian criminal law, namely the presumption of innocence that is guaranteed by s 11(d) of the *Charter*”.¹⁴ Moreover, section 11(e) of the *Charter* protects an accused person’s right “not to be denied reasonable bail without just cause”, which the Supreme Court has described as “a basic entitlement to be granted reasonable bail unless there is just cause to do otherwise”.¹⁵

As described in *Hall* by Justice Iacobucci of the Supreme Court (as he then was), section 11(e) of the *Charter* calls on the judiciary “to ensure that pre-trial release remains the norm rather than the exception to the norm,

10 See for example: *R v Gibbs*, 2019 BCPC 335 at para 23 [*Gibbs*]; *R c Dubé*, 2019 QCCQ 7985 at para 31 [*Dubé*]; *R v Duncan*, 2020 BCSC 590 at para 37 [*Duncan*]; *R c Quannaaluk*, 2020 QCCQ 2524 at para 74 [*Quannaaluk*]; *R v EB*, 2020 ONSC 4383 at paras 32, 39, 43 [*EB*].

11 *R v Penunsi*, 2019 SCC 39 at para 64, citing *R v Nowazek*, 2018 YKCA 12 at para 58.

12 *Antic*, *supra* note 4 at para 21. See also: *R v Morales*, [1992] 3 SCR 711, Lamer CJ at 725, 1992 CanLII 53; *R v St-Cloud*, 2015 SCC 27 at para 70 [*St-Cloud*].

13 *Zora*, *supra* note 6 at para 1.

14 *St-Cloud*, *supra* note 12 at para 70.

15 *R v Pearson*, [1992] 3 SCR 665 at 691, 1992 CanLII 52.

and to restrict pre-trial detention to only those circumstances where the fundamental rights and freedoms of the accused must be overridden in order to preserve some demonstrably pressing societal interest”.¹⁶ An accused person’s s 11(e) *Charter* right not to be denied reasonable bail has two distinct components.¹⁷ First, it includes the right to “reasonable bail”, which refers to the reasonableness of any conditions imposed on the accused, including the quantum of any monetary component.¹⁸ Second, it includes the right not to be denied bail without “just cause”, which limits the denial of bail to a “narrow set of circumstances” and prevents denial of bail for “any purpose extraneous to the bail system”.¹⁹

While release without conditions is the default position, a judge or justice of the peace can deny release or impose conditions on the accused when they are released, “provided that the Crown justifies the detention or the conditions”.²⁰ The statutory grounds on which pre-trial detention of an accused may be justified are: (i) to ensure the accused will appear in court (i.e. to address flight risk); (ii) to protect the public, including any victim or witness of the offence, or any person under the age of 18 years; and (iii) to maintain public confidence in the administration of justice.²¹ These are referred to as the primary, secondary, and tertiary grounds for pre-trial detention, respectively. The tertiary ground requires consideration of the apparent strength of the prosecution’s case, the gravity of the offence, the circumstances surrounding the commission of the offence, including the aggravating and mitigating factors that are considered in sentencing, and the potential for a lengthy term of imprisonment, among other things.²²

Still, as the default is unconditional release on an undertaking, any more restrictive form of release must be demonstrated to be necessary having regard to the statutory criteria for detention, and courts are obliged to impose the least restrictive form of release that is appropriate.²³ This means judicial officials “must consider release with fewer and less onerous conditions before release on more onerous ones”, and any conditions imposed “must be minimal, necessary, reasonable, the least onerous in the

16 *Hall, supra* note 4, Iacobucci J at para 49, dissenting.

17 *St-Cloud, supra* note 12 at para 27.

18 *Antic, supra* note 4 at para 41.

19 *Antic, supra* note 4 at para 40.

20 *Ibid* at para 21.

21 *Criminal Code*, s 515(10); *Antic, supra* note 4 at para 34.

22 *Criminal Code*, s 515(10)(c); *St-Cloud, supra* note 12 at para 61.

23 See the summary of principles and guidelines in *Antic, supra* note 4 at para 67.

circumstances, and sufficiently connected to a risk listed in s. 515(10)” of the *Criminal Code*.²⁴ The Court has also insisted that “[a]ll those involved in the bail system” must be guided by the principle of restraint.²⁵

Caveats to the application of the *Gladue* principles to bail decisions

While there is some overlap in terms of their emphasis on restraint, the legal principles governing bail are not conducive to an unmodified application of the *Gladue* principles. As pointed out by Judge Agnew of the Saskatchewan Provincial Court in *Heathen*, the presumption of innocence is the first principle to be applied to bail, making it problematic to rely on sentencing objectives designed for those found guilty, such as rehabilitation.²⁶ According to Justice Bychok of the Nunavut Court of Justice in *Jaypoody*, rather than being concerned with moral culpability, the statutory grounds for justifying pre-trial detention are all primarily aimed at the assessment of risk, whether this is the accused person’s flight risk, the substantial likelihood they will reoffend, the substantial likelihood they will interfere with the administration of justice, or the risk of a loss of public confidence in the justice system.²⁷ Furthermore, as pointed out by Judge Galiatsatos of the Court of Quebec in *Penosway*, there is no role for general sentencing principles like deterrence, denunciation, and retribution, nor their attenuation in light of the *Gladue* principles at the bail stage.²⁸ All these caveats are likely to have continuing relevance regardless of the subsequent amendments to the *Criminal Code*.²⁹

Judge Doulis of the British Columbia Provincial Court has provided his own succinct description of the potential disconnect between the *Gladue* principles applied in sentencing and the relevant statutory considerations for a bail hearing in *MLB*:

Gladue stands for two propositions: Indigenous offenders may have reduced moral culpability for their criminal actions due to historical personal factors, and they may share a different

24 *Zora*, *supra* note 6 at para 24.

25 *Ibid* at para 6.

26 *Heathen*, *supra* note 8 at para 29.

27 *Jaypoody*, *supra* note 8 at paras 90-91.

28 *Penosway*, *supra* note 7 at para 115.

29 *Quannaaluk*, *supra* note 10 at paras 71-78; *EB*, *supra* note 10 at paras 33-34; *R v Gaudet*, 2020 ONSC 3975 at para 10 [*Gaudet*].

worldview such that traditional punitive principles of sentencing are not appropriate[,] requiring the court to consider restorative justice options. Both are principles of sentencing which assume the offender is guilty of the crime. At the bail stage, accused persons are presumptively innocent. The court does not inquire into their moral culpability or the effectiveness of punitive sentences, [but] rather, whether they will come to court, re-offend pending trial, or if their release would bring the administration of justice into disrepute.³⁰

Yet in spite of these concerns—and now bolstered by clear statutory direction—existing case law provides clear guidance on how an Indigenous accused’s unique circumstances can play a significant role in bail hearings without losing sight of the presumption of innocence. According to Judge Doulis, even the Supreme Court’s more general guidance with respect to bail requires judges to be mindful of the presumption of innocence “and not detain persons, including Indigenous persons, who would otherwise be releasable but for the fact their personal circumstances (such as poverty, family dysfunction, or mental health) limit their ability to put forth a perfect bail plan, residence, surety, or cash bail to secure their release”.³¹ As summarized below, a basis for this third proposition can also be identified in *Gladue* and *Ipeelee* without regard to either moral blameworthiness or the sentencing objectives specific to individuals who are already determined to be guilty.

Assessing bail criteria and release plans in light of systemic discrimination in bail

Some courts have applied the *Gladue* principles to bail in the sense of being attentive to any systemic impacts the criteria for bail might have when applied to an Indigenous accused and their proposed sureties. This is closely linked to the first prong of the *Gladue* analysis in sentencing, which demands attention to the systemic and background factors that played a role in that individual coming before the court. While the impact of these factors on moral blameworthiness has limited relevance in bail decisions, systemic and background factors are also key to ameliorating systemic discrimination in the criminal justice system more broadly. As the Supreme Court pointed out in both *Gladue* and *Ipeelee*, reliance on

30 *R v MLB*, 2019 BCPC 218 at para 60.

31 *Ibid* at para 65.

facially neutral socioeconomic factors such as employment status, level of education, and family situation in sentencing has disproportionate impacts on Indigenous people due to the higher rates at which they are socially and economically marginalized.³² In *Ipeelee*, the Court pointed out that “[s]entencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic discrimination”.³³

In *Magill*, Judge Ruddy of the Territorial Court of Yukon pointed out that the same risk of systemic discrimination against Indigenous people in sentencing will also arise in bail decisions whenever facially neutral socioeconomic factors like employment status and family situation are relied upon in support of detention:

These socioeconomic factors play an equally, if not more important, role at the bail stage of a criminal charge. An accused with a poor employment record, substance abuse issues and an unstable family and community support network is more likely to be detained, even though these are the very results that flow from the Canadian history of colonialism, dislocation and residential schools. A judge has the obligation to evaluate the application of bail criteria to ensure that the result does not serve to perpetuate systemic racial discrimination.³⁴

In her application of this approach, Judge Ruddy accepted a proposed release plan for Mr. Magill, who was facing charges that included impaired driving causing death, obstruction of justice, and failing to abide by the abstain condition of release orders.³⁵ In spite of Mr. Magill’s charge for breaching an abstain condition in the past, she was satisfied that his release plan included “intensive, culturally appropriate treatment” that significantly increased the likelihood of compliance.³⁶ Judge Ruddy viewed Mr. Magill’s alcoholism and alcohol-related charges in context to his home community, Ross River, where alcohol consumption was “extremely high” and where there was a higher rate of offending in comparison to other Yukon communities.³⁷ Judge Ruddy found that culturally appropriate counselling and treatment could address the risks

32 *Gladue*, *supra* note 1 at para 67; *Ipeelee*, *supra* note 1 at para 67.

33 *Ipeelee*, *supra* note 1 at para 67.

34 *Magill*, *supra* note 7 at para 26.

35 *Magill*, *supra* note 7 at para 1.

36 *Ibid* at para 50.

37 *Ibid* at paras 30-31.

assessed in the bail hearing, such as flight risk (i.e. the primary ground for pre-trial detention).

A broadly similar approach can be seen in cases from other jurisdictions.³⁸ For instance, Justice Lee of the Alberta Court of Queen’s Bench applied the *Gladue* principles in a bail decision involving an Indigenous accused with a history of administration of justice offences in *DD(P)*.³⁹ The accused was found to have alcohol and drug addictions that required “immediate treatment” and that were related to the “very tragic circumstances” of his upbringing, and these unique circumstances were said to “undoubtedly dovetail” with many of his past convictions.⁴⁰ In light of this, Justice Lee accepted a release plan in which the accused would attend a six-week Salvation Army treatment program in spite of a “horrendous” criminal record that included numerous administration of justice offences.⁴¹ Some of the language in this short decision has received criticism from other members of the bench, particularly its references to rehabilitation.⁴² However, Justice Lee’s approach does demonstrate how systemic and background factors shed light on an accused’s criminal record at the bail stage. Rather than uncritically relying on that record to deny release, he accepted a release plan that addressed the addictions he found to have played a part in both the past offences and present charges faced by the accused.

In *Duncan*, Justice Kent of the British Columbia Supreme Court applied a similar lens to a release plan proposed for an Indigenous accused who has a history of personal and intergenerational addictions and poverty linked to broader systemic and background factors.⁴³ The accused also had what Justice Kent described as an “abysmal record of repeated criminal activity (multiple B&E’s), failures to report and other breaches of increasingly stringent bail conditions”.⁴⁴ Yet he was satisfied that a release plan involving attendance at an isolated residential treatment program and strict mobility restrictions, combined with Mr. Duncan’s genuine intention to deal with his addictions, reduced any risk to public

38 See for example: *Pitawanakwat*, *supra* note 7; *Pierce*, *supra* note 7; *Daniels*, *supra* note 7; *Spence*, *supra* note 7; *R v GTB*, 2020 ABQB 228 at para 90.

39 *DD(P)*, *supra* note 7.

40 *Ibid* at para 13.

41 *Ibid* at para 10.

42 See: *Heathen*, *supra* note 8 at para 29; *Penosway*, *supra* note 7 at para 108.

43 *Duncan*, *supra* note 10.

44 *Ibid* at para 32.

safety to an acceptable level.⁴⁵ The residential treatment program would last a minimum of six months, require complete abstinence from drugs and alcohol, and offer a variety of both general and cultural programming, including talking circles, a sweat lodge, and Indigenous arts and crafts.⁴⁶ The Court was satisfied that participation in this program combined with strict mobility restrictions “would be a culturally responsive and appropriate application of the *Gladue* factors in this particular case”.⁴⁷ Rather than invoking rehabilitation, Justice Kent’s approach was framed around the Supreme Court’s guidance in *Myers* that release into treatment with appropriate conditions can provide a less onerous alternative to remand while still addressing the risks posed by the accused and the root causes of their alleged criminal behaviour.⁴⁸

In *Quannaaluk*, Judge Galiatsatos of the Court of Quebec considered systemic factors in addressing judicial interim release for an Inuk woman struggling with alcoholism who was charged with various breaches of a supervised probation order, including conditions relating to abstinence. In context to her risk of recidivism, Judge Galiatsatos noted that courts have a “general (though not absolute) aversion to incarcerating individuals for their mere inability to respect abstinence conditions” since the accused’s addiction may pose “a real risk of perpetual re-incarceration”.⁴⁹ In this case, the accused did not have a concrete history of violence when intoxicated, she had acquired an impressive amount of structure in her life in the preceding months (including obtaining housing), she had the support of a dedicated social worker, and she was regularly accessing social and cultural programming.⁵⁰ Judge Galiatsatos noted that her efforts had been “imperfect—even outright deficient—in many regards”, but Ms. Quannaaluk had nevertheless made considerable progress in addressing her addiction and developing structure in her life, factors which “ought not be disregarded”.⁵¹ The Court was concerned that preventive incarceration might compromise these efforts in a way that would render Ms. Quannaaluk less structured and therefore more dangerous.⁵²

45 *Ibid* at para 33.

46 *Ibid* at para 34.

47 *Ibid* at para 38.

48 *Ibid* at para 28, citing *Myers*, *supra* note 3 at para 67.

49 *Quannaaluk*, *supra* note 10 at para 98.

50 *Ibid* at paras 100-108.

51 *Ibid* at para 114.

52 *Ibid*.

Judge Galiatsatos noted that “[t]he battle of alcoholism is not one that is won overnight” and “[i]t often comes with setbacks and relapses”, and these evolving and dynamic circumstances must be accounted for in bail.⁵³ He contextualized this substance abuse issue as “an understandable and foreseeable tragic by-product” of how Ms. Quannaaluk was “brutally victimized by countless men for several decades”, stretching back to her childhood.⁵⁴ Likewise, the available Indigenous-focused programming was relevant to Ms. Quannaaluk’s ability to address her risk of recidivism, and her circumstances meant interim detention would have a disproportionate adverse impact, effectively reverting her to a state of homelessness upon release, “which would inescapable aggravate her addiction problems” and “leave society in a no better state”.⁵⁵ Judge Galiatsatos instead imposed conditions that focused on her risk of violence while intoxicated, prohibiting her from possessing knives and placing restrictions to avoid potentially violent men visiting her apartment since she had been convicted of stabbing and killing an abusive partner.⁵⁶

Other courts have also accepted that an Indigenous accused’s systemic and background factors might shed light on their criminal record in ways that are relevant to the statutory grounds for pre-trial detention.⁵⁷ For example, a lengthy record of offences involving a failure to comply with court orders may need to be contextualized by the systemic issues identified in *Zora*, *Antic*, and *Myers*, such as widespread issues with how bail conditions are imposed and the incentivizing effect of pre-trial custody on guilty pleas, especially for more minor offences.⁵⁸ Addictions may be important context for alcohol or drug-related convictions.⁵⁹ Over-policing could have relevance to their criminal record as well.⁶⁰ If the accused’s circumstances include cognitive deficits, such as those linked to Fetal Alcohol Spectrum Disorder, this could also shed light on an existing pattern of breaches that requires some form of accommodation in bail decisions.⁶¹

53 *Ibid.*

54 *Ibid* at para 115.

55 *Ibid* at para 117.

56 *Ibid* at paras 118-126.

57 See for example: *Chocolate*, *supra* note 7 at paras 49-51, 55; *Gibbs*, *supra* note 10 at para 25; *Dubé*, *supra* note 10 at paras 39-42; *Gaudet*, *supra* note 29 at para 11; *EB*, *supra* note 10 at paras 37-38, citing Rogin, *supra* note 6 at 355.

58 *EB*, *supra* note 10 at paras 48-49.

59 *Ibid* at para 51.

60 *Ibid* at paras 52-53, citing: *R v Le*, 2019 SCC 34 at paras 89-97; *R v King*, 2019 ONSC 6851 at paras 35-46.

61 *TJ(J)*, *supra* note 7 at paras 56-58.

Some courts have concluded that high unemployment rates in Indigenous communities require close attention to the impacts of pre-trial detention on an Indigenous accused's own employment prospects.⁶² At the same time, this factor might also explain why the accused's employment record remains sparse, making this something that should not be over-emphasized when assessing their flight risk.⁶³ Social and economic disadvantages may render the restrictive release condition of a cash deposit inappropriate or provide context for why a smaller cash deposit would be appropriate.⁶⁴ Similar disadvantages may even reduce flight risk where the accused lacks the means to permanently abscond from the jurisdiction.⁶⁵ Systemic and background factors could also explain a lack of suitable sureties for an Indigenous accused.⁶⁶ And if Crown counsel rely on actuarial risk assessment tools in bail hearings for Indigenous accused these could raise the same concerns with respect to their validity, potential cultural bias, and contribution to systemic discrimination that have been canvassed by the courts in other contexts.⁶⁷

In some cases, the unique circumstances of an Indigenous accused might appear relevant to the statutory grounds for pre-trial detention in ways that invite adverse treatment on the basis of factors closely linked to their Indigeneity. For example, in *Hope*, the Ontario Court of Appeal rejected the Crown's attempt to rely on the unique circumstances of an Indigenous accused and his sureties as favouring pre-trial detention. First, the Crown argued Mr. Hope was a flight risk as he was allegedly able to travel to the United States without a passport due to his

62 See for example: *Silversmith*, *supra* note 7 at para 31; *Legere*, *supra* note 7 at para 50; *Penosway*, *supra* note 7 at para 121.

63 *Daniels*, *supra* note 7 at paras 37, 39-40.

64 See for example: *Fuller*, *supra* note 7 at para 54; *Gibbs*, *supra* note 10 at paras 27-28; *Duncan*, *supra* note 10 at paras 29, 54.

65 *Daniels*, *supra* note 7 at para 41.

