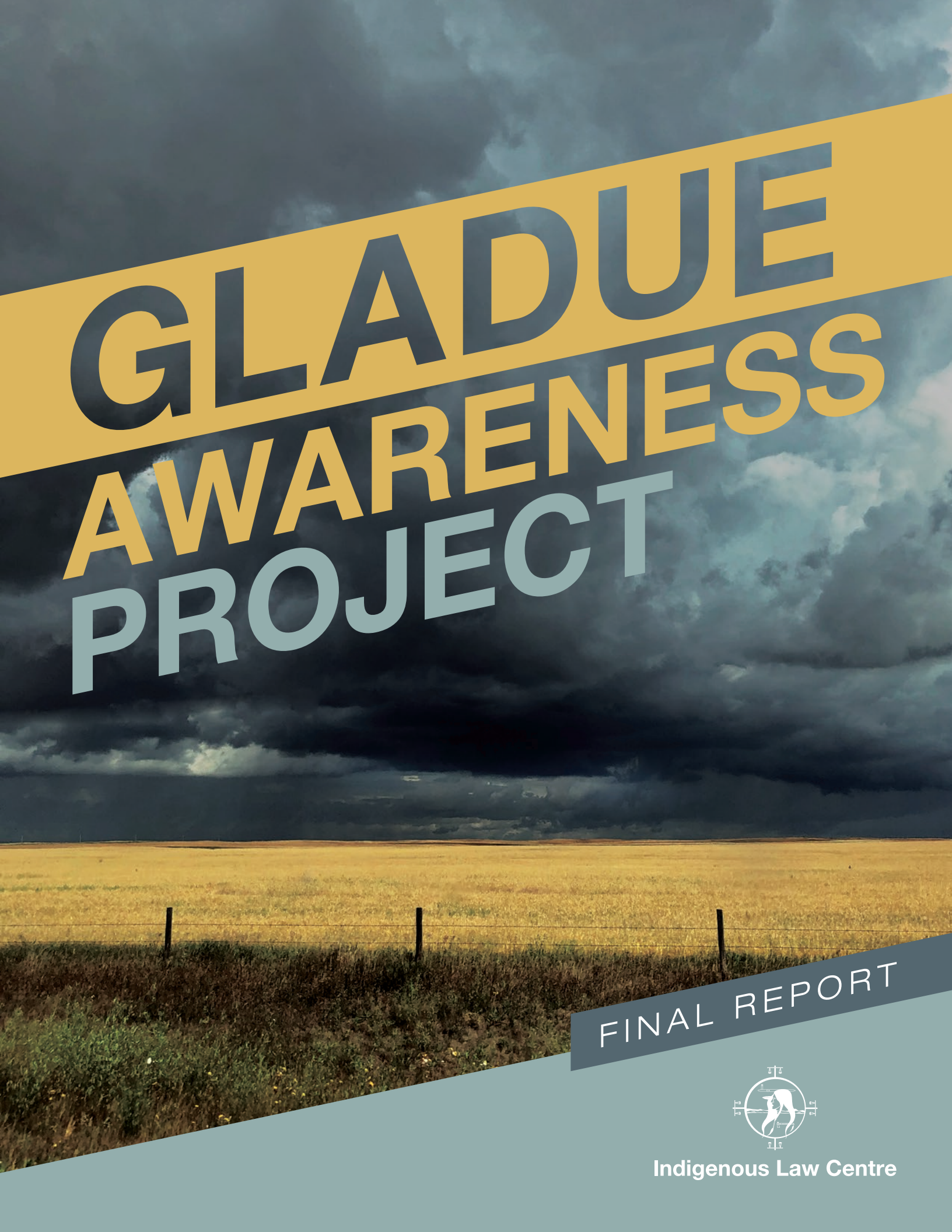

GLADUE AWARENESS PROJECT

FINAL REPORT

Indigenous Law Centre

Indigenous Law Centre
University of Saskatchewan

GLADUE AWARENESS PROJECT:

FINAL REPORT

About the Author

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Indigenous Law Centre

The Law Foundation of Ontario
Advancing access to justice

Contents

I. Introduction

This project has been generously funded by the Law Foundation of Ontario. It is an initiative of the Indigenous Law Centre at the University of Saskatchewan (the "Centre") aimed at facilitating the sharing of knowledge with respect to both the crisis of Indigenous over-incarceration in Saskatchewan and our justice system's response. The project was originally designed, administered, and executed by the Honourable Judge Michelle Brass in her previous capacity as the Centre's Gladue Project Research Officer between February and November 2018. However, due to her appointment to the Provincial Court while the project was still underway, her reported findings were left in draft. In order to respect the new role and institutional position of Judge Brass, the task of drafting this final report was taken on by Benjamin Ralston, who accepts full responsibility for all opinions and analysis expressed within, as well as any errors or omissions that may have been missed. This report has also benefitted from many detailed and thoughtful suggestions from the Centre's director, Marilyn Poitras.

The Gladue Awareness Project has aimed to foster greater knowledge of the Gladue decision and its implementation in Saskatchewan. The *Gladue* decision was released by the Supreme Court of Canada approximately twenty years ago to address what judges must consider when sentencing Indigenous people. The Supreme Court took it as an opportunity to clearly acknowledge the disproportionate rates at which Indigenous people are sentenced to prison in Canada and interpret Parliament's response to this crisis through a 1996 amendment to the *Criminal Code*. The Court also took note of how Indigenous over-incarceration has been linked to the systemic discrimination that Indigenous people face throughout Canada's criminal justice system, as well as the complex and devastating intergenerational legacies of the residential school system and settler colonialism faced by Indigenous peoples across the country.

In addition to this, the *Gladue* decision speaks to the differing cultures, worldviews, and legal traditions of Indigenous peoples in Canada when it comes to responses to wrongdoing. It mandates that sentencing judges endeavour to accommodate these differences through their approach to sentencing Indigenous people so as to be consistent with Indigenous perspectives on sentencing. The Supreme Court has re-affirmed the *Gladue* framework in several subsequent decisions since 1999. Yet the crisis of Indigenous over-incarceration continues to grow and there are still many barriers to the *Gladue* framework's full implementation over twenty years later.

