



Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System

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1. Introduction

Since the 1970’s, the overrepresentation of Indigenous¹ persons in Canada’s criminal justice system has been a critical concern among policy-makers, academia, and Indigenous communities. Numerous government and academic studies on this subject illustrate the extent of the problem.

As part of the amendments to the *Criminal Code* introduced in 1996, Parliament enacted section 718.2(e), a remedial provision aimed at alleviating Indigenous over-incarceration through sentencing. In April 1999, the Supreme Court of Canada interpreted s. 718.2(e) for the first time in *R v Gladue* (“*Gladue*”), a decision in which an Indigenous woman was sentenced to imprisonment for the manslaughter of her common-law spouse.

The Supreme Court’s decision in *Gladue* had important ramifications for justice system participants and stakeholders. To achieve the purpose and maintain the principles set out in *Gladue*, a number of programs were established, funded by the federal and provincial governments.

Various critiques and concerns about the application of *Gladue* were subsequently raised. In 2012, the Supreme Court in *R v Ipeelee* (“*Ipeelee*”) reaffirmed its commitment to the principles enunciated in *Gladue*, addressed a number of critiques, and clarified concerns.

Despite the Court’s commitment, as well as increasing availability of *Gladue*-related programming, the over-incarceration of Indigenous peoples remains a persistent, growing, and urgent issue for the Canadian criminal justice system. The justice system, as it relates to Indigenous peoples, continues to be in a state of crisis (Iacobucci 2013; *Gladue* para 64).

1.1 Objectives

In view of the implications of the *Gladue* and *Ipeelee* decisions for Canada’s criminal justice system, this paper was designed to meet the following objectives:

(1) to provide a brief statistical overview on the overrepresentation of Indigenous persons in the Canadian correctional system, a summary of the legislative reforms that led to s. 718.2(e), and an overview of the court’s interpretation in *Gladue* and *Ipeelee*;

¹ This paper considers the term “Indigenous” to be a modernization of the term “Aboriginal”.

As per the Constitution Act of 1982, “Aboriginal” peoples includes First Nations, Inuit, and Métis peoples of Canada. For consistency, “Indigenous” is used throughout this report, with the exception of (1) where “Aboriginal” is used to convey a legal meaning, such as in case law, (2) where Statistics Canada uses “Aboriginal identity” in data collection and (3) when quoting directly from authors.

(2) to analyze the key issues in the literature regarding the application of s. 718.2(e), and the *Gladue* and *Ipeelee* decisions in sentencing Indigenous individuals;

(3) to describe the justice system initiatives and programs that have been put in place to support the application of s. 718.2(e) in Canadian provinces and territories;

(4) to summarize the studies on the experiences of members of the court system and Indigenous accused who have participated in Indigenous justice system initiatives.

1.2 Methodology

A first draft of this report was completed in 2011. The first draft summarized literature from 1999 to 2010 found in databases² using the keywords Gladue, Aboriginal Justice, Aboriginal Court, indigenous populations, indigenous justice, indigenous court, criminal justice, Aboriginal offender. Websites of the federal, provincial, and territorial governments as well as their partners were also examined to identify model programs in Indigenous justice.

Since the *Ipeelee* decision in 2012 addressed critiques and concerns following *Gladue*, the first draft of this report has since been updated, as issues raised in much of the prior literature has been clarified by the Supreme Court. The update includes literature from 2010—2016,³ notably focusing on commentary and critique following *Ipeelee*, and practical challenges to the implementation of Gladue principles. The latter is informed by the experiences of the Indigenous Justice Program, which funds and supports *Gladue*-related programming across Canada.

This report is structured in four sections. The first is a brief statistical overview of the overrepresentation of Indigenous persons in the criminal justice system, and of the legislative reform leading to s. 718.2(e) and of the *Gladue* and *Ipeelee* decisions. The second section discusses key issues in the application of s. 718.2(e). The third section features initiatives and model programs which provide sentencing processes, sanctions, and rehabilitation programs which are meant to reflect Gladue principles. The final section highlights experiences of accused persons and justice system actors with *Gladue* and with Indigenous Justice initiatives and programs.

² Current Contents, psychINFO, Social Work Abstracts, Social Index, Sociological Abstracts, Criminal Justice Abstracts, NCJRS, ProQuest

³ In addition to the databases above, the update to the first draft also used Quicklaw, Westlaw, and HeinOnline, and used “Ipeelee” as a keyword

2. Statistical Overview on the Overrepresentation of Indigenous Persons in the Canadian Correctional System and Legislative Reforms to Address the Problem

2.1 Statistical Overview

The overrepresentation of Indigenous persons in Canadian prisons began at the end of the Second World War (Rudin 2008) and remains a well-documented reality based on abundant scientific and statistical documentation (Department of Justice Canada 2017). A quick look at the recent statistical data shows that the measures taken to combat this reality have not yet produced the desired results. Compared to all other categories of accused persons, Indigenous Canadians continue to be jailed younger, denied bail more frequently, granted parole less often and hence released later in their sentence, over-represented in segregation, overrepresented in remand custody, and more likely to be classified as higher risk offenders. They are more likely to have needs in categories like employment, community integration, and family supports (Parkes 2012; Green 2012).

Although Indigenous adults represent only about 3% of the adult population in Canada, they are overrepresented in admissions to provincial and territorial correctional services; in 2015-2016, they accounted for 26% of admissions (Statistics Canada 2016). Among women, 38% of those admitted to provincial and territorial sentenced custody were Indigenous, while the comparable figure for men was 26% of admissions identified as Indigenous (*ibid.*). In the federal correctional services, Indigenous women accounted for 31% of female admissions to sentenced custody, while Indigenous men accounted for 23% of admissions (*ibid.*).

The discrepancies between Indigenous and non-Indigenous incarceration rates are more pronounced in certain jurisdictions than in others (see Table 1). For example, while the proportion of Indigenous persons sentenced to imprisonment is double their representation in the Québec population, in Saskatchewan the proportion of Indigenous inmates is roughly seven times higher than their representation in the provincial population. Although the problem of overrepresentation of Indigenous adults in corrections is a general problem in most jurisdictions, particularly for remand and sentenced custody, the problem is more pronounced in the Western provinces.

Table 1: Indigenous Adults⁴ as a Proportion (%) of Admissions to Remand, Provincial or Territorial Sentenced Custody, Probation and Conditional Sentences, by Jurisdiction, 2013-2014⁵

	Sentenced Custody	Remand	Other Temporary Detention
Newfoundland and Labrador	23.2%	30.3%	3%
Prince Edward Island	1.7%	6%	--
Nova Scotia	10%	12.2%	12.8%
New Brunswick	9%	10.5%	10%
Québec	3.5%	5.2%	1.3%
Ontario	12%	13.3%	6.7%
Manitoba	77%	74.6%	69.3%
Saskatchewan	78%	76%	62.4%
Alberta	--	--	--
British Columbia	32.6%	29.6%	18%
Yukon	75.6%	73.3%	55%
Northwest Territories	89%	88%	0%
Nunavut	98%	96%	0%

The situation is not very different for Indigenous youth. Although Indigenous youth between the ages of 12-17 comprise only 7% of all adolescents in the general population, in 2014-2015, about 35% of youth admitted to correctional services were Indigenous (Statistics Canada 2017). Indigenous girls accounted for 44% of female youth admitted, and Indigenous boys accounted for 29% of male adolescents admitted. Although the *Youth Criminal Justice Act* mandates that the Court must consider alternatives to custody for Indigenous youth, in 2015/2016, 54% of Indigenous youth in correctional services were admitted to custody whereas the comparable figure for non-Indigenous youth was 44% (ibid.). The proportion of Indigenous youth admissions to custody has grown over time: in 2011-2012, 48% of Indigenous youth involved in the correctional system were admitted to custody; in 2014/2015, the number had grown to 52% (ibid.).

Overall, the percentage of both Indigenous youth and adults in correctional services significantly exceeded their representation in the general population (see Table 2).

⁴ Aboriginal identity indicates whether the person is Aboriginal and includes North American Indian, Métis and Inuit, whether registered or not.

⁵ Based on data from the Adult Correctional Services Survey (ACS) and the Integrated Correctional Services Survey (ICSS). The ACS and the ICSS are administered by the Canadian Centre for Justice Statistics (Statistics Canada) in collaboration with adult provincial/territorial and federal correctional systems responsible for correctional services in Canada. Provincial and territorial sentenced admissions include provincial and territorial inmate admissions as well as federal inmates admitted to the provincial and territorial system prior to being transferred to a federal penitentiary.

TABLE 2: Percentage of Indigenous Adults and Youth Admitted to Correctional Services⁶

	Adults ⁷	Youth ⁸
Canadian population	3%	7%
Remand	25%	36%
Federally sentenced custody	25%	33%
Community sentence	24%	29%

2.2 Legislative Reforms to Address the Problem of Indigenous Overrepresentation in the Prison System

In 1996, Bill C-41 introduced significant reforms to sentencing, a culmination of more than a decade of federal government review of the criminal justice system (BCCLA 2014). The new *Criminal Code* provisions codified objectives and principles of sentencing, recognizing the significant increase in the general incarceration rates in Canada and the disproportionate levels in the number of Indigenous persons in penal institutions (Daubney and Parry 1999). Among the new provisions, two are particularly noteworthy: (1) the introduction of conditional sentences and (2) the special reference to sentencing Indigenous offenders. Section 718.2(e) of the *Criminal Code* states that sentencing courts must take into consideration the following principle:

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

These amendments were, to some extent, a response to the high incarceration rates for non-violent crimes and the frequent use of custodial sentences for Indigenous individuals (Daubney and Parry 1999). However, Bill C-41 did not provide judges with specific sentencing guidelines. Parliament left it up to the courts to clarify both the use of conditional sentences and the application of s. 718.2(e):

. . . the Courts of Appeal will consider the reasons in support of sentences and their relation to the statement of principles and purposes of lower courts and that over a period of time, the development of the appellant jurisprudence would provide the guidelines that were being sought by those advocating numerical sentencing guidelines. (Daubney and Parry 1999, 45)

⁶ Data taken from Adult Correctional Statistics in Canada, 2014/2015, and Youth Correctional Statistics in Canada, 2014/2015, *Juristat* 85-002-X 2014/2015

⁷ Reporting jurisdictions in 2014/2015 included Correctional Service Canada (CSC) and all provinces and territories with the exception of community supervision data for Nova Scotia, New Brunswick and Alberta. The overall reported counts include only those jurisdictions for which both custody and community data were available.

⁸ Reporting jurisdictions in 2014/2015 included all provinces and territories with the exception of Québec, Nova Scotia, New Brunswick and Alberta.

Section 718.2(e) began having an impact on judicial decisions after the Supreme Court interpreted it for the first time in 1999 in *Gladue*. The landmark decision reviewed the sentence of imprisonment for an Indigenous woman who was convicted of manslaughter of her common-law spouse.

2.3 The *Gladue* Decision

Jamie Tanis Gladue was born in McLennan, Alberta, of a Cree mother and a Métis father. On September 16, 1995, Jamie was celebrating her 19th birthday in the company of her common-law spouse, Reuben Beaver, her friends, and members of her family. During the celebrations, she and her guests drank beer. Jamie suspected her spouse of having an affair with her older sister, Tara. She voiced her suspicions and her desire for revenge to her friends.

When Tara Gladue left the party, she was followed by Mr. Beaver. Jamie Gladue was visibly angry at Mr. Beaver and also left the party to find him. According to the witnesses, she threatened to kill him. She eventually located Mr. Beaver and Tara Gladue as they were leaving Tara's apartment.

When they returned to their home, Jamie Gladue and Mr. Beaver quarreled, and she attacked him with a knife, causing his death. At the time of the stabbing, Jamie had a blood-alcohol content of between 155 and 165 mg of alcohol in 100 ml of blood, indicating that she was highly intoxicated.

2.3.1 Mitigating Factors

At the time of sentencing, the judge took into consideration a number of mitigating factors:

- (1) The accused was a young mother.
- (2) She had no criminal record apart from an impaired driving conviction.
- (3) Her family was supportive.
- (4) While on bail, she attended alcohol abuse counselling and upgraded her education.
- (5) She had been provoked by the victim's insulting behaviour and remarks.
- (6) At the time of the offence, she had a hyperthyroid condition (which can cause overreaction to emotional situations).
- (7) She showed signs of remorse.
- (8) She entered a plea of guilty.

2.3.2 Aggravating circumstances

- (1) The accused stabbed the deceased twice, the second time after he had fled in an attempt to escape.
- (2) From the remarks she made before and after the attack, it was clear that the accused intended to harm the victim.
- (3) She was not afraid of the victim.

The trial judge sentenced Ms. Gladue to three years of incarceration, noting in particular the seriousness of the offence, the importance of the principles of denunciation and general

deterrence. As Ms. Gladue and her spouse lived in an urban area (not “within the aboriginal community as such”, *Gladue*, para 18), the judge found that there were no special circumstances arising from their Indigenous status that he should take into consideration. Noting the very serious nature of the offence, the judge sentenced her to three years’ imprisonment with a ten-year weapons prohibition.

2.3.3 Court of Appeal for British Columbia

Ms. Gladue appealed her sentence of three years’ imprisonment but not the ten-year weapons prohibition. Among the four grounds of appeal, only one was directly relevant, namely “whether the trial judge failed to give appropriate consideration to the appellant’s circumstances as an aboriginal offender” (*Gladue*, para 19). The appellant also sought to adduce fresh evidence regarding her efforts since the killing to maintain links with her Indigenous heritage (notably, she had taken steps to become full status Cree).

The Court of Appeal unanimously concluded that the judge had erred in finding that s. 718.2(e) did not apply because Ms. Gladue was not living in an Indigenous community. However, the three judges of the Court of Appeal did not reach a consensus on whether the sentence was fit. Two judges dismissed the appeal, agreeing with the trial judge that the crime had been sufficiently serious to justify imprisonment. They also refused to consider the appellant’s fresh evidence. The third judge (dissenting) analyzed parliamentary reports on s. 718.2(e) and spoke favourably about the steps the appellant had taken to maintain her links with Indigenous culture. In the view of the dissenting judge, a three-year sentence was excessive because an alternative method to advance the appellant’s rehabilitation could have been crafted (for example, a period of supervised probation). Ultimately, the appeal was dismissed by a majority of the B.C. Court of Appeal.

2.3.4 Supreme Court of Canada

The Supreme Court of Canada considered whether the sentence of three years of imprisonment was a correct application of s. 718.2(e). At the outset, the Supreme Court recognized both “[t]he systematic use of the sanction of imprisonment in Canada” (*Gladue*, para 53) and “the magnitude and gravity of the problem” of the overrepresentation of Indigenous peoples in Canadian prisons (*Gladue*, para 64). *Gladue* also states:

The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem (para 64).