66 See: *Gibbs*, *supra* note 10 at paras 26-27; *Sledz*, *supra* note 7; *Gaudet*, *supra* note 29 at para 52.

67 See *EB*, *supra* note 10 at paras 54-56, citing: *Ewert v Canada*, 2018 SCC 30 at paras 63-65; *R v Haley*, 2016 BCSC 1144 at paras 260-264; *R v Awasis*, 2016 BCPC 219 at paras 100-122, *aff'd* 2020 BCCA 23, leave to appeal to SCC *ref'd* 39262 (26 November 2020); *R v Gracie*, 2019 ONCA 658 at para 51; *R v Durocher*, 2019 NWTSC 37 at paras 204-206. See also: *R v Nepinak*, 2017 MBPC 62; *R v Knott*, 2012 MBQB 105 at paras 22-32, 40; *R v Quock*, 2015 YKTC 32 at paras 92-97; *R v Teneycke*, 2018 BCPC 60 at para 84; *R c Kritik*, 2019 QCCA 1336 at paras 33-35; *R v Keerwasin*, 2019 ONSC 3516 at paras 30, 48; *Penosway v R*, 2019 QCCS 4016 at paras 64-75, 116-118; *R v Head*, 2020 ABPC 211 at para 32.

“aboriginal status”.⁶⁸ However, the Court of Appeal did not find this to be a significant concern in light of Mr. Hope’s social network and community ties in Canada, including a fiancée.⁶⁹ Second, the Crown took issue with Mr. Hope’s sureties as they pledged amounts secured by the equity in their homes on reserve, which could be immune to creditors’ remedies by virtue of s 89 of the *Indian Act*.⁷⁰ The Court of Appeal cautioned that “the protection afforded to people of aboriginal descent provided under the *Indian Act* should not interfere with their right, in circumstances that are otherwise warranted, to secure release from detention”.⁷¹ It also suggested that the Crown’s ability to execute against the properties willingly pledged in support of Mr. Hope was somewhat beside the point. The Court of Appeal appears to have been sensitive to the risk of discriminatory treatment of Indigenous accused and sureties that was inherent in both these arguments.

Calibrating bail conditions to avoid contributing to systemic discrimination

Some courts have highlighted how inappropriate bail conditions can further contribute to systemic discrimination and Indigenous over-incarceration. For example, Judge Lortie of the Court of Quebec pointed to some of the findings of the commission of inquiry led by retired justice Jacques Viens on this topic in *Dubé*. Among other things, the Viens Commission found that court orders may be impossible to respect in some Indigenous communities due to housing shortages, generalized problems with substance abuse, a lack of therapeutic resources, and the small size of the communities if this means an accused will inevitably be in contact with victims.⁷² Judge Lortie found that these systemic issues helped put the accused’s past record of administration of justice

68 *Hope*, *supra* note 7 at para 18. Presumably this argument was premised on Jay Treaty rights that are recognized under the United States’ *Immigration and Nationality Act* for anyone who qualifies as an “American Indian Born in Canada” by proving at least a 50% Indigenous “bloodline”. See Greg Boos & Greg McLawsen, “American Indians Born in Canada and the Right of Free Access to the United States” (2013) 69 *Border Policy Research Institute Publications*, online: <https://cedar.wvu.edu/bpri_publications/69>.

69 *Ibid* at paras 17, 19.

70 *Ibid* at para 32. See *Tyendinaga Mohawk Council v Brant*, 2014 ONCA 565 for a thorough discussion of this statutory immunity from creditors’ remedies and its limits.

71 *Hope*, *supra* note 7 at para 33.

72 *Dubé*, *supra* note 10 at para 41, citing *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Final Report* (Québec: Gouvernement du Québec, 2019).

breaches in context, and supported the sufficiency of his release plan in spite of its imperfections.⁷³

Judge Rosborough of the Alberta Provincial Court has also drawn attention to systemic issues associated with uncalibrated, automatic bail conditions for Indigenous accused.⁷⁴ In *Omeasoo*, for example, he suggested that the imposition of abstention clauses on alcoholics, unless fine-tuned, may be “tantamount to ordering the clinically depressed to ‘just cheer up’”, and that this in turn may be linked to *Gladue* factors.⁷⁵ In *Rowan*, he pointed out how a ‘no go / no contact’ condition would be difficult to comply with in an Indigenous community where alternate housing might be unavailable, the accused might have little to no other collateral support, and these issues become exacerbated over the winter months.⁷⁶ Judge Rosborough accepted that this type of bail condition may be fully appropriate where the victim legitimately fears for their safety and steadfastly insists on no contact. However, “[w]here the victim is ambivalent to or repeatedly disregards such a condition, imposing a ‘no go / no contact’ condition merely serves to perpetuate the overrepresentation of aboriginals in pre-trial detention facilities”.⁷⁷

In *R v A(M)*, Justice of the Peace Murdoch-Flowers of the Nunavut Court of Justice drew attention to the risk that bail conditions prohibiting alcohol consumption might dissuade Inuit women from reporting acts of violence against them to the police due to the fear of being charged themselves if intoxicated.⁷⁸ This was a sentencing decision for an Inuk woman charged with breaching a no-alcohol bail condition after she reported a domestic assault against her, and the Justice of the Peace pointed out that he had heard a case with “near identical” circumstances one year prior.⁷⁹ He also noted that the National Inquiry into Missing and Murdered Indigenous Women and Girls raised this very issue in its final report, and other reports specific to Inuit shed light on systemic and background reasons for widespread distrust of police.⁸⁰

73 *Ibid* at paras 42, 44.

74 See: *R v Omeasoo*, 2013 ABPC 328 [*Omeasoo*]; *R v Boyssis*, 2015 ABPC 67; *R v Rowan*, 2018 ABPC 208 [*Rowan*].

75 *Omeasoo*, *supra* note 74 at paras 37, 42, 44.

76 *Rowan*, *supra* note 74 at para 43.

77 *Ibid* at para 45.

78 *R v A(M)*, 2020 NUCJ 4. See also *R v K(M)*, (19 December 2018), Iqaluit 08-18-879 (Nu Ct J) [on file with author].

79 *Ibid* at paras 5-8.

80 *Ibid* at paras 18-25, citing: Canada, National Inquiry into Missing and Murdered

While the reasonableness of the bail condition itself was not before the Justice of the Peace in *R v A(M)*, similar systemic issues particular to Indigenous women may be relevant when such bail conditions are first being considered.

In *Ugyuk*, Justice Cooper of the Nunavut Court of Justice pointed out that a multiplicity of release documents could lead to confusion over bail conditions if an accused accrues additional charges after they are first released and then is released with additional or varied conditions.⁸¹ For this reason, she urged that “the best approach is to vacate the earlier release documents and put all charges and conditions on one document”.⁸² While this guidance was not explicitly linked to the Indigeneity of the accused in this case or any systemic factors he faced, Justice Cooper noted elsewhere that Mr. Ugyuk had a grade 5 education, was unemployed, suffered from an undisclosed form of disability, addiction issues, and possible mental health issues, and was living homeless in a shack in a remote community due to his estrangement from his family.⁸³ These were listed as disadvantages of particular relevance to the overall assessment of the reasonableness of his bail conditions pursuant to the direction in s. 493.2 of the *Code* and *Zora*.⁸⁴

These cases indicate how both individual and community-level systemic and background factors can be relevant to whether particular bail conditions are reasonable for Indigenous accused. The Supreme Court of Canada acknowledged similar concerns in *Zora*, citing *Omeasoo* with approval among other cases and secondary sources on this topic.⁸⁵

Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: Government of Canada, 2018) at 628-629; Pauktuutit Inuit Women of Canada, *Addressing Gendered Violence against Inuit Women: A review of police policies and practices in Inuit Nunangat* (Ottawa: Pauktuutit Inuit Women of Canada, 2020).

81 *R v Ugyuk*, 2020 NUCJ 27 at paras 39-40, 44.

82 *Ibid* at para 40.

83 *Ibid* at para 48.

84 *Ibid* at paras 46-47.

85 *Zora*, *supra* note 6 at para 79.

Attention to an Indigenous accused's culture, beliefs, laws, or community standards

Some courts have also taken into consideration an Indigenous accused's culture, beliefs, legal traditions, and community standards in applying the statutory provisions for bail. This appears to be analogous to the consideration of culturally appropriate sanctions and procedures at the second prong of the *Gladue* analysis. In *Jaypoody*, for instance, Justice Bychok of the Nunavut Court of Justice accepted that an Inuk's risk of recidivism could feasibly be reduced by releasing them "into the hands of an elder in a traditional outpost camp" where they will be "away from the idleness created by too few jobs, away from the stresses of overcrowding, away from the abuse of legal or bootlegged alcohol, away from the pressures of negative peer groups, and back to a purposeful and traditional way of life".⁸⁶ He described this as applying the statutory law of pre-trial bail "in the context of community standards and Inuit Qaujimajatuqangit" or "Inuit social governance".⁸⁷

This culturally sensitive approach to the statutory provisions governing bail was first explicitly set out in the *Brant* and *Silversmith* decisions of the Ontario Superior Court of Justice.⁸⁸ In *Brant*, Justice Parfett listed three unique considerations as part of a "broader analysis" to be undertaken when addressing bail for Indigenous accused:

...the Court must look at whether the sureties offered, in the context of the Aboriginal culture, can control the accused's behaviour. The Court must also look at whether detention of the Aboriginal accused has a disproportionately negative impact on that accused, and whether that impact could be alleviated by strict bail considerations. Finally, the Court must look at whether Aboriginal law and customs provide the assurances of attendance in court and protection of the public that are required for release.⁸⁹

Justice Parfett had before her a proposal for Mr. Brant to stay with his brother and his mother in the Tyendinaga Mohawk Territory in

86 *Jaypoody*, *supra* note 8 at para 97.

87 *Ibid* at paras 75, 98.

88 *Brant*, *supra* note 7; *Silversmith*, *supra* note 7.

89 *Brant*, *supra* note 7 at para 21.

Ontario. Defence counsel proposed that both Mr. Brant's brother and an Elder of the community would act as his sureties, he would be required to take direction from them, and he would be required to abide by a curfew, maintain his current employment, and report to the local police force, among other conditions.⁹⁰ Justice Parfett accepted evidence to the effect that the Tyendinaga Mohawk community is a matrilineal society where a mother or a female Elder's orders would be complied with, and where a failure to abide by conditions that would place such a woman in legal jeopardy "would be viewed very negatively by the community and might result in the offender being shunned".⁹¹ She also found that the Tyendinaga Mohawk community as a whole had taken responsibility for Mr. Brant and committed to assist him by raising a deposit of money through community donations.⁹² Finally, Justice Parfett took into account the "very negative impact" of incarceration on Mr. Brant in terms of separating him from his community and his community responsibilities, as well as his loss of a sense of identity, which was "inextricably bound up with his responsibilities towards the community".⁹³ In light of all this, Mr. Brant was released into the community on a recognizance with conditions, sureties, and a deposit of money. This same approach was then applied to similar circumstances in *Silversmith*.

In *Trudeau*, Justice Hennessy of the Ontario Superior Court of Justice also adopted a contextual and culturally sensitive approach in assessing an Indigenous accused's mother as a proposed surety. She found the accused's mother to be "a proper and suitable surety, with deep roots in her community and a strong bond and relationship with her accused daughter and the proposed co-sureties".⁹⁴ Justice Hennessy found these characteristics could suffice in the absence of material assets:

Let me comment on the Crown's submission that the system is all about the money. Certainly, there are sureties who pledge great sums of money or assets which are worth great sums of money. These are people who have significant assets. And for some of these people, their material assets are their most valuable assets. Shirley Trudeau, however, does not have access to great wealth nor has she accumulated material assets of great

90 *Ibid* at para 25.

91 *Ibid* at para 26.

92 *Ibid* at para 27.

93 *Ibid* at para 28.

94 *Trudeau, supra* note 7 at para 53.

value. In this way she is not much different than many people who live in Wikwemikong. But her promise and her standing in the community of her family and her ancestors are also assets. Perhaps they are her greatest assets, and these are the assets she will put at risk should she not fulfill her duties as a surety.⁹⁵

Paying closer attention to Indigenous community standards and perspectives may also raise concerns for release. In *Trodd*, members of the Magnetewan First Nation expressed their apprehension over Mr. Trodd being released without adequate safeguards.⁹⁶ The Chief of the Magnetewan First Nation gave evidence at the bail hearing that “made it clear that he was looking to the judicial system to protect the community” and “he did not propose that the community had the means to do so”.⁹⁷ Many of Mr. Trodd’s prior victims were community members and Justice Koke held that community support was therefore “imperative” for his release plan to succeed, though “sadly” there was no evidence of it.⁹⁸ Mr. Trodd’s mother was proposed as a surety with high status and important roles in the community but she was in denial of her son’s criminal conduct and viewed him as a victim.⁹⁹ While Justice Koke accepted that this was clearly “the type of case which the Supreme Court attempted to address in the *Gladue* decision”, the lack of any community support for Mr. Trodd’s plan and the denials of his sureties resulted in continued pre-trial custody.¹⁰⁰

In *Magill*, Judge Ruddy also considered the *Brant* factors when assessing Mr. Magill’s connections to the small, close-knit Indigenous community of Ross River and how these connections favoured release in this case. She took note of his many ties with Ross River, including community members who attended the court proceedings in support of either him or the victim in Whitehorse a four-hour drive away. Judge Ruddy found this to be relevant to whether his proposed surety could control his behaviour in context to his culture and community since “in a very real sense, the eyes of Ross River are on him”.¹⁰¹

95 *Ibid* at para 52.

96 *Trodd, supra* note 7 at para 21.

97 *Ibid.*

98 *Ibid* at para 53.

99 *Ibid* at paras 23, 39-43.

100 *Ibid* at paras 52-54.

101 *Magill, supra* note 7 at para 41.

Public confidence in the administration of justice must account for *Gladue* principles

The *Gladue* principles might also have particular relevance to the tertiary ground for pre-trial detention. This requires courts to consider confidence in the administration of justice from the perspective of a reasonable member of the public who is “familiar with the basics of the rule of law in our country and with the fundamental values of our criminal law, including those that are protected by the *Charter*”.¹⁰² Several courts have accepted that a reasonable member of the public should be presumed to be cognizant of the systemic and background factors that impact Indigenous people in the criminal justice system when applying this standard.¹⁰³ As Judge Galiatsatos stated in *Penosway*, “[t]oday, Canadian society is sensitive to and fully aware of the problem of the over-representation of Aboriginal persons in the prison system”.¹⁰⁴

Case-specific information may be necessary but full reports are not always feasible

Several courts have accepted that the *Gladue* principles apply to bail decisions only to find themselves unable to employ them meaningfully without adequate case-specific information.¹⁰⁵ In *Takakenew*, for example, Judge Wolf of the British Columbia Provincial Court was advised that the two accused before him were Indigenous and he was alive to the potential relevance of the *Gladue* principles. Yet he had no information regarding the nation they were from, if they were members of a band with community supports, or whether any other alternatives were available.¹⁰⁶ This makes it challenging to meaningfully apply the *Gladue* principles

102 *St-Cloud*, *supra* note 12 at para 79.

103 See for example: *Cyr*, *supra* note 7 at para 52; *Magill*, *supra* note 7 at para 45; *Murphy*, *supra* note 7 at para 45; *CW*, *supra* note 7 at para 49; *Duncan*, *supra* note 10 at paras 45-50; *EB*, *supra* note 10 at para 67; *Quannaaluk*, *supra* note 10 at paras 136-137.

104 *Penosway*, *supra* note 7 at para 186.

105 See for example: *Rich*, *supra* note 7 at paras 21-27; *Robinson*, *supra* note 7 at paras 14-15; *Pinacie-Littlechief*, *supra* note 7 at para 47; *Trudeau*, *supra* note 7 at para 80; *R v McGrath*, 2020 ONCJ 192 at para 16; *R v BMD*, 2020 ABQB 577 at paras 44-46; *R v Charlie-Tom*, 2020 BCSC 491 at para 21 [*Charlie-Tom*].

106 *Takakenew*, *supra* note 7 at paras 41-42.

in bail beyond more generalized attention to systemic issues or judicial notice of local conditions and broader background factors.¹⁰⁷

On the other hand, ordering the preparation of lengthy, comprehensive *Gladue* reports or pre-sentence reports for bail hearings may be inappropriate given the likelihood of this leading to delay, inconvenience, and additional expense in proceedings that are by their very nature meant to be summary and short notice.¹⁰⁸ In light of this, the need for case-specific information with respect to the unique circumstances of an Indigenous accused has been described as “necessarily relaxed in the bail hearing context”.¹⁰⁹

In some cases there may already be a *Gladue* report available prior to the bail hearing based on past interactions of the accused with the criminal justice system, in which case this could be directly placed before the court or updated for bail purposes.¹¹⁰ A prior sentencing decision might adequately summarize these circumstances as well.¹¹¹ In *Louie*, the British Columbia Court of Appeal expected to find similar information in the release plan for an Indigenous accused by way of reliable if not sworn statements from family and community members addressing the circumstances of their supports, proposed residence, and employment opportunities.¹¹²

As addressed in Chapter 11, while a *Gladue* report may be the preferable tool for obtaining this type of information in the sentencing context, it is not the exclusive means. Emphasizing the substance of *Gladue* information before the court over its form, taking judicial notice of generalizable circumstances, and making reasonable inferences may be particularly appropriate in context to the pre-trial detention of an Indigenous person who remains legally innocent and entitled to full recognition of that status.

107 See for example *R v MM*, 2020 ONSC 3990 at para 12.

108 *Magill*, *supra* note 7 at para 28.

109 *Ibid.* See also *EB*, *supra* note 10 at paras 31-32.

110 *Duncan*, *supra* note 10 at para 10; *Charlie-Tom*, *supra* note 105 at para 21.

111 *Quannaaluk*, *supra* note 10 at paras 34-43.

112 *Louie*, *supra* note 7 at para 36.

Conclusion

While the Supreme Court has yet to weigh in on the relevancy of the *Gladue* principles to bail and some courts have expressed concerns with this approach in the past, s 493.2(a) of the *Criminal Code* now explicitly requires particular attention to the circumstances of an Indigenous accused. This extension of the *Gladue* principles therefore seems unlikely to excite further controversy to the extent that these principles are understood more broadly than just an inquiry into moral blameworthiness and sentencing objectives. The Supreme Court's decisions in *Gladue*, *Wells*, and *Ipeelee* also address the systemic discrimination Indigenous people face throughout the justice system, the potential for prison to impact them more adversely, and how a failure to accommodate their cultural differences and distinct legal perspectives can reinforce both alienation and disparity in outcomes. These principles are more easily imported into the bail context and have been taken into account by courts in ways that respect the significant differences between sentencing proceedings and bail hearings. In doing so, this emerging jurisprudence may also bring the meaning of some of these principles into starker relief for sentencing proceedings as well.