The primary focus of this project has been on sharing information about the *Gladue* decision and the unique considerations involved in the sentencing of Indigenous people with all those who work in or are exposed to the criminal justice system in this province. This final report not only summarizes the work completed through the project to date but may also provide a baseline for future research and education in the area. Among other things, it introduces sections 718 and 718.2(e) of the *Criminal Code* and summarizes how reported cases from Saskatchewan have engaged with, discussed, and applied the *Gladue* decision and related case law from the Supreme Court of Canada. By raising awareness and sharing information it is hoped that this project will assist others in their own work addressing Indigenous over-incarceration in Saskatchewan.

This final report will first provide background information on the Centre's work to date in relation to the *Gladue* decision and the disproportionate incarceration of Indigenous people. It will then canvass the current statistics on the disproportionate number of Indigenous people being put in prison in Saskatchewan. The legislation and the Supreme Court of Canada case law that guides Indigenous sentencing will also be introduced in summary form, as will the relevance of this project to the Truth and Reconciliation Commission of Canada's final report and Calls to Action. The information and views received from participants in the project's seminars will also be summarized so as to identify some perceived gaps in the response to the *Gladue* decision in Saskatchewan. A summary of trends in the case law in Saskatchewan has also been provided, along with the identification of a few outliers in this province's current case law as compared to case law from other provinces and territories. Some of the innovative resources generated within Saskatchewan to respond to the *Gladue* decision will also be canvassed here. Likewise, there will be a brief discussion of analogous developments in Australia and New Zealand. Finally, the costs associated with incarceration will be contrasted against costs associated with existing responses to Indigenous over-incarceration such as community-based options for sentencing.

During the course of the Gladue Awareness Project and the drafting of this report, several other studies and conferences with respect to the *Gladue* decision have taken place, albeit with a national focus or a focus on other provincial contexts.[1] Of particular note, a thorough study of comparative approaches to implementing the *Gladue* decision across Canada may soon be available. This project differs in that it is largely focused on Saskatchewan's response and existing barriers within this province. While this report is the final product from the Centre's Gladue Awareness Project, it is by no means intended to be the final word on the *Gladue* decision's implementation in Saskatchewan and it was not possible to canvass all issues and barriers that have arisen in the wake of this decision. Yet it is hoped that this report will help stimulate further discussion, research, and action by highlighting some of the existing gaps and summarizing the knowledge that has been gained through this project. Without a doubt, much work lies ahead for all those involved in the criminal justice system in this province if this crisis is to be tackled.

1 For example, the International Centre for Criminal Law Reform and Criminal Justice Policy, a UN-affiliated international research institute, has undertaken a comparative analysis of specialized pre-sentence reports for Indigenous offenders across Canada. Its final report had not been made public by the time of writing but a draft was reviewed by the author of this report. As another example, a National Working Group on *Gladue* headed by Dr. Jane Dickson is engaged in a four-year SSHRC-funded study of best practices for the implementation of the Gladue decision (2017-2021). Among other topics, the National Working Group is exploring the development of a set of national standards for Gladue reports, writers, and training. These concepts are addressed later in this report.

II. Background

The Centre has a long history of research, publications and education with respect to Indigenous[2] peoples and the Canadian legal system, including the criminal justice system. The Centre was first established in 1975 by Dr. Roger C. Carter to facilitate access to legal education for Indigenous students, promote the development of the law and the legal system in Canada in ways which better accommodate the advancement of Indigenous peoples, and disseminate information concerning Indigenous peoples and the law.[3] Both the College of Law and the Centre's research and publications have addressed issues facing Indigenous people and the criminal justice system in the past.[4] More recently some of the Centre's research and publications have addressed the impacts and implementation of the Supreme Court of Canada's modern framework for sentencing Indigenous people, as first comprehensively addressed in the *Gladue* decision.[5]

In November of 2016, the Centre co-hosted a national Gladue Report Writers Symposium at the College of Law. This brought together Gladue report writers, lawyers, academics, and other key actors in Canada's criminal justice system from across Canada to discuss the *Gladue* decision and how it is being implemented in different provinces and territories, with a major focus on the preparation and use of Gladue reports to provide the information that sentencing judges need in order to fulfill their obligations. The term "Gladue report" refers to a form of pre-sentence report tailored to the specific circumstances of an Indigenous person being sentenced that provides both: (a) individualized information to assist the judge's understanding of how intergenerational and systemic effects such as colonialism, displacement, residential schools, poverty, unemployment, and substance abuse might have affected the individual, their family, and their community; and (b) information about available restorative or rehabilitative programs that would be suitable based on an individual's particular Indigenous heritage or connection.[6] A number of different topics were canvassed at the event including the utility of Gladue reports, the standards to which the

2 The terms "Indigenous" and "Aboriginal" are used in this report to refer to matters of common concern to First Nations, Inuit, and Métis. Where context allows, more specific terms are used. Use of the term "Indigenous" has been preferred over "Aboriginal", but the latter is used where it more precisely reflects statutory or constitutional language, or where it appears in direct quotations from other sources. Furthermore, the terms "Indigenous" and "Aboriginal" have been capitalized throughout this document for consistency with the long held conventions applied by the Centre to all of its publications.

3 Further information can be found at "Native Law Centre" (5 December 2018), online: *University of Saskatchewan* <https://www.usask.ca/nativelaw/index.php>.

4 See for example Richard Gosse, James Youngblood Henderson, & Roger Carter, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994); Matthias R.J. Leonardy, *First Nations Criminal Jurisdiction in Canada: The Aboriginal right to peacemaking under public international and Canadian constitutional law* (Saskatoon: Native Law Centre, 1998); Wanda D. McCaslin, ed, *Justice as Healing: Indigenous Ways* (St. Paul, MN: Living Justice Press, 2005).

5 *R v Gladue*, [1999] 1 SCR 688, 2 CNLR 252 ["*Gladue*"].

6 See *R v Lawson*, 2012 BCCA 508 at para 26, cited in *R v Burwell*, 2017 SKQB 375 at para 82.

reports and writers are held, and various legal, ethical, and practical issues that are encountered by Gladue report writers across Canada.