In writing the decision, the Supreme Court aimed to establish “a framework for the sentencing judge to use in sentencing an aboriginal offender” (*Gladue*, para 28). The framework it set out is as follows (*Gladue*, para 93):

1. 718.2(e) is a remedial provision aimed at addressing the over incarceration of aboriginal people. Sentencing judges have a statutory duty to give force to the provision and are encouraged to use restorative approaches to sentencing.
2. 718.2(e) should be read with other provisions in Part XXIII of the *Criminal Code*, which state the purpose and principles of sentencing, and which places emphasis on decreasing the use of incarceration.
3. Sentencing is an individual process. Judges should ask, what is a fit sentence for this accused for this offence in this community? For aboriginal offenders, this requires a different method of analysis which considers:
 - a. Unique systemic or background factors that have played a part in bringing the aboriginal offender before the court, and;
 - b. Types of sentencing procedures/sanctions appropriate in the circumstances for the offender because of his/her aboriginal heritage or connection.
4. In determining an appropriate sentence for an aboriginal accused,
 - a. Judges should take judicial notice of systemic and background factors, and the priority given to restorative approaches in Indigenous approaches to justice.
 - b. Pre-sentence reports should provide information pertaining to (a) and (b) above, unless this requirement is waived by the aboriginal offender. Counsel has duty to assist in gathering this information.
 - c. Incarceration should be seen as a sanction of last resort; if there are no alternatives to incarceration, length of term must be carefully considered.
5. 718.2(e) applies to all aboriginal offenders regardless of whether they live on- or off-reserve. The relevant “aboriginal community” is to be defined broadly, and an aboriginal offender in an urban centre not having networks for support does not relieve the sentencing judge of the obligation to find an alternative to imprisonment. Absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a judge to craft a sentence that takes into account the principles of restorative justice, and the needs of the parties involved.
6. While the application of 718.2(e) may mean that an aboriginal offender may have a shorter jail term than a non-aboriginal offender for the same offence, the provision should not be considered an automatic reduction of sentence. The use of alternatives to imprisonment should not be considered a more lenient sentence. As the traditional sentencing goals of deterrence, denunciation and separation are still relevant, it is likely that the more serious or violent the crime, the more likely that terms of imprisonment will be the same for offences and offenders whether aboriginal or not.

With regard to Jamie Gladue, the Supreme Court found that the sentencing judge had erred in limiting the application of s. 718.2(e) to Indigenous offenders living on-reserve or in rural areas. The judge did not consider the background or systemic factors that may have been involved in the circumstances of the crime, and counsel did not assist in providing this information.

Moreover, the Court of Appeal judges should have reviewed the fresh evidence added at trial and, if necessary, should have remitted the matter to the trial judge with instructions to obtain information on the circumstances of the appellant as an Indigenous offender.

The Court also determined that the aggravating factors of the offence must be taken into account, as they would be for any offender. For Ms. Gladue, a sentence of three years' imprisonment was deemed reasonable.

Finally, the Supreme Court noted that Ms. Gladue was granted day parole after serving six months in prison. The conditions imposed were that she reside with her father, take alcohol and substance abuse counselling and comply with the Electronic Monitoring Program. Six months later, the appellant was granted full parole with the same conditions as the ones applicable to her release on day parole. The Court found that the results of the sentence were in the interests of the appellant and society and that, therefore, a new sentencing hearing to canvass the appellant's circumstances as an Indigenous offender would not be necessary. The appeal was dismissed.

2.3.5 Reactions to the Supreme Court's Decision

The Supreme Court's decision in *Gladue* was praised by many for recognizing the ways that the criminal justice system has failed Indigenous people (Haslip 2000; Nowlin 2004; Roach and Rudin 2000; Roach 2009), and the need for culturally appropriate sanctions and sentences (Drummond 1997; Proulx 2005). In particular, it recognized that systemic and background factors should be considered in sentencing Indigenous persons living off-reserve or without status (Roach and Rudin 2000; Proulx 2005). Many responded favourably to what they saw as a recognition of the relevance of social context in determining an appropriate sentence (Williams 2008, Cameron 2008, Ozkin 2012). *Gladue* recognized the cumulative effects of colonialism on Indigenous communities, as well as "how widespread racism has translated into systemic discrimination in the criminal justice system" (para 61).

However, as s. 718.2(e) was controversial when it was enacted by Parliament, the *Gladue* decision also faced political backlash. Political and subsequent media critique were generally of the view that *Gladue* was unfair for non-Indigenous offenders because it was a "race-based discount" on sentencing. Closely linked is the critique that *Gladue* would be inconsistent with the principle of sentencing parity (s. 718.2(b)). During parliamentary debates, Bloc Québécois and Reform Members of Parliament critiqued the section on formal equality grounds, questioning the differential treatment of Indigenous offenders.⁹ In one news story, in which a drunk driver who was Indigenous received a conditional sentence, the step parent of the child who was killed complained that "a treaty card is like a get out of jail free card" (Roach and Rudin 2000). Another editorial columnist wrote: "we believe that no one should get special treatment before the courts based on their skin colour" (Roach and Rudin 2000).

While as the independent third branch of government, the court does not base its decisions on political criticism, public opposition of *Gladue* could undermine the progress made by the decision. Public criticism grounded in formal equality points, perhaps, to the need for more education and information on the concept of substantive equality on which constitutionally entrenched equality rights are based. As explained in the next section, in *R v Ipeelee*, the Court

⁹ Pierrette Venne, a Bloc Québécois MP, argued: "why should an Aboriginal convicted of murder, rape, assault or uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?" (Roach and Rudin 2000)

addresses these critiques and explains that differential treatment is at times needed to achieve true equality.

Roach and Rudin (2000) point out that while 718.2(e) is a remedial provision rooted in the concept of substantive equality, the Court is “sending messages about the need for both different and similar treatment of aboriginal offenders” (p. 381). *Gladue* recognizes that overrepresentation is an indication that the criminal justice system is discriminatory towards Indigenous peoples. Hence, a different methodology that considers different factors is needed in sentencing Indigenous offenders. Yet, the Court also states that even after these factors are considered, Indigenous offenders may receive the same sentence, especially in cases of serious or violent crimes. For Roach and Rudin, the most ambiguous section of *Gladue* is whether the same principles applied to serious and violent crimes.

Other academic and political critique question why s. 718.2(e) focuses on ethnic background instead of proportionality, a fundamental principle in sentencing (Anand 2000; Stenning and Roberts 2001); as well as if sentencing is the appropriate place to address overrepresentation (LaPrairie 1990; Rudin 2005). These critiques are addressed by the Supreme Court in *R v Ipeelee*.

2.4 Subsequent Jurisprudence

2.4.1 *R v Ipeelee*

Thirteen years after the *Gladue* decision, two cases of breaches of Long-Term Supervision Orders (LTSOs) were appealed to the Supreme Court. The cases of Manasie Ipeelee and Frank Ladue were addressed together in the 2012 *R v Ipeelee* decision, in which the Court examined the issue of whether s. 718.2(e) was applicable to breaches of LTSOs.

Facts of the Case

Ipeelee

Manasie Ipeelee was a 39-year-old Inuk man born and raised in Iqaluit, Nunavut living in Kingston, estranged from his family. His mother was an alcoholic and died when he was young. He began drinking at 11 and became an alcoholic; he was first involved with the criminal justice system at 12 years old. His adult criminal record “shows a consistent pattern of... administering gratuitous violence against vulnerable, helpless people while he is in a state of intoxication” (para 9). He was designated a Long Term Offender in 1999, when he sexually assaulted a homeless woman, causing bodily harm. On August 20, 2008, he was found publically intoxicated in Kingston, a breach of his LTSO condition to abstain from alcohol.

Mr. Ipeelee pled guilty to the breach. His Inuit status was not given significant weight during sentencing. On appeal, the Ontario Court of Appeal acknowledged that his Inuit status should have been considered, but found the sentence of three years imprisonment to be appropriate.

Ladue

Frank Ralph Ladue was 49 years old and a member of the Ross River Dena Council Band, a small community in the Yukon. Both of his parents were alcoholics and died when he was very young. At five years old, he was sent to residential school for four years, where he alleges that he suffered serious physical, sexual, emotional, and spiritual abuse. Upon returning to his community at 9 years old, he could no longer speak his traditional language to communicate his experiences with his family; as a result, he began drinking and acting out. With the exception of a six-year period of sobriety in the 1990s, during which he had no criminal convictions, Mr. Ladue drank heavily throughout his life and also began using illicit drugs while in a federal penitentiary.

Mr. Ladue was first convicted of an offence when he was 16 years old. He had a series of sexual offences, which led to his characterization as a “serial sex offender.” He was designated a Long Term Offender when he broke into a woman’s home and sexually assaulted her. After his sentence, he was supposed to be released to a halfway house in Kamloops where he would have received support from an Indigenous elder. However, he was instead arrested and detained for the duration of an outstanding DNA warrant – an administrative error by Crown officials. As a result, he was released to a different halfway house in downtown Vancouver, despite concerns that drugs were accessible both at the residence and in the surrounding neighbourhood. Mr. Ladue breached his LTSO condition when he was asked for a urine sample and it tested positive for cocaine.

The Supreme Court’s Decision

In a strong majority decision, the court held that s. 718.2(e) applied to breaches of LTSO conditions, affirming and clarifying the principles set out in *Gladue*, as well as addressing a number of critiques. Mr. Ipeelee’s sentence was reduced to one year, and the BC Court of Appeal’s decision to reduce Mr. Ladue’s sentence to one year was upheld.

The court articulated the principles of sentencing which were codified in 1996. Sentencing is an individual process that assesses all relevant factors and circumstances of the offender. The fundamental principle is that sentences must be proportional to both (1) the gravity of the offence and (2) the degree of responsibility of the offender. As a long standing principle central to the sentencing process, proportionality is consistent with s. 12 of the *Charter* and can also be described as a principle of fundamental justice. The court clarified that *Gladue* does not set out an alternative sentencing method disregarding proportionality, but rather, judges must take *Gladue* factors into consideration in order to craft a just sentence that is proportional to the gravity of the offence and to the degree of responsibility of the offender.

In other words, until s. 718.2(e) was enacted, sentences for Indigenous offenders were often not consistent with the proportionality principle, because they did not consider the factors set out in *Gladue*. If *Gladue* recognized the extent of the Indigenous over incarceration problem (*Ipeelee*, para 58), *Ipeelee* is an explicit acknowledgement of Canada’s complicity in creating this problem and contributing to its perpetuation. The Court acknowledges that the Canadian criminal justice system has “failed the Aboriginal peoples of Canada” (para 57), a recognition of both the culturally inappropriate nature and the systemic discrimination of the criminal justice system. It

was also made clear that judges have a duty to take judicial notice of systemic and background factors, including: the history of colonialism, displacement, residential schools and how that continues to translate to lower educational attainment, lower income, higher unemployment, higher rates of substance abuse and suicide, and higher rates of incarceration (para 60).

Justice Lebel addressed what he called “a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*” (para 63). In particular, the Court responded to the following related criticisms:

(1) Sentencing is not an appropriate means for addressing overrepresentation

While the issue of overrepresentation is complex, the roots of which extend far beyond the criminal justice system, judges, as front-line workers, have a limited, but important role to play (para 69). As judges have discretionary power and can significantly impact an offender’s experience in the criminal justice system, they can endeavor to reduce crime rates in Indigenous communities, rehabilitate offenders, and ensure that systemic factors do not lead to discrimination in sentencing.

The purpose of sentencing is to promote a just, peaceful, and safe society through imposing just sanctions that are consistent with the principle of proportionality, and a just sanction is one that does not “operate in a discriminatory manner” (para 68). *Gladue* factors are not “hijacking the sentencing process in pursuit of other goals” (para 68); rather, they ensure that sentences for Indigenous offenders are not discriminatory, ensuring that sentencing fulfills its fundamental purpose.

(2) *Gladue* principles are a “race-based” discount on sentencing

The *Gladue* decision had stated explicitly that s. 718.2(e) is not an automatic reduction of a sentence; but even still, there have been critiques that the likely outcome is that an Indigenous offender will either not be sentenced to incarceration, or be given shorter sentences. The Court’s response to this was two-fold.

First, it is necessary to consider systemic and background factors for Indigenous offenders to ensure that sentences are proportional to the degree of responsibility of the offender. As criminal liability follows from voluntary conduct, the reality that Indigenous offenders have been restrained by their systemic and background circumstances may diminish their level of moral culpability. Failing to take such factors into account would mean that sentences are not proportional to the degree of responsibility of the offender. Such circumstances may also mean that “a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se” – in other words, restorative justice approaches may be more appropriate.

Additionally, directing judges to find more culturally appropriate sanctions will more effectively achieve the objectives of sentencing. *Gladue* factors address the fact that Indigenous people are less likely to be “rehabilitated” by imprisonment, because prisons are often culturally inappropriate and rampant with racial discrimination. *Ipeelee* recognizes that not all offenders

and all communities share the same world view “with respect to such elemental issues as the substantive content of justice and the process of achieving justice” (para 74); and these differences must be considered if the criminal justice system is to be effective.

(3) *Gladue* violates the principle of sentencing parity (as articulated in s. 718.2(b)) because it creates unjustified distinctions between offenders who are otherwise similarly situated

The sentencing parity critique is premised on the argument that Indigenous offenders are similarly situated to non- Indigenous offenders when their circumstances and history are, in fact, unique. Indeed, “poverty and other incidents of social marginalization may not be unique, but how people get there is. No one’s history in this country compares to Indigenous people’s” (para 77). In addition, background and systemic factors are also taken into account for non-Indigenous offenders (para 77).

The Court cautioned that a formalistic approach to sentencing parity should not undermine the remedial purpose of s. 718.2(e): “to treat aboriginal offenders fairly by taking into account their difference” (Roach and Rudin 2000, p. 380). As Canada is a diverse society that is far from achieving perfect equality, the same treatment will have differential impact on different individuals. It is for this reason that s.15 Charter jurisprudence takes a substantive, rather than a formal approach to equality; and that affirmative action programs are constitutionally protected in s. 15(2) of the Charter. As no two offenders appearing before the courts will have the same circumstances, s. 718.2(b) does not require that there is *no* disparity in sentencing, but rather that disparity in sentences are justified (para 79). For Indigenous offenders, differences are justified based on unique systemic and background factors.

In addition, the Court clarified that offenders are not required to establish a causal link between systemic and background factors and the offence itself. Factors like intergenerational trauma and the legacy of colonialism are not seen as excuses for criminal conduct, but rather considerations for an appropriate sentence. Finally, s. 718.2(e) and *Gladue* factors apply to all Indigenous offenders, regardless of the seriousness of their offence. Failing to apply *Gladue* would be failing a statutory obligation, and would result in an unfit sentence that is inconsistent with the fundamental principles of proportionality.

2.4.2 Commentary on the *Ipeelee* Decision

The *Ipeelee* decision was seen as a reaffirmation and expansion of the Court’s decision in *Gladue*. Rudin (2012) writes, “the decision goes beyond *Gladue* in its analysis, its acknowledgement of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently” (para 2). In the thirteen years since *Gladue*, as the Indigenous prison population has continued to rise, *Ipeelee* is seen as a call to action for criminal justice system participants to meaningfully adhere to *Gladue* principles (Green 2012; Parkes et al. 2012). The decision renewed interest in s. 718.2(e), creating momentum for programs, tools, and resources.¹⁰

¹⁰ Gevikoglu (2013) discusses renewed interest in s. 718.2(e). The *Gladue Handbook* developed by the University of Manitoba cites *Ipeelee* as a call to action. *Gladue*-related programming will be discussed further in section 4.