CHAPTER 14: DANGEROUS OFFENDERS

The Supreme Court of Canada briefly touched on the role that the *Gladue* principles play in dangerous offender applications under the *Criminal Code* in *Boutilier*.¹ Yet this case did not involve an application to designate an Indigenous person as a dangerous offender. Instead, the *Gladue* principles were considered in context to a broader *Charter* analysis of the provisions setting out the dangerous offender regime. More detailed consideration of the role of the *Gladue* principles in dangerous offender applications has been provided by lower courts in cases where they directly address the unique circumstances of Indigenous people. However, the focus of this chapter will be on cases that have been decided since 2017 as the Supreme Court's decision in *Boutilier* clarified how courts need to approach dangerous offender applications in order to remain *Charter*-compliant and in doing so it overturned or clarified several aspects of the lower court jurisprudence that preceded it.

A clarification of the law in *Boutilier*

The Supreme Court of Canada took the *Boutilier* appeal as an opportunity to address how the dangerous offender provisions in the *Criminal Code* must be interpreted in order to remain within the constitutional bounds of the *Charter*, which it turn required attention to s 718.2(e) and other principles and objectives of sentencing. While the matter was before the sentencing judge, Mr. Boutilier pleaded guilty to six charges related to a pharmacy robbery and car chase, the Crown applied to have him designated a dangerous offender subject to an indeterminate sentence, and Mr. Boutilier initiated a constitutional challenge in response. The sentencing judge concluded that one of two provisions challenged by Mr. Boutilier was unconstitutionally overbroad—namely s 753(1), which sets out the criteria to designate someone a dangerous offender. Yet Mr. Boutilier was nonetheless designated a dangerous offender

1 *R v Boutilier*, 2017 SCC 64 [*Boutilier*].

and an indeterminate sentence was imposed. Both parties appealed. The Court of Appeal concluded both provisions were constitutionally sound and upheld both the designation and the sentence. Mr. Boutilier's further appeal to the Supreme Court of Canada was also dismissed, with the majority confirming the constitutionality of the impugned provisions and the designation and indeterminate sentence imposed on him. However, Justice Karakatsanis partially dissented on the basis that the dangerous offender regime's emphasis on public safety risks the imposition of grossly disproportionate (and thus unconstitutional) sentences, especially for Indigenous persons. In contrast, the majority's approach focused on providing an interpretation of this statutory regime that ensures constitutional boundaries are respected.

The dangerous offender regime involves a “two stage” process.² First, there is the “designation stage” in which the statutory requirements set out at s 753(1) must be met before a court is able to designate someone as dangerous.³ This stage involves four criteria: (1) whether the predicate offence is a “serious personal injury offence”, as listed at s 752 of the *Criminal Code*; (2) whether the offence is part of a broader pattern of violence; (3) whether there is a high likelihood of harmful recidivism; and (4) whether the violent conduct is intractable.⁴ The third and fourth criteria are future-oriented and thus require a *prospective* assessment of someone's dangerousness.⁵

Second, there is the sentencing or “penalty stage” in which a court determines whether to sentence someone found to be a dangerous offender to: (a) an indeterminate period of detention in a penitentiary; (b) a sentence for the offence for which they have been convicted followed by a long-term supervision order; or (c) solely a sentence for the offence for which they have been convicted.⁶ These three possibilities are set out at s 753(4) of the *Criminal Code*. Section 753(4.1) further states that the court must impose an indeterminate sentence unless satisfied that there is “a reasonable expectation that a lesser measure [...] will adequately protect the public against the commission by the offender of murder or a serious personal injury offence”. Sections 753(1) & (4.1) were challenged under sections 7 and 12 of the *Charter*.

2 *Ibid*, Côté J at para 13.

3 *Ibid*, Côté J at para 14.

4 *Ibid*, Côté J at paras 26-33.

5 *Ibid*, Côté J at para 27.

6 *Ibid*, Côté J at para 15.

The two provisions challenged by Mr. Boutilier were impacted by amendments to the *Criminal Code* in 2008 that removed discretionary language from the designation stage of the dangerous offender regime. As a result of these changes, “[i]f a sentencing judge is satisfied that the statutory criteria have been met, the designation must follow”.⁷ Yet the Supreme Court noted that some discretion has been retained at the penalty stage. The sentencing judge “must impose an indeterminate sentence on a designated individual *unless* he or she is satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public”.⁸

The finer details of the Supreme Court’s interpretation of the *Criminal Code* and its clarification of the dangerous offender regime go beyond the scope of this publication and its focus on the *Gladue* principles. In summary, however, the majority clarified that—contrary to some of the prior lower court jurisprudence—sentencing judges must continue to consider an individual’s future treatment prospects at the designation stage as part of their assessment of the future risk they pose to public safety in spite of the 2008 amendments. It also clarified that the regime does not impose any presumption of an indeterminate detention for individuals designated as dangerous offenders “[n]or does it prevent a sentencing judge from considering sentencing objectives and principles”.⁹

The majority held that its interpretation ensures that s 753(4.1) “will not result in grossly disproportionate sentences or the imposition of a detention of indeterminate duration in cases where such a sentence is unfit”.¹⁰ It held that when properly interpreted, the availability of indeterminate detention is limited to “a narrow group of offenders that are dangerous *per se*”.¹¹ Moreover, a long-term supervision order “remains available for dangerous offenders who can be controlled in the community in a manner that adequately protects the public from murder or a serious personal injury offence”.¹² Finally, the majority upheld the sentencing judge’s initial decision to sentence Mr. Boutilier to an indeterminate period of detention as consistent with its clarification of the process for designating dangerous offenders.

7 *Ibid*, Côté J at para 20.

8 *Ibid*.

9 *Ibid*, Côté J at para 71.

10 *Ibid*.

11 *Ibid*, Côté J at para 75.

12 *Ibid*, Côté J at para 76.

Future treatment prospects must be considered at both stages

While some prior lower court case law had suggested otherwise, the majority judgment in *Boutilier* is unequivocal that evidence of future treatment prospects must be considered at both the designation stage *and* the penalty stage. The Court held that “an offender cannot be designated as dangerous unless the judge concludes that he or she is a *future* ‘threat’ after a prospective assessment of risk” and “future risk assessment has always required consideration of future treatment prospects”.¹³ In other words, the designation stage will not capture those “who, though currently a threat to others, may cease to be in the future, notably after successful treatment”.¹⁴ This future-oriented assessment requires Crown counsel to establish that someone’s pattern of violent conduct “is very likely to continue and to result in the kind of suffering against which the section seeks to protect, namely, conduct endangering the life, safety or physical well-being of others or, in the case of sexual offences, conduct causing injury, pain or other evil to other persons”.¹⁵ The sentencing judge must be satisfied that their pattern of conduct is “substantially or pathologically intractable”.¹⁶ The majority interpreted “intractable” as meaning “behaviour that the offender is unable to surmount”.¹⁷ It also overturned a line of cases that had erroneously concluded that there was no longer a need to prove intractability in light of the 2008 amendments to the *Criminal Code*.¹⁸

Dangerous offender applications are typically conducted in one hearing and the evidence presented to a sentencing judge with respect to someone’s future treatment prospects will be relevant to both stages, albeit in different ways. In the words of the majority, “[a]ll of the evidence adduced during a dangerous offender hearing must be considered at both stages of the sentencing judge’s analysis, though for the purpose of making different findings related to different legal criteria”.¹⁹ For example, clinical evaluations provide evidence regarding personality traits or disorders, substance use disorders, and patterns of behaviour that are relevant to both an assessment of future risk and the sentence that will be necessary to

13 *Ibid*, Côté J at para 23.

14 *Ibid*.

15 *Ibid*, quoting from *R v Lyons*, [1987] 2 SCR 309 at 338, 1987 CanLII 25.

16 *Ibid*.

17 *Ibid*, Côté J at para 27.

18 *Ibid*, Côté J at paras 29-32.

19 *Ibid*, Côté J at para 44.

manage that risk.²⁰ Someone will not be designated as dangerous “if their treatment prospects are so compelling that the sentencing judge cannot conclude beyond a reasonable doubt that they present a high likelihood of harmful recidivism or that their violent pattern is intractable”.²¹ Where these future treatment prospects are not sufficiently compelling to affect the designation decision, “they will still be relevant in choosing the sentence required to adequately protect the public”.²²

Proportionality and the *Gladue* principles must be applied at the penalty stage

Of particular importance to the *Gladue* principles, both the majority and the dissent in *Boutilier* interpreted the sentencing judge’s role at the penalty stage as requiring the application of “the sentencing principles and mandatory guidelines outlined in ss. 718 to 718.2”.²³ This includes “the fundamental principle of proportionality” among other mandatory sentencing principles.²⁴ The majority cautioned that “[a]n error in the application of these principles is reviewable by an appellate court”.²⁵ While public protection is an enhanced sentencing objective for those who have been designated as dangerous, this does not mean this objective “operates to the exclusion of others”.²⁶

The majority stated that the *Criminal Code*’s sentencing principles—including the *Gladue* principles—“apply to every sentencing decision, whether made under the regular sentencing regime, the dangerous offender regime or the long-term offender regime”.²⁷ It emphasized that “an offender’s moral culpability, the seriousness of the offence, mitigating factors, and principles developed for Indigenous offenders are each part of the sentencing process under the dangerous offender scheme” and each “is relevant to deciding whether or not a lesser sentence would sufficiently protect the public”.²⁸

20 *Ibid.*

21 *Ibid.*, Côté J at para 45.

22 *Ibid.*

23 *Ibid.*, Côté J at para 53, Karakatsanis J at para 106, dissenting.

24 *Ibid.*, Côté J at para 53, Karakatsanis J at para 107, dissenting.

25 *Ibid.*, Côté J at para 53, citing *R v Lacasse*, 2015 SCC 64.

26 *Ibid.*, Côté J at para 56.

27 *Ibid.*, Côté J at para 54.

28 *Ibid.*, Côté J at para 63.

In the partially dissenting reasons of Justice Karakatsanis she also affirmed the relevance of the *Gladue* principles in this context. She noted that Indigenous people are not only overrepresented in Canadian prisons in general, they are “especially [overrepresented] in the dangerous offender population”.²⁹ She highlighted the Supreme Court’s past recognition that “racism, colonialism, and intergenerational trauma inform this disturbing statistic”.³⁰ Justice Karakatsanis also reiterated that “the systemic disadvantages and marginalization faced by Indigenous people inform moral blameworthiness and therefore the proportionality of sentences for Indigenous offenders”.³¹ Furthermore, she recited the two categories of unique circumstances that must be considered under the *Gladue* analysis, as explored in detail earlier in this book.

The principle of restraint guides the penalty stage

The majority and dissent also agreed that the principle of restraint applies to the penalty stage of the dangerous offender scheme.³² This principle “dictate[s] that a judge ought to impose an indeterminate sentence only in those instances in which there does not exist a less restrictive means by which to protect the public adequately from the threat of harm”.³³ If public protection can be achieved without indeterminate detention then it would overshoot this goal to impose such a penalty.³⁴

Justice Karakatsanis dissents on risk of grossly disproportionate sentences

Justice Karakatsanis agreed with the majority’s view that the designation of an individual as a dangerous offender “calls for consideration of their future treatment prospects, and thus is not unconstitutionally overbroad on that basis”.³⁵ However, she did dissent with respect to the

29 *Ibid*, at Karakatsanis J at para 107, citing Canada, Public Safety Canada Portfolio Corrections Statistics Committee, *Corrections and Conditional Release Statistical Overview* (2015 Annual Report).

30 *Ibid*.

31 *Ibid*, citing *R v Ipeelee*, 2012 SCC 13 at para 73.

32 *Ibid*, Côté J at paras 54, 57–63, Karakatsanis J at para 109.

33 *Ibid*, Karakatsanis J at para 109, citing *R v Johnson*, 2003 SCC 46 at para 29.

34 *Ibid*, Côté J at para 57.

35 *Ibid*, Karakatsanis J at para 91.

constitutionality of the penalty stage’s “singular focus” on public safety, concluding that this would impose indeterminate detention in cases where doing so would be grossly disproportionate to the sentence mandated by the principles in the *Criminal Code*, thus violating s 12 of the *Charter* in a way that cannot be saved by s 1.³⁶ In her view, the overriding emphasis placed on the level of risk and the nature of future harm likely to be caused by the individual designated a dangerous offender at the penalty stage requires indeterminate detention without adequate discretion for the consideration of their moral blameworthiness, “even if this sentence is inconsistent with *Gladue* principles”.³⁷

While Justice Karakatsanis did not differ from the majority in her view that s 718.2(e) and other sentencing principles must be considered at the penalty stage, she differed in her view of the constitutionality of constraints on their relevance to the sentence in the current statutory regime. She pointed out that regardless of questions of proportionality, if there is no evidence of community supervision programs or it is unknown whether the individual will be amenable to treatment, indeterminate detention will be imposed.³⁸ She emphasized the potential for this to result in grossly disproportionate sentences that fail to consider factors impacting moral blameworthiness such as addiction and its links to poverty and childhood abuse or the roots of someone’s criminality in intergenerational trauma.³⁹ Justice Karakatsanis found it “particularly distressing” that the penalty stage constrains the application of the *Gladue* principles in light of the fact that “Indigenous offenders are significantly overrepresented in the dangerous offender population”.⁴⁰

The application of the *Gladue* principles at the designation stage

One question the Supreme Court did not address in *Boutilier* was whether (and how) the *Gladue* principles might inform the designation stage of the dangerous offender regime. There is some precedent for doing so under an earlier version of the regime, albeit dated. In *George*, the British Columbia Court of Appeal held that childhood aggression and adult

36 *Ibid.*

37 *Ibid.*, Karakatsanis J at para 117.

38 *Ibid.*, Karakatsanis J at para 122.

39 *Ibid.*, Karakatsanis J at paras 123-124.

40 *Ibid.*, Karakatsanis J at para 124.

criminality must be differentiated when assessing whether a pattern of persistent aggressive behaviour has been established, particularly for an Indigenous person given the direction in s 718.2(e).⁴¹ The Court of Appeal made this distinction to ensure the provisions do not “fall more heavily on the poor and disadvantaged members of our society”—in that case, an Indigenous foster child with significant cognitive deficits who was raised in a non-Indigenous culture.⁴² Yet most pre-*Boutilier* case law suggests the *Gladue* principles are not relevant when assessing whether an Indigenous person meets the statutory criteria for designation as a dangerous offender set out in s 753(1).⁴³

On the other hand, the pre-*Boutilier* case law does suggest the *Gladue* principles will be relevant to whether there is a reasonable possibility of eventually controlling someone’s risk of recidivism in the community, in which case a long-term offender designation may be more appropriate.⁴⁴ According to the Saskatchewan Court of Appeal, this assessment requires the sentencing judge to turn their mind to whether there are any “alternative Aboriginal-focused means aimed at addressing the environmental, psychological or other circumstances which aggravate the risk of reoffending posed by the Aboriginal offender in question”.⁴⁵ Where alternative means are suitable and available they may “enhance the cogency of the possibility of eventual control of the risk that the Aboriginal offender will reoffend in the community”.⁴⁶ This means the sentencing judge must assess “the existence or non-existence” of alternative means, as well as their “availability, nature, suitability, and efficacy”.⁴⁷ One measure of this might be evidence of past involvement in culturally relevant programming and whether this had a positive impact.⁴⁸

41 *R v George*, [1998] BCJ No 1505 (QL), 1998 CanLII 5691 (CA) at paras 14-19 [George].

42 *Ibid* at para 15.

43 See for example: *R v Osborne*, 2014 MBCA 73 at paras 90-101; *R v Peekeekoot*, 2014 SKCA 97 at paras 60-62, leave to appeal to SCC ref’d 36186 (26 March 2015) [Peekeekoot]; *R v Mattson*, 2014 ABCA 178 at para 44 [Mattson]; *R v Radcliffe*, 2017 ONCA 176 at para 63.

44 *Ibid*.

45 *Peekeekoot*, *supra* note 43 at para 62, citing *R v Standingwater*, 2013 SKCA 78 at para 51 [Standingwater].

46 *Ibid*.

47 *Ibid*.

48 See for example *R v Monias*, 2014 ABQB 147 at paras 56-61, 65, 68-70.

The Saskatchewan Court of Appeal further explained this approach in *Moise* where it held that it would be an error in principle for a sentencing judge to fail to take *Gladue* considerations into account when deciding whether someone ought to be designated as a dangerous offender or a long-term offender.⁴⁹ While moral blameworthiness has a limited impact on the need for incarceration to protect the public, “culturally sensitive programming and supports may make a difference to the offender’s rehabilitation and management, within the community, of his or her risk to reoffend”.⁵⁰ The Court of Appeal stated that “[t]here must be a meaningful evaluation of any alternatives to incarceration including culturally sensitive programming, supports and safeguards available within and outside the Aboriginal community which may assist in rehabilitating the offender, reducing his or her risk to reoffend violently and managing his or her behaviour within the community”.⁵¹

As detailed above, the majority judgment in *Boutilier* clarified that an individual’s future treatment prospects and the intractability of their behaviour must be considered at both stages of the dangerous offender analysis, with the result that all evidence adduced in these proceedings must be considered at both stages as well. Given this clarification, suitable and available Indigenous-focused options for treatment and rehabilitation will presumably have relevance to both the designation stage and the penalty stage of this statutory regime. Consistent with this view, the Northwest Territories Court of Appeal has insisted that thorough *Gladue* information is needed with respect to any available culturally sensitive programming so that a sentencing judge is in a position to analyze someone’s “future prospects for treatment, intractability, and appropriate sentence”.⁵² Moreover, several courts have either stated or implied that the *Gladue* principles are relevant at both stages of the dangerous offender regime since *Boutilier* was released.⁵³ On the other hand, earlier case law suggesting the *Gladue* principles are

49 *R v Moise*, 2015 SKCA 39 at para 27.

50 *Ibid* at para 24, citing: *Standingwater*, *supra* note 45 at paras 49-53; *Peekeekoot*, *supra* note 43 at para 58; *R v Montgrand*, 2014 SKCA 31 at paras 16-17.

51 *Ibid* at para 26.

52 *R v Zoe*, 2020 NWTCA 1 at para 58 [*Zoe*].