The overall aim of the symposium was to explore any potential role the Centre might play in the development of national standards for Gladue reports or in the establishment of a formal training program for Gladue report writers. In addition to this, the diversity of attendees and presenters allowed participants to raise and discuss emerging best practices and become more aware of the many regional differences in terms of how the *Gladue* decision is being implemented across the country. Breakout sessions were held to encourage more inclusive sharing of knowledge between participants. Likewise, all attendees were given an opportunity to vote on whether the Centre should consider offering Gladue report writer training through the University of Saskatchewan.

The symposium led to detailed and practical conversations on these topics and more. Likewise, a tally of attendees' votes indicated majority support for the exploration of training options, though not without some significant differences of opinion. At the same time, a majority of attendees expressed opposition to national standards being set for Gladue reports. Attendees' discussions also brought to light the diversity of approaches to implementing the *Gladue* decision across the country and the need to be cautious about any one-size-fits-all approach to training or standards for these reports. For example, it became clear that the level of detail and information presented in Gladue reports varied from one province or territory to the next, and from one provider to the next. This was in part due to different standards for the reports, as well as varying amounts of time and resources made available to report writers. In Alberta, for example, this also appeared to be a consequence of limited disclosure that Gladue report writers were able to access about the individuals they were tasked with researching and reporting on. In other words, there was no one model for a Gladue report and the quality and level of detail of these reports varied considerably.

The symposium also highlighted the fact that Gladue reports are rarely used and difficult to access in several areas of Canada.[7] Remarkably, this includes many provinces and territories that are home to comparatively large overall proportions of Indigenous residents, such as Manitoba (~18%), Saskatchewan (~16%), the Northwest Territories (~51%), and Nunavut (~86%).[8] It was also clear that the level of urbanization as well as the diversity of Indigenous cultures, languages, protocols, and laws across Canada have given rise to a diversity of approaches to the *Gladue* decision. For example, representatives from large cities like Vancouver spoke of Indigenous individuals from across the country appearing before their courts, which required their Gladue report writers to be generalists in terms of their knowledge of Indigenous cultures, languages, protocols, and laws. In contrast, representatives from the smaller, less urbanized jurisdiction of Prince Edward Island spoke of being able to provide a more culturally specific approach through the Mi'kmaq Confederacy of PEI. Many related questions and concerns were raised over who should prepare Gladue reports, which organizations should govern report programs, and what level of legal and editorial oversight is needed for report writers.

In addition to the discussion of regional differences and differences of opinion, the symposium also highlighted existing knowledge gaps around the implementation of the *Gladue* decision in Saskatchewan specifically. The Gladue Awareness Project therefore picks up where this symposium left off by looking at Saskatchewan's evolving response to the *Gladue* decision.

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7 A recent publication addressing the availability of Gladue reports across Canada states that there is still no formal process for the preparation of Gladue reports in Newfoundland, New Brunswick, Manitoba, Saskatchewan, the Northwest Territories, and Nunavut: Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond Publishing, 2019) ["Rudin"] at 109.

8 Statistics Canada, "Aboriginal Peoples Highlight Tables, 2016 Census" (20 Feb 2019), online: *Statistics Canada* <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/abo-aut/Table.cfm?Lang=Eng&T=101&S=99&O=A>.

The project has been structured around three main avenues for information sharing. The first involved holding a series of live seminars throughout the province in 2018. The second focused on the development of brochures and booklets. The third means is this final report that now brings the project to an end. All these materials are available for wide dissemination throughout the province and beyond to anyone who may wish to access this information.

The live seminars were originally planned to run for two days each. However, it quickly became apparent to the Research Officer that time management and attendance could all be improved by condensing the materials into one-day sessions. It was important to encourage as many people as possible to attend these sessions as they functioned as a forum for information sharing among all attendees, including the Research Officer herself. Not only were attendees presented with educational materials but they were also given an opportunity to share their own experiences and ideas on possible solutions to tackling the disproportionately high incarceration rates faced by Indigenous people in Saskatchewan.

The objective of the Research Officer who carried out this previous stage of the project was not simply to tell as many people as possible about the *Gladue* decision and its implications; it was also to hear about the lived experiences and insights of participants so they could help inform future educational activities and research on this topic. The seminars provided a vital setting in which to discuss what was happening on the ground in Saskatchewan and the information that was shared with the participants in these seminars often surprised them. For example, the Research Officer reported that up-to-date statistics related to Indigenous over-incarceration in Saskatchewan came as a surprise to many of the participants even though it was commonly known that the incarceration rates for Indigenous people were disproportionately high. In this way the true severity of this problem came to light in the seminars, as did the need for more action from all those involved in the criminal justice system.

III. Indigenous over-incarceration in Saskatchewan

Saskatchewan has one of the highest proportions of Indigenous residents of all jurisdictions in Canada. Over 16% of the province's population self-identified as "Aboriginal" in the 2016 Census.[9] Almost 11% of Saskatchewan's residents self-identified as First Nations and over 5% self-identified as Métis.[10] Saskatchewan's Indigenous residents also made up almost 12% of all those self-identifying as First Nations in Canada that year, as well as approximately 10% of all those self-identifying as Métis.[11]

Yet even in light of the high proportion of Indigenous residents in Saskatchewan, the rate at which Indigenous people are incarcerated compared to others is unmistakably alarming. According to Statistics Canada, an average of approximately 75% of all adult admissions into custody for provincial and federal prisons in Saskatchewan over the past five years have been confirmed to be Indigenous people.[12] Indigenous people also made up an average of around 64% of all adults admitted to community services during the same period.[13] More recent data were provided by the Government of Saskatchewan for 2018 to confirm that last year Indigenous people made up 75% of all admissions to sentenced custody, 74% of all admissions to remand, and 70% of all admissions to probation or conditional sentences.[14] In other words, Indigenous people are significantly over-represented among all categories of people being sentenced in Saskatchewan, but this over-representation is most apparent among those being sent to prison.

With an eye to the future, it is also important to note that the Indigenous population within Saskatchewan is comparably young. According to the 2016 Census data, 42.5% of Saskatchewan's Indigenous population was under the age of 19, as compared to 22.9% of the province's non-Indigenous population.[15] And Indigenous youth (ages 12 to 17) are being incarcerated at

9 *Ibid*.

10 *Ibid*. In addition, 360 people in Saskatchewan self-identified as Inuit in 2016 (approximately 0.03% of the province's overall population).