Proportionality as a principle of fundamental justice

Beyond addressing the criticisms of *Gladue*, some authors found the Court's discussion of proportionality to be significant, particularly as a potential basis for future *Charter* challenges to mandatory minimum sentences (Roach 2012). Justice Lebel writes,

“This principle was not borne out of the 1996 amendments to the *Code* but, instead, has long been a central tenet of the sentencing process... It also has a constitutional dimension, in that s. 12 of the *Canadian Charter of Rights and Freedoms* forbids the imposition of a grossly disproportionate sentence that would outrage society's standards of decency. In a similar vein, proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the *Charter*” (para 36, emphasis added).

Some view this as the constitutional entrenchment of the proportionality principle by a majority of the Supreme Court. For some authors, *Ipeelee* gives judicial discretion in the sentencing process constitutional status, which provides a more substantial basis to *Charter* challenges to mandatory minimum sentence cases (Sylvestre 2013). Roach (2012) also notes that proportionality may have been introduced as a principle of fundamental justice; however, it is still unclear whether Lebel's statement is a legally binding portion of the decision.

Recognizing social context in sentencing

Roach (2012) views *Ipeelee* as a “more contextual and offender-sensitive vision of proportionality” (p. 231). The fundamental principle of proportionality is that sentences must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Courts have typically focused on assessing the former, and have not significantly developed the latter. With *Ipeelee*, Sylvestre (2013) argues that the Court is moving towards a concept of shared or collective responsibility for crime grounded in the notion of “degree of responsibility of the offender.”

While criminal theory has traditionally been based on individual responsibility, Sylvestre suggests that courts have “created some space for considering social, economic, and political aspects of crime” (p. 22). In *R v Nasogaluak*, in which an Inuk man was violently arrested and detained, the Court clarified that state misconduct was a relevant mitigating factor in sentencing. Sylvestre argues that *Ipeelee* moves beyond individual instances of state misconduct in *Nasogaluak* to consider the role of the state in the perpetration of the crime as it relates to the degree of responsibility of the offender:

“Most specifically, the Court examines the role of the criminal justice system itself, as well as that of the state more generally, in violating fundamental human rights and creating conditions of social and economic deprivation that may create conflicts that are criminalized... Such a

discussion is grounded in the concept of ‘degree of responsibility’” (p. 7-8).

The decision not only notes that Correctional Services Canada’s administrative error caused Mr. Ladue to be placed in an environment in which he would be vulnerable to breaching his LTSO, but also that his breach is directly connected to his addiction to opiates, which he began using in a federal penitentiary (paras 27-30). This, according to Sylvestre, acknowledges the responsibility of the criminal justice system itself in the perpetration of crime. In addition, the Court’s reasoning that background and systemic factor affects the offender’s level of blameworthiness, and hence the degree of responsibility of the offender, implies a broader understanding of crime and responsibility. Specifically,

“a conception of responsibility that socializes individual choice, emphasizes the collectivization of risk and draws moral condemnation to the social, economic and political order in which societal conflicts are embedded” (p. 9).

In other words, the Court’s reasoning in *Ipeelee* appears to be moving towards a conception of criminal responsibility in which an individual’s degree of responsibility is reduced by the social, economic, and political circumstances that informed the offence.¹¹ Sylvestre supports extending the use of social context in sentencing to other offenders “undergoing state violence and systemic discrimination such as poor and homeless people, immigrants and racial minorities” (p. 10). However, *Ipeelee*’s contextual approach has not been widely adopted outside of the Indigenous offender context (Ozkin 2012). For example, while the Ontario Court of Appeal in *R v Borde* accepted that “systemic and background factors relating to African-Canadians might be taken into account in sentencing if the factor played a role in the commission of the offence”, it held that judges did not need to take judicial notice of systemic and background factors for African-Canadian offenders.

Nevertheless, *Ipeelee* further enunciates the proportionality principle, and is clear that “proportionality must not only denounce crimes and reflect concerns for victims, but also ensure justice for the offender” (Roach 2012, p. 230).

2.4.3 Notable Application of *Gladue* by Courts of Appeal across Canada

Beyond the application of s. 718.2(e) to sentencing criminal offences, *Gladue* factors have been applied whenever an Indigenous person’s liberty is at stake. As stated in *Gladue*, relevant factors should be considered by all decision-makers who have the power to influence the treatment of Indigenous offenders in the justice system.”¹² Some notable cases include:

¹¹ Sylvestre suggests that the criminal justice system is arguably responsible for creating conditions for the perpetration of crimes, particularly when it comes to administration of justice offences (AOJOs). As they currently make up 21% of charges before criminal courts in Canada, AOJOs are troubling because they criminalize behaviour that “would not have been regarded as criminal if it were not included in a court order” (p. 9).

¹² Para 85

<i>R v Sim</i> 2005 CanLII 37586 Ont CA	<i>Gladue</i> factors were relevant to a Review Board disposition of an Indigenous person found not criminally responsible.
<i>R v Jenson</i> 2005 CanLII 7649 Ont CA	<i>Gladue</i> factors are relevant to determinations of period of parole ineligibility in sentencing, even if the offender receives a life sentence.
<i>Frontenac Ventures Corporation v Ardoch Algonquin</i> 2008 ONCA 534	In sentencing Indigenous individuals found in civil contempt of Court for engaging in a peaceful protest, <i>Gladue</i> factors were applicable.
<i>R v Sutherland</i> 2009 BCCA 534	<i>Gladue</i> factors were considered in the decision to modify s. 161 orders prohibiting the offender from attending a community centre where there were culturally appropriate rehabilitation programs.
<i>United States v Leonard</i> , 2012 ONCA 622	In an extradition case involving an Indigenous Canadian, it was held that <i>Gladue</i> factors were relevant to a determination of whether an individual's personal circumstances would make extradition contrary to s. 7 of the <i>Charter</i> . <i>Gladue</i> factors should also be considered when prosecutorial discretion is exercised about whether to prosecute domestically or to extradite.
<i>R v Kokopenace</i> 2013 ONCA 273	<i>Gladue</i> factors were considered in determining whether the State made reasonable efforts to ensure representative inclusion of Indigenous people in jury selection.
<i>Twins v Canada (Attorney General)</i> 2016 FC 537 (CanLII)	Parole Board of Canada and its Appeal Division must consider <i>Gladue</i> factors when making decisions.

3. Challenges and Criticisms in Applying s. 718.2(e) and the *Gladue* Decision

Despite the Court's decision in *Gladue*, and its subsequent call to action in *Ipeelee*, *Gladue* principles are perceived by Indigenous offenders to be ineffective and inconsistently applied (Iacobucci 2013; Pfefferle 2008 Roach 2009). Non-Indigenous offenders have benefited more from the 1996 sentencing reforms than Indigenous offenders, and overincarceration has worsened since *Gladue* (MacIntosh and Angrove 2012, p. 33).

A 2008 study conducted by Welsh and Ogloff (2008) evaluated the impact of s. 718.2(e) by analyzing a sample of 691 sentencing decisions, chosen both before and after the enactment of s. 718.2(e). The analysis sought to determine the extent to which Indigenous status was correlated with judges' sentencing decisions. Using hierarchical regression analyses, the study concluded that Indigenous status alone did not significantly predict the likelihood of receiving a custodial disposition relative to aggravating and mitigating factors or sentencing objectives cited by judges. Instead, aggravating and mitigating factors, such as offence seriousness, prior criminal history and the offender's plea, were significantly related to sentencing decisions.

Welsh and Ogloff (2008) suggest that s. 718.2(e) and its interpretation by the Supreme Court "underestimate the true complexity of the over-representation problem" (p. 512). The authors note that interactions between Indigenous status and the aggravating and mitigating factors mentioned may explain why Indigenous status alone does not seem to significantly influence sentencing decisions. They echo critiques made in the aftermath of *Gladue* that sentencing may not be the appropriate means to remedy overrepresentation. Indeed, the Court's response to this critique is one that other authors have also found dissatisfying (MacIntosh and Angrove 2012; Gevikoglu 2013). Constance MacIntosh and Gillian Angrove write,

"The Court explains that 'sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders', but there is no further explanation as to how this will practically happen (p. 130)."

Gladue should not be regarded as a panacea for overrepresentation, but rather as a contribution to the efforts required. Nonetheless, questions about how sentencing can address overrepresentation point to the challenges of implementing *Gladue* principles in a meaningful and effective way. Although a number of programs and initiatives, subsidized by the federal and provincial governments, support efforts to reduce overrepresentation through sentencing, Parliament's goal of eliminating Indigenous overrepresentation within a generation remains far from fulfillment. This section will explore the challenges to the implementation of *Gladue* principles, as well as critiques of whether *Gladue* principles are a sufficient or appropriate solution.

3.1 Challenges to Implementation

3.1.1 "Reconciling" Retributive and Restorative Approaches

For Roach and Rudin (2000), *Gladue* was significant because it recognized the restorative purpose of sentencing codified in s. 718.2, which added reparation to victims and the community, and the promotion of responsibility in the offender alongside the traditional purposes of denunciation, deterrence, separation, and rehabilitation. The addition of restorative justice to the principles of sentencing was meant, in part, to address the criminal justice system's over-reliance on incarceration (Roach and Rudin 2000, p. 363).

The Court offers a general definition of restorative justice in *Gladue*:

“In general terms, restorative justice may be described 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. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime (para 71).”

Critique in the aftermath of the *Gladue* decision found the Court’s emphasis on restorative justice to be contradictory with the traditional sentencing principles of denunciation, separation, and deterrence. Some authors viewed retributive and restorative approaches to justice as irreconcilable – essentially arguing that judges would not be able to both adopt *Gladue* principles and adhere to traditional sentencing principles (Haslip 2000; Pfefferle 2008).

However, the statement that traditional sentencing purposes remain relevant seems only to indicate that *Gladue* does not force judges to use a restorative sanction in every case involving an Indigenous offender, to the detriment of deterrence, denunciation, and separation. The essential direction is that judges consider, to the extent possible, different alternatives when sentencing an Indigenous offender. In addition, the Court was clear that restorative sentences should not be seen as more lenient sentences, as there is “widespread consensus” that incarceration does not necessarily achieve the traditional goals of sentencing (para 57, 72).

Are Conditional Sentences Restorative?

Along with s. 718.2(e), conditional sentences were introduced into the *Criminal Code* during the 1996 legislative reforms. There is no consensus on whether conditional sentences should be seen as a restorative suggestion. For example, Quigley (1999) views conditional sentences as a helpful tool that would allow judges to reconcile retributive and restorative approaches to sentencing. On the other hand, Williams (2008) considers conditional sentences to be primarily in line with criminal law’s punitive purposes of denunciation and deterrence, rather than serving a rehabilitative purpose. Williams (2008) argues that conditional sentences are an alternative to incarceration that relocates imprisonment “from the dedicated institutions to the defendant’s community” (p. 84-85). They are usually lengthier than carceral sentences, and accompanied by “stringent, punitive restrictions on liberty,” breaches of which would result in the offender’s incarceration (Williams 2008, p. 84-85).

Roach and Rudin (2000) similarly caution against the conditional sentence’s potential of “net-widening” (p. 375). They suggest that post-*Gladue*, judges are more likely to impose conditional sentences, which may have onerous and unrealistic “healing” conditions. Indigenous offenders would then “find themselves disproportionately breached and imprisoned, perhaps for a longer period than if they had been sent directly to jail,” which would worsen, rather than reduce overrepresentation (p. 375).

Nonetheless, conditional sentences have the potential to offer greater flexibility and rehabilitation. In her analysis of the application of *Gladue* principles in sentencing Indigenous

women, Cameron (2008) questioned why conditional sentences were not given in the cases of *R v Norris* and *R v Moyan*. In these cases, a conditional sentence would have afforded both women the ability to parent their child, work, as well as participate in education and treatment programs.

Defining Restorative Justice as it applies to the Criminal Law

The confusion around reconciling retributive and restorative approaches to justice points to confusion around the meaning of restorative justice itself, as applied to the criminal law. Justice Melvyn Green (2012) explains that restorative justice is most often applied in Canadian Courts as a model “focused on reparative or compensatory sanctions” (p. 8). The language of *Gladue*, however, suggests an alternate view that sees restorative justice as “a comprehensive theory of justice in itself,” which does not see rehabilitation and reintegration as sentencing objectives to be balanced against deterrence and denunciation. Instead,

“These conventionally opposing principles are facets of a holistic ‘restorative’ exercise that includes the offended community and the community of the offender in the process of adjudication as well as the determination of appropriate sanctions” (p. 8).

In other words, restorative justice is not just one consideration or one kind of sanction, but rather an alternate theoretical approach to justice. While there is no universally agreed upon definition of restorative justice, the Federal-Provincial-Territorial Working Group on Restorative Justice defines restorative justice as:

“An approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime.”¹³

Chartrand and Horn (2016) define restorative justice as:

“An approach to crime and conflict that brings the victim, the offender, members of the larger community, and oftentimes professional service providers together into a non-hierarchical setting in order to collectively address a harm that was committed and to set a path towards reconciliation between all relevant parties. (p. 3)”

In practice, as section 4 will explore in greater detail, restorative justice programs tend to be community-based. While there is no single approach to restorative justice, common types of programming include victim/offender mediation, family group conferencing, and various “circle” programs (Chartrand and Horn 2016).

¹³ This definition is adapted from Cormier 2002.

Green (2012) sees *Gladue* as placing a duty on all justice system participants – not only sentencing judges – to work towards a more restorative process. The comprehensive restorative justice theory, which focuses on community repair and healing, is also seen as more consistent with Indigenous approaches to justice (p. 8).¹⁴

Restorative justice in relation to Indigenous legal tradition

In its discussion of Indigenous sentencing approaches, the Supreme Court specified that it did not want to imply that all Indigenous communities shared the same understanding of justice or the same approaches to sentencing.¹⁵ However, Gevikoglu (2013) argues that by characterizing Indigenous legal tradition as primarily restorative, the Court conflates Indigenous justice with Western notions of restorative justice, and with each other. The language in *Gladue* sets up Indigenous approaches to criminal justice in opposition to the Canadian Criminal Justice system, which has been primarily retributive. Indeed, aforementioned concerns about the difficulty of reconciling retributive and restorative justice is consistent with Gevikoglu’s analysis, even though Indigenous and Canadian approaches to criminal justice do not necessarily contradict. For example, Professor Michael Jackson has laid out an alternative framework of Indigenous justice which complemented, instead of contradicting the Canadian criminal justice system.

Gevikoglu’s concern is that Western notions of restorative justice may not be sufficient to ensure that Indigenous offenders are sentenced in a way that is “appropriate in the circumstances for the offender because of his/her aboriginal heritage or connection” – a key factor in remedying over incarceration, according to *Gladue*. In *Ipeelee*, the Court states that sentencing options other than incarceration can play “a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime” (para 128). Yet, it does not discuss what options other than incarceration might be, it does not refer to anything from the Inuit or Dena legal traditions, and ends up just reducing both *Ipeelee* and *Ladue*’s sentences. While restorative justice allows for practices like diversion and sentencing circles to exist in certain spaces within the framework of the criminal justice system, Indigenous communities are not afforded much more autonomy in the sentencing process (Gevikoglu 2013).