53 See for example: *R v Wolfleg*, 2018 ABCA 222 at paras 113, 126, leave to appeal to SCC refused, 38542 (13 June 2019) [*Wolfleg*]; *R v Broadfoot*, 2018 ONCJ 215 at para 92; *R v Wesley*, 2018 ONCA 636 at para 23; *R v Hunter*, 2018 ABPC 287 at paras 184, 221; *R v Piche*, 2019 SKCA 54 at paras 112-114; *R v Natomagan*, 2019 ABQB 943 at paras 47-62; *Zoe*, *supra* note 52 at para 59.

only relevant at the penalty phase still resurfaces in some cases.⁵⁴ Yet the individualized, case-specific information contained in a *Gladue* report may nevertheless have relevance.⁵⁵

The need for detailed case-specific information

Another important topic not touched upon in *Boutilier* is the need for case-specific information when an Indigenous person is subject to dangerous offender proceedings. Several appellate courts have heard arguments to the effect that a sentencing judge erred by proceeding with a dangerous offender application in the absence of a *Gladue* report. In some cases, appellate courts have been satisfied by the level of case-specific information presented to the sentencing judge through other means such as expert evidence.⁵⁶ While many appellate courts have referred to a formal *Gladue* report as a “preferable” source of *Gladue* information in this context, they have stopped short of suggesting that a *Gladue* report must be made available in all cases.⁵⁷ In *Shanoss*, the British Columbia Court of Appeal also emphasized that it would be inappropriate for an appellate court to simply “speculate that if a stand-alone *Gladue* report had been prepared then some material information might possibly have come forward that could affect or have affected the sentence”.⁵⁸ On the other hand, there are also appellate decisions where it has been found that the depth and scope of case-specific information available to the sentencing judge was inadequate in the absence of a full *Gladue* report.⁵⁹ Regardless of its source, it will constitute an error in principle for a sentencing judge to determine a dangerous offender application without adequate *Gladue* information before them.⁶⁰

54 See for example *R v Pelletier*, 2019 BCPC 211 at para 217, citing *Mattson*, *supra* note 43.

55 See for example *R v Anderson*, 2018 BCSC 2528 at para 55.

56 See for example: *Peekeekoot*, *supra* note 43 at paras 118-120; *Mattson*, *supra* note 43 at para 50; *R v Fontaine*, 2014 BCCA 1 at para 34 [*Fontaine*]; *R v Shanoss*, 2019 BCCA 249 at para 32 [*Shanoss*].

57 *Fontaine*, *supra* note 56 at para 34; *Mattson*, *supra* note 43 at para 50; *Wolfleg*, *supra* note 53 at para 52.

58 *Shanoss*, *supra* note 56 at para 33. See also *Peekeekoot*, *supra* note 43 at paras 119-120.

59 See for example: *Wolfleg*, *supra* note 53 at paras 78-81, 108-127; *Zoe*, *supra* note 52 at paras 50-60.

60 *Wolfleg*, *supra* note 53 at para 127.

The application of actuarial risk assessment tools to Indigenous people

Another *Gladue*-related consideration in dangerous offender proceedings arises from a concern that certain actuarial tools may have discriminatory impacts when applied to Indigenous people. As noted earlier in this publication, this persistent issue has also been raised in context to the use of these tools in the correctional system and bail decisions, as well their incorporation into pre-sentence reports. Two inter-related issues appear to be the overlap between actuarial risk factors and *Gladue* factors—often referred to as a form of cultural bias—and the lack of adequate data and research validating certain tools for application to Indigenous people. In *Ewert*, the Supreme Court acknowledged “credible concerns” that the information derived from certain actuarial risk assessment tools may be “of questionable validity with respect to Indigenous inmates because the tools fail to account for cultural differences”.⁶¹ It also noted the “long-standing” and “credible” concern that evaluating Indigenous inmates with certain actuarial tools “perpetuates discrimination and contributes to the disparity in correctional outcomes between Indigenous and non-Indigenous offenders”.⁶²

As actuarial risk assessment tools are often used when assessing individuals in dangerous offender applications, similar arguments have often been raised in this context. Questions with regards to a particular instrument’s validity and its potential bias against Indigenous people may warrant careful exploration during the hearing of expert evidence, especially as practices change in the wake of the *Ewert* decision.⁶³ For example, experts may need to adjust their scores to accommodate for cultural bias due to systemic and background factors, such as how an individual’s traumatic upbringing can impact how they “present” or how higher rates of truancy on reserve may contextualize an individual’s personal history of truancy in school.⁶⁴ Sentencing judges may wish to also explore whether the particular actuarial tools relied upon by experts have been validated for Indigenous people.⁶⁵ The cultural differences

61 *Ewert v Canada*, 2018 SCC 30 at para 66.

62 *Ibid* at para 53.

63 See for example: *R v Teneycke*, 2018 BCPC 60 at para 84; *R c Kritik*, 2019 QCCA 1336 at paras 33-35 [*Kritik*]; *R v Gracie*, 2019 ONCA 658 at paras 50-52; *R v Keerwasin*, 2019 ONSC 3516 at paras 30, 48; *R v Durocher*, 2019 NWTSC 37 at paras 198-206 [*Durocher*]; *Penosway v R*, 2019 QCCS 4016 at paras 64-75, 116-118.

64 *Durocher*, *supra* note 63 at para 146.

65 *Ibid* at para 147.

that distinguish Inuit from other Indigenous peoples have been raised as a further consideration to potentially explore in this context.⁶⁶ These concerns with actuarial risk assessment tools link back to the concerns first expressed by the British Columbia Court of Appeal in *George* that seemingly neutral considerations in the assessment of an individual's risk and dangerousness could disproportionately impact some Indigenous individuals due to systemic and background factors.⁶⁷ In other words, courts may need to be alive to the risk of systemic discrimination in this context as well.

Conclusion

The Supreme Court of Canada made it clear in *Boutilier* that the *Gladue* principles must be applied at the penalty stage of a dangerous offender application. What is less clear in the case law to date is whether and how they might also be relevant at the designation stage of this statutory regime. Appellate jurisprudence exists to the effect that sentencing judges should be attentive to systemic discrimination in how the designation criteria is applied, both in considering someone's childhood behaviour and assessing whether risk assessment tools have been validated for Indigenous people. Other cases from appellate courts mandate close attention to culturally relevant programming when assessing an Indigenous person's future prospects for treatment and the intractability of their conduct as well. Yet there are also cases that suggest the *Gladue* principles will only be relevant at the penalty stage. Similar to the bail jurisprudence, these divergent positions could simply reflect different perspectives regarding the overall ambit of the *Gladue* principles. The impacts of systemic and background factors on someone's moral blameworthiness have attenuated relevance in this context. But there may still be other reasons to pay attention to cultural differences and systemic factors in making factual determinations within these proceedings, regardless of how they are characterized in relation to the *Gladue* decision.

66 *Kritik, supra* note 63 at paras 33-35.

67 *George, supra* note 41 at para 18.

CHAPTER 15: YOUNG PERSONS

The *Gladue* principles are also applied in the criminal justice system's dealings with Indigenous youth. There is clear legislative direction for an Indigenous young person's unique circumstances to be taken into account during sentencing so this is by no means a controversial statement to make. Likewise, bail decisions for Indigenous young persons will require attention to the interim release provisions under the *Criminal Code*, thereby incorporating its statutory basis and jurisprudence for the consideration of their unique circumstances in this context as well.¹ Nevertheless, complex questions arise during Crown applications for an Indigenous young person to be sentenced as an adult in terms of how the *Gladue* principles might inform these decisions. The Supreme Court of Canada has yet to weigh in with specific guidance on the relevance of the *Gladue* principles to the criminal justice system's dealings with Indigenous young persons so existing lower court jurisprudence will be carefully summarized in this chapter.

The sentencing of an Indigenous young person ordinarily takes place under a distinct statutory scheme: the *Youth Criminal Justice Act (YCJA)*.² Canada's youth criminal justice system "stands separate from the adult criminal justice system".³ This separate system applies to "all persons between the ages of 12 and 17, as well as persons charged with having committed an offence while they were a young person".⁴ While the

1 As noted by Agnew J in *R v KRT*, 2019 SKPC 37 at para 10: "By virtue of s. 28 of the *YCJA*, the interim release provisions of the *Criminal Code* apply to interim release under the *YCJA*, except where they are overridden by the *YCJA*. In my view, this means that the case law which has developed regarding adult judicial interim release is also applicable under the *YCJA*, except where incompatible with the *YCJA*". Consistent with this interpretation, jurisprudence regarding the application of the *Gladue* principles to bail decisions for Indigenous adults has been applied in context to bail decisions for Indigenous youth. See for example: *R v TK*, 2020 SKQB 262.

2 *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*].

3 *R v KJM*, 2019 SCC 55, Moldaver J at para 49.

4 *Ibid.*

YCJA only came into effect in 2003, youth accused of criminal offences have received distinct treatment in Canadian law for over a century.⁵ The reason for distinct treatment is the “recognition of the presumption of diminished moral blameworthiness of young persons and [...] their heightened vulnerability in dealing with the justice system”.⁶ This has been affirmed as a principle of fundamental justice under s 7 of the *Charter*.⁷ It also finds expression in Canada’s international commitments under the *United Nations Convention on the Rights of the Child*.⁸

The presumptively diminished moral blameworthiness and greater vulnerability of young persons may be amplified by the *Gladue* principles when sentencing Indigenous youth. This is because an Indigenous youth’s systemic and background factors may reduce their moral culpability as variables independent from their age. The *Gladue* decision also speaks to the vulnerability of Indigenous people to systemic discrimination in the justice system more generally, with this potentially making prison a less appropriate or effective sanction. The potential for this type of overlap and amplification is a recurring theme in the existing jurisprudence on the sentencing of Indigenous young persons.

The general application of *Gladue* principles to the sentencing of young persons

It is clear that the *Gladue* principles apply in an analogous manner whenever Indigenous youth are sentenced under the *YCJA*, which “very clearly and repeatedly calls for the consideration of *Gladue* factors and alternatives in the sentencing process”.⁹ Section 50(1) of the *YCJA* ensures that s 718.2(e) of the *Criminal Code* applies to the sentencing of young persons “with any modifications that the circumstances require”. Section 3(1)(c)(iv) sets out the broad principle that “within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should [...] respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal

5 *Ibid*, Brown & Abella JJ at para 132, dissenting.

6 *Ibid*, Brown & Abella JJ at para 133, dissenting, citing *R v SJL*, 2009 SCC 14 at para 62.

7 *Ibid*, Brown & Abella JJ at para 134, dissenting, citing *R v DB*, 2008 SCC 25 [DB].

8 *DB*, *supra* note 7, Abella J at para 60.

9 *R v TDP*, 2004 SKPC 57 at para 23.

young persons and of young persons with special requirements”. Section 38(2)(d) sets out the sentencing principle that “all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons”. The *YCJA* also encourages sentencing judges to consult with the young person, their family, and the community, and provides for conferences and pre-sentence reports in order to accomplish this, thus facilitating access to relevant *Gladue* information for an Indigenous youth.¹⁰

The jurisprudence on the application of the *Gladue* principles to young persons under the *YCJA* reflects many parallel practices and considerations to the sentencing of adults. For example, the unique circumstances of an Indigenous young person may have a mitigating effect on the sentence imposed.¹¹ Likewise, the *Gladue* principles can be actualized in a sentencing circle, they can result in restorative and community-oriented sanctions, and they can contemplate engaging with Elders and participating in cultural and land-based activities.¹² Sentencing judges under the *YCJA* may wish to obtain a *Gladue* report in addition to other pre-sentence reports in order to better assess the unique circumstances of an Indigenous youth.¹³ Furthermore, it will constitute an error justifying an appeal if an Indigenous young person is sentenced without adequate consideration of the *Gladue* principles.¹⁴ Many of the principles are general enough to apply without modification.

On the other hand, the *Gladue* jurisprudence governing the sentencing of adults has at times required further modification or accommodation to the distinct vulnerabilities and needs of youth. For example, an Indigenous youth may have less capacity to identify and articulate their own unique circumstances and needs in support of the *Gladue* analysis, especially when their immaturity is compounded by other factors like a mental disability.¹⁵ Some youth may be “inarticulate, fearful and [...] possess very weak verbal skills”, in which case it will be

10 *Ibid* at paras 28-29. See also *R v M(JL)*, 2005 SKPC 28 at para 76 [*M(JL)*].

11 See for example: *R v Bull*, 2015 ABPC 256 at para 57.

12 See for example *R v MI*, 2018 NSPC 56 at paras 5, 19-23.

13 See for example: *R v C(K)*, 2011 ONCJ 364; *R v L et al*, 2012 BCPC 503; *R v SCL*, 2014 BCCA 336; *R v JDS*, 2014 ONSC 228; *R v JVP*, 2016 YKTC 34 at para 17 [*JVP*]; *R v TM*, 2017 BCSC 862 [*TM*]; *R v JS*, 2017 YKTC 23.

14 See for example: *R v TJD*, 2016 MBCA 67; *CP and JA v R*, 2009 NBCA 65 at para 21 [*CP and JA*].

15 *M(JL)*, *supra* note 10 at para 28. See also *R v RH*, 2013 SKPC 8 at paras 76-80, 86.

essential that court reports provide *Gladue* information “in light of these limitations and their reduced maturity and increased vulnerability”.¹⁶ This may require greater attention to collateral sources of information, such as interviews with their parents and extended family members or community members who are in a position to provide relevant individualized information.¹⁷

The *Gladue* principles could play a more dominant role in the sentencing of Indigenous young persons as well, bearing in mind the *YCJA*'s distinct statutory objectives and sentencing principles as compared to those of the *Criminal Code*.¹⁸ Among other differences, the *YCJA* excludes general deterrence as a relevant principle for young persons, denunciation and specific deterrence are discretionary rather than mandatory principles, and its focus is on the imposition of the least restrictive sentence capable of achieving accountability for the young person and the promotion of their rehabilitation and reintegration into society.¹⁹ At a broader level, the *YCJA* aims to restrict the use of incarceration as a sanction for young persons in light of their reduced maturity and moral sophistication.²⁰ These differences echo the *Gladue* principles in their focus on restraint and restorative justice over countervailing sentencing principles and objectives that might otherwise become dominant in the sentencing of an adult.

The *Gladue* principles in Crown applications to sentence youths as adults

While an Indigenous youth will ordinarily be sentenced under the *YCJA*, there is also a legislated process for the Crown to seek an adult sentence for a young person. Pursuant to s 64(1) of the *YCJA*, the Attorney General can apply for “an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than two years and that was committed after the young person attained the age of 14 years”. In these applications the intersection between the *Gladue*

16 *Ibid* at para 76.

17 See *YCJA*, s 40(2). See also: *R v Wellwood*, 2011 BCSC 689 at paras 14-25; *R v ZW*, 2016 ONCJ 490 at para 58.

18 See *CP and JA*, *supra* note 14 at para 25. See also *R v AS*, 2012 NSPC 104 at para 68.

19 *R v SNJS*, 2013 BCCA 379 at paras 27-30; *R v BMS*, 2016 NSCA 35 at paras 23-34; *R v JMO*, 2017 MBCA 59 at paras 55-58 (*sub nom R v Okemow*) [*Okemow*].

20 See *DB*, *supra* note 7, Abella J at paras 40-42. See also *Okemow*, *supra* note 19 at para 58.

principles and the presumption of diminished moral blameworthiness comes into even starker relief.

Section 72 of the *YCJA* sets out the two-part test that governs whether a young person should receive an adult sentence. The sentencing judge must be satisfied that: “(a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and (b) a youth sentence imposed in accordance with the purpose and principles [of the *YCJA*] would not be of sufficient length to hold the young person accountable for his or her offending behaviour”.²¹ If either prong is not satisfied the young person must be sentenced as a youth.²² While each prong requires consideration of similar factors, they must be analyzed separately to ensure both are satisfied.²³ The onus rests on the Crown to satisfy the sentencing judge that both prongs have been met.²⁴

If the s 72 test is satisfied and the youth receives an adult sentence, they will be subject to the sentencing principles under the *Criminal Code*, including its provisions governing dangerous and long-term offenders.²⁵ It is worth noting that the distinct considerations underlying the *YCJA* may still have relevance to an adult sentence for a young person, whether directly or indirectly.²⁶ While there is still some apparent debate over whether the s 3 principles of the *YCJA* directly apply to a young person who is sentenced as an adult, it is at least accepted “that the objective of rehabilitation should generally be enhanced and moderate the penalty to be imposed”.²⁷ Nevertheless, a successful Crown application under s 72 has obvious punitive implications in that it brings more retributive sentencing principles into play and it even exposes a young person to the possibility of being designated a long-term offender or dangerous offender who could then be subject to an indeterminate sentence.

21 *YCJA*, s 72(1).

22 *YCJA*, s 72(1.1). See also *R v LM*, 2017 SKQB 336 at para 102 [*LM*].

23 *LM*, *supra* note 22 at paras 106-108. See also *R v W(M)*, 2017 ONCA 22 at paras 105-106; *Okemow*, *supra* note 19 at para 53; *R v NW*, 2018 NSPC 14 at para 16 [*NW*]; *R v Chol*, 2018 BCCA 179 at paras 38-44 [*Chol*]; *R v RDF*, 2019 SKCA 112, Tholl JA at para 30, Jackson JA at paras 211-214, dissenting [*RDF*].

24 *YCJA*, s 72(2). See also *DB*, *supra* note 7, Abella J at paras 92-93.

25 *YCJA*, s 74(1).

26 *R v Pratt*, 2007 BCCA 206 at paras 26-59; *R v Nguyen*, 2008 BCCA 252 at para 33; *R v Flaten*, 2009 SKCA 136 at paras 36-38; *R v Smith*, 2012 NSCA 37 at paras 23-25; *Okemow*, *supra* note 19 at paras 121-123; *R v CM*, 2013 ABPC 60 at paras 22-32.

27 *R v Elie*, 2012 ONCJ 39 at para 29.

The *Gladue* principles will clearly apply when an adult sentence is crafted following a successful Crown application under s 64(1). However, the fact that these applications place a young person at risk of far longer periods of incarceration than would otherwise be available under the *YCJA* raises the question of whether *Gladue* principles should be considered as part of the s 72 analysis as well. Regardless of whether this is viewed as an application of the *Gladue* principles *per se*, the systemic and background factors of an Indigenous youth can be relevant to their level of maturity, moral blameworthiness, and accountability.²⁸ Additionally, there is ample jurisprudence to support the position that the *Gladue* principles should be applied at both prongs of the s 72 analysis.²⁹ In fact, at least one appellate court has concluded that it would be an error in principle for a sentencing judge to fail to apply the *Gladue* principles to both prongs.³⁰

In *R v Anderson*, Justice Mainella of the Manitoba Court of Appeal has provided the most detailed rationale for concluding that the *Gladue* principles must be applied at each stage of the s 72 test under the *YCJA*:

Section 72(1)(a) of the *YCJA* must be read in light of section 50(1) of the *YCJA*. That provision states that eight aspects of the *Criminal Code* relating to adult sentencing, including section 718.2(e), also apply to proceedings under the *YCJA* “with any modifications that the circumstances require.” The leading decision on the meaning of section 50(1) of the *YCJA* is *R v BWP; R v BVN*, 2006 SCC 27. In that case, Charron J explained that Parliament made a “deliberate” (at para 23) choice as to which aspects of adult sentencing would apply to the *YCJA*.

As explained in *Okemow*, the underlying purpose of the *YCJA* is “to restrict the use of custody in sentencing a young person” (at para 42). Custody, and particularly an adult sentence, is reserved for a very narrow set of offences and offenders.