11 Statistics Canada, "Aboriginal peoples in Canada: Key results from the 2016 Census" (25 Oct 2017), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm> ["Key Results from 2016 Census"].

12 Statistics Canada, "Table 35-10-0016-01 Adult custody admissions to correctional services by aboriginal identity" (2 Jun 2019), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001601>.

13 Statistics Canada, "Table 35-10-0020-01 Adult admissions to community services by aboriginal identity" (2 Jun 2019), online: *Statistics Canada* <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510002001>.

14 Personal correspondence with Marc L'Heureux, Director of Projects, Community Corrections, Government of Saskatchewan (4 April 2019).

15 Government of Saskatchewan, "Saskatchewan Aboriginal Peoples – 2016 Census", online: *Publications Saskatchewan* <http://publications.gov.sk.ca/documents/15/104388-2016%20Census%20Aboriginal.pdf>.

the most alarming rates of all. According to Statistics Canada, in 2016/2017 almost all youth admissions to custody in this province were Indigenous—92% of all male youth admissions and 98% of all female youth admissions.[16] These rates indicated significant increases from the already disproportionate rates reported in 2006/2007—70% of all male youth admissions and 86% of all female youth admissions.[17] More recent data was provided by the Government of Saskatchewan for 2018 to confirm that 84% of all male youths admitted to custody last year self-identified as Indigenous, as did 75% of all female youths admitted to custody.[18]

Indigenous children and youths are also clearly over-represented in the foster care system in Saskatchewan, which may be a factor in the high rates at which they are brought into contact with the criminal justice system. According to 2011 data, approximately 87% of all foster children aged 14 and under in Saskatchewan were Indigenous, as compared to the 27.4% of Saskatchewan's overall population of children aged 14 and under who are Indigenous.[19] This was the highest proportion of Indigenous children in foster care for any province in the 2011 data, surpassed only by the territories where Indigenous people make up significantly larger proportions of the overall populations. Looking at the country as a whole, Saskatchewan was home to 12% of all Indigenous foster children in Canada in 2011.[20]

Where might these statistical trends lead us? In a presentation at a national criminal justice symposium in January 2019, Lynn Barr-Telford, Director General of Statistics Canada's Health, Justice and Special Surveys Branch, used statistics for Indigenous over-incarceration in Saskatchewan to simulate what the future could look like if nothing is done to correct our current course. Ms. Barr-Telford also pointed out how addressing education gaps for Indigenous people in the province, as just one statistically relevant variable, could significantly shift this trajectory. As summarized in the symposium's final report:[21]

> If nothing were to change in Saskatchewan, a microsimulation demonstrated that the number of people having contact with the police for a criminal offence in Saskatchewan will grow from about 37,000 people in 2011 to more than 46,000 people in 2036. The vast majority of the increase in people having contact with the police over that period will be borne by the Indigenous population, rising over that period from 59% of all such contacts in 2011 to 70% in 2036. However, if the gap in education attainment between Indigenous and non-Indigenous people were reduced, the projections shift considerably.

The statistics clearly speak to more than just the distressing present reality of Indigenous over-incarceration in Saskatchewan. They also suggest that current trends will continue to spiral towards an increasingly disproportionate representation of Indigenous people in prison in Saskatchewan unless significant changes are undertaken to disrupt this trajectory.

16 *Ibid* at Table 13 – Admissions of youth to custody, by Aboriginal identity, sex and jurisdiction, 2016/2017.

17 *Ibid*.

18 Personal correspondence with Marc L'Heureux, Director of Projects, Community Corrections, Government of Saskatchewan (28 March 2019).

19 Annie Turner, "Insights on Canadian Society: Living arrangements of Aboriginal children aged 14 and under" (13 April 2016), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/75-006-x/2016001/article/14547-eng.htm>.

20 *Ibid*.

21 International Centre for Criminal Law Reform and Criminal Justice Policy, *Re-inventing Criminal Justice: The Eleventh National Symposium – Final Report* (Vancouver BC: International Centre for Criminal Law Reform and Criminal Justice Policy, 2019) ["*Re-inventing Criminal Justice* 2019"] at 4-5.

IV. The sentencing of Indigenous people

A. Section 718 of the *Criminal Code*

In order to understand the Supreme Court of Canada's framework for the sentencing of Indigenous people, it is important to first consider the broader framework for criminal sentencing in Canadian law as set out in section 718 of the *Criminal Code*.[22] The fundamental purpose of criminal sentencing is "to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions […]".[23] In order to achieve this, "we must know whom we protect, from what evil and how effective criminal sentences are at protecting the public".[24]

Section 718 also describes the following objectives of criminal sentencing:

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

The first three objectives are traditionally classified as the "punitive" objectives (in other words, those aimed at punishing offenders), in contrast to the remaining three more recently introduced "restorative" objectives, which are aimed at helping the offender, the victim, and the community address the harm done.[25] It is worth paying attention to how each of these objectives has been interpreted by sentencing judges in Canada:

> **(a) Denunciation** in sentencing is aimed at the wider public in an "attempt to publicly announce society's attitudes towards the offence committed", focusing on the offender's conduct rather than their "particular personal

22 This basic summary of section 718 of the Criminal Code has been adopted with revisions from previous work by the author of this report, Benjamin Ralston, for a study on the impacts of Bill C-75 on *Gladue* sentencing.
23 *Criminal Code*, RSC 1985, c C-45, s 718.
24 Clayton C. Ruby et al, *Sentencing*, 8th ed (Markham, ON: LexisNexis, 2012) ["*Sentencing*"].
25 Gilles Renaud, *The Sentencing Code of Canada: Principles and Objectives* (Markham ON: LexisNexis Canada Inc, 2009) ["*The Sentencing Code*"] at §7.4, p 201.

characteristics".[26] Denunciation has been described as a "symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's most basic code of values as enshrined within our substantive criminal law".[27] However, it is far from clear whether an emphasis on community disapproval actually changes the public's attitudes.[28]