Although a detailed comparative analysis of the relationship between restorative justice and Indigenous legal tradition is outside the scope of this report, a number of key differences are highlighted here. Chartrand and Horn (2016) note that restorative and Indigenous legal tradition generally have similar underlying principles, in that both can be described as aiming to achieve community healing, reconciliation, and the reintegration of the offender. However, there are several material differences between the two.

First, Indigenous legal traditions are generally a source of complex mechanisms, both proactive and reactive, that produces and maintains stability and order in Indigenous communities. Prior to the imposition of Western law, Indigenous legal tradition “shaped behavior, guided relationships, and addressed conflict” through kinship – which Chartrand and Horn describe as producing “multidirectional legal obligations towards everyone and everything” (2016, p. 6). While Indigenous legal traditions are diverse, a common theme through most are the idea of law being

¹⁴ P. 8

¹⁵ Para 73

interconnected, intertwined, and rooted in relationships between people and to nature (p. 5-6). In addition, Indigenous legal traditions still had a retributive element - where kinship responsibilities were disregarded, communities utilized sanctions and penalties, which were generally enforced by family or community members (p. 7). Finally, Indigenous legal traditions placed a high importance on spirituality (p. 13).

As the imposition of Western law and colonial policies have displaced and disrupted kinship practices (p. 11), both the Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples have called for the “recognition, revitalization, and full integration and implementation” of Indigenous legal tradition alongside Canadian law (p. 8). Chartrand and Horn (2016) trace an ongoing relationship between Indigenous and Restorative justice – Indigenous legal tradition was influential in the early development of underlying principles, values, and programs of restorative justice. Restorative justice has similarly influenced the programs and processes of modern Indigenous justice – where Indigenous legal traditions would have been punitive historically, programs today take a more restorative approach. As both Indigenous and Restorative justice continues to be integrated into the Canadian criminal justice system, the relationship between the two will undoubtedly continue to evolve.

3.1.2 Judicial Discretion Limited by Mandatory Minimum Sentences

Due to the addition of mandatory minimum sentences to the *Criminal Code* in recent years, many authors have expressed concern that *Gladue* and *Ipeelee* may see very limited application.¹⁶ Parkes (2012) writes that mandatory minimums are “deeply at odds” with the principles expressed in *Ipeelee*: that sentencing should be a flexible and highly individualized process to ensure proportionality (p. 22). Although judges still retain discretion over some detention decisions, such as bail hearings, their “hands are tied” in many areas and they have limited ability to craft sentences that consider the “unique circumstances” facing Indigenous offenders (MacIntosh and Angrove 2012, p. 34).

With mandatory minimums, as access to conditional sentences is also restricted, discretion in sentencing shifts from judges to Crown prosecutors (Rudin 2012, p. 4-5). In deciding the offence that an accused is charged with, prosecutors indirectly determine the length and type of sentence that an offender will receive (Rudin 2012). This is particularly troubling because unlike a judge’s sentence which that can be appealed, a prosecutor’s decision can only be reviewed for abuse of process (Parkes 2012, p. 25). While there is no empirical research in Canada yet on the effects of this transfer of discretionary power, in the United States, mandatory minimums have had disproportionately adverse effects on racialized minorities (Parkes 2012). *Gladue* and *Ipeelee* acknowledge both the blatant and systemic discrimination faced by Indigenous people in the criminal justice system. Despite the lack of empirical data, it is clear that Indigenous people “are less likely than other accused to benefit from the exercise of prosecutorial discretion” (Parkes 2012, p. 25; Rudin 2012).

¹⁶ For example, Bill c-2 in 2005 and Bill c-10 in 2012.

Due to the disproportionate impact that mandatory minimum sentences will have on Indigenous people, Parkes (2012) sees potential s. 7, s. 12, and s. 15 *Charter* challenges being raised by Indigenous offenders. Rudin (2012) similarly sees the potential for s. 15 *Charter* challenges based on *Gladue* principles:

“The existence of systemic discrimination towards Aboriginal people means that section 15 requires that judges ensure that in making the decision they alone are empowered to make -- the sentencing decision -- they are not contributing to the discrimination faced by Aboriginal people (p. 8).”

3.1.3 Inadequate Resources

The implementation of *Gladue* principles require additional resources at every step of the sentencing process, as additional obligations are required of judges, defense counsel, prosecutors, correctional officials, as well as community organizations. Judges need additional information about the Indigenous accused’s background, as well as available and appropriate alternatives to incarceration or to the traditional sentencing process. Indigenous justice initiatives and programs also need to exist and be adequately resourced in the offender’s community. The lack of resources – both in the preparation of pre-sentence information, and in the availability of alternatives to incarceration – is a crucial impediment to remedying over incarceration.

3.1.3.1 The preparation of *Gladue* reports

Gladue requires sentencing judges to consider systemic and background factors of the offender, and the types of sentencing procedures and sanctions that are appropriate in the circumstances. In the aftermath of *Gladue*, some authors were uncertain about who fell under s.718.2(e). There was initial confusion about whether and how systemic and background factors were relevant to the offences of individuals who were not “culturally” or “visibly” Indigenous (Pfefferle 2008). Subsequent case law, particularly *Ipeelee*, has been clear that no causal link needs to be established between an offender’s Indigenous background and the offence committed. *Gladue* factors must be considered for all self-identified Indigenous people – regardless of whether they have status, live on- or off-reserve – unless the individual waives the right to have such factors considered (Parkes et al. 2012). In a recent decision, the Ontario Court of Appeal found that it was an error to dismiss the offender’s Indigenous background, even though he was adopted by a white family and had no “apparent” connection to his heritage (*R v Kreko*).

It is undoubtedly challenging for judges to determine the relevant background factors in sentencing, especially as the experiences of Indigenous offenders are diverse and dynamic in an ever-changing society. For example, Brian Pfefferle (2008) points out that courts often dismissed *Gladue* factors when an offender’s background is criminal, failing to take into account the effects of living in Indigenous communities with high crime rates. The provision of pre-sentence information is such a key determinant of the effectiveness of *Gladue* that Rudin (2008) considers it a reason that s. 718.2(e) has not reduced overrepresentation.

In some jurisdictions, Gladue Reports are written with the specific purpose of providing information relevant to s. 718.2(e). These reports highlight the circumstances of the Indigenous offender and how these circumstances relate to the systemic factors that may be responsible for the individual's involvement with the criminal justice system (Rudin 2005). Unlike the average pre-sentence report, Gladue Reports are written after a number of extensive meetings with an "empathic peer", a process that is often challenging, but also restorative (Green 2012). They provide the offender with the opportunity to "critically contemplate his or her personal history and situate it in the constellation of family, land and ancestry that informs identity and worth" (Green 2012, p. 9).

Currently, independent Gladue Reports are available in British Columbia, Alberta, Ontario, Québec, Nova Scotia, and Northwest Territories (Department of Justice Canada 2013). In Manitoba, a few private agencies prepare Gladue Reports, at the request of and with funding from Legal Aid. In Saskatchewan, there was a pilot project involving assistance from British Columbia in providing training for writing Gladue Reports. By the completion of the two year pilot project, 25 Gladue Reports had been written. A final phase of the pilot project is still underway; capturing oral histories from Elders is underway by the University of Saskatchewan. The University intends to maintain this database of oral histories, and make it available free of charge to those tasked with preparing Gladue Reports. Prince Edward Island similarly is in the process of instituting a pilot program. The remaining provinces and territories have no organized and funded Gladue Report-writing program, or no Gladue Reports at all. It is important to note that even where the service is available, the accessibility of Gladue Reports is subject to the availability of resources, varies greatly amongst these jurisdictions, and is far from widespread implementation. Specialized Gladue Courts spend significantly more time on each case than other courts in the same city (Knazan 2003). At the Gladue Court at Old City Hall in Toronto, due to the additional time and resources needed, Gladue Reports are only made when Crown is seeking a sentence of at least 90 days for an out-of-custody client or 6 months for an in-custody client (Aboriginal Legal Services Toronto). In British Columbia, Gladue Reports can only be prepared by people who have been trained by the Legal Services Society. Cuts to legal aid from 2001-onwards has placed significant constraints on the ability of the Legal Services Society to authorize Gladue Reports for Indigenous offenders, which are now only funded by legal aid in limited circumstances (Barnett and Sundhu 2014).

In jurisdictions without Gladue reporting programs, no independent information will be submitted by the defence on behalf of the accused. Instead, information about the offender's background is added to pre-sentence reports, generally prepared by correctional services (Department of Justice Canada 2013). Without specific training and awareness for the unique background circumstances of Indigenous offenders, inadequately prepared information can actually undermine *Gladue* principles and perpetuate systemic discrimination (Parkes 2012). Defence counsel, probation officers, and parole officers do not always have the cultural competency or training to elicit a complete picture of the circumstances of the offender (Rudin 2005; Rudin 2008). In some jurisdictions, probation officers are entitled to a set number of hours to prepare Gladue information (Rudin 2005; Rudin 2008). This is an issue especially because Indigenous individuals may be reluctant to relate their experiences to court personnel, given the distrust that characterizes the relationship between Indigenous peoples and the justice system (Turpel-Lafond 1999).

Furthermore, Parkes (2012) argues that adding *Gladue* factors to pre-sentence reports is ineffective because the latter has a fundamentally different purpose. Pre-sentence reports are meant to provide risk assessment to the court of the offender's likelihood to reoffend. In contrast, a Gladue Report provides "culturally situated information which places the offender in a broader socio-historical context... and reframes the offender's risks/need by holistically positioning the individual as part of a community and as a product of many experiences" (Parkes 2012, p. 24).

Parkes (2012) explains that *R v Knott* illustrates how inadequate Gladue information can actually undermine efforts to reduce over incarceration. In writing the decision to order a suspended sentence for an Indigenous man convicted of aggravated assault, Justice McCawley addressed the inadequacy of the pre-sentence report that was prepared. Justice McCawley noted that although Mr. Knott's pre-sentence report mentioned general *Gladue* factors, they were not linked to his particular experiences – such as the crucial factor that his grandparents were residential school survivors (para 19). The report also concluded that Knott was at a high risk to reoffend, but Justice McCawley found the assessment to be erroneous because the factors considered were not put into context:

"When one puts some of the concerns which might otherwise carry significant weight in context a very different picture emerges. Mr. Knott was found to be supportive of crime due to his reported antisocial behaviour and to demonstrate "a pattern of generalized trouble in the sense he reported financial problems, has never been employed for a full year, has been suspended and expelled, has two non-rewarding parents, could make better use of his time and has few anticriminal friends." In my view these are exactly the kinds of systemic issues that need to be considered in the appropriate context.

For example, Mr. Knott's lack of a history of employment to a large extent can be explained by his taking on the care of his grandparents who raised him and, to all intents and purposes, were his parents..." (para 23-24)

As *R v Knott* demonstrates, when *Gladue* factors are added to pre-sentence reports, but not contextualized in the experience of Indigenous communities, they are actually seen as risk factors justifying incarceration. As such, drawing probation officers' attention to these factors may unintentionally discriminate against Indigenous offenders instead of reducing over incarceration. This perhaps explains why 76% of offenders sentenced to a repeat offence received a shorter sentence when a Gladue Report was prepared, compared to offenders without Gladue Reports (Barnett and Sundhu 2014).

Thus, although Gladue information must always be requested where the liberty of an Indigenous accused is at stake, such requests are inconsistent and reports may be written improperly, which may actually undermine *Gladue* principles (Pfefferle 2008). This significantly hinders judges' ability to consider background and systemic circumstances affecting Indigenous offenders in order to determine appropriate bail conditions and sentences.

3.1.3.2 Lack of appropriate alternative processes or sanctions

Gladue states that regardless of an Indigenous accused's place of residence, and even if community programs are not readily available, judges must make the effort to find alternative processes or sanctions. Judges are challenged to create new sentencing options and to adapt existing measures such as counselling, community service, fines, treatment and monitoring programs to the reality of Indigenous offenders.

However, the lack of culturally appropriate sentencing processes and alternatives to incarceration undoubtedly affects the effective implementation of *Gladue* principles (Welsh and Ogloff 2008; Haslip 2000; Parkes et al. 2012). Roach and Rudin (2000) note, for example, that in *R v Wells*, the offender was sentenced to imprisonment instead of a conditional sentence in part because of the lack of anti-sexual assault programming in his immediate community. This issue is particularly acute for individuals living in urban areas who may have little or no connection to an Indigenous community (Pfefferle 2008). Without adequate resourcing of alternatives to imprisonment, even the implementation of thorough Gladue Reports across Canada would likely have little effect in reducing overrepresentation (Truth and Reconciliation Commission of Canada 2015).

As section 4 will explain further, a number of Gladue Courts have been set up, notably in Ontario and in British Columbia. Generally, these courts allow Indigenous accused who plead guilty to be diverted to an alternative community-based sentencing process that decides upon a "plan of care" for the individual (Green 2012). Where Gladue Courts do not exist, an Indigenous accused would go through the traditional sentencing process, the result of which may be a conditional sentence. There is a crucial difference between the two sanctions: whereas non-compliance with a condition in a "plan of care" is brought back to the Community Council, breach of a conditional sentence likely results in incarceration (Roach and Rudin 2000).

Justice Melvyn Green (2012) is critical that even at the Gladue Court at Old City Hall, if an accused person is not diverted to Community Council and does not have a Gladue Report prepared, they will receive a "boilerplate" plan of care. He argues that to truly adhere to *Gladue* principles requires more than just referring the individual to Indigenous programming, where it is available. Rather, it

"[r]equires the inclusion of First Nations and Inuit peoples in the creation and practice of models of criminal justice that are grounded in and legitimated by customary law and tradition." (p. 10)

Considering the diversity of Indigenous communities and experiences of Indigenous offenders, a multitude of programs and initiatives will need to be established as no one model of Indigenous justice will uniformly apply to all. Turpel-Lafond (1999) warns that without proper resourcing, successful Crown appeals of "unduly lenient" *Gladue* sentences will undermine the development of alternative sanctions (p. 375). It is also important that resources are distributed holistically, across programs at all steps of the criminal justice process (p. 376). In return, successful implementation of *Gladue* will diminish resources spent on incarceration (Roach and Rudin 2000).

3.2 Critical Responses to the Application of *Gladue*

3.2.1 Impact on the Community

Prior to *Gladue*, the Alberta Court of Appeal had expressed the view that s. 718.2(e) could be detrimental to the safety of victims of crime (Roach and Rudin 2000). Such a view, of course, assumes that incarcerating the offender will be safest for victims, when in reality, short and recurrent prison sentences have done little to ensure the safety of the victim and of the community (Roach and Rudin 2000). Just as restorative approaches to sentencing should not be viewed as more “lenient”, they should also not be assumed to be less “safe.” In theory, restorative justice balances the needs of offenders, victims, and community (*R v Gladue*, para 71-72).