28 *R v KM (A Young Person)*, 2017 NWTSC 26 at para 28.

29 See for example: *R v JF*, 2012 BCSC 780 at paras 63-64; *R v DLS and JB*, 2012 MBQB 177 at paras 39-33, 52-54; *R v A(DR)*, 2014 MBQB 199 at paras 33-34; *R v DR*, 2015 SKQB 157 at paras 62-75, 96, 121; *R v MJM*, 2016 MBQB 36 at paras 57-58; *TM*, *supra* note 13 at para 80; *R v AWB*, 2018 ABCA 159 at paras 29-34 [*AWB*]; *R v M(SR)*, 2018 MBQB 86 at paras 59, 61-62, 83, 106-107 [*M(SR)*]; *R v HJR*, 2019 MBPC 12 at paras 17-24, 34 [*HJR*]; *R v LTN*, 2019 SKQB 337 at paras 68-69, 71, 80; *Chol*, *supra* note 23 at para 61; *RDF*, *supra* note 23, Tholl JA at paras 37, 84, Jackson JA at paras 218, 224, dissenting.

30 *R v Anderson*, 2018 MBCA 42 at para 91 [*Anderson*]. See also *AWB*, *supra* note 29 at paras 32-33.

One of the key aspects of deciding whether the presumption of diminished moral blameworthiness or culpability has been rebutted is the circumstances of the offender (see *DB* at para 77). Given the importance of the principle of restraint under the *YCJA* and related principles, such as the prospects for rehabilitation and safe reintegration into society, in my view, Parliament's intention for deliberately choosing to incorporate section 718.2(e) of the *Criminal Code* into the *YCJA* was so that it would be mandatory that *Gladue* factors that may have played a part in bringing the Indigenous young person before the courts, as well as sentencing procedures and sanctions that may be appropriate because of the offender's Indigenous background, would have to be considered in any sentencing proceeding under the *YCJA*, including both requirements for an adult sentence under section 72(1) of the *YCJA*. Such an approach is consistent with Parliament's general desire to ameliorate the problems of overrepresentation of, and discrimination against, Indigenous people in the criminal justice system (see Sherri Davis-Barron, *Youth and the Criminal Law in Canada*, 2nd ed (LexisNexis, 2015) at 357-65).³¹

In applying the *Gladue* principles to the first prong of s 72, several sentencing judges have found an Indigenous youth's systemic and background factors will reinforce the presumption of diminished moral blameworthiness to the degree they indicate reduced moral culpability for reasons other than age.³² As addressed earlier in this publication, *Gladue* factors can also be linked with mental health issues or disabilities like FASD that might further diminish a young person's moral blameworthiness.³³ *Gladue* factors could indicate lower maturity if they suggest a lack of structure, adult guidance, or life skills in an Indigenous young person's upbringing.³⁴ They might also shed light on their other individual circumstances, such as a gang association, which may relate back to systemic and background factors such as family dysfunction, a lack of community structure, or cognitive deficits.³⁵ A young person's background experiences of crime, poverty, and racism might also help

31 *Anderson*, *supra* note 30 at paras 60-62. See also *AWB*, *supra* note 29 at paras 32-33.

32 See for example: *R v SA*, 2014 MBPC 17 at paras 62-64, 69; *R v KTD*, 2015 MBQB 119 at paras 22-25 [*KTD*]; *JVP*, *supra* note 13 at paras 29, 53-54;

33 *KTD*, *supra* note 32 at para 25.

34 *R v Henderson*, 2018 SKPC 27 at para 47 [*Henderson*].

35 *HJR*, *supra* note 29 at para 20

explain any anti-social views, the normalization of violence, or a “warped concept of what it is to be ‘a man’”, for example.³⁶

When various overlapping personal circumstances such as systemic and background factors and cognitive impairments reinforce a young person’s low level of maturity, moral sophistication, and capacity for the independent judgment of an adult, the Crown’s onus to rebut the presumption of diminished moral blameworthiness will be challenging to meet.³⁷ At the same time, the first prong of the s 72(1) analysis is “founded on reduced moral culpability as a result of youthfulness” and therefore “cognitive limitations and emotional and mental health, while relevant to this prong, should not overwhelm the analysis”.³⁸ Presumably the same could be said of systemic and background factors.

One reported decision goes so far as to suggest that the Crown can rebut the presumption of diminished moral blameworthiness “by advancing evidence that the young person’s lack of adult maturity, moral sophistication, and capacity for independent judgment, which are implicated in the offending behaviour, are largely due to factors other than age”, including the systemic and background factors of an Indigenous youth.³⁹ Yet the Court conceded that this will be difficult to achieve in practice.⁴⁰ Rather than viewing *Gladue* factors and age-related factors as mutually reinforcing evidence of an Indigenous youth’s diminished moral culpability, this would mean relying on their systemic and background factors to justify a potentially much harsher penalty, raising the spectre of systemic discrimination. In most cases the consequences of systemic and background factors for moral culpability appear to be more likely to support a youth sentence rather than an adult one, thereby avoiding this risk.

The consideration of the *Gladue* principles at the second prong of the s 72 test—the assessment of whether a youth sentence will be of sufficient length to hold the young person accountable—requires attention to the principle of restraint, the availability of culturally appropriate supports, and the moral blameworthiness of the young person.⁴¹

36 *NW, supra* note 23 at paras 185-186. Note that this case involved the sentencing of an African Nova Scotian young person rather than an Indigenous young person but the sentencing judge nevertheless applied analogous principles (see paras 28-35).

37 *Henderson, supra* note 34 at para 47.

38 *Chol, supra* note 23 at para 61.

39 *Henderson, supra* note 34 at para 48.

40 *Ibid* at paras 56-57.

41 See for example: *Anderson, supra* note 30 at paras 90-106; *M(SR), supra* note 29 at paras 106-107.

Justice Jackson of the Saskatchewan Court of Appeal has provided a clear explanation of the continuing relevance of moral blameworthiness at this second step:

The Crown must overcome both aspects of s. 72(1) and each aspect must be kept separate, but s. 72(1)(b) is assessed on the premise of the findings of s. 72(1)(a). This means that if a judge finds that the Crown has not rebutted the presumption of diminished moral blameworthiness or culpability under s. 72(1)(a), accountability under s. 72(1)(b), if the clause were to be considered, would be assessed for a person of diminished culpability. The focus remains on this young offender with this level of culpability. Holding a young offender with diminished responsibility accountable is a far different matter than holding a young person with high culpability accountable. Culpability cannot be assessed having regard for the seriousness of the crime alone.⁴²

Finally, the *Gladue* principles may have further relevance to a decision as to *where* an Indigenous young person ought to serve a prison sentence. For example, an Indigenous youth's systemic and background factors might indicate that they should be placed in a youth custody facility rather than an adult facility even after reaching the age of 20 if these factors are linked with other vulnerabilities that adult criminals prey upon.⁴³

Conclusion

The application of the *Gladue* principles in the sentencing of Indigenous young persons has many parallels with the dangerous offender context. In crafting a fit and proportionate sentence for an Indigenous person the sentencing judge must take into account whether any systemic and background factors diminish their moral blameworthiness regardless of whether this is in context to sentencing an Indigenous young person, adult, or dangerous offender. While the dominant sentencing principles shift from one context to the next, the fundamental principle of proportionality remains a constant in sentencing. But there are still other questions to be explored in terms of the potential for systemic discrimination in how facially neutral rules are applied to the unique circumstances of an Indigenous young person, requiring sensitivity to both the evaluation of the evidence and how it is obtained.

42 *RDF, supra* note 23, Jackson JA at para 224, dissenting.

43 *R v Flett*, 2015 MBCA 59 at paras 24-26.

CHAPTER 16: COLLATERAL CONSEQUENCES

Several sentencing decisions have also addressed how the *Gladue* principles can intersect with the consideration of collateral consequences when sentencing an Indigenous person. These are the consequences of an offence, conviction, or sentence that are particular to the individual being sentenced as a result of their individual circumstances. While this particular extension of the *Gladue* principles has yet to receive significant discussion in appellate-level decisions, there are a number of precedents for taking into account the harsher consequences of prison sentences and firearms prohibitions for some Indigenous people that pre-date the *Gladue* decision, as addressed in detail in Chapter 1 of this book. Several sentencing decisions since then have continued to account for an Indigenous person's unique individual circumstances by assessing whether they are likely to be impacted more adversely by a conviction or a particular sentence even if these are not always explicitly identified as collateral consequences.

The Supreme Court of Canada has yet to weigh in on how the *Gladue* principles might overlap with the consideration of collateral consequences in sentencing. In its more general guidance in *Suter*, however, the Supreme Court has stated that courts may need to look at “any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender” in order to achieve a proportionate sentence that accounts for all relevant circumstances related to the particular offence and offender.¹ In other words, there is a broad scope to consider the incidental impacts of an offence, conviction, or sentence based on someone's unique situation. As summarized in this chapter, the unique circumstances of Indigenous people have been found to amplify the impact of particular penalties in some cases. Likewise, some courts have identified collateral impacts that arise from the unique circumstances of Indigenous people. Accounting for unique circumstances in this context is functionally distinct from

1 *R v Suter*, 2018 SCC 34 at para 47 [*Suter*].

assessing an Indigenous person's moral blameworthiness in light of their systemic and background factors, but it may be linked to other aspects of the *Gladue* principles, such as the need to be attentive to sources of systemic discrimination

General principles governing the consideration of collateral consequences

The collateral consequences of a specific offence, conviction, or sentence on an offender are often accounted for by reducing or modifying the sentence that is imposed to avoid, mitigate, or otherwise compensate for these consequences. However, these are not true mitigating factors in the sense that they are relevant to sentencing for reasons unrelated to the gravity of the offence and the level of responsibility of the offender. Instead they are relevant in that they reflect whether “a particular sentence would have a more significant impact on the offender because of his or her circumstances”, which must be accounted for in light of the sentencing principles of individualization and parity.² Collateral consequences can also be relevant to the sentencing objective of assisting in rehabilitating offenders.³ Although a sentence can be adjusted to address collateral consequences, it must remain proportionate to the gravity of the offence and the moral blameworthiness of the offender, however.⁴ In other words, accounting for collateral consequences both contributes to and is bound by the fundamental sentencing principle of proportionality.

A wide variety of circumstances and statutory provisions have been found to be relevant to sentencing as collateral consequences of a particular offence, conviction, or sentence. Sentencing judges can consider any violent actions an individual has suffered from fellow inmates or a vigilante group for their role in the commission of an offence.⁵ The impact of a particular conviction or sentence on an individual's immigration status, either within Canada or elsewhere, and their risk of deportation might warrant consideration.⁶ Loss of property to civil forfeiture could

2 *Ibid* at para 48.

3 *R v Pham*, 2013 SCC 15 at para 11 [*Pham*].

4 *Suter*, *supra* note 1 at para 56.

5 *Ibid* at para 53.

6 See for example: *Pham*, *supra* note 3; *R v Croteau*, 2015 ABPC 142 [*Croteau*].

be relevant.⁷ Health risks associated with a term of imprisonment during a pandemic may need to be considered.⁸ If a particular sentence is likely to lead to a youth sentence being converted into an adult sentence, this too may need to be addressed.⁹ A sentencing judge must also be alive to the consequences of a conviction on someone's eligibility for income and disability assistance.¹⁰ That said, the Supreme Court has insisted that sentencing judges are not to impose inappropriate or artificial sentences to avoid collateral consequences that inevitably flow from statutes if doing so will circumvent legislative intent.¹¹

In more ordinary circumstances, a particular offence, conviction, or sentence can have relevant collateral consequences for someone's employment prospects, professional credentials, and business interests.¹² It might have relevant consequences for their family and their ability to care and provide for their children, in some cases leading to the involvement of a child protection agency.¹³ It could lead to reputation loss, public disgrace, social stigma, or ostracism.¹⁴ It might result in loss of housing.¹⁵ It could impact education plans as well.¹⁶ And it might otherwise affect someone's prospects for rehabilitation in terms of access to a family support network or services within the community, such as counselling.¹⁷ In some cases, the collateral consequences of the

7 *R v Knudsen*, 2019 BCPC 198 at para 36.

8 *R v Lemmen*, 2020 BCPC 67 at paras 158-190; *R v Studd*, 2020 ONSC 2810 at paras 42-45; *R v Morgan*, 2020 ONCA 279 at paras 8-11.

9 *R v Fisher*, 2019 MBCA 82.

10 *R v Dennis*, 2013 BCCA 153.

11 *Pham*, *supra* note 3 at para 15.

12 See for example: *R v Hewson*, 2016 ONCJ 784 at para 106; *R v Hillier*, 2018 ONCJ 397 at para 166 [*Hillier*]; *R v Macintosh*, 2018 NSPC 45 at para 58; *R v Murray*, 2018 ONCJ 393 at para 166 [*Murray*]; *R v Eastwood*, 2018 ONCJ 469 at para 79; *R v Carroll*, 2019 ONCJ 133 at paras 93-96 [*Carroll*]; *R v JM*, 2019 BCPC 235 at para 113.

13 See for example: *R c Stanberry*, 2015 QCCQ 1097 at paras 18-19; *R v Tattersall*, 2016 BCPC 81 at para 82 [*Tattersall*]; *R v McDonald*, 2016 NUCA 4 at paras 41-44; *Hillier*, *supra* note 12 at para 167; *R v BD*, 2017 ONSC 5526 at para 39; *R v AL*, 2018 NSPC 61 at para 21; *R v Vicente*, 2018 ONCJ 716 at paras 74, 76 [*Vicente*]; *R v Drakes*, 2018 NWTSC 63 [*Drakes*]; *R v KST*, 2019 BCPC 112 at paras 114, 118.

14 See for example: *Vicente*, *supra* note 13 at para 73; *Carroll*, *supra* note 12 at para 96; *Murray*, *supra* note 12 at para 165.

15 See for example: *Drakes*, *supra* note 13; *R v Roberts*, [2015] NJ No 356 (QL), 2015 CanLII 69483 (Prov Ct) at para 2.

16 *Croteau*, *supra* note 6.

17 See for example: *R v PMM*, 2019 BCPC 276 at para 79; *R v HO*, 2020 ONCJ 69 at para 56.

commission of an offence can even assist in determining whether the objectives of deterrence and denunciation are met.¹⁸ On the other hand, when certain consequences are almost inevitable given the nature of a particular offence, conviction, or sentence, this will reduce any mitigating impact they might otherwise have on the sentence imposed.¹⁹

Unique circumstances can translate into unique collateral consequences

Some collateral consequences can be unique to Indigenous people or impact them more adversely than others due to unique circumstances like their cultural values or geographic realities. For example, firearms prohibitions can be particularly impactful for Indigenous people when they interfere with hunting, trapping, and fishing for subsistence or cultural purposes.²⁰ Similarly, a driving prohibition can impact an Indigenous person living in an isolated community more harshly than it would someone living in an urban setting.²¹

An Indigenous person who lives in a small, tight-knit community might face amplified social stigma and ostracization for an offence, as might their family.²² In some cases a conviction could impact an Indigenous individual's status in their community in a wholly unique way by making them ineligible for a role like a hereditary chieftainship.²³ While some of these cases openly link these collateral consequences with the *Gladue* principles, the consideration of collateral consequences in sentencing is open-ended enough that this may not be necessary to recognize the relevancy of these circumstances to sentencing.

18 See for example: *R v Nagashbandi*, 2008 ABPC 302 at paras 63-67; *R v Aileo*, 2014 BCPC 15 at para 45.

19 *Suter*, *supra* note 1 at para 49.

20 *R v WJN*, 2012 ONSC 5917 at para 47; *R c Awashish*, 2012 QCCA 1430; *Tattersall*, *supra* note 13 at paras 82, 156(p); *R c Gunner*, 2017 QCCQ 12563 at paras 97-101; *R v Shobway*, 2017 ONCJ 476.

21 *R v Calliou*, 2019 ABCA 365 at para 13.

22 *R v TWS*, 2018 ABQB 870 at para 80.

23 *R v TRJ*, 2015 BCSC 352 at paras 25-28.

Systemic factors can amplify common collateral consequences

Many of the most commonplace collateral consequences of offences, convictions, and sentences can be amplified for Indigenous people due to systemic factors. That is to say that the collateral consequences for an Indigenous person's employment, education, family, housing, or access to services can be amplified by such systemic factors as higher rates of unemployment and child apprehensions, lower rates of formal education, scarce, overcrowded, or inadequate housing, or a lack of other services in particular Indigenous communities. A common collateral consequence like loss of employment could be more impactful for someone living in a community where employment is disproportionately scarce, for example, or for someone who faces barriers like limited formal education or disabilities.²⁴ At the same time, systemic factors like high rates of unemployment have been found to contribute to higher incidences of crime and incarceration for Indigenous people as well.²⁵ In *R v Kanatsiak*, Judge Galiatsatos of the Court of Quebec took note of this “vicious cycle” in which social disadvantages self-perpetuate when the sentencing process contributes to criminogenic factors for Indigenous people like unemployment.²⁶

Prison sentences may have collateral consequences for some Indigenous people

Some sentencing decisions have accounted for harsh conditions during pre-sentence custody as a collateral consequence of general application.²⁷ In some cases, uniquely adverse impacts of incarceration on an Indigenous person have been considered as a collateral consequence as well. The Supreme Court of Canada did state in *Gladue* that Indigenous people are “more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often

24 *R v Auger*, 2017 ABCA 304 at paras 11-12.

25 *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 at para 67 [*Gladue*].

26 *R c Kanatsiak*, 2019 QCCQ 1888 at paras 88-90, rev'd in part on other grounds 2020 QCCS 1523.

27 See for example: *R v Cunningham*, 2019 ONCJ 559; *R v Turco*, 2019 ONCJ 646.

rampant in penal institutions”.²⁸ This has clear relevance to the sentencing judge’s duty to consider culturally appropriate procedures and sanctions under s 718.2(e). However, some sentencing judges have gone further by considering the adverse impacts of incarceration on an Indigenous person as a collateral consequence as well, echoing some of the early cases summarized in Chapter 1.

In *Beardy*, Judge Corrin of the Manitoba Provincial Court interpreted the *Gladue* and *Ipeelee* decisions as implying that “the specific impact of incarceration on an offender should be considered”.²⁹ He noted that “jail sentences that remove Aboriginal offenders far from their community and family support systems must be carefully scrutinized as their impact on the offender may well be potentially counterproductive because of their inherently harsh and cruel personal consequences”.³⁰ Mr. Beardy was described as a “youthful offender” displaced from his remote and rural Indigenous community in Lake St. Martin by a forced evacuation that brought him to the foreign environment of a large multi-cultural urban centre, which in turn destabilized his ability to cope with stress.³¹ The Court also recognized that Mr. Beardy suffered depression and suicidal tendencies that would make prison “particularly difficult”.³² In these circumstances, Judge Corrin held that “it would be imprudent to accord too much weight to general deterrence”.³³

In *Iserhoff*, Judge Ladouceur of the Court of Quebec accounted for the collateral consequences that two Cree men from the Eeyou Istchee territory in northern Quebec would face if sentenced to incarceration in southern correctional institutions.³⁴ The Court found that the Cree men would serve custodial sentences “far away from [their] family and community, making it more difficult to receive visits from [their] loved ones and maintain a connection with [their] culture”.³⁵ This would take place in “a cultural environment that is fundamentally different from [their] Aboriginal culture” and where they are a minority, making imprisonment

28 *Gladue*, *supra* note 25 at para 68.