(b) **Deterrence** means using the threat of punishment as a way to discourage crime.[29] It is meant "to protect the public from commission of [certain] crimes by making it clear to the offender and to other persons with similar impulses that if they yield to them they will meet with severe punishment".[30] Courts often stress the need for deterrence when faced with "particularly heinous" crimes like domestic abuse.[31] Sentences may be aimed at 'general deterrence' in the sense of discouraging the broader public from committing similar criminal acts, or 'specific deterrence' in the sense of discouraging an offender from committing a similar offence in the future.[32] The objective of general deterrence is met by increasing the penalty for an offence.[33] In contrast, specific deterrence may require greater attention to the individual offender, their record and attitude, as well as their motivation, reformation, and rehabilitation.[34] The Supreme Court has cautioned against over-reliance on the deterrent value of sentencing since it is "speculative".[35]

(c) **Separation** from society is an objective for offenders who cannot be deterred or reformed as it means they are "physically prevented from committing further crime".[36] This objective appears to be intended to apply only in exceptional cases as judges are also required to exercise restraint in the use of imprisonment under section 718.2(e), as discussed below.[37]

(d) **Rehabilitation** is a sentencing objective that requires "punishment to fit the offender" in terms of their potential for rehabilitation, reflecting the belief that one "may be 'treated' and presumably cured of criminal tendencies" so long as their sentences are tailored to their unique needs [38] While it has been a long-standing assumption in the criminal justice system that imprisonment can support rehabilitation, studies, statistical evidence, and more recent jurisprudence have strongly suggested otherwise.[39] This objective has nevertheless been characterized by the Supreme Court as consistent with a restorative justice approach to sentencing.[40]

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26 *Sentencing*, n 24*,* at §1.18, p 6.
27 *Ibid*, citing R v M(CA), [1996] SCJ No 28, 105 CCC (3d) 327 at 369.
28 *Ibid* at §1.19, p 7.
29 *Ibid* at §1.21, p 7.
30 *Ibid* at §1.23, p 8, citing *R v H* (1980), 3 A. Crim. R 53 at 74.
31 *Ibid* at §1.22, p 8, citing *R v Bates,* [2000] OJ No 2558, 146 CCC (3d) 321 (ONCA).
32 *Ibid* at §1.24, p 8, and §1.38, p 14, citing *R v Morrissette and Two Others,* [1970] SJ No 269, 1 CCC (2d) 307 at 310 (SKCA).
33 *Ibid* at §1.27, p 10, citing *R v N(BV),* [2006] SCJ No 27, 1 SCR 941 (3d) at para 36*.*
34 *Ibid* at §1.38, p 14, citing *R v Morrissette and Two Others,* [1970] SJ No 269, 1 CCC (2d) 307 at 310 (SKCA).
35 *Ibid* at §1.22, p 8, citing *R v Proulx*, [2000] SCJ No 6, 140 CCC (3d) 449 at 465-66 ["*Proulx*"].
36 *Ibid* at §1.41, p 15.
37 *Ibid* at §1.42, p 15.
38 *Ibid* at §1.45-1.46, p 16.
39 *Ibid* at §1.46-1.52, pp 16-18.
40 *Proulx*, n 35, at para 18.

(e) Reparation is an objective aimed at having an offender return the victim or society to the position it was in before the offence occurred, to the extent this is possible.[41] While some criminal activity may not be appropriate for monetary compensation, a judge may make an order for restitution in cases where property has been lost or destroyed, or an order for 'pecuniary damages' in cases of bodily harm or threats of bodily harm.[42] A condition of community service may be seen as another way for the offender to make reparations.[43] This objective is also considered to be consistent with a restorative justice approach.[44]

(f) Promotion of responsibility and acknowledgement of harm is about addressing the risk of further criminal and anti-social behaviour from an offender who fails to accept responsibility for their wrongdoing and lacks insight into the harm they have caused.[45] According to the Supreme Court, "[t]he need for offenders to take responsibility for their actions is central to the sentencing process".[46] Expressing remorse and entering an early guilty plea might be ways for an offender to demonstrate they are taking responsibility for what they have done.[47] While this objective is often seen as having a "restorative" focus as well, it might also justify imprisonment if necessary.[48]

It is important to be aware that criminal sentencing is highly discretionary in Canada—both in terms of the sentences Crown counsel first seeks and those ultimately pronounced by the Court. According to the Supreme Court, it is "one of the most delicate stages of the criminal justice process in Canada".[49] The process is guided by section 718 and its sentencing objectives.[50] However, it also involves "the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing".[51] In keeping with this, Canadian courts have developed "a system of sentencing ranges and categories" guided by two related principles: the parity and proportionality principles.[52]

Parity: The parity principle is set out in section 718.2(b) of the *Criminal Code* as follows: "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". This principle is sometimes used to overturn sentences that fall outside the range of sentences found to be appropriate in previous cases.[53] It allows appeal courts to ensure some amount of consistency between sentencing decisions with comparable facts. The principle developed "to preserve and ensure fairness by avoiding disproportionate sentences among convicted persons where, essentially, the same facts and circumstances indicate equivalent or like sentences".[54] It seems to respond to the concern that "convicted persons must not be

41 *Sentencing*, n 24, at §1.56, p 20.
42 *Ibid*.
43 *Proulx*, n 35, at para 112.
44 *Ibid* at para 18.
45 *The Sentencing Code*, n 25, at §7.21, p 206.
46 *Proulx*, n 35, at para 19.
47 *Ibid*, at §7.21, p 206.
48 *The Sentencing Code*, n 25, at §7.94, p 224.
49 *R v Lacasse*, [2015] 3 SCR 1089, 2015 SCC 64 ["*Lacasse*"] at para 1.
50 *Ibid.*
51 *Ibid.*
52 *Ibid*.
53 See for example *R v Stroshein*, [2001] SJ No 90, 153 CCC (3d) 155 (SKCA) at p 165, cited in *Sentencing*, n 24, at §2.27, pp 35-36.
54 *Sentencing*, n 24, at §2.28, p 36.

left with a sense of injustice or grievance as a result of disparate sentences", especially where they are sentenced alongside co-accused offenders.[55] Deviations from parity may be justified by differences in an offender's age, role in the offence, criminal record or background, as well as other mitigating and aggravating factors applying to each individual offender.[56]