There is nonetheless concern that making Indigenous identity a determining factor in sentencing will mean that Indigenous communities, which already suffer from higher than average crime rates, will receive less protection from the law (Gevikoglu 2013). As Justice Rothstein writes in his dissenting opinion, “Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal” (*R v Ipeelee*, para 131). Gevikoglu (2013) argues that by framing the opposition to *Gladue* as based in intolerance, and only addressing “race-based discount” critiques in *Ipeelee*, the Court overlooks the concerns of Indigenous communities.

As *R v Morris* demonstrates, this concern is more pronounced and complex for victims of gender-based violence and domestic abuse. In *R v Morris*, Crown appealed the Provincial Court of British Columbia’s sentence of two years of probation for Mr. Morris’s violent assault and unlawful confinement of his common law spouse. Mr. Morris was the former Chief of the Liard Band in Watson Lake. While he was assessed by a psychologist as being at low risk for violent offence generally, he was considered at high risk for future spousal violence. At trial, his sentencing had been adjourned for 4 months in order to give the community time to formulate submissions. The community held a talking circle with elders, members of the community, the victim, the accused, and their families. On the day of sentencing, however, due to the victim’s apprehension about making sentencing recommendations for the Court, the talking circle was more of a general discussion.

A summary of the talking circle submitted to the judge recommended healing and counselling over incarceration. At the same time, the Liard Aboriginal Women’s Society submitted a letter, signed by 50 people, expressing concerns over the sentencing process. The letter expressed fear that as Mr. Morris was a former Chief in the community, Aboriginal Leadership will “use their power and authority to retaliate against those who find the courage to speak out against violence.” It also noted that many Kaska women have “extreme feelings of anxiety and vulnerability” in light of the case. Noting the offence’s divisive impact on the community, the sentencing judge imposed a suspended sentence with two years of probation.

The BC Court of Appeal overturned the suspended sentence. Justice Finch wrote that in attempting to give effect to his understanding of Aboriginal justice, the sentencing judge “lost sight of the court’s overriding duty” to order a sentence proportional to the gravity of the offence and the degree of responsibility of the offender (para 56). Not only is the severity of an offence aggravated when it is committed against a spouse (para 59), Mr. Morris’s assault was pre-meditated, with no drug and alcohol involved. And though he was identified as an Indigenous offender, the trial court did not properly assess systemic and background factors that brought Mr. Morris to court. As such, the suspended sentence was unfit because “it sends a completely wrong message to the victim, the offender and the community” (para 62). Noting the community’s lack of capacity to address domestic violence in a traditional and restorative way, Mr. Morris was sentenced to 12 months of incarceration with two years of probation.

The sentence given to Mr. Morris at trial level appears to be consistent with Gevikoglu (2013)’s criticism of *Gladue* and *Ipeelee*: “the particularized focus on Indigenous identity takes on a character that subsumes other considerations, including differences within Indigenous communities” (p. 8). Of course, as the BC Court of Appeal decision explained, s. 718.2(e) does not require Indigenous identity to be the *most* determinative factor in sentencing, it is meant to be considered with all other relevant sentencing principles and factors. As well, a correct application of restorative justice approaches promoted by *Gladue* will take into account the needs of the offender, the victim, and the community. Finally, *Gladue* may only be successful when communities are able to establish initiatives and programs that effectively deal with issues of poverty, substance abuse, family breakdown, the effects of residential schools and other systemic causes of crime (Turpel-Lafond 1999).

3.2.2 Overrepresentation within the framework of reconciliation

As *Gladue* and *Ipeelee* have explained, s. 718.2(e) is a remedial measure. Its purpose is to remedy Indigenous over incarceration, and it aims to do so through utilizing a different method of analysis in sentencing that pays special attention to the background and systemic factors of Indigenous offenders, and the types of sentencing procedures and sanctions that are culturally appropriate.

While the causes of over incarceration are multiple and complex, a root cause is undoubtedly the cumulative effects of colonialism and its ongoing legacy. The Royal Commission on Aboriginal Peoples (1996) concluded that the impacts of colonialism most effectively explained the prevalence of socio-economic disadvantage among Indigenous communities, which has led to the overrepresentation of Indigenous people in prisons. Similarly, the Aboriginal Justice Inquiry of Manitoba (1991) attributes higher crime rates to “the despair, dependency, anger, frustration, and sense of injustice prevalent in Aboriginal communities,” which stem from the trauma and loss of culture experienced by families and communities as a result of colonial policies over the past century.

The ongoing discrimination faced by Indigenous people in the criminal justice system, seen as a legacy of colonialism, is explained by the Aboriginal Justice Inquiry of Manitoba following the police killing of an Indigenous man in a city street. Commissioner Paul Chartrand was quoted as saying:

“Aboriginal over-representation is the end point of a series of decisions made by those with decision-making power in the justice system. An examination of each of these decisions suggest that the way that decisions are made within the justice system discriminates against Aboriginal people at virtually every point.”

The Truth and Reconciliation Commission of Canada similarly notes in the context of parole eligibility that while criminal records are typically a reliable risk predictor, “systemic discrimination related to poverty and the legacy of residential schools undoubtedly disadvantages Aboriginal offenders” (Truth and Reconciliation of Canada 2015, p. 177).

Indeed, *Gladue* considerations are meant to remedy over incarceration through addressing the impacts and legacy of colonialism; yet, considering the intimate interconnection of the two issues, critics have questioned if *Gladue* principles in sentencing are sufficient. The Royal Commission on Aboriginal Peoples concluded that Indigenous self-governance over the “substance and process of justice” in the criminal justice system is essential in a new nation-to-nation relationship. Recognizing that “it has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism” (Aboriginal Justice Inquiry of Manitoba 1991), some authors argue that greater Indigenous self-determination over the criminal justice system is necessary to remedy over incarceration in the long term.

In making the case for Indigenous self-governance, the Commission rejected the “indigenization” of the criminal justice system: the practice of maintaining existing state structures, but with Indigenous staff and programs, such as diversion and Indigenous courtworkers (Gevikoglu 2013; Rudin 2005). Instead, Indigenous communities should be given the resources – in terms political power, legal jurisdiction, and financial support – to develop criminal justice frameworks in accordance with Indigenous legal traditions (Royal Commission on Aboriginal Peoples 1996; Aboriginal Justice Inquiry of Manitoba 1991; Gevikoglu 2013; Rudin 2005). In that sense, Gevikoglu views s. 718.2(e) as a limited solution, symbolizing “a constitutional and socio-legal compromise: a space within the criminal justice system for Indigenous legal approaches” (p. 6).

Rudin (2005) expresses a similar sentiment. He explains that because the colonial experience took away the right and the ability of Indigenous people to govern and maintain order in their own communities, restorative justice responses to criminal justice must be developed by Indigenous people. After all,

“The impacts of colonialism cannot be remedied by having non-Aboriginal organisations whether they be government or non-governmental organisations, tell Aboriginal people what they and cannot do; that process, however well meaning, just perpetuates the colonial experience.” (p. 95)

As a remedial solution formulated within the existing criminal justice system structures, s. 718.2(e) is potentially problematic in that it risks essentializing Indigenous identity. According to Gevikoglu (2013), essentialism is the idea “that individuals who share the same characteristics possess a shared, constant biological nature or essence,” and which ascribes “to group members a common experience of oppression that is culturally and historically invariable” (p. 8). Though the diversity of Indigenous communities is briefly acknowledged in *Gladue* and *Ipeelee*, the many different cultures and legal traditions are nonetheless all encompassed by “aboriginal.”¹⁷ This, Gevikoglu argues, is essentialism. In setting up a framework for differential treatment in sentencing based on Indigenous identity, *Gladue* puts courts in the position of determining the relevant background and systemic circumstances of Indigenous offenders. In other words, using Indigenous identity in sentencing means that courts are constructing Indigenous identity in law. Gevikoglu views *Gladue* as characterizing Indigenous persons as “victimized by systemic and direct discrimination, suffering from dislocation, and substantially affected by poor social and economic conditions” (p. 9). *Ipeelee* even suggests that Indigenous persons are victimized by their experiences to the point of having diminished moral culpability – as Gevikoglu points out, the only other categories with diminished criminal liability are youth and the mentally ill. The recognition of structural constraints and social context in sentencing, of course, is not universally thought of as incompatible with autonomy and free will (Sylvestre 2013; Ozkin 2012). Nonetheless, considering the way that Indigenous identity has been used in colonial laws and policies in the past, it is

“Important to consider the impact that both appropriating Indigenous identity and essentializing that identity as victimized, dislocated and poor has on Indigenous communities’ and offenders’ agency in the sentencing process” (Gevikoglu 2013, p. 9).

For critics of *Gladue*, the pertinent concern is whether and how s. 718.2(e), which has the potential of essentializing Indigenous identity, will enable Indigenous people to have greater power and autonomy in the criminal justice system. Currently, decisions of who is diverted and when processes like sentencing circles are utilized are still made by police, Crown prosecutors, or judges within the non-Indigenous justice system. Practitioners within the criminal justice system must acknowledge that *Gladue* has the potential of harming Indigenous offenders, and be aware of how Indigenous individuals, communities, and legal traditions are characterized in their work (Gevikoglu 2013, p. 13).

The Truth and Reconciliation Commission of Canada (2015) called upon federal, provincial, and territorial governments commit to the elimination of the over incarceration of Indigenous people in the criminal justice system. It also endorsed the United Nations Expert Mechanism on the Rights of Indigenous People recommendation that “substantive changes are required within the criminal legal system in relation to Indigenous peoples’ rights to their land, territories, and natural resources; political self-determination; and community well-being” (p. 204). As *Gladue* Courts and various community-based Indigenous justice programming continues to be implemented, at the very least, Indigenous voices must be included in the creation and

¹⁷ According to Indigenous and Northern Affairs Canada, there are more than 630 First Nations communities in Canada, representing more than 50 Nations and Indigenous languages, not including Métis and Inuit peoples. Online: <<http://www.aadnc-aandc.gc.ca/eng/1100100013791/1100100013795>>.

development of these processes. More work is undoubtedly needed to examine how over incarceration can be addressed in conjunction with the broader constitutional question of reconciliation and nation-to-nation.

3.2.3 Overlooking Gender Dimensions of Crime and Victimization

Finally, critics have expressed concern about the gender-neutral nature of the *Gladue* analysis, especially, as overrepresentation is growing more quickly among Indigenous women than men. The s. 718.2(e) analysis set out in *Gladue* ignores intersectionality: for Indigenous women, the systemic experiences of colonialism is compounded by, and inseparable from, gender inequality. The interaction between gender and Indigenous identity means that sentencing approaches that remedy the over incarceration of Indigenous women do not fit neatly into the dichotomy of “traditional” and “western” (Gevikoglu 2013; Cameron 2008; Williams 2008).

Cameron (2008) argues that *Gladue* information needs to incorporate gender analysis because Indigenous women disproportionately experience indicators of colonialism set out in *Gladue*, yet the impact is often less visible to judges. Some gender-specific *Gladue* considerations highlighted by Cameron include:

1) Parenting

Many Indigenous women are the sole or primary caregiver in their family: In 2006, 18% of Indigenous women aged 15 and over were heading families on their own, compared with 8% of non-Indigenous women (Statistics Canada 2011a). Considering the legacy of family separation and high rates of child apprehension that form the experience of Indigenous communities, women should be given alternatives to incarceration where possible so that they can continue to parent their children.¹⁸

2) Displacement

Indigenous women’s displacement from their reserves is a result of discrimination by both state policy and their own communities. The *Indian Act* undermined and removed Indigenous legal orders, in which women held positions of power and had access to resources, and replaced them with structures that “uniformly devalued women and placed men in positions of power and control”. The *Act* included provisions that took away “Indian” status from Indigenous women who married non-Indigenous men. Without status, women were no longer able to access resources, such as on-reserve housing, cultural resources, interaction with elders, subsidies for education, and land claim settlement resources.

Although these provisions were changed in 1985, “Indian” status recovery still has a second generation cut-off. At the same time, *Indian Act* band council litigates against women’s efforts to rejoin their community. The result is that Indigenous women, their children, and grandchildren are displaced to urban areas – as of 2006, 72% of Indigenous women live off-reserve. Not only does this mean that Indigenous women lack access to resources and a connection to their ancestral land – which for many Indigenous cultures, is intimately tied to a sense of belonging

¹⁸ Correctional Services Canada has a Mother-Child program, which allows some women to keep young children with them while incarcerated. However, due to policy changes in 2008 to eligibility requirements, participation in the program has been minimal. Online: < <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/mrgnlzd/index-en.aspx#s12>>.

and cultural identity, but living in urban areas also means greater risk of poverty, systemic and direct racism, and sexual exploitation.

3) Violence

Experiencing violence and trauma is linked to substance abuse, as well as poverty and homelessness, two factors mentioned in *Gladue*. Indigenous women are three times more likely to experience violence than non-Indigenous women (Statistics Canada 2011b). Of Indigenous women who experienced intimate partner violence (IPV), close to half reported the most severe forms of violence, such as being sexually assaulted, beaten, choked, or threatened with a gun or a knife (ibid.). Many female offenders commit violent crime in self-defence, or after having been subject to IPV. Cameron argues that existing legal mechanisms like “battered women syndrome”, the self-defence argument, and principles of provocation should be applied rigorously by judges to address this “gendered legacy of colonialism.”

4) Poverty

Indigenous women’s poverty is exacerbated by higher rates of underemployment and, where women are employed, the wage gap. Disproportionate levels of poverty forces Indigenous women, particularly in urban areas, to resort to illegal work such as dealing drugs or sex work, for their own and their children’s survival.

Cameron analyzes the cases *Gladue*, *Moyan*, and *Norris*, noting the shortcomings of the Court’s gender-neutral approach. Ms. Gladue, whose offence was decontextualized from her history of intimate partner violence, was portrayed as an aggressor. The court also did not consider the effects of displacement – it is mentioned that she lives off-reserve, but no further information is provided. In *Moyan*, s. 718.2(e) was not applied because Ms. Moyan did not engage in what the judge perceived to be a traditional cultural lifestyle, which Cameron notes is not actually the point of considerations of systemic and background factors. Sentencing should have instead considered how Ms. Moyan was affected by experiences of colonialism. For Ms. Norris, although it was noted that she was controlled by her former partner who profited from her drug-trafficking, the court did not contextualize how her dependence and fear of her former partner made her “vulnerable to criminal survival strategies.”

Despite the fact that conditional sentences have been extended to covering serious crimes, including violence against Indigenous women, it was unfortunately not ordered in all three cases, even though it would have given the women the freedom to parent, work, and participate in education, counselling, and treatment programs. Not taking gender-specific mitigating factors into account, Cameron argues, leads to unfair decisions because women are “forced to take full personal responsibility for circumstances that are clearly related to their experiences of colonialism.” As a result, they are separated from their children, which further exacerbates the cumulative impact of colonialism.