29 *R v Beardy*, 2017 MBPC 32 at para 16, *aff’d* 2018 MBCA 52.

30 *Ibid.*

31 *Ibid* at para 15.

32 *Ibid* at para 16.

33 *Ibid.*

34 *R c Iserhoff*, 2019 QCCQ 2339. See also *R c Mianscum*, 2019 QCCQ 3829 at para 61 [*Mianscum*].

35 *Ibid* at para 172.

more challenging for them.³⁶ Furthermore, the Cree men were found to be statistically less likely to be granted temporary absence in preparation for conditional release or to be released on parole than non-Indigenous inmates.³⁷ These *prospective* collateral consequences were accounted for in determining a proportionate sentence for them independent from the *retrospective* impact of systemic and background factors on their moral culpability.³⁸ Analogous collateral consequences have been accounted for in other sentencing decisions of the Court of Quebec involving Indigenous people since the *Iserhoff* decision was issued.³⁹

Similarly, Judge Mackenzie of the Saskatchewan Provincial Court weighed the substance abuse rehabilitation programming available in custody against programming available in the community of Regina when sentencing an Indigenous woman for a drug trafficking offence motivated by addiction in *McKenzie*.⁴⁰ Judge Mackenzie found there to be a “stark distinction” between the small number of programs available in custody, with uncertainty around availability and wait times, as compared to the comprehensive and readily accessible options available in the community, including culturally relevant programming.⁴¹ He also took into account statistics regarding high rates of drug and alcohol use within correctional institutions.⁴² The Court held that a consequence of any custodial sentence for Ms. McKenzie would be a greater risk of relapse and recidivism given the limited programming and the exposure to negative peer groups and drugs that could be reasonably anticipated in prison.⁴³ Again, these factors appear to have been considered independently from the assessment of the impact of systemic and background factors on her moral culpability.⁴⁴

36 *Ibid.*

37 *Ibid.*

38 *Ibid* at para 173.

39 See for example: *Mianscum*, *supra* note 34 at para 61; *R c Neeposh*, 2020 QCCQ 1235 at paras 60-67; *R c Wiscutie*, 2020 QCCQ 2439 at paras 40-45.

40 *R v McKenzie*, 2018 SKPC 53.

41 *Ibid* at paras 53-62.

42 *Ibid* at para 63.

43 *Ibid* at paras 64-66.

44 *Ibid* at para 24-33.

Indigenous community punishments as collateral consequences

In *Suter*, the Supreme Court of Canada confirmed that the “non-state” collateral consequences someone endures as a result of a particular offence—such as vigilante violence—may be considered when determining an appropriate sentence.⁴⁵ In doing so, the Supreme Court appears to have approved of how sentencing judges in Australia take into account the retribution some Indigenous people face from community members for the same conduct that results in criminal proceedings.⁴⁶ Australian case law considers this type of “extra-curial punishment” to be a material fact relevant to sentencing regardless of its legality or legitimacy in the eyes of the courts.⁴⁷ This type of non-state punishment is treated as a mitigating factor in sentencing so as to ensure an Indigenous person is not “punished twice for the same offence” and “in practice it appears that some balancing of punishments is done within both systems”.⁴⁸ In addition, Australian courts have taken into account extra-curial punishment within Indigenous communities even when it has not involved any physical injuries to the person being sentenced.⁴⁹

In Canada, there has been far less judicial attention to parallel punishments imposed by Indigenous communities when sentencing Indigenous people, even though this topic was addressed in reports before the Supreme Court in *Gladue*.⁵⁰ Nevertheless, there is some precedent for recognizing an Indigenous community’s decision to banish someone based on an offence, conviction, or sentence as a circumstance worthy of consideration by the courts in sentencing. In *S(G)*, for example, Judge Digiuseppe of the Ontario Court of Justice suggested that the banishment of an Ojibway man with a limited grasp of English

45 *Suter*, *supra* note 1 at para 57.

46 *Ibid* at paras 52–53, citing *R v Mamarika*, [1982] FCA 94 (Australia).

47 *Jadurin v The Queen*, [1982] FCA 215 (Australia); *R v Minor*, [1992] NTCCA 1 (Australia) at 27 [*Minor*]; *R v Daetz*, [2003] NSWCCA 216 (Australia) at para 57.

48 *Minor*, *supra* note 47 at 24, citing *Recognition of Aboriginal Customary Laws* (Australian Law Reform Commission Report, 1986), vol 1 at para 508.

49 *R v Miyatataruwuy*, [1996] NTSC 84 (Australia), citing *Munungurr v The Queen* (1994) 4 NTLR 63 (Australia).

50 See Chapter 2 for a summary of findings from the commissions of inquiry and task forces that pre-dated the enactment of s 718.2(e) and its interpretation in the *Gladue* decision. See especially Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 76.

“from his community, his family and his way of life” arguably amounted to “a virtual prison sentence for him, and just as effective in terms of deterrence and denunciation as any sentence this Court might impose”.⁵¹ And where banishment has been imposed by the sentencing judge, this too has been equated with a period of incarceration.⁵²

In *R v RRM*, Chief Justice Finch of the British Columbia Court of Appeal (as he then was) more directly addressed why an Indigenous nation’s decision to banish someone has a mitigating impact on sentence, albeit without terming this a collateral consequence:

...when the appellant is released from custody he will not have support from either community, and will have limited opportunities for access to adult family members until his probation period terminates. He will be thrown on his own resources into the larger community, isolated from his family, and with nowhere to live. Banishment is a significant additional penalty, and clearly one which, as the Crown concedes, should have been considered in mitigation by the sentencing judge.⁵³

Other examples of Indigenous communities addressing wrongdoing through their own parallel processes have also been considered by sentencing judges. For instance, there are several cases from British Columbia’s courts that make note of how the Tsimshian, Nisga’a, Gitksan, Babine, and Wet’suwet’en address wrongdoing through holding feasts or potlatches.⁵⁴ In *William*, the British Columbia Supreme Court took note of a “shame feast” that would hold an individual accountable to their clan within the Babine Nation by shaming them in front of their community and requiring them to “pay their debt to society”.⁵⁵ This appears to have been considered as evidence of community support.⁵⁶ In other cases, a shame feast has been considered for incorporation into the sentence itself in support of restorative justice, rehabilitation, and

51 *R v S(G)*, 2004 ONCJ 110 at para 39.

52 See for example: *R v Griffith*, [1998] BCJ No 2008 (QL), 1998 CanLII 5490 (CA) at para 51; *R v Felix*, 2002 NWTSC 63 at para 51.

53 *R v RRM*, 2009 BCCA 578 at para 39.

54 See for example: *R v Morrison*, 2012 BCSC 155 at paras 35-36; *R v McLean*, 2014 BCSC 1293 at para 19; *R v RRGs*, 2014 BCPC 170 at para 22; *R v EJTM*, 2016 BCSC 356 at paras 12, 15; *R v Casimir*, 2016 BCSC 65 at para 15.

55 *R v William*, 2014 BCSC 1639 at para 30.

56 *Ibid* at paras 30, 61, 67.

reintegration.⁵⁷ Notably, these feasts appear to have cultural, financial, and reputational impacts on the Indigenous person for whom they are being held.⁵⁸ In principle, these extra-curial impacts of an offence, conviction, or sentence could be treated as collateral consequences so as to be accounted for in the sentence imposed by the courts when they occur outside of that process.

Conclusion

There are several older precedents for sentencing judges to draw upon when considering how an Indigenous person's unique circumstances can make prison a harsher penalty for them. Some of the task forces and commissions that preceded the *Gladue* appeal had called for Indigenous community punishments to be accounted for in sentencing as well, echoing the Australian jurisprudence and the Australian Law Reform Commission. With this background context in mind it is perhaps more surprising to find these issues have received so little jurisprudential attention to date than it is to see them now emerging in decisions like *Iserhoff*. As the Supreme Court of Canada has clarified that non-state punishments can be accounted for as collateral consequences—building on the Australian jurisprudence in doing so—these impacts of the unique circumstances of Indigenous peoples may warrant more attention going forward. The existing cases demonstrate how the unique circumstances of Indigenous people shed light on more than just culpability.

57 See for example: *R v Loring*, 2009 BCCA 166 at paras 21-26; *R v DBV*, 2011 BCSC 1350 at paras 39, 48; *R v GEW*, 2014 BCSC 2597 at para 60; *R v BS*, 2018 BCSC 2044 at paras 56, 74-77.

58 See for example *R v HGR*, 2015 BCSC 681 at paras 7-8.

CHAPTER 17: ABSOLUTE AND CONDITIONAL DISCHARGES

Lower courts have also explored the outer boundaries of the *Gladue* principles in context to discharge applications where prison is not contemplated. As the New Brunswick Court of Appeal points out in *Perley*, s 718.2(e) not only aims to make prison the penalty of last resort and reduce Indigenous over-incarceration, it also encourages a restorative approach to sentencing more generally.¹ In other words, the *Gladue* principles are still important when crafting non-custodial sentences.² However, this is a topic that has yet to receive any explicit guidance from the Supreme Court of Canada and some courts and counsel have at least raised the question of whether the *Gladue* principles remain relevant in the absence of any threat of incarceration. This is a particularly important legal question in context to applications for absolute or conditional discharges, as explored in this chapter.

Several sentencing decisions have now addressed the *Gladue* principles in determining whether to grant a discharge, which means no conviction will be entered in spite of the accused being found guilty of an offence.³ An application for a discharge takes place within a sentencing proceeding but requires attention to a unique set of statutory criteria. Section 730(1) of the *Criminal Code* empowers a sentencing judge to direct either an absolute discharge or a discharge subject to conditions set out in a probation order. The only offences for which a discharge is categorically unavailable under the *Criminal Code* are those that carry either a statutory minimum sentence or a maximum sentence of 14 years or more. Section 730(1) also dictates that the sentencing judge must be satisfied that a discharge would be “in the best interests of the accused and not contrary to the public interest”.⁴

1 *Perley v R*, 2019 NBCA 88 at para 20.

2 *Ibid.* See also *R v Kuliktana*, 2020 NUCA 7 at para 34.

3 *Criminal Code*, RSC 1985, c C-46, s 730(3) [*Criminal Code*].

4 *Criminal Code*, s 730(1).

As summarized in this chapter, several sentencing decisions have found that the *Gladue* principles apply to an application under s 730(1). Section 718.2(e) must still be applied alongside the other sentencing principles in the *Criminal Code* when determining a fit sentence in this specific context, providing a straightforward basis for their relevancy. In addition, an Indigenous person's unique circumstances can shed light on both their best interests and the broader public interest in context to the statutory test under s 730(1).

The statutory test for granting an absolute or conditional discharge

In order to understand how the *Gladue* principles can intersect with these applications, it is worth first reviewing the general test for an absolute or conditional discharge. The leading case on discharges as a sentencing tool is the 1973 *Fallofield* decision of the British Columbia Court of Appeal.⁵ Little has changed with respect to the statutory provisions since then and the principles remain the same.⁶ The Court of Appeal held that there are no restrictions on the availability of a discharge beyond those explicitly provided for in the *Criminal Code* as “a discretion which is unfettered by law must not be fettered by judicial interpretation of it”.⁷ The Court also emphasized that nothing in the *Criminal Code* limits the availability of an absolute or conditional discharge to “a technical or trivial violation”.⁸ Instead, this sentencing option is available for any offence falling outside the statutory bounds of a mandatory minimum sentence or a maximum sentence of 14 years or more.⁹ Nor will a discharge be routinely granted for any particular type of offence, with the appropriateness of this sentence being dependent on the circumstances.¹⁰ However, the power to direct a discharge is not one to be exercised as an alternative to probation or a suspended sentence.¹¹

As set out explicitly in s 730, the two conditions precedent for a discharge are that it is: (i) in the best interests of the accused; and (ii) not contrary

5 *R v Fallofield*, [1973] BCJ No 559 (QL), 1973 CanLII 1412 (CA) [*Fallofield*].

6 *R v Jeremiab*, 2018 BCCA 89 at para 14.

7 *Fallofield*, *supra* note 5 at 452.

8 *Ibid* at 454.

9 *Ibid*.

10 *Ibid* at 455.

11 *Ibid*.

to the public interest. The first condition presupposes “that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against [them] in order to deter [them] from future offences or to rehabilitate [them], and that the entry of a conviction against [them] may have significant adverse repercussions”.¹² This criterion will often be satisfied as “in almost every case a discharge would certainly be in the interests of the accused”, although for some individuals a short term of imprisonment or probation might deter them from further criminal activity and remove them “from the very environment which may have generated such activity”.¹³ An assessment of the best interests of the accused also requires attention to the collateral consequences of a conviction in light of personal circumstances such as age, current and future employment, education and career plans, familial obligations, ability to travel, mental health and course of treatment.¹⁴

The second condition precedent for a discharge is framed in the negative; it requires consideration of whether a discharge might be “injurious to the public interest” rather than a determination of whether it will advance the public interest.¹⁵ In making this assessment, the sentencing judge must give due weight to general deterrence, but this “does not preclude the judicious use of the discharge provisions”.¹⁶ It requires attention to the gravity of the offence, its incidence in the community, public attitudes towards it, and public confidence in the effective enforcement of the criminal law.¹⁷ The more serious the offence, the less likely a discharge should be granted, or the greater the need for mitigating circumstances to counterbalance the gravity of the offence.¹⁸ Collateral consequences of a conviction—such as impacts on employment prospects or education—have relevance to this criterion as well.¹⁹ For example, there may be a

12 *Ibid* at 454-455.

13 *R v MacFarlane* (1976), 3 Alta LR (2d) 341 at 343, 55 AR 222 (CA).

14 See for example: *R v Meneses* (1974), 25 CCC (2d) 115 at 116, 1974 CanLII 1659 (Ont CA) [*Meneses*]; *R v Edmunds*, 2012 NLCA 26 at paras 20, 23; *R v Haggerty*, 2013 ABQB 711 at paras 23-24 [*Haggerty*]; *R v Rubia*, [2017] NJ No 112 (QL), 2017 CanLII 16111 (Prov Ct) at para 41.

15 *R v Atleo*, 2014 BCPC 15 at para 31 [*Atleo*]. See also: *R v Martinuk*, 2010 ABQB 514 at para 14; *R v Sellars*, 2013 NSCA 129 at paras 25-29.

16 *Fallofield*, *supra* note 5 at 455.

17 See: *R v Elsharawy*, [1997] NJ No 249 (QL), 1997 CanLII 14708 (CA) at para 3; *R v Roberts*, 2004 SKCA 153 at para 8; *R v Collier*, 2006 NBCA 92 at para 14; *Atleo*, *supra* note 14 at paras 35-36.

18 *R v Foianesi*, 2011 MBCA 33 at para 21.

19 *Ibid*. See also: *R v Sowden*, 2011 ONCJ 244 at paras 45-48; *R v Kowtak*, 2019 NUCJ 3 at paras 45-46 [*Kowtak*].

public interest in the accused being given every opportunity to be a productive member of their family and the broader community.²⁰ In assessing these various factors, the sentencing judge must not lose sight of the broader sentencing principles under the *Criminal Code*, including the fundamental principle of proportionality.²¹

The *Gladue* principles apply to an application for a discharge

An application for a discharge under s 730(1) does not directly invoke a threat of prison, although a custodial sentence may still be deemed fit if the application fails. In light of this, some counsel and sentencing judges have at least raised the question of whether the *Gladue* principles are relevant to the determination of an application pursuant to s 730. As Judge Galiatsatos of the Court of Quebec asked rhetorically in *Kanatsiak*, “if the issue is merely whether or not an offender will be discharged (as opposed to being formally convicted and sentenced to a non-custodial sanction), does the rationale behind s. 718.2(e) still apply?”²² To date, courts have all consistently answered this question in the affirmative, including Judge Galiatsatos himself, with some doing so explicitly and others doing so implicitly through their consideration of the unique circumstances that require attention under this distinct sentencing analysis.²³

It is also worth noting that prior to its repeal in December of 2018, s 255(5) of the *Criminal Code* had allowed for discharges under s 730 for impaired driving offences that could be demonstrably linked to the need for curative treatment in relation to alcohol or drugs—commonly known

20 *Meneses*, *supra* note 14 at 117.

21 *R v Lowe*, 2012 ABPC 128 at paras 16-17.

22 *R v Kanatsiak*, 2019 QCCQ 1888 at para 78, rev'd on other grounds 2020 QCCS 1523 [*Kanatsiak*].

23 See for example: *R v Stevens*, 2009 NSPC 46 [*Stevens*]; *R c Idlout*, 2009 QCCQ 5104 [*Idlout*]; *R v Mason*, 2011 MBPC 48 [*Mason*]; *R c Orweetaluktuk*, 2011 QCCQ 12725 at para 7; *R v Dennis*, 2013 BCCA 153 at paras 28-29 [*Dennis*]; *Haggerty*, *supra* note 14 at paras 35-37; *R c Snowboy*, 2014 QCCQ 2420 at para 9 [*Snowboy*]; *R v Samson*, 2014 YKTC 33 at paras 67-70, aff'd 2015 YKCA 7 [*Samson*]; *R v Rodrigue*, 2015 YKTC 5 at paras 100-103 [*Rodrigue*]; *R v Mathewsie*, 2016 NUCA 5 at para 44; *R c WG*, 2017 QCCQ 16076 at para 33 [*WG*]; *R v Potvin*, 2017 ONCJ 429 at paras 36-37 [*Potvin*]; *R v Wells*, 2018 BCSC 738 [*Wells*]; *Kowtak*, *supra* note 19 at para 46; *R v TLC*, 2019 BCPC 314 [*TLC*]; *R v Robinson*, 2020 BCPC 146; *R v Harper*, 2020 BCPC 226.

as curative discharges.²⁴ The test applied for a curative discharge under s 255(5) was effectively “a contextual expression of the test set out in s. 730 as it would be applied to an impaired driving offence; namely, that a discharge should only be granted if the court ‘considers it to be in the best interests of the accused and not contrary to the public interest’”.²⁵ Up until its repeal, much of the jurisprudence under s 255(5) supported the conclusion that the *Gladue* principles should be applied to applications for curative discharges, modified as needed to the considerations that arise in this context.²⁶

In *Kanatsiak*, Judge Galiatsatos helpfully summarized much of the existing jurisprudence on the application of the *Gladue* principles to determinations under s 730 and endorsed this development of the law. He held that sentencing judges are obliged to give s 730(1) “a generous application when sentencing Aboriginal offenders so as to attempt to break the cycle of systemic criminalization”.²⁷ Similarly, in *Potvin*, Judge Doody of the Ontario Court of Justice pointed out that a discharge may keep an Indigenous accused “one step away from potential incarceration” in comparison to other options that make prison more likely in the event of a subsequent offence.²⁸ In *Mason*, Judge Sandhu of the Manitoba Provincial Court also concluded the *Gladue* principles oblige sentencing judges to pay attention to how Indigenous people first enter the criminal justice system “and to give some benefit to aboriginal offenders as they may exit the justice system”.²⁹

As noted already, any determination of an application under s 730(1) needs to respect the general sentencing principles set out in the *Code*, including the fundamental principle of proportionality. In light of this, the unique circumstances of an Indigenous accused ought to be considered under a standard *Gladue* analysis in this context.³⁰ In other words, courts should explore how an Indigenous person’s systemic and

24 *R v Menacho*, 2019 NWTTC 15 at paras 13-17; *R v Sabbatis*, 2020 ONCJ 242 at paras 36-37 [*Sabbatis*].