Proportionality: The proportionality principle is set out in section 718.1 of the *Criminal Code* as follows: "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". According to the Supreme Court, "[p]roportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances".[57] Proportionality requires that the individualization and the parity of a sentence are reconciled.[58] The Supreme Court has also cautioned that "[t]he principle of parity of sentences …is secondary to the fundamental principle of proportionality".[59]

Proportionality and parity are considered alongside the other sentencing objectives set out at section 718 of the *Criminal Code* in determining what sentence is 'fit'. The judge must "properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed".[60] The proportionality principle requires judges to design a sentence in each case that balances aggravating factors (those calling for a more severe sentence) with mitigating factors (those calling for a more lenient sentence).[61] The push and pull between aggravating and mitigating factors in any one case might mean that aggravating factors effectively "cancel out" the impact of mitigating factors on the sentence, or vice versa.[62] Yet sentencing is "more art than science" and "[u]nlike arithmetic, sentencing deliberations do not lead to a single, 'correct' answer".[63]

This basic framework for sentencing under the *Criminal Code* applies to all offenders. However, as will be discussed below, its application must be modified to accommodate the unique worldviews, experiences, and legal traditions of Indigenous peoples, as well as the systemic discrimination that Indigenous individuals face in the criminal justice system. These complex realities provide critical context for the sentencing of Indigenous people in Canada.

55 *Ibid* at §2.29-2.30, pp 36-37.
56 *Ibid* at §2.39, p 40.
57 *Lacasse*, n 49, at para 53, per Wagner J (majority).
58 *Ibid*.
59 *Ibid* at para 54.
60 *Ibid* at para 54, per Wagner J (majority).
61 *Sentencing*, n 24, at §5.2, p 209, citing *R v Larche*, [2006] SCJ No 56 at 13.
62 *R v Latimer*, [2001] 1 SCR 3 at para 85.
63 *R v Bao*, 2018 ONCJ 136 at para 11.

B. Section 718.2(e) & the Supreme Court of Canada

In 1996, Parliament introduced a number of amendments to the *Criminal Code*'s framework for sentencing, including the addition of section 718.2(e). Section 718.2(e) calls for restraint in the use of imprisonment for the sentencing of any offender, but calls for particular attention to Indigenous people. It reads as follows:

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

Even before section 718.2(e) was enacted, some Canadian judges were considering the "cultural background and social relationships" of Indigenous people when sentencing them.[64] Yet section 718.2(e) does more than just restate the law as it already existed and must be interpreted as having some sort of remedial impact.[65] According to the Supreme Court of Canada, it requires judges to follow a different process or methodology when sentencing Indigenous people.[66]

R v Gladue, [1999] 1 SCR 688

Background

Jamie Tanis Gladue was sentenced to three years in prison after pleading guilty to manslaughter for killing her common law husband when she was 19 years old. Ms. Gladue was born and raised in Alberta by her Cree mother and Métis father.[67] She was living with her common law husband in Nanaimo on Vancouver Island at the time of the offence. Ms. Gladue was intoxicated after celebrating her birthday and confronted her spouse over his infidelity with her older sister. Her spouse mocked her and she stabbed him twice, killing him.

The sentencing judge found there were a number of mitigating factors in Ms. Gladue's favour: she showed some signs of remorse and entered a guilty plea; she was a young mother with a supportive family; she had a limited criminal record; she was undergoing alcohol counseling and upgrading her education; she was provoked by her spouse's insulting behavior and remarks; and she had a hyperthyroid condition that caused her to overreact to emotional situations.[68] However, there were also several aggravating factors: she stabbed the victim twice, showing that she meant to cause him harm; and she was the aggressor and clearly not afraid of the victim.[69]

The judge concluded that the sentencing principles of denunciation and general deterrence must play a role in sentencing Ms. Gladue, as well as the need to rehabilitate the accused and ensure she had insight into her conduct and the effect of her alcohol abuse.[70] The judge went on to

64 *Sentencing*, n 24, at §18.4, p 639, citing *R v Fireman*, [1971] OJ No 1642 (ONCA) at paras 2-18, *R v Jacobish*, [1997] NJ No 225 (NLCA), and *R v Naqitarvik*, [1986] NWTJ No 4 (NWTCA), among others. See also Larry Chartrand, "The Aboriginal Sentencing Provision of the Criminal Code as a Protected "Other Right" under Section 25 of the Charter" (2012) 57:18 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 389 ["Chartrand 2012"] at 395-399.
65 *Sentencing*, n 24, at §18.4, pp 639-640.
66 *Ibid*, p 640.
67 *Gladue*, n 5, para 2.
68 *Ibid*, para 15.
69 *Ibid*, para 16.
70 *Ibid*, para 17.

conclude that there were no "special circumstances" to consider in relation to the fact that both Ms. Gladue and her deceased spouse were Indigenous since they were living in an urban area off-reserve and not within an Indigenous community, and the offence was a very serious one.[71]

Ms. Gladue appealed her three-year sentence to the British Columbia Court of Appeal on various grounds, including the sentencing judge's failure to give appropriate consideration to her circumstances as an Indigenous person.[72] The Court of Appeal was unanimous in concluding that the judge was incorrect in finding that section 718.2(e) did not apply because Ms. Gladue and her spouse were not living on reserve.[73] However, two out of three judges on the Court of Appeal were of the view that the seriousness of the offence meant it was nevertheless appropriate for the sentencing judge to not give effect to section 718.2(e).