On the other hand, Toni Williams (2008) observes that the criminal justice system has at times used intersectional analysis in a way that contributed to the over incarceration of Indigenous women. In the 1990s, law enforcement shifted to a risk-based model that aimed to pre-empt crime rather than responding to individual offences after the fact; it did so by focusing on populations predicted or perceived to be problematic. The same identity factors that signify

mitigating experiences of colonialism in *Gladue* were deemed to be sources of criminogenic risk/needs in Correctional Services Canada's prisoner assessment and classification. Toni Williams explains the conundrum this creates in sentencing:

“When faced with an Aboriginal woman who embodies what the criminalization process deems to be criminogenic risk/needs, the sentencing judge is asked to justify a non-carceral sanction in terms of those same aspects of the defendant's intersectionalized identity that point to incarceration as necessary to contain and manage her risk of re-offending.”

Criminalization and law enforcement, which necessarily divides people into “good” and “bad”, “dangerous” and “innocent”, creates a difficult binary for Indigenous women, who are often both victims and victimizers. Through an analysis of 18 first instance cases involving Indigenous women, Toni Williams observes that Indigenous women's intersectional identity may not do much to mitigate their sentences, because of how identity factors have been incorporated into sentencing decisions based in controlling risk.

Of the 18 cases analyzed, 8 were carceral sanctions, 9 were conditional sentences, and 2 were stand-alone probation orders on top of time served. Those receiving incarceration and conditional sentences had similar offences – for example, 5 of the women who were incarcerated and 5 with conditional sentences had killed someone. All the defendants who were convicted of homicides and assaults knew the victim, and almost all were spouses or former spouses, or children, which is consistent with research indicating that women's violence tend to be inflicted on family members. While judges take judicial notice of the history of colonialism, the decisions analyzed do not explicitly discuss the discrimination of Indigenous people in Canada. Women's criminality in the cases analyzed is linked to experiences of childhood violence, substance dependency, socio-economic disadvantage, displacement, and family dysfunction, which are not explicitly attributed to a legacy of colonialism and ongoing discrimination.

Toni Williams observes that for decisions of non-carceral sentences, judges constructed sanctions in two ways. In some instances, non-carceral sentences were seen as healing rather than punitive. Although Indigenous women's identity is equated to substantial levels of risk/need, judges felt that restorative and rehabilitative sanctions were a better fit. For others, non-carceral sentences were deemed as equally punitive. Offenders are characterized as risks “containable” by sanctions such as conditional sentences. For sentences of incarceration, criminogenic risk and punitive objectives are prominent. Indigenous identity is either minimized, or linked to greater risk/needs. In one instance, because the offender was characterized as high risk, prison was constructed in the decision as a space of safety, stability and support that would allow the offender to escape from her dangerous community. This characterization, of course, did not mention the discrimination and lack of culturally appropriate services in prisons mentioned in *Gladue*.

It appears that on the one hand, emphasis on the identity of Indigenous women means that s. 718.2(e) will more likely mitigate the offender's sentence. On the other hand, without contextualization in the history of colonialism, the use of identity factors in sentencing creates

the risk of perpetuating the stereotypical narrative that Indigenous women are inherently suffering from economic deprivation, substance abuse, family and community dysfunction, and male violence, all of which point to high risk for criminality. Toni Williams worries that this would represent Indigenous women's offences "as over-determined by ancestry, identity and circumstances, exactly the type of representation of compromised moral agency that feeds stereotypes about criminality." In other words, there is a risk of essentializing Indigenous women's identity. This points again to the importance of resources being allocated to Gladue reports which effectively contextualizes community and identity factors within the societal and systemic factors in which they are situated.

3.3 Other Considerations

3.3.1 Application to Offenders with FASD

Based on the recognition in *Ipeelee* that background and systemic factors may diminish the culpability of Indigenous offenders, Milward (2014) argues that courts should move towards needs-based sentencing for Indigenous accused with Fetal Alcohol Spectrum Disorder (FASD). Incarcerating FASD offenders is theoretically problematic because the prevalence of FASD in Indigenous communities is a legacy of colonialism. Practically, it is problematic because as many as 60-75% of FASD subjects are prone to attention deficits and impulsivity – making the deterrent effect to incarceration a challenge for FASD offenders, especially considering the lack of FASD-specific treatment programs in correctional facilities.

Through an analysis of case law, Milward (2014) notes that many judges are applying *Gladue* factors in sentencing – recognizing that FASD is caused by substance abuse, which is a result of colonial policies. The challenges, as Justice Watson of the Alberta Court of Appeal notes in *R v Ramsay*, are in accurately assessing the moral blameworthiness of the offender, and "balancing the protection of the public against the feasibility of reintegrating the offender into the community" (para 50). Such a balanced assessment requires in depth information about the accused person's condition – which falls within the requirements of *Gladue* and the scope of Gladue reports. Additionally, considering that the breach of a probation condition is a criminal offence, special attention should be paid to the sanction imposed, since a person with FASD may not be able to adhere to the terms of a probation order or conditional sentence due to impulsivity. Probation officers and other court personnel need to have greater awareness of FASD.

Finally, a study of qualitative interviews with justice professionals with FASD experience – including Indigenous lawyers, provincial court judges, correctional psychologists, and correctional educators – pointed to the pressing need for more resources (Milward 2014). Milward specifically emphasizes the importance of providing resources to Indigenous communities so that they have the capacity to provide programs and services for Indigenous persons with FASD.¹⁹

¹⁹ Milward cites the Central Urban Metis Federation Wellness Centre and the Community Council Program in Toronto as programs that have been successful for offenders with FASD.

3.3 Application to Bail

As mentioned above, outside of sentencing, *Gladue* applies to all situations where an Indigenous person's liberty is at stake.²⁰ In the bail context, *Gladue* was found to be relevant in *R v Wesley* in British Columbia and *R v Pittawanakwat* in Ontario at the trial level, and *R v Robinson* at the appellate level. Currently, an Indigenous accused's background is considered for bail decisions in eight provincial and territorial jurisdictions (Department of Justice Canada 2013).²¹

The right to reasonable bail is entrenched in s. 11(e) of the *Charter*, and is closely connected to other entrenched constitutional rights such as the presumption of innocence (s. 11(d)), the right not to be arbitrarily detained or imprisoned (s. 9), and the right to liberty and security (s. 7). Section 11(e) means both that restrictions attached to bail, such as the quantum of any monetary element, should be reasonable, and that an accused person has a right not to be denied bail without "just cause" (Rogin 2014).²² To uphold this right, courts should ensure that pre-trial release is the norm, and that both onerous bail restrictions and pre-trial detention are used as a last resort (*R v Hall*). Indeed, the "ladder principle," which guides bail practices in Canada, favours pre-trial release as early as possible, on the least onerous grounds. The subsequent steps on the ladder are release with non-monetary conditions, release with various monetary conditions, and finally detention as a last resort. Prosecutors must show sufficient cause for each step of the ladder (*R v Anoussis*).

Despite these principles, in the last decade, the remand custody population has consistently been greater than the population of actually sentenced offenders in Canada – a situation that many are calling a bail crisis (Statistics Canada 2016; Rogin 2014). In 2014/2015, 57% of the custodial population were in remand custody, awaiting a bail hearing or awaiting trial (Statistics Canada 2016). Indigenous accused are over-represented in this population. Rogin (2014) analyzed 25 reported bail cases involving Indigenous accused between 2002-2014, arguing that not only does the bail crisis disproportionately affect Indigenous people, but that *Gladue* factors have been applied in a way that exacerbates the crisis.

As acknowledged by the Supreme Court in *Gladue*, Indigenous accused are more likely to be denied bail due to, among other factors, bias in the criminal justice system (para 65).²³ Rogin argues that current bail practices are not adhering to the ladder principle, particularly for marginalized individuals. Discretion in bail decisions imports "inherent biases and discriminatory attitudes", as the assessments of risk of flight and to public safety "is impacted by factors such as race, class, Aboriginal heritage, [and] ability" (p. 44). Such perceived risk is managed by the use of sureties and increasingly onerous pre-trial release conditions (Rogin 2014, p. 44). Considering the socio-economic conditions and existing criminal records of many Indigenous accused, they are often unable to access pre-trial release, or are released with overly stringent bail conditions (Kellough and Wortley 2002; Rudin 2005).

²⁰ *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534; *United States v Leonard*, 2012 ONCA 622 affirmed in *R v Anderson*, 2014 SCC 41.

²¹ Alberta, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan, and the Yukon.

²² Rogin cites *R. v. Pearson*, [1992] 3 S.C.R. 665, *R. v. Morales*, [1992] 3 S.C.R. 711 and affirmed in *R. v. Hall*, 2002 SCC 64, [2002] S.C.J. No. 65 at para. 16.

²³ See also Aboriginal Justice Inquiry of Manitoba (1991); *R v Summers*; Kellough and Wortley's (2002) study which concluded that Indigenous persons in Manitoba were less likely to be released on bail than non-Indigenous persons.

Rogin's analysis of cases concludes that the application of *Gladue* to bail has been sporadic and lacking in clarity, deemed relevant in some cases and not explicitly recognized in others. As *Gladue* is a framework for sentencing, applying it to bail hearings without adaptation could violate the presumption of innocence. For example, examining background factors that brought the person before the court is inappropriate in the bail context because such evidence is meant to diminish an offender's moral culpability in sentencing. It would not only take more time to provide such information – which would prolong the amount of time that Indigenous accused persons spends in pre-trial custody compared to non- Indigenous accused, but it also presupposes that the accused will be found guilty. Rogin similarly critiques references to rehabilitation and restorative justice in bail hearing decisions, which justify onerous release conditions “more directed at ‘reforming’ the accused than with concerns related to the law of bail” (p. 80). It is problematic if pre-trial release conditions begin to look like a probation order or conditional sentence, since at this point the accused has not been convicted of an offence and hence does not require “reform.”²⁴

Echoing Gevikoglu (2013), Rogin notes also that courts tend to over-emphasize Indigenous heritage when applying *Gladue* without drawing connections to the legacy of colonialism. Ultimately, Rogin is concerned that the misapplication of *Gladue* could perpetuate the same stereotypes and biases which contributes to the over incarceration of Indigenous persons in the criminal justice system:

“However unintended, the erosion of the presumption of innocence for Aboriginal accused re-enforces a bias that Aboriginal people are ‘criminals’, more likely to commit crimes, and more likely to be guilty than their non-Aboriginal counterpart.” (p. 55)

Additionally, being denied bail leads to criminalization through pre-trial custody. Accused persons charged with minor offences may need to wait months in pre-trial custody, but may face little to no jail time if they plead guilty (Rogin 2014; Rudin 2015). The incentive to plead guilty is troubling: an innocent accused person could be criminalized through pre-trial custody, and should they be charged with an offence in the future, they will have even less possibility of accessing bail. Needless to say, this further exacerbates the bail crisis and the over incarceration of Indigenous persons.

Rogin concludes with recommendations for the application of *Gladue* to bail. Instead of examining factors that brought the accused person before the court and considering ways to rehabilitate and to adhere to restorative justice, bail courts should consider the factors and practices that disproportionately affect Indigenous peoples and contribute to their over incarceration. These factors include racial bias and the tendency to over-charge Indigenous persons in policing, the over-reliance on sureties, and the use of overly stringent forms of release. In order for the application of *Gladue* to bail to serve its intended purpose, the framework must be adapted to the bail process so as to not erode the presumption of innocence for Indigenous accused, and in a way that acknowledges the systemic bias in the bail process.

²⁴ See Rogin (2014)'s discussion of *R v Robinson*, *R v P.(D.D.)*, *R v Misquadis-King*, and *R v Pierce*

4. *Gladue* in Practice: Initiatives and Model Programs

The summary of literature in the above sections highlights the complexities of addressing Indigenous overrepresentation; to do so requires much more than just changes in sentencing principles. Programs and resources are needed in every stage of the criminal justice process to meaningfully implement *Gladue* principles: from courtworkers who prepare pre-sentence information for judges, to alternate sentencing processes that operate in accordance with Indigenous legal tradition, to community-based alternatives to incarceration both on reserves and in urban centres.

A number of initiatives aimed at alleviating Indigenous over incarceration exist across Canada, many of which are funded by the federal, provincial, and territorial governments. Governments also partner with NGOs – often Indigenous community organizations – to deliver services. These initiatives include: the establishment of specialized Indigenous courts, the implementation of restorative justice based alternatives to incarceration, access to courtworkers, awareness training for the judiciary, Indigenous police programs, and culturally appropriate correctional programs. From their development to their implementation, these programs attempt to adapt to the needs and values of the Indigenous community for which they are intended. While this section will not be an exhaustive list of existing initiatives, it will highlight and describe a number of programs that have been key to the implementation of *Gladue* principles.

Not all programs mentioned have been evaluated. Nonetheless, they are considered best practices because they reflect *Gladue* principles, whether they were established before or as a response to the addition of s. 718.2(e) and the *Gladue* decision. The initiatives and programs are organized into the following categories: courts specializing in Indigenous matters, community justice committees, Indigenous courtworker programs and restorative justice programs.

4.1 Courts Specializing in Indigenous Matters

The establishment of courts specializing in Indigenous matters is considered one of the most direct and representative implementations of *Gladue* principles. These courts aim to ensure that charges against Indigenous individuals are heard in a way that would give sufficient consideration to the unique circumstances of Indigenous accused and offenders in a culturally appropriate environment. Specialized Indigenous courts are part of the provincial courts system, and thus have the same powers. Depending on how the court is structured, non-Indigenous individuals may be tried in an Indigenous court. There is some debate on whether non-Indigenous peoples should be tried in Indigenous courts: while some argue that where a crime is committed should determine where judgment takes place, others feel that a specialized Indigenous court may not be suitable for non-Indigenous accused persons who do not share the same values and beliefs. To date, eight jurisdictions have established specialized courts for Indigenous accused persons (Department of Justice Canada 2013).²⁵

²⁵ These include: Alberta, British Columbia, Nova Scotia, Nunavut, Ontario, Saskatchewan, Yukon, and Northwest Territories. A specialized court is supported by a range of services that ensure that information about an Indigenous accused's/offender's background and the kinds of non-custodial sentences available to Indigenous accused/offenders are incorporated systematically into the bail and sentencing decision-making procedures in order to allow the court to prepare decisions in keeping with the

4.1.1 The Gladue Court at Old City Hall in Toronto

In the wake of the *Gladue* decision, there was concern among judges that criminal justice system actors did not have the resources to pay adequate attention to the background and systemic factors of Indigenous accused and offenders, particularly in urban areas. In Toronto, a group of judges, academics, and community organizations met for a year to discuss their concern. Their efforts culminated in the creation of the Gladue Court at Old City Hall (OCH). As the first Indigenous court in an urban environment in Canada, the Court began offering its services in 2001, and is voluntary and open to all self-identifying Indigenous persons (Aboriginal Legal Services Toronto 2016). Currently, there are three additional Gladue Courts in Toronto, as well as in Sarnia, London, Brantford, and Thunder Bay (Clark 2016). As well, a number of other courts are serviced by Gladue Report Writer programs funded by the Ontario Ministry of the Attorney General, Legal Aid Ontario, and the Department of Justice Canada (Department of Justice Canada 2013).