25 *R v Luke*, 2019 ONCJ 514 at para 31 [*Luke*].

26 See for example: *R v Gambler*, 2012 SKPC 60 at para 34; *R v Aisaican*, 2015 SKPC 11 at paras 70-71; *R v Daybutch*, 2016 ONCJ 595, rev’d on other grounds 2017 ONSC 6678; *R v Morin*, 2017 SKPC 55 at paras 13-20, 43-44; *Luke*, *supra* note 25 at paras 33-42; *Sabbatis*, *supra* note 24 at paras 97-110.

27 *Kanatsiak*, *supra* note 22 at para 87.

28 *Potvin*, *supra* note 23 at para 36.

29 *Mason*, *supra* note 23.

30 *Kanatsiak*, *supra* note 22 at para 81.

background factors impact their moral culpability and the relevance of restorative justice and rehabilitation when assessing an application for a discharge.³¹ However, some sentencing judges have identified additional considerations that can arise when the specific statutory criteria for a discharge application under s 730 intersect with an Indigenous person's unique systemic and background factors. These will be summarized in the remainder of this chapter.

Systemic and background factors can impact an Indigenous person's best interests

Some courts have canvassed how systemic factors can amplify a conviction's collateral consequences when determining an Indigenous person's best interests under s 730, as addressed in detail in Chapter 16. This is equally true of the collateral impacts of both a conviction and a sentence. Whenever a sentencing judge assesses an Indigenous person's best interests, the collateral consequences of a criminal record for their employment, education, or career prospects can be amplified by systemic factors like higher rates of unemployment or lower levels of formal education among Indigenous people or within their particular community.³² In other words, the criminal record could impose a disproportionate adverse impact on an Indigenous person's education and employment prospects if they are already facing systemic barriers to education and employment.

A criminal record can have a compounding negative impact on someone whose personal circumstances already constrain their employability, such as a person with limited formal education or mental and physical disabilities.³³ Depending on the case-specific details, these could be linked to an Indigenous person's systemic and background factors, such as when Fetal Alcohol Spectrum Disorder is closely linked with intergenerational trauma. Furthermore, an Indigenous person who lives in a small, remote community may already have to 'wear' their offence every day in that community, facing more shame than they would otherwise experience in

31 See for example: *Haggerty*, *supra* note 14 at paras 35-37; *WG*, *supra* note 23 at para 73; *Potvin*, *supra* note 23 at paras 9-35; *Wells*, *supra* note 23 at paras 35-39; *Luke*, *supra* note 25 at paras 32-40.

32 *Idlout*, *supra* note 23 at para 24; *Kanatsiak*, *supra* note 22 at paras 87-91.

33 *R v Auger*, 2017 ABCA 304 at paras 11-12.

more populous urban centres where they could reasonably expect to have some anonymity.³⁴ The way these circumstances interact can shed light on whether a conviction is likely to support or inhibit that individual's rehabilitation and whether it will contribute to specific deterrence in any meaningful way.³⁵

Likewise, judicial consideration of systemic factors can help guard against the risk of discharges being treated as a privilege exclusive to those with higher social status, such as individuals with professional designations or those who are employed full-time.³⁶ Higher rates of unemployment and lower rates of formal education among Indigenous peoples can have a systemic effect on the probability of a discharge being available if they are statistically less likely to face collateral impacts on either their employment or professional status. Some sentencing judges therefore contextualize the potential impact of a criminal record on an Indigenous person by comparing them to members of their own community rather than broader demographic reference points.³⁷

The *Gladue* principles impact whether a discharge is contrary to the public interest

Several sentencing decisions have also concluded that there are unique considerations engaged when determining if a discharge would be contrary to the public interest for an Indigenous person. In *Rodrigue*, for example, Judge Cozens of the Territorial Court of Yukon stated that this criterion requires consideration of whether a discharge furthers the public interest in making reparations towards Indigenous peoples in light of the harm done by destructive government policies like the residential school system.³⁸ Judge Cozens also noted that when a sentencing judge decides whether a conviction is required to maintain public confidence in the administration of justice, this must be done from the perspective of an ordinary, fair-minded member of society who is informed about the circumstances of the accused and the offence they committed, including

34 *Samson*, *supra* note 23 at paras 66, 71.

35 *Idlout*, *supra* note 23 at para 24.

36 See *R c Rozon*, [1999] RJQ 805, 1999 CanLII 11146 (CS) at para 36 [*Rozon*], cited in *Idlout*, *supra* note 23 at para 14. See also *R c Darby*, 2012 QCCS 26 at para 11.

37 *Idlout*, *supra* note 23 at para 14; *WG*, *supra* note 23 at para 67.

38 *Rodrigue*, *supra* note 23 at para 102.

the impact on the victim, and the relevant principles of sentencing.³⁹ This hypothetical observer would therefore be aware of the *Gladue* principles and the unique circumstances of the accused.

When assessing whether granting a discharge would be contrary to the public interest, some sentencing judges have also concluded that a discharge is likely to make a positive contribution to the public interest if it helps address the root causes of Indigenous over-incarceration in relation to the personal circumstances of an Indigenous accused. For instance, if the discharge supports someone in serving their community as a professional, advancing their education, and serving as a role model for others, these are “especially persuasive factors” in assessing this second criterion.⁴⁰ The same may be said of a discharge that supports someone’s ambitions for a community leadership role.⁴¹ On the other hand, if an Indigenous person is facing challenges like addictions or disabilities, but taking positive steps towards rehabilitation by addressing factors that led to their criminal conduct, it would not be contrary to the public interest to give them the opportunity to stabilize their life.⁴² Once more, a discharge is not meant to be exclusively available to those who benefit from higher social standing like professionals.⁴³

In *Idlout*, Judge Bigué of the Court of Quebec emphasized the specific public interest of “all the Inuit communities of Nunavik” when assessing this second criterion for an Inuk from Inukjuak in the Nunavik region of northern Quebec.⁴⁴ He stated it would not be contrary to the public interest “to be able to rely on as many people as possible with no criminal records, whenever possible”, especially in a small Indigenous community like Inukjuak.⁴⁵ Mirroring the second prong of the *Gladue* analysis, Judge Bigué also took into account the unique culture, values, needs, and understanding of sentencing of the Inuit of Nunavik, stating that they emphasize restorative justice as part of their cultural heritage and

39 *Ibid* at para 103.

40 *Stevens*, *supra* note 23 at paras 16–20. See also: *WG*, *supra* note 23 at para 74; *Kanatsiak*, *supra* note 22 at paras 89–91; *Luke*, *supra* note 25 at para 40; *TLC*, *supra* note 23 at para 78.

41 *Samson*, *supra* note 23 at paras 63, 68, 70.

42 *Dennis*, *supra* note 23 at para 27; *Luke*, *supra* note 25 at para 39; *TLC*, *supra* note 23 at paras 73–74; *Sabattis*, *supra* note 24 at paras 100–103.

43 *Rozon*, *supra* note 36, cited in *Idlout*, *supra* note 23 at para 14.

44 *Idlout*, *supra* note 23 at para 17.

45 *Ibid* at para 20. See *Snowboy*, *supra* note 23 at para 15 with respect to the Cree of James Bay.

as “a preferred way of settling offences”.⁴⁶ He held that this favoured an absolute discharge since the accused already paid a donation for the benefit of a non-profit organization in the community without waiting for a decision from the court.⁴⁷

Conclusion

The extension of the *Gladue* principles to applications for discharges under the *Criminal Code* further demonstrates the broad scope of their potential relevancy. Systemic and background factors may shed light on the effectiveness of a criminal record as a sanction for an Indigenous person if it appears likely to impede their rehabilitation and reinforce the root causes of their conduct. These factors could impact a conviction’s proportionality if they amplify its consequences beyond what would otherwise be justified by culpability and the gravity of the offence alone. Furthermore, sentencing judges have considered the *Gladue* principles in assessing the public interest in granting a discharge in a manner that closely parallels assessments of the public interest and public confidence with respect to bail decisions and joint submissions, as addressed in earlier chapters in this book. These cases demonstrate how judicial attention to systemic discrimination in the criminal justice system can extend the implications of the *Gladue* principles beyond s 718.2(e)’s direct reach while remaining in line with the Supreme Court of Canada’s broader directions.

46 *Ibid* at paras 18-22.

47 *Ibid* at para 23.

CHAPTER 18: SENTENCING IN CIVIL AND ADMINISTRATIVE LAW CONTEXTS

The *Gladue* principles emerged from a purposive interpretation of a specific provision in the *Criminal Code*. Obviously it is no coincidence that the majority of cases addressed in this publication are criminal sentencing decisions. Yet there are other sentencing contexts in which an Indigenous person may face the risk of incarceration, in which systemic and background factors can impact culpability in legally relevant ways, or in which systemic discrimination and the alienation of Indigenous collectives and individuals in the justice system are relevant background context for viewing case-specific circumstances before the court. While the Supreme Court of Canada has yet to weigh in on the application of the *Gladue* principles to sentencing proceedings in a civil or administrative law context there are several lower court decisions that have addressed this topic to date.

Regulatory prosecutions

First of all, there are several examples of the *Gladue* principles being considered and applied in sentencing proceedings for regulatory offences under federal or provincial public welfare statutes.¹ The principles have even been applied—whether directly or by analogy—when imprisonment is neither sought nor statutorily available.² These cases are noteworthy in

1 See for example: *R v Lamouche*, 2000 ABQB 461; *R v Cardinal*, 2009 ABPC 77 & 2010 ABQB 673; *R v Joseph*, 2013 BCPC 199 [*Joseph*]; *R v Bob*, 2015 BCPC 402 [*Bob*]; *R v Seward*, 2015 BCPC 71 [*Seward*]; *R v Johnnie*, 2016 BCPC 96 at para 155 [*Johnnie*]; *R v Henry*, 2016 ONCJ 146 [*Henry*]; *R v Sparrow and Grant*, 2018 BCPC 53 [*Sparrow and Grant*]; *R c Diabo*, 2018 QCCA 1631 [*Diabo*]; *R v Doxtator*, 2019 ONCJ 420 [*Doxtator*]; *R v Tinoco*, 2019 BCPC 68 [*Tinoco*]; *Agence du revenu du Québec c Wysote*, 2019 QCCQ 8243 [*Wysote*].

2 See for example: *R v Nagano*, 2014 YKTC 55 at paras 50-53; *Henry*, *supra* note 1; *Doxtator*, *supra* note 1.

light of the Supreme Court of Canada’s caution that regulatory offences are “not criminal in any real sense” and instead are “in substance of a civil nature”, stating that offences such as these “might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application”.³ In spite of these important differences, the sentencing jurisprudence for regulatory offences supports either direct reliance on the sentencing provisions of the *Criminal Code* or indirect reliance on the common law principles that they codify. Both provide a basis for reliance on the *Gladue* principles in this context.

Often there will be an explicit statutory basis for importing the sentencing provisions of the *Criminal Code* into the regulatory context, subject to any necessary modifications.⁴ But even in the absence of such statutory incorporation, these same provisions have been relied upon as reflections of universal principles of general applicability for the purposes of sentencing for regulatory offences.⁵ Where there is no statutory basis for reliance on the sentencing provisions set out in the *Criminal Code*, there may be an absence of any other guidance or expression of legislative intent in terms of sentencing principles. As noted by Judge Kukurin of the Ontario Court of Justice, reference to these provisions and the common law positions they have codified ensures that a sentence is not “just chosen arbitrarily from the pool of sentence options available in any particular case”.⁶

Regardless of the underlying source of their sentencing principles, many sentencing decisions for regulatory offences have emphasized how public welfare statutes differ from the *Criminal Code*. For example, it is common for courts to point to deterrence as the primary or paramount sentencing principle for regulatory offences.⁷ In this context, deterrence has been described as having “a more positive aspect” than “its usual negative connotation of achieving compliance by threat of punishment”.⁸

3 *La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers*, 2013 SCC 63, Wagner J at para 89, citing *R v City of Sault Ste. Marie*, [1978] 2 SCR 1299 at 1302-3.

4 See for example: *Provincial Offences Procedure Act*, RSA 2000, c P-34, s 3; *Offence Act*, RSBC 1996, c 338, s 133; *Summary Proceedings Act*, RSNS 1989, c 450, s 7.

5 See *R v Kirk*, 2005 ONCJ 352 at para 16 [Kirk]. See also: *Ontario (Electrical Safety Authority) v Broomfield*, 2019 ONCJ 454 at paras 97-104; *Oshawa (City) v Ye*, 2019 ONCJ 389 at para 45

6 *Kirk*, *supra* note 5 at para 16.

7 *R v Paulsen*, 2015 BCPC 45 at para 65 [Paulsen], citing *R v Cotton Felts*, [1982] 2 CCC (3d) 287, 1982 CanLII 3695 (Ont CA) [Cotton Felts].

8 *Cotton Felts*, *supra* note 7 at 296.

Deterrence in context to public welfare statutes means “emphasizing community disapproval of an act, and branding it as reprehensible” so as to have “a moral or educative effect” on the public.⁹ Each regulatory statute will have unique considerations reflecting its specific subject matter.¹⁰ Furthermore, sentencing judges must have regard to the statutory framework, including any legislated purposes or guidance with respect to available penalties.¹¹

Yet in spite of these differences, sentencing proceedings for regulatory offences must still respect the fundamental principle of proportionality, which requires close attention to the gravity of the offence and the degree of responsibility of the offender.¹² Regulatory offences will generally involve a lower degree of moral blameworthiness than criminal offences, as most regulatory offences are designed to impose punishment on the basis of mere negligence, and some on the basis of absolute liability.¹³ But the penalty imposed may nevertheless vary in relation to a particular offender’s moral culpability.¹⁴ This suggests an Indigenous person’s systemic and background factors will be relevant to the degree they impact their moral culpability or responsibility, in keeping with the Supreme Court of Canada’s general guidance on proportionality in *Ipeelee* and *Anderson*, as addressed in detail in Chapters 7 and 8 of this book.

There is also an important role for the principle of restraint, “which can influence not only fines but also the need for and length of incarceration”.¹⁵ This principle reflects “the inherent notion of fairness that although sentencing must at times occur in the public interest, punishment should

9 *Ibid*, citing *R v Roussy*, [1977] OJ No 1208 (QL) (CA). See also *Bob*, *supra* note 1 at paras 63-66; *Jobnnie*, *supra* note 1 at para 155; *R v Steer*, 2016 BCPC 318 at para 33; *Dabaja v Ontario (Ontario Motor Vehicle Industry Council)*, 2017 ONCJ 834 at para 21; *R v Shercom Industries Inc*, 2018 SKPC 3 at para 26.

10 Some courts have articulated specific factors to consider when sentencing for a breach of occupational health and safety regulations (see for example *R v Allen Services & Contracting Ltd.*, 2018 NWTTC 3 at para 21). Others have articulated specific principles to be applied when sentencing for environmental offences (see for example *R v Terroco Industries Limited*, 2005 ABCA 141 at paras 34-64).

11 *Alberta (Health Services) v Bhanji*, 2017 ABCA 126 at para 30 [*Bhanji*].

12 *Paulsen*, *supra* note 7 at para 66; *R v R.D. Longard Services Limited*, 2015 NSPC 35 at paras 21-26; *R v Brox*, 2016 BCSC 1190 at paras 43-45; *Bhanji*, *supra* note 11 at paras 35-36; *R v Khalaf*, 2017 ABPC 240 at para 30; *Ontario (Labour) v New Mex Canada Inc*, 2019 ONCA 30 at paras 66-74 [*New Mex Canada*].

13 *New Mex Canada*, *supra* note 12 at para 73.

14 *Ibid*.

15 *Ibid* at para 82.

not be more aggressive than the public interest requires”.¹⁶ This principle may be extended to the sentencing of corporations for regulatory offences, but it applies with greater force in the sentencing of individuals who can lose their liberty through incarceration.¹⁷ Typically fines are sufficient to achieve the deterrence required for regulatory offences in light of this general principle of restraint and other sentencing principles.¹⁸ In light of the broad scope of judicial notice in *Gladue* and *Ipeelee*, which recognizes the harsher impact of imprisonment on Indigenous people and the higher rates of socio-economic disadvantage they face, the principle of restraint may provide a further basis for the application of the *Gladue* principles in the regulatory sentencing context.

In order to implement the *Gladue* principles in regulatory prosecutions *Gladue* reports have sometimes been relied upon for case-specific information.¹⁹ Some courts have even ordered the preparation of *Gladue* reports in this context.²⁰ In keeping with the criminal law jurisprudence, however, other sources may be relied upon when a *Gladue* report is not available, such as testimony from witnesses or the person being sentenced, or ordinary pre-sentence reports with relevant information.²¹

The application of the *Gladue* principles within sentencing proceedings for regulatory offences has been almost indistinguishable from their application in criminal sentencing. With the exception of cases where only fines are available, there may be little need to modify these principles to better suit this particular context. In fact, some sentencing proceedings will involve a combination of regulatory and criminal offences that could make it challenging to take inconsistent approaches when applying these principles.²²

On the other hand, the distinct sentencing principles and considerations that are engaged by certain types of regulatory offences may require some flexibility with respect to the application of the *Gladue* principles. For example, the distinct meaning of deterrence in context to regulatory offences, emphasizing community disapproval and education, has been

16 *Ibid.*

17 *Ibid.*

18 *Ibid* at para 86.