Justice Rowles dissented. She reviewed various reports and parliamentary debates in order to conclude that section 718.2(e) was designed to remedy "the excessive use of incarceration generally, and the disproportionately high number of [A]boriginal people who are imprisoned, in particular".[74] She also concluded that section 718.2(e) invites judges to recognize and address the impact of systemic discrimination against Indigenous people in the criminal justice system, as well as the different conceptions of justice and appropriate sanctions that many Indigenous peoples hold, with a particular emphasis on restorative approaches.[75] Justice Rowles was of the view that a three-year prison sentence was excessive and she would have replaced it with a two-year prison sentence followed by three years of probation.[76]

The Supreme Court of Canada agreed to hear Ms. Gladue's appeal with respect to how section 718.2(e) ought to be interpreted. The Court took this as an opportunity to set out a framework for the different approach that judges must take when sentencing Indigenous people.[77]

Section 718.2(e) is more than a restatement of existing law

As mentioned above, some sentencing judges already considered the unique circumstances of Indigenous people in sentencing prior to 1996. However, the Supreme Court insisted that section 718.2(e) was more than just a restatement of existing law and interpreted it in light of Parliament's creation of the conditional sentence, which suggested "a desire to lessen the use of incarceration".[78] The Court also interpreted this provision in light of the introduction of new restorative sentencing objectives into section 718 of the *Criminal Code*[79]—namely, the provision of reparations, the promotion of responsibility in offenders, and the acknowledgment of harm done to victims and the community. Section 718.2(e) created a "judicial duty to give its remedial purpose real force" in the day-to-day practice of sentencing Indigenous people.[80]

71 *Ibid*, para 18.
72 *Ibid*, para 19.
73 *Ibid*, para 20.
74 *Ibid*, para 21.
75 *Ibid*.
76 *Ibid*, para 23.
77 *Ibid*, para 33.
78 *Ibid*, para 40.
79 *Ibid*, para 43.
80 *Ibid*, para 34.

Indigenous over-incarceration relates to racism, systemic discrimination, and culture clash

The Supreme Court acknowledged that over-incarceration in general is "a long-standing problem" in Canada and it interpreted section 718.2(e) as "a reaction to the overuse of prison as a sanction".[81] The Court also recognized that the overuse of incarceration is of much greater concern in the sentencing of Indigenous people, drawing attention to the statistics of Indigenous over-incarceration from Manitoba and Saskatchewan as "particularly worrisome".[82] The Court took judicial notice of a "large number of commissions and inquiries" that had drawn attention to "the excessive incarceration of [A]boriginal peoples".[83] It also stated that excessive imprisonment of Indigenous people was "only the tip of the iceberg" in terms of the estrangement of Indigenous peoples from the criminal justice system, noting that Indigenous people are overrepresented in "virtually all aspects of the system".[84]

The Court also reiterated its previous recognition of widespread racism and bias against Indigenous people within Canada, which has "translated into systemic discrimination in the criminal justice system".[85] Likewise, the Court cited the findings of past inquiries and commissions that addressed the different worldviews, cultural values, and experiences of Indigenous peoples.[86]

A sentencing judge's role in remedying injustice against Indigenous peoples

According to the Supreme Court, section 718.2(e) is Parliament's direction to judges "to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process".[87] There are many socio-economic determinants of crime that "sentencing innovation" cannot address, such as poverty, substance abuse, lack of education, or lack of employment opportunities.[88] However, the Court did note that over-incarceration arose in part from bias against Indigenous people and "an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms of [A]boriginal people".[89] It concluded that sentencing judges can play a role in remedying injustice against Indigenous peoples in Canada as they determine whether Indigenous people go to jail or whether other sentencing options are employed that might play "a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime".[90]

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81 *Ibid*, para 57.
82 *Ibid*, para 58.
83 *Ibid*, para 59, citing: Canadian Corrections Association, *Indians and the law: a survey prepared for the Honourable Arthur Laing, Department of Indian Affairs and Northern Development* (Ottawa: Canadian Welfare Council, 1967); Douglas A. Schmeiser, *The Native Offender and the Law* (Ottawa: Law Reform Commission of Canada, 1974); Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* (Manitoba: Aboriginal Justice Inquiry, 1991), vol 1, online: Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca> ["*Aboriginal Justice Inquiry of Manitoba*"]; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) ["*Bridging the Cultural Divide*"].
84 *Gladue*, n 5, para 60.
85 *Ibid*, para 61, citing *R v Williams*, [1998] 1 SCR 1128 ["*Williams*"], para 58.
86 *Gladue*, n 5, paras 62-63, citing *Bridging the Cultural Divide* and *Aboriginal Justice Inquiry of Manitoba*, n 83.
87 *Gladue*, n 5, para 64.
88 *Ibid*, para 65.
89 *Ibid*.
90 *Ibid*.

The Court set out a two-part framework to guide sentencing judges in their remedial role under section 718.2(e). When sentencing Indigenous people, judges must consider:[91]

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

Unique systemic or background factors

The first part of this analysis requires judges to consider the background factors behind crimes by Indigenous people, including how "[y]ears of dislocation and economic development have translated, for many [A]boriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation".[92] The Court recognized that these and other factors contribute to both a higher incidence of crime and a higher rate of incarceration among Indigenous peoples.[93] While such factors may explain some crime and recidivism among non-Indigenous people as well, the circumstances of Indigenous people are unique "because many [A]boriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions".[94]

Parliament's singling out of Indigenous people in section 718.2(e) was appropriate in light of their adverse experiences of rampant discrimination and culturally inappropriate environments in penal institutions.[95] As a result of these unique systemic and background factors, Indigenous people are "more adversely affected by incarceration and less likely to be 'rehabilitated' thereby".[96] Consideration of these factors is intended to help judges evaluate whether imprisonment will actually deter or denounce crime in a way that is meaningful to an offender's community, or whether the prevention of crime and "individual and social healing" requires a restorative approach.[97]

Appropriate sentencing procedures and sanctions

The second prong of the analysis requires attention to appropriate sentencing procedures and sanctions for Indigenous individuals, speaking to a need for more culturally appropriate processes and outcomes from sentencing. This aspect of the analysis appears to recognize distinctions between Indigenous peoples and their varied perspectives and traditions as judges are instructed to inquire into "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender <u>because of his or her particular [A]boriginal heritage or connection</u>".[98] Yet the Court accepted at a level of generality that Indigenous peoples all hold "different conceptions of appropriate sentencing procedures and sanctions" and that the "sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their communities".[99]

91 *Ibid*, para 65.
92 *Ibid* at para 67.
93 *Ibid*.
94 *Ibid* at para 68.
95 *Ibid*.
96 *Ibid*.
97 *Ibid* at para 69.
98 *Ibid* at para 66 (emphasis added).
99 *Ibid* at para 70.