The Gladue Court at OCH is a sentencing and bail hearing court that takes a case management approach. While the Gladue Court itself is not set up too differently from other OCH courts, it aims to incorporate Indigenous values, principles, and conceptions of justice into court processes and proceedings. Personnel at the court including judges, Crown and duty counsel all receive Gladue-related training, and specially trained Indigenous courtworkers play a critical role in working with the accused.

Accused persons at OCH are given opportunities as early as possible to identify as Indigenous by the presiding justice of the peace, duty counsel, Crown counsel and Indigenous courtworker. Once they identify as Indigenous, an Indigenous courtworker explains the option of the Gladue Court, and liaises with Crown Counsel about the possibility of diversion. An accused person released on promise to appear can be diverted to Community Council at Aboriginal Legal Services upon a guilty plea, or may proceed to a Gladue Court hearing, where charges may be withdrawn or stayed, or where the accused may proceed to trial court. An accused person not granted bail can apply to the Toronto Bail Program, Gladue Supervision, which is designed to cover bail in the absence of a surety. The program allows the accused person to work with a Gladue bail supervisor to design a plan of care (a release plan).

Upon a guilty plea, Indigenous accused diverted to Community Council are able to access culturally appropriate rehabilitation²⁶. The Community Council at Aboriginal Legal Services Toronto is a “restorative circle of Indigenous volunteers,” including Indigenous Elders, who work with the client to discuss why the offence occurred, and set up a rehabilitative plan of care. Green (2012) notes that Community Councils existed prior to colonization, and the Gladue Court

directive of the Supreme Court in *Gladue*. Additionally, those working in the court (e.g. defence lawyers, Crown attorneys/prosecutors and judges) are knowledgeable of the range of programs and services available to Indigenous people.

²⁶ “In communities where these programs exist, Indigenous accused have the option to apply to have their charges diverted (deferred) out of the courts and placed into the Aboriginal Community Justice Program. Each program has an operational protocol agreement with their local Crown Attorney’s office that outlines the process, the charge types, and eligibility requirements to participate in the program.” The Crown exercises discretion in choosing not to prosecute based on a variety of factors. Ontario Federation of Indigenous Friendship Centres, 2013. (<http://www.ofifc.org/about-friendship-centres/programs-services/justice/aboriginal-community-justice-program>)

at OCH is the first initiative that has adapted the concept to an urban environment. Through the plans of care, Indigenous individuals are connected to culturally relevant services suited to their needs, which can include, but are not limited to: harm reduction, sweat lodges, support for anger management, counselling for substance abuse, housing, education and training, and employment assistance. Through diversion, Indigenous offenders have their charges withdrawn, and are often referred to opportunities to engage with their culture, something that is often lacking in urban centres. Indigenous accused who are not diverted may also work with Indigenous courtworkers to design a plan of care, which is then provided to the judge in a Gladue Report, and is usually adopted (Green 2012). Because individuals before the court actively participate in designing their plans of care, these rehabilitative programs “have an impressive success rate... as measured by the completion of court-directed programs” (Green 2012, p. 7).

An independent evaluation of the Gladue Court at OCH was conducted by Clark (2016), who interviewed court officials, staff from Aboriginal Legal Services, accused persons, and others in the Indigenous criminal justice process, and also reviewed files, statistics, and conducted court observation. He provided some recommendations, such as taking a “circle” approach in Gladue Court hearings, as is done by the Aboriginal Youth Court in Toronto, or at least holding occasional sentencing circles so that there are opportunities for a more culturally appropriate sentencing format. Clark is also concerned that, since accused persons can only be diverted upon admission of guilt, Indigenous accused have an incentive to plead guilty in order to access rehabilitative programs. A defense counsel interviewed by Clark remarked that Gladue Courts are “a safe place for [his] clients to plead guilty” (p. 46). More research undoubtedly needs to be done on the issue.

Nonetheless, Clark concluded that the Gladue Court is meeting its objectives, has maintained flexibility, and along with Aboriginal Legal Services, Community Council, and the Toronto Bail Program, Gladue Supervision, is “providing a critically important service to Aboriginal individuals, their families and the larger Aboriginal community” (p. 4). Similarly, Justice Melvyn Green (2012), who presides over the Ontario Court of Justice at OCH, explained the significance and the important role of the Court:

“The Court enables cross-institutional understanding. It provides positive reasons to identify as Aboriginal and to embrace that identity. It affords a channel for community-building. And it facilitates, or at least accommodates, the catharsis and insight that sometimes accompanies focused introspection through the telling of personal accounts of cultural, familial and personal disintegration.” (p. 7)

Indeed, clients who had gone through the Gladue Court and diversion to Community Council were less likely to re-offend when compared to Indigenous offenders in other jurisdictions.

4.1.2 Tsuu T’ina First Nation Court in Alberta

Established in 2000, the Tsuu T’ina First Nation Court is on the Tsuu T’ina reserve, and its judge, prosecutors, court clerks, court social workers, probation officers, Peacemaker and some defence counsel are Indigenous. The court blends two systems: the Provincial Court of Alberta

and the peacemaker process – a circle process that involves the victim and offender, their respective families, and volunteers and resource personnel. It presides over Tsuu T’ina members, non-Tsuu T’ina Indigenous persons, and non-Indigenous persons, and has jurisdiction over criminal justice, youth justice, and First Nation by-law offences.

The Court uses peacemaking traditions that reflect the values of the Tsuu T’ina Peoples, including smudging with sage or sweet grass. Local Peacemakers and Elders are directly involved in the court process and review the cases diverted from the justice system as well as cases that require dispute resolution. Cases can be referred to the Peacemaker’s office by schools, police, provincial courts, the Tsuu T’ina Band Administration or by a community member (Alberta Justice and Attorney General and Alberta Solicitor General and Public Security 2006). The Peacemaker process occurs only if the victim agrees to participate, and homicides and sexual assault offences are excluded from this process (Proulx 2005). The associated Office of the Peacemaker operates a peacemaking program that employs culturally appropriate mediation and alternative dispute resolution techniques (Department of Justice Canada 2015).

4.1.3 First Nations Courts in British Columbia

There are currently four First Nations (Gladue) Courts in British Columbia, located in North Vancouver, Duncan, Kamloops, and New Westminster. Two more First Nations Courts have been proposed, by the Tsilhqot’in National Government and Sto:lo Tribal Council (Dhillon 6 March 2016).

Indigenous persons who have pleaded guilty to a criminal offence can be referred to a First Nations Court for most bail and sentencing hearings. The Courts take a restorative justice approach to sentencing. The judge hears from the offender; victim; their respective family, friends, and community members; Crown counsel; defense counsel; as well as others involved with the court, such as Elders, social workers, Native Courtworkers, counsellors, probation officers, and police officers. The judge works with all parties involved to devise a healing plan, which aims to help the offender, the victim, and the community. Through the healing plan, the offender will take responsibility for their actions, work on the root causes of the offence, and be asked to return to the court so that the judge can monitor their progress (Legal Aid BC 2014).

4.1.4 The Cree-speaking Court and the Dene-speaking Court in Saskatchewan

Based in Prince Albert, the Cree-speaking Court was established in 2001, and is composed of Cree judges, court clerks, Crown prosecutors, legal aid lawyers, and victim services. The court travels to serve nearby Indigenous communities, including Pelican Narrows, Sandy Bay, Montreal Lake, and Big River First Nations. Participants may request to speak in English or Cree. The peacemaking process is used where appropriate for the situation.

In 2006, the Dene-speaking Court in Meadow Lake began providing services in both the Cree and Dene languages with the assistance of translators. The presiding judge is Cree and the court uses a restorative approach (Whonnock 2008).

4.1.5 Nunavut Court of Justice

Established in 1999 with the creation of Nunavut, the Nunavut Court of Justice is the only unified criminal court in Canada. Although not a designated Gladue Court, Gladue elements are in a sense built into the court because of the mostly Inuit population in Nunavut. One of the Court's main objectives is to provide an "efficient and accessible court structure capable of responding to the unique needs of Nunavut" (Clark 2011, p. 345). It aims to provide culturally appropriate services and engage with communities through providing court interpretation services, utilizing elders' panels and youth panels in sentencing, and other community-based sentencing alternatives.

As Nunavut has the highest rate of crime in Canada – in violent crimes, property related offences, and administration of justice offences, the Nunavut Court of Justice faces unique challenges. Judges hear cases in Iqaluit, and also spend a significant amount of time in circuit due to the territory's large geographical area. Hearings can at time be delayed due to weather. Language is a barrier for non-Inuit lawyers, judges, and staff, as Inuktitut or Innuinaqtun is the first and often only language for most community residents. Interpreters and Inuit courtworkers play a crucial role in minimizing court delays, which can be especially problematic since offenders and victims often live in small communities.

Clark (2011) observed that in order for the Court to function effectively and meet its goals, there needs to be more resources for hiring, training and supporting legal aid lawyers, Inuit courtworkers, and community-based Justices of the Peace. Legal aid lawyers have had to take on additional work since the *Gladue* decision in preparing pre-sentence reports, as nearly all sentencing hearings are Gladue hearings in Nunavut. Inuit courtworkers, who are funded through a cost-sharing agreement between the federal and Nunavut Departments of Justice, play a critical role in case preparation, communicating between lawyers and clients, and follow up. Justices of the Peace, depending on their level, may preside over trials relating to summary convictions, Nunavut statutes and bylaws; breach of conditional sentence hearings; peace bond applications; child welfare hearings; and may even act as Youth Court judges and issue telewarrants. As Justices of the Peace do not have to be lawyers in Nunavut, there is flexibility for a member of the community who speaks Inuktitut or Innuinaqtun to be trained to adjudicate certain matters, so that disputes do not have to wait for circuit judges to travel from Iqaluit.

In addition to greater resource provision to legal aid lawyers, Inuit Courtworkers, and Justices of the Peace, Clark also recommends the implementation of community-based restorative alternatives to the court system such as community justice committees and youth justice committees. As there is concern amongst critics that circuit courts lacking knowledge and understanding of remote communities may not have sufficient credibility and legitimacy in the eyes of community residents, community-based alternatives could both complement the court system and relieve some of its responsibilities.

4.2 Indigenous Courtworker Programs

Indigenous courtwork programs are found in every province and territory across Canada, with the exception of PEI and New Brunswick. Nationally, over 180 courtworkers provide services to

approximately 60,000 Indigenous clients in over 450 communities each year.²⁷ Indigenous courtworkers provide support to Indigenous accused throughout various court processes, including translation, interpretation, and guidance. Courtworkers also refer accused persons to other services or organizations if needed, ensure liaison with other agencies, and follow up on the cases (Department of Justice Canada 2008). Indigenous Courtworker Programs are considered to be complementary to other Aboriginal Justice initiatives, and Indigenous courtworkers play an essential role as frontline workers of the criminal justice system.

In a number of jurisdictions, Indigenous courtworkers play a critical role in the preparation of Gladue information prior to sentencing. Among the programs currently in operation, the Gladue Caseworker Program established by Aboriginal Legal Services of Toronto was independently evaluated. Over a two-year period, Campbell Research Associates (2008) interviewed judges, Crown attorneys (federal and provincial), defence counsel, Gladue caseworkers, and the Gladue program manager. Relevant records such as Gladue caseworkers' daily logs and client records were also reviewed.

Gladue Reports were generally requested by judges and defence counsel, and accused persons generally agreed that a report should be prepared (Campbell Research Associates 2008). If a Gladue Report was refused by the accused, it was usually because the accused was in remand and did not want to delay their sentencing, or because the accused person did not want to have family members contacted by a courtworker. The cases analyzed by the evaluation indicated that sentencing was completely consistent with Gladue Report recommendations in over 60% of the cases, and mostly consistent in 20% of the cases.

4.3 Other Restorative- and Community-Based Alternative Programs

Through the Aboriginal Justice Directorate (AJD), the Department of Justice Canada supports Indigenous community-based justice programs that offer alternatives to mainstream criminal justice processes. AJD programs use a restorative justice approach, and their services are based on the justice-related priorities and designed to reflect the culture and values of the communities in which they are situated. Clients are referred from over 750 communities across Canada, including urban, rural, and Northern communities, both on- and off-reserve. There are also many restorative- and community-based alternative programs funded exclusively by the provinces and territories. A number of programs are based in the circle principle, and in general, programs are characterized by the community's active participation, the offender taking responsibility and being held accountable, the intervention on the causes of crime, the principles of reparation and the offender's positive reintegration into society. There are diverse approaches to Indigenous, restorative, and community based programs, reflecting the diversity of Indigenous peoples in Canada. This section features examples of (1) community justice committees (2) healing circles and (3) sentencing circles.

4.3.1 Community Justice Committees

²⁷ For more information, including a list of ACWs, see: <http://justice.gc.ca/eng/fund-fina/gov-gouv/acp-ipc/index.html>.

Generally, Community Justice Committees are made up of local volunteers who partake in the dispute resolution process. Certain criminal matters may be diverted to Community Justice Committees by the Royal Canadian Mounted Police (RCMP) or Crown Prosecutors. Offences that are eligible for diversion include theft, mischief, breaking and entering, alcohol and drug offences, vandalism, and minor assaults. Like the Community Council at Aboriginal Legal Services Toronto, an individual may be diverted only after accepting responsibility for the offence, and the community justice process is voluntary. Taking a restorative approach, Community Justice Committees hear from all parties involved in an offence when creating a resolution that aims to repair the harm done by the offence. Possible resolutions include but are not limited to community service, restitution, counselling and apologies (Northwest Territories Justice).

There are Community Justice Committees in nearly all provincial and territorial jurisdictions. In Ontario, for example, there are ten community justice programs for adults serving 24 communities. In Québec, community justice committees may identify certain measures that the court could impose in the sentencing context or act as mediators in certain disputes between members of the community. They may also work with enforcement or probation officers to follow up on measures set out in an order (Ministère de la justice du Québec 2008). In Alberta, the Alexis Restorative Justice Initiative promotes information sharing between the court system and the Alexis Justice Committee, Elders, and other members of the community. The justice committee plays an important role in sentencing by identifying the cultural and social resources available on reserve. The committee also assists the probation officer in monitoring offenders and preparing reports on offenders' compliance with probation conditions.

While there are many community justice committees across the country, inadequate information sharing, coordination, and integration between justice system stakeholders and community justice programs remains a challenge (Department of Justice Canada 2013). Greater integration and communication would undoubtedly improve the effectiveness of service delivery for Indigenous persons in the criminal justice system.

4.3.2 Healing Circles

Like other forms of alternative programs with a restorative component, healing circles involve the participation of the offender, the victim (if they wish to participate), their respective families, and other community members such as Elders. Taking a holistic approach, healing circles aim to reach a consensus on how to repair the harm done by the offence, which includes its effects on the relationships of the offender with the victim and the community. They also address the underlying causes of the offence so as to rehabilitate the offender. Similar to community justice committees, resolutions from healing circles can include specialized counselling programs, community service with an Elder's council, potlatch or other remedies specific to the offender's cultural traditions, as well as direct restitution. As an alternative to formal court proceedings, the circle process tends to better serve the needs of Indigenous communities, and is in line with Indigenous conceptions of justice. A healing circle or other form of restorative justice process may be part of a set of conditions imposed by the court, where the court would enforce the recommendations of the circle, as well as additional conditions that it sees fit (Justice Education Society 2016).