19 See for example: *Sparrow and Grant*, *supra* note 1; *Diabo*, *supra* note 1; *Tinoco*, *supra* note 1.

20 See for example: *Wysote*, *supra* note 1; *R v Karau*, 2014 ONCJ 207.

21 See for example *Josephb*, *supra* note 1.

22 See for example: *R v Lazore*, 2015 ONSC 1090; *R v Naziel*, 2018 BCPC 146; *R v Hilbach*, 2019 BCPC 73.

found to be amenable to a restorative justice approach to sentencing in at least one reported decision.²³ Likewise, the perspectives of Indigenous communities and victims can have greater significance where regulatory offences have impacted their collective and constitutionally protected Aboriginal and treaty rights, irrespective of whether the offender is an Indigenous person or even a natural person as opposed to a corporation.²⁴ Greater attention to contextual differences like these may support a more meaningful application of the *Gladue* principles in regulatory prosecutions.

Professional discipline hearings

In another example of the *Gladue* principles being extended into an administrative law context, several hearing panels of self-governing professions have considered them when determining appropriate penalties for Indigenous professionals who have been found guilty of unprofessional conduct.²⁵ There is even some precedent for the consideration of Indigenous peoples' systemic and background factors, worldviews, and alienation from the justice system on questions of procedural fairness in this context.²⁶ This trend is an interesting one since the discipline decisions of self-governing professions are very clearly governed by administrative law principles rather than any statutory reference to the *Criminal Code*. Self-regulating professions in Canada are legislatively mandated to determine appropriate sanctions for breaches of their ethical and practice standards, and their determinations in this regard are owed deference from the courts when subject to judicial review.²⁷ These disciplinary penalties can also be guided by principles that have no obvious parallels in the criminal law, such as public confidence in a profession and its effective self-regulation.²⁸

23 *Seward*, *supra* note 1 at paras 79-80.

24 See for example: *R v Joe*, 2000 BCSC 1100 at para 22; *R v Northern Pulp Nova Scotia Corporation*, 2016 NSPC 29; *R v Kirby Offshore Marine Operating LLC*, 2019 BCPC 185.

25 See for example: *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSHP 12 & 2013 ONSLAP 18 [*Robinson*]; *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214 & 2017 ONLSTH 34. Similar principles have also been applied to other racialized professionals: *Law Society of Upper Canada v Selwyn Milan McSween*, 2012 ONLSAP 3; *Law Society of Upper Canada v Okpala*, 2017 ONLSTH 204; *Nova Scotia Barristers' Society v Lyle Howe*, 2017 NSBS 4, aff'd 2019 NBCA 81, leave to appeal to SCC ref'd 39004 (30 April 2020).

26 See *Coutlee (Re)*, 2018 LSBC 33.

27 See for example: *Law Society of New Brunswick v Ryan*, 2003 SCC 20; *Richardson v Law Society of New Brunswick*, 2011 NBCA 108; *College of Physicians and Surgeons of Ontario v Peirovy*, 2018 ONCA 420 at paras 72-76 [*Peirovy*].

28 *Faminoff v The Law Society of British Columbia*, 2017 BCCA 373 at para 41.

Nevertheless, courts will still assess the reasonableness of penalties based on consistency with previous decisions (i.e. parity) and proportionality, which require attention to the specific circumstances of the offence and the offender.²⁹ They are also guided by more generalizable sentencing principles such as protection of the public, general and specific deterrence, and rehabilitation.³⁰ These principles provide a very palpable basis for an Indigenous professional's unique circumstances to be considered in penalty decisions, albeit with necessary modifications to suit this context.³¹ The systemic and background factors of an Indigenous professional could also shed light on the evidence before the hearing panel in various other ways, such as helping contextualize an individual's attitude towards the police or their work for other Indigenous people as a reflection of their good character.³² Addressing the *Gladue* principles in penalty decisions has the potential to enhance the public's respect for and confidence in Canadian professions and their self-regulation rather than detracting from these considerations.³³

It is worth noting that Indigenous over-incarceration has no direct relevance in sentencing Indigenous professionals for findings of unprofessional conduct.³⁴ The harshest penalty available to discipline panels will be revocation of someone's licence to practise their particular profession. On the other hand, the regulatory bodies that govern the professions are typically guided by broad public interest mandates that could mandate attention to diversity within the professions.³⁵ Similarly, they may be required to assist and support their members in meeting their professional obligations, bringing into play the need to accommodate their unique needs and circumstances.³⁶ The principle of substantive equality might therefore justify the extension of the *Gladue* principles into

29 *Matheson v College of Physicians and Surgeons of Prince Edward Island*, 2010 PECA 5 at paras 130-131; *Nanson v Saskatchewan College of Psychologists*, 2013 SKQB 191 at para 38; *Reid v College of Chiropractors of Ontario*, 2016 ONSC 1041 at para 100; *Merchant v Law Society of Saskatchewan*, 2014 SKCA 56 at paras 119-122; *Ontario (College of Physicians and Surgeons of Ontario) v Lee*, 2019 ONSC 4294 at paras 101-110.

30 *Peirovy*, *supra* note 27 at para 64.

31 *Robinson*, *supra* note 25 at paras 72-79.

32 *Ibid* at paras 51-57.

33 *Ibid* at para 73.

34 *Ibid* at para 72.

35 *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32, Abella, Moldaver, Karakatsanis, Wagner, & Gascon JJ at paras 40-43, 46-47, McLachlin CJ at paras 139-142.

36 *Moore v The Law Society of British Columbia*, 2018 BCSC 1084 at paras 94-97, 141.

this context, especially where Indigenous people are underrepresented in a particular profession. In any event, hearing panels are likely to require case-specific information in order for them to meaningfully apply the principles in this context just as they would in any other.³⁷

Contempt of court proceedings

The *Gladue* principles have also been applied when sentencing an Indigenous person for contempt of court.³⁸ Many of the same rationales for extending the *Gladue* principles into sentencing proceedings for regulatory offences and professional discipline apply in this context as well, especially their relationship to proportionality. Prior to addressing the case law on point, the basic principles that govern sentencing in context to contempt of court will be briefly summarized to place these decisions in context.

Contempt of court proceedings are a discretionary power for the courts to enforce their process and maintain their dignity and respect by sanctioning a party for breaching their orders.³⁹ The common law recognizes two different categories of contempt: criminal contempt and civil contempt.⁴⁰ Criminal contempt addresses breaches of a court order accompanied by an element of “public defiance”, whereas civil contempt aims to secure compliance with court orders where this element is absent.⁴¹ Civil contempt of court is still “quasi-criminal in nature” and the court order must be intentionally breached.⁴² In this context, public defiance means something more than an intentional breach—namely “conduct calculated to bring the administration of justice by the courts into disrepute”.⁴³

Criminal contempt is a common law offence so the sentencing principles in s 718 of the *Criminal Code* do not directly apply, “though they may

37 See for example *Law Society of Alberta v Willier*, 2018 ABLS 22 at para 35.

38 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, leave to appeal to SCC ref'd 32764 (4 December 2008) [*Frontenac*]; *Canadian National Railway Company v Plain*, 2013 ONSC 4806 at paras 33-34; *Bacon St-Onge v Conseil des Innus de Pessamit*, 2019 FC 794 [*Bacon St-Onge*]; *Trans Mountain Pipeline ULC v Mivasair*, 2020 BCSC 1512.

39 *Carey v Laiken*, 2015 SCC 17 at para 30 [*Carey*].

40 *Ibid* at para 31.

41 *Ibid* at para 31.

42 *Carey*, *supra* note 39 at paras 35, 41-42.

43 *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 1992 CanLII 99.

provide a useful backdrop”.⁴⁴ Some criminal law sentencing principles like the separation of offenders from society or the provision of reparation to victims are not generally applicable in this context.⁴⁵ The principle of rehabilitation is more relevant in civil contempt cases that primarily concern securing compliance with court orders, though deterrence may still have primacy in civil contempt cases.⁴⁶ Denunciation and deterrence are the principal sentencing objectives for criminal contempt of court, and the fundamental principle of proportionality brings individualization and the parity principle into play as well.⁴⁷ Prison sentences are not necessarily uncommon for criminal contempt of court as opposed to civil contempt.⁴⁸

Sentencing for civil contempt is aimed at securing compliance with court orders but it can also be guided by punishment, and courts can craft a sentence to match the gravity of the contempt, deter the contemnor’s continuing conduct, and deter others from engaging in similar conduct.⁴⁹ The Ontario Court of Appeal has set out several factors to consider when sentencing for civil contempt that closely parallel the principles governing criminal sentencing, namely: proportionality; the presence of mitigating and aggravating factors; deterrence and denunciation; similarity to sentences in like circumstances (i.e. parity); and the reasonableness of a fine or incarceration.⁵⁰

The Supreme Court of Canada has also emphasized that courts must show restraint in the exercise of their discretion in contempt of court proceedings, using these as a “last rather than first resort”.⁵¹ Likewise, the principle of restraint has been applied in this context in the sense of relying on prison as a sanction of last resort.⁵² In several cases courts have sentenced contemnors to alternatives to incarceration like community service and house arrest as well.⁵³

44 *Trans Mountain Pipeline ULC v Mivasair*, 2019 BCCA 156 at para 55.

45 *Ibid* at para 56.

46 *Ibid*.

47 *Ibid* at paras 57-59.

48 *Ibid* at para 59; *Larkin v Glase*, 2009 BCCA 321 at para 52.

49 *Ibid* at para 32.

50 *Boily v Carleton Condominium Corporation 145*, 2014 ONCA 574 at para 90; *Business Development Bank of Canada v Cavalon Inc*, 2017 ONCA 663 at para 90.

51 *Carey*, *supra* note 39 at para 36.

52 See for example: *Free (Estate) v Jones*, 2004 ABQB 486 at paras 35-37; *Chiang (Re)*, 2009 ONCA 3 at para 90.

53 See for example: *Alberta (Child, Youth and Family Enhancement Act, Director) v BM*,

As systemic and background factors can affect the proportionality of a sentence for an Indigenous person by shedding light on moral blameworthiness they would presumably apply in this sentencing context just as they would in any other. Questions regarding the appropriateness and effectiveness of a prison sentence for an Indigenous person would logically apply in this context as well. Alternatives to incarceration are also available, which suggests that an accommodative approach in line with the *Gladue* principles is possible. And while contempt of court proceedings emphasize deterrence over restorative principles, the *Gladue* analysis is regularly applied in long-term and dangerous offender proceedings that emphasize public protection so the primacy of deterrence in this context need not act as a categorical bar to the application of the *Gladue* principles either.

In *Frontenac Ventures Corporation* the Ontario Court of Appeal indeed concluded that the *Gladue* principles apply when sentencing Indigenous people for contempt of court. This was a successful appeal from sentence for two leaders of the Ardoch Algonquin First Nation and the First Nation itself. Six-month prison sentences and substantial fines were imposed for civil contempt after the appellants and others peacefully disrupted exploratory uranium drilling within their traditional territory in breach of an injunction. The Court of Appeal held that the trial judge erred in focusing exclusively on punishment and deterrence and failing to address reformation and rehabilitation.⁵⁴ The trial judge also erred by failing to refer to mitigating factors, including the events giving rise to their conduct and their leadership roles within their community.⁵⁵ Likewise, the Court of Appeal held that the limited purpose of their conduct in preventing uranium exploration on lands subject to land-claim negotiations should have been considered.⁵⁶ The Court of Appeal equated all of these considerations with the *Gladue* principles.⁵⁷

The Court of Appeal in *Frontenac* noted that this matter engaged many of the broader concerns addressed in *Gladue* in terms of the justice system's overall engagement with Indigenous peoples.⁵⁸ In particular

2009 ABCA 270; *Ouellet v BM*, 2010 ABCA 240 at paras 59-62; *Astley v Verdun*, 2013 ONSC 6734 at paras 39-44; *Workers' Compensation Board of British Columbia v Skylite Building Maintenance Ltd*, 2019 BCSC 1862 at paras 29-34.

54 *Frontenac*, *supra* note 38 at para 50.

55 *Ibid* at para 51.

56 *Ibid* at para 53.

57 *Ibid* at para 54.

58 *Ibid* at para 57.

it pointed to the estrangement of Indigenous peoples from the justice system, the impacts from years of dislocation, and whether imprisonment would be meaningful to a particular Indigenous community.⁵⁹ Enforcing injunctions by imprisonment in this context was held to emphasize the estrangement of this community and Indigenous peoples generally from the justice system.⁶⁰ The use of prison as a first response “dramatically marginalize[d] the significance of aboriginal law and aboriginal rights” as well.⁶¹ Systemic and background factors including years of dislocation helped explain why the Indigenous leaders sentenced in this case did not see any meaningful avenue of redress within the justice system itself and resorted to self-help.⁶² Finally, a prison sentence would be far from meaningful to this First Nation as it would pit them against the justice system and emphasize the gulf between two differing senses of justice.⁶³ The Court of Appeal also found that the conflict between the land claims and asserted constitutional rights of this First Nation and the applicable provincial mining legislation constituted a relevant background factor that should have resulted in “significant mitigation” in sentencing.⁶⁴

Justice Lafrenière of the Federal Court has also invoked the *Gladue* principles when sentencing an Indigenous person for civil contempt in an Indigenous governance context in *Bacon St-Onge*. In that case a member of the Pessamit Innu Nation sought to enforce a court order from a successful application for judicial review with respect to the First Nation’s customary election code and an application that occurred pursuant to that code. Justice Lafrenière reviewed the *Gladue* and *Frontenac* decisions and concluded that he must “impose a sentence by resorting to the restorative model of justice in sentencing aboriginal offenders and reducing the imposition of jail sentences where to do so would not sacrifice the traditional goals of sentencing”.⁶⁵

Justice Lafrenière found that a term of imprisonment would create turmoil in the community as the First Nation’s members had re-elected five of the seven respondents.⁶⁶ Very little evidence had been

59 *Ibid.*

60 *Ibid* at para 58.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 *Ibid* at para 62.

65 *Bacon St-Onge*, *supra* note 38 at para 88.

66 *Ibid* at para 89.

provided with respect to systemic and background factors, but the Court took note of the Canadian government's past interference with the governance of First Nations, the contribution of non-payment of fines to the crisis of Indigenous over-incarceration, and the different worldviews of Indigenous and non-Indigenous people "with respect to such elemental issues as the substantive content of justice and the process of achieving justice".⁶⁷ Fines were imposed and the defendants were ordered to pay these amounts into court to be remitted to non-profit organizations in *Pessamit*.⁶⁸

Conclusion

The application of the *Gladue* principles in these sentencing proceedings outside the *Criminal Code* further demonstrates their contextual malleability and broad implications. While a period of incarceration can be a realistic consequence for contempt of court and certain regulatory offences, several of these cases indicate that the threat of imprisonment is not a necessary prerequisite for the principles to apply. This conclusion finds support in the existing case law on absolute and conditional discharges as well, as addressed in Chapter 17 of this book. The principle of proportionality applies in all these sentencing proceedings and provides a clear basis for the consideration of systemic and background factors when assessing an Indigenous person's moral blameworthiness. What may be more noteworthy is the way the *Gladue* principles have been adapted to differing contextual considerations, ranging from the good character of an Indigenous lawyer who represents marginalized Indigenous clients to the differing worldviews and perspectives on justice that clash during contested land claims and resource extraction activities. The broad framework and principles first set out by the Supreme Court of Canada in *Gladue* provide a contextual lens that seems to be quite amenable to careful repurposing in each of these contexts, among others.

67 *Ibid*, citing *R v Ipeelee*, 2012 SCC 13 at para 89.

68 *Ibid* at paras 91, 93.

CONCLUSION

The Supreme Court of Canada's trilogy of sentencing decisions in *Gladue*, *Wells*, and *Ipeelee* has left an indelible mark on Canadian law. The *Gladue* decision has been cited in over 2,700 subsequent decisions at the time of writing, *Wells* in over 600, and *Ipeelee* in almost 2,000. The contextual approach to sentencing in these cases has been linked to the constitutional principles of proportionality and substantive equality. The Supreme Court of Canada has illustrated how this contextual approach can be effectively repurposed in a wide variety of distinct legal contexts, ranging from judicial oversight for correctional decisions to the fashioning of new evidentiary protections for jury trials. Other courts have extended the *Gladue* principles directly or by analogy to the decisions of parole boards and mental health review boards.¹ The principles are applied within criminal sentencing to determine periods of parole ineligibility and exemptions from firearms prohibitions.² There are many other examples of how they have become entrenched in Canadian law that could not be fully explored within this publication. In the areas of law that are closely scrutinized here, it is clear Parliament's instruction for sentencing judges to pay "particular attention to the circumstances of Aboriginal offenders" has had wide-ranging and often unpredictable legal implications over the subsequent two and a half decades. The interrogation of what makes Indigenous individuals and collectives unique in sentencing has opened up other lines of inquiry that have barely been explored to date.

Nevertheless, applying the Supreme Court's broad framework and flexible principles in specific cases has not always been easy for the courts. According to Judge Gorman of the Provincial Court of Newfoundland and Labrador it is still difficult to assess s 718.2(e)'s practical effect on sentences more than two decades after it was added to the *Criminal*

1 See for example: *R v Sim* (2005), [2006] 2 CNLR 298, 2005 CanLII 37586 (Ont CA); *Twins v Canada (Attorney General)*, 2016 FC 537.

2 See for example: *R v Johnny*, 2016 BCSC 2169; *R v Shobway*, 2017 ONCJ 476.

Code.³ Chief Justice Richards of the Saskatchewan Court of Appeal has described the Supreme Court’s decisions in *Gladue* and *Ipeelee* as challenging to operationalize.⁴ Contemporary cases from the Ontario Court of Appeal have emphasized that “more than the bare assertion of an offender’s Aboriginal status” is required before the *Gladue* principles have any tangible impact on sentencing.⁵ It is remarkable to think that the Newfoundland Court of Appeal came to effectively this same conclusion back in 1994, prior to either the enactment of s 718.2(e) or the sentencing of Ms. Jamie Gladue.⁶

Whether these issues are fact-driven or reflect difficulties with the “inferential approach” required by the *Gladue* analysis is not entirely clear.⁷ The depth and breadth of the jurisprudence that has interpreted and applied the *Gladue* framework since 1999 may make it particularly unwieldy for the day-to-day functioning of sentencing courts. It is my sincere hope that this book at least modestly assists by synthesizing much of the case law.

3 *R v JS*, [2018] NJ No 290 (QL), 2018 CanLII 92246 (Prov Ct) at para 64.

4 *R v Chanalquay*, 2015 SKCA 141 at para 48.

5 *R v Monckton*, 2017 ONCA 450 at para 115; *R v FHL*, 2018 ONCA 83 at para 38; *R v EC*, 2019 ONCA 688.

6 *R v PGH*, [1994] NJ No 16 (QL), 1994 CanLII 9721 (CA).

7 *R v Whitehead*, 2016 SKCA 165 at para 63.

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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 book synthesizes the hundreds of cases that expand on these principles to provide readily accessible guidance to all those involved in their practical implementation.

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