The Court also noted that most traditional Aboriginal conceptions of sentencing "place a primary emphasis upon the ideals of restorative justice" and share a common emphasis on the importance of community-based sanctions.[100] Restorative justice was 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".[101] The Court noted that restorative justice places its focus on those most closely affected by crime and "[t]he appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender".[102]

The Court also accepted that a sentence focused on restorative justice is not necessarily a "lighter" punishment than a period of incarceration.[103] It cited an article from the *Saskatchewan Law Review* pointing out that while offenders are obliged to take responsibility for their actions in restorative justice processes, "incarceration obviates the need to accept responsibility" and "[f]acing victim and community is for some more frightening than the possibility of a term of imprisonment".[104] According to the cited passage, a restorative justice process also "yields a more beneficial result in that the offender may become a healed and functional member of the community rather than a bitter offender returning after a period of imprisonment".[105]

In light of all this, the Court stated that community-based sanctions that coincide with Indigenous concepts of sentencing and the needs of Indigenous people and communities should be implemented where "reasonable in the circumstances".[106] Even where community-based sanctions may not be reasonable, the Court stated that it is appropriate for sentencing judges to "attempt to craft the sentencing process and the sanctions imposed in accordance with the [A]boriginal perspective".[107] The phrase "Aboriginal perspective" is typically used by Canadian courts as shorthand for perspectives informed by the unique laws, customs, practices, and traditions of each Indigenous nation or community.[108]

Judicial notice and the need for community and individual-specific information

The Supreme Court made it clear that sentencing judges must take judicial notice of the systemic or background factors Indigenous peoples face in general and follow the two-pronged approach to sentencing Indigenous people in all future cases. It also anticipated a need for further evidence of an Indigenous individual's circumstances in order for sentencing judges to fulfill their obligation under section 718.2(e). The Court stated that "counsel on both sides" are expected to assist sentencing judges by bringing such evidence before them.[109] Sentencing judges need to be informed about

100 *Ibid* at paras 70, 74.
101 *Ibid* at para 71.
102 *Ibid*.
103 *Ibid* at para 72.
104 *Ibid*, citing Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60 *Saskatchewan Law Review* 153 at 165.
105 *Gladue*, n 5, at para 72.
106 *Ibid* at para 74.
107 *Ibid*.
108 See for example *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 35; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 147-148; *R v Van der Peet*, [1996] 2 SCR 507 at paras 49-50; *Spookw v Gitxsan Treaty Society*, 2017 BCCA 16 at paras 51-52; and *R v Manuel*, 2008 BCCA 143 at paras 53, 57-58. See also Dwight Newman, "You Still Know Nothin' 'Bout Me: Toward Cross-Cultural Theorizing of Aboriginal Rights" (2007) 52 *McGill Law Journal* 725; Mark Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's Law Journal* 470; Chief Justice Lance SG Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the British Columbia Continuing Legal Education conference on Indigenous Legal Orders and the Common Law, Vancouver, November 2012) at paras 9-14, online: <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>.
109 *Gladue*, n 5, at para 83.

both the circumstances of Indigenous individuals and the "alternatives to incarceration that exist whether inside or outside the [A]boriginal community of the particular offender".[110] This may require the use of a pre-sentence report and calling witnesses "who may testify as to reasonable alternatives".[111] Where a sentencing judge fails to properly fulfill their duty under section 718.2(e), this may also require the consideration of fresh evidence on an appeal from sentence.[112]

Impact on the length of prison sentences

The Court acknowledged there will be cases where the objectives of deterrence, denunciation, and separation are still "fundamentally relevant".[113] Yet, "even where an offence is considered serious, the length of the term of imprisonment must be considered".[114] This may lead to shorter sentences for Indigenous people as compared to non-Indigenous people in some cases.[115] Still, the more violent and serious the offence, the more likely the terms of imprisonment for Indigenous and non-Indigenous people will be "close to each other or the same, even taking into account their different concepts of sentencing".[116]

The Supreme Court also made it clear that section 718.2(e) does not require "an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is [A]boriginal".[117] In other words, the analysis does not provide anyone with a sentencing 'discount' simply because they self-identify as Indigenous. Instead, it requires judges to consider the unique background circumstances of Indigenous individuals as part of the broader task of weighing various factors in designing a fit sentence for them.[118] Echoing the principle of substantive equality, the Court stated that section 718.2(e)'s fundamental purpose is "to treat [A]boriginal offenders fairly by taking into account their difference".[119]

The framework is applicable to all Indigenous people

The Supreme Court also clarified that the *Gladue* sentencing framework applies to all Indigenous people and not just those who are living within Indigenous communities.[120] This will "at least" include anyone who comes within the scope of section 25 and section 35 of the *Constitution Act, 1982*—namely, "Indians (registered or non-registered)", Inuit, and Métis.[121] It applies to all Indigenous people "wherever they reside, whether on- or off-reserve, in a large city or a rural area".[122] Likewise, while the availability of programming, support, and supervision within an Indigenous community will make it easier to find and impose an alternative sentence, "even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative".[123] Furthermore, the term "community" includes any network of support and interaction that might be available in an urban centre, and even the absence of these does not relieve a judge from their obligation to try to find alternatives.[124]

110 *Ibid* at para 84.
111 *Ibid*.
112 *Ibid* at para 85.
113 *Ibid* at para 78.
114 *Ibid* at para 79.
115 *Ibid*.
116 *Ibid*.
117 *Ibid* at para 88.
118 *Ibid*.
119 *Ibid*.
120 *Ibid* at para 89.
121 *Ibid* at para 90.
122 *Ibid* at para 91.
123 *Ibid* at para 92.
124 *Ibid*.

R v Wells, [2000] 1 SCR 207

One year after releasing the *Gladue* decision, the Supreme Court of Canada reiterated this framework for sentencing Indigenous people while dismissing an appeal from an Indigenous man's 20-month sentence for what the sentencing judge characterized as a "major" or "near major sexual assault".[125] Mr. Wells had been convicted of sexually assaulting an 18-year-old Indigenous woman in her own bedroom in Tsuu T'ina Nation while she was either asleep or unconscious from the effects of alcohol.[126] The sentencing judge had before him a pre-sentence report that was generally favourable to Mr. Wells, assessing him as "posing no threat to the community as long as he abstained from alcohol use" and recommending a conditional sentence.[127] Nevertheless, Mr. Wells was sentenced to 20 months' incarceration in a provincial correctional institution in order to provide "the necessary elements of deterrence and denunciation".[128] This sentence was upheld by both the Alberta Court of Appeal