As was noted in *Gladue*, restorative approaches are not necessarily “lighter sentences,” but may in fact be a “greater burden on the offender than a custodial sentence” (para 72). As offenders must take responsibility for and accept the harm that they caused, a healing circle process “is intensive and in many ways more difficult than a passive jail sentence” (Justice Education Society 2016). Victims who participate may also find the process less traumatic than the court process. Some examples of healing circles include: Biidaaban: The Mnjikaning Community Healing Program in Ontario; the Community Holistic Justice Program in Newfoundland and Labrador; and the Prince George Urban Aboriginal Justice Society in British Columbia. The Mi’kmaq Confederacy of Prince Edward Island’s Aboriginal Justice Program provides a series of circle processes for the various stages of the criminal justice process. The circles serve the objectives of Conflict-Resolution, Early Intervention, Sentencing, Healing, and Reintegration (Mi’kmaq Confederacy of PEI).

4.3.4 Sentencing Circles

Based on the traditional circle process, sentencing circles facilitate community participation in sanctioning an offender. Community members join the judge, the offender and the victim to discuss the factors that contributed to the offence, and options for sanctions and community reintegration. The circle often will arrive at recommendations for a community sentence that includes some form of restitution, community service, counselling, and possibly a period of custody. Unlike community justice committees and healing circles, sentencing circles are not outside of the court process. The circle’s recommendations do not have to be adopted by the sentencing judge (Mi’kmaq Confederacy of PEI).

There are three types of sentencing circles: (1) the simple circle where accused persons, victims, their respective families, community representatives and members of the justice system are together in the same circle; (2) the double circle where the persons who form the simple circle are together in an inner circle, and onlookers sit in an external circle (they may move their chairs and join the inner circle if they wish); (3) separate circles, which provide for two stages in the sentencing process. In the first stage, a circle known as the “sentencing council” meets without a judge being present. Once this first committee has reached a consensus, the second circle is organized with the judge present, who is informed of the council’s recommendations (Jaccoud 1999).

Sentencing circles are used throughout Canada and are integral to the provision of culturally appropriate processes for Indigenous offenders.

4.3.4 Community Holistic Circle Healing Program (CHCHP) at Hollow Water

The Community Holistic Circle Healing Program at Hollow Water is one of the most documented restorative justice programs in Canada (see, for example, Bushie 1999; Green 1998; LaPrairie 1998; Department of Justice Canada 2009; Umbreit et al. 2002). The program was established in 1983 by social service providers looking to address problems faced by youth in the community, such as truancy, substance abuse, and suicide. In the process, social workers identified victimization from sexual abuse as the underlying cause for many of the community’s

issues. According to Ross (1994), 75% of Hollow Water's population had been victimized by sexual abuse and 35 % were offenders.

The CHCHP is both a healing circle and a sentencing circle (Bushie 1999; Jaccoud 1999). Evaluations of the program have been generally positive, indicating benefits to both participants and the community at large (Native Counselling Services of Alberta, 2001; Lajeunesse and Associates, 1996). The program nonetheless faces a number of challenges. Since the process requires public acknowledgement of sexual abuse, the confidentiality of participants is necessarily compromised. Additionally, the complexity of social bonds in the community can create distrust throughout the healing process.

In summary, the large variety of programs for Indigenous persons in the criminal justice system reflects the diversity of Indigenous communities, as well as the possibilities of making the criminal justice process more restorative, community-based, and culturally appropriate.

While these programs provide valuable services for Indigenous accused and offenders, we note also the criticism that restorative justice approaches need to be better integrated into the court system, including Gladue Courts. Relying on community efforts alone may not be sustainable in the long run:

“These community-mediated efforts at restorative justice are logistically challenging and often time-consuming and emotionally draining. They are, from a court-management perspective, inefficient. They may also, over time, produce a kind of justice fatigue by exhausting the energy and good will demanded of the host communities and, in particular, community Elders.” (Green 2012, p. 9)

The lack of independent evaluative studies of many existing programs, as well as greater efforts of integrating programs into the mainstream court system remain areas for future work.

5. Participants' Experiences in *Gladue*-Related Programs

There has not yet been extensive or comprehensive research on the experiences of participants of the criminal justice system in *Gladue* related programs, and existing research is largely qualitative. For example, participants of community stakeholder engagement sessions run by the Aboriginal Justice Directorate (AJD) have generally provided anecdotal feedback that culturally appropriate programs are better suited to responding to clients' circumstances.²⁸ This section will highlight some of the experiences of (1) accused persons/offenders, (2) members of the judiciary, and (3) defense council, while noting that further and more comprehensive research should be done in this area.

²⁸ According to the Aboriginal Justice Directorate at the Department of Justice Canada, further engagement is ongoing and a report is forthcoming.

5.1 Experiences of Accused Persons / Offenders

5.1.1 The Lived Experiences of Clients of the Community Council Program

In his thesis, Craig Proulx (2001) noted that the lived experiences of clients of the Community Council Program (CCP), the diversion program at Old City Hall, were often shaped by the impacts of residential schools and the child welfare system. While some clients were weary of defining the Indigenous experience as being based predominantly on victimization, the effects – direct or intergenerational – of abuse in residential schools and the child welfare system are for many an underlying cause of substance abuse and criminality.

Experiences of discrimination were prevalent at all stages of the mainstream criminal justice system. Clients described the perception of being charged simply for being Indigenous – whether due to overt police racism or a presumption of criminality rooted in negative stereotypes of Indigenous people normalized in Canadian culture. As many CCP clients lived on the streets, they were also more visible to law enforcement. CCP members and staff described clients arriving at their offices after being released from custody with injuries from being beaten, and note also the excessive use of strip searches by police. In short:

“The racism, stereotypical thinking, and physical/ mental/ spiritual/ emotional abuse and torture by the police are seen as endemic... Aboriginal knowledge that they are more likely to be picked up for a crime than non-Aboriginals is a form of mental abuse.” (p. 71)

CCP clients and duty counsel also described the phenomenon of lawyers pressuring accused persons to plead guilty without proper investigation so as to spend less time on each file, though Proulx notes that evidence of this is anecdotal. Clients cited also the lack of knowledge and understanding of the Indigenous experience on the part of both counsel and judges presiding over their case.

5.1.2 Experiences at the Gladue Court

In an independent evaluation of the Gladue Court at Old City Hall, Clark (2016) interviewed accused persons awaiting hearings, as well as people who had been diverted to the Community Council Program.

Over the 7-month evaluation period, approximately 94 Indigenous persons appeared at the Gladue Court. In general, despite the fact that cases took longer to process at OCH, Indigenous individuals generally had positive feedback about their experiences. Participants noted, for example, that “in this court they take you seriously” (p. 26), “they take the time to talk to you, see what you need, and figuring out a way to help you” (p. 40). For those who have had cases heard at another court, the bail process at Old City Hall was seen as “fair, reasonable, and culturally relevant,” in part because clients of the Toronto Bail Program, Gladue Supervision participate in the designing of their release plans. Similarly, Indigenous clients had positive feedback about participating in rehabilitative programs through diversion to Community Council.

While participants indicated that they would tell other Indigenous accused about the Gladue Court, they also pointed to the need for greater awareness in other courts around the Greater Toronto area. As the opportunity to identify as Indigenous depends on court professionals, Clark recommended that there be greater outreach and education for judges, Crown, and defence counsel at other courts in the city. In addition, some participants questioned why the court was not structured as a sentencing circle. While there have been some attempts at using the circle format at the Gladue Court, Clark notes that turning completely to sentencing circles would cause major delays and is not feasible at this time.

5.2 Experiences of Members of the Judiciary

5.2.1 Judges' experiences with *Gladue*

While the judiciary has not spoken extensively about their experience with *Gladue*, it is clear that sentencing reform alone will not be adequate to address overrepresentation, as the Supreme Court notes in *Gladue* (para 65). In *R v Dantimo*, Judge O'Neill writes that the difficulty for sentencing judges is that they "can only deal with the symptoms of the problem... and not the causes" (para 31).

Justice Melvyn Green (2012), who presides over the Gladue Court at OCH, is also critical of "the Supreme Court's repeated invocation of 'restorative justice'" in *Gladue* and *Ipeelee* as the Court does not mention anything more specific, or provide "a roadmap" for how restorative justice might be implemented (p. 8). For Justice Green, the Gladue Court falls short in that it replicates an adversarial model, instead of creating a process more in line with a restorative justice approach.

5.2.2 Judges' Perception of Restorative Justice Programs

Belknap and McDonald (2010) analyzed the experiences of 27 judges regarding the use of Indigenous sentencing circles in intimate-partner abuse cases. Most judges noted that the benefits of using sentencing circles was greater community involvement and awareness, as well as the fact that the accused takes responsibilities for their actions before the circle is convened.

The judges considered the following as essential conditions that must be met to use sentencing circles: the victim's consent; support for the victim; the skills and ability of the community to deal with intimate-partner abuse cases (i.e. that the members of the circle are physically and emotionally available, that they understand the dynamics of intimate-partner abuse, etc.) and that the voluntary programs ordered by the court, such as rehabilitation programs on substance abuse, anger management, counselling are completed by the parties involved.

Judges noted that the most challenging aspect of sentencing circles was the time and resources required to convene and conduct them. Some communities lack the capacity to effectively convene them, notably because of a lack of neutrality on part of members of the circle. Some

judges also questioned sentencing circles' effectiveness in preventing abuse and were concerned about the safety of victims in the absence of incarceration.

5.3 Defense Counsel Experiences with *Gladue*

McDonald (2008) examined the effects of *Gladue* on defense counsel, which revealed a number of barriers to the implementation of *Gladue* principles. Many defense counsel indicated that they had not yet integrated *Gladue* into their strategies, as they were under the impression that it would not carry much weight in plea bargaining. Some were under the impression that *Gladue* principles were discriminatory towards non-Indigenous offenders, echoing some of the post-*Gladue* critique which is addressed by the Supreme Court in *Ipeelee*. Others felt that s. 718.2(e) would have only been successful if the offenders had lived on a reserve – which is a misconception addressed by the *Gladue* decision itself. Defense counsel also noted that accused persons in remand sometimes refused the preparation of a Gladue Report, as it would have lengthened their time in custody. Finally, counsel pointed to the lack of culturally appropriate alternatives to incarceration and limited access to well-prepared Gladue Reports as other barriers to the implementation of *Gladue* principles.

On the other hand, Clark's 2016 evaluation of the Gladue Court paints a different picture. In addition to accused persons, courtworkers, judges, and Community Council members, Clark also interviewed defense counsel at the Gladue Court. Defense counsel used Gladue Reports prepared by courtworkers, but noted that it was often difficult to bring up accused persons' background information from their Gladue Reports in court, as accused persons who had experienced trauma did not "want the painful details of their life raised in a forum" (p. 29). Defense counsel familiar with Gladue Court proceedings would speak about the Gladue Report in general terms, and point the presiding judge to a specific page; however, not all lawyers were sensitive to this. Defense counsel also indicated that culturally relevant release plans made it easier for judges to grant bail and diversion (p. 34).

6. Conclusion

This report has examined legislative, judicial, policy, and community efforts at addressing the overrepresentation of Indigenous offenders in the Canadian criminal justice system. Section 2 provided a brief statistical overview of the overrepresentation of Indigenous offenders, as well as a summary of *Gladue*, *Ipeelee*, and commentary in the aftermath of *Ipeelee*. Section 3 reviewed the literature surrounding overrepresentation, focusing on the practical challenges to the application of *Gladue* principles; criticism of the approach taken by judicial interpretation of s. 718.2(e); as well as other considerations such as offenders with fetal alcohol spectrum disorder and the application of *Gladue* to bail. Section 4 featured initiatives aimed at the implementation of *Gladue* principles – these programs aim to provide more restorative and culturally appropriate sentencing processes, sanctions, as well as rehabilitation programs. The final section highlighted the experiences of accused persons, judges, and defense counsel, noting that more comprehensive work about the experiences of justice system participants is required.

Indigenous overrepresentation is complex, with roots in factors such as the ongoing legacy of colonialism and systemic discrimination in the criminal justice system. While sentencing judges work at the frontlines of the criminal justice system, changing sentencing principles alone will not be a sufficient response, as was acknowledged by the Supreme Court in *Gladue*. The creation of Gladue Courts and other alternative justice programs for Indigenous offenders demonstrate the importance of extra-judicial solutions. At the Department of Justice Canada, the Aboriginal Justice Directorate (AJD) supports Indigenous community-based justice programs which offer alternatives to mainstream criminal justice processes. The AJD's key objectives are to assist Indigenous peoples in assuming greater responsibility for the administration of justice in their communities; to incorporate Indigenous values within the Canadian justice system; and to reduce the rate of victimization, crime, and incarceration among Indigenous communities. AJD programs take a restorative approach, offer unique services based on the justice-related priorities of the communities in which they are situated, and are designed to reflect Indigenous cultures and values. Many AJD funding recipients incorporate *Gladue* in their everyday work. As this report has demonstrated, consistency in funding and the ongoing evaluation of these programs will be crucial in ensuring that Indigenous persons have access to a culturally appropriate criminal justice system across Canada.

Efforts to implement *Gladue* principles and reduce overrepresentation going forward should also be informed by the call by both the Truth and Reconciliation Commission and the United Nations Declaration on the Rights of Indigenous Peoples for the “recognition, revitalization, and full integration and implementation” of Indigenous legal tradition in Canada. While one view of s. 718.2(e) and Gladue-related initiatives is that their eventual success in eliminating overrepresentation would mean that they are no longer required, they should instead be thought of as a first step towards greater Indigenous self-determination in the criminal justice system.

Jurisprudence

Frontenac Ventures Corporation v Ardoch Algonquin First Nation, 2008 ONCA 534, 91 OR (3d) 1.

R v Anoussis, 2008 QCCQ 8100, 242 CCC (3d) 113.

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R v Jenson [2005] 74 OR (3d) 561, 195 CCC (3d).

R v Knott, 2012 MBQB 105; 278 Man R (2d) 82.

R v Kokopenace, 2013 ONCA 389, 115 OR (3d) 481.

R v Kreko, 2016 ONCA 367, 131 OR (3d) 685.

R v Morris, 2004 BCCA 305, 186 CCC (3d) 549.

R v Nasogaluak, 2010 SCC 6 at 39

R v Pitawanakwat, [2003] OTC 1049, 61 WCB (2d) 597.

R v Ramsay, 13 BCAC 176

R v Robinson, 2009 ONCA 205, 95 OR (3d) 309.

R v Sim [2005] 78 OR (3d) 183, 201 CCC (3d) 482.

R v Sutherland, 2009 BCCA 534, 281 BCAC 33.

R v Wesley, 2014 BCCA 321, 116 WCB (2d) 316.

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R. v Borde 2003 CanLII 4187 (ON CA), (2003), 63 O.R. (3d) 417, at para. 39

R. v Morales, [1992] 3 S.C.R. 711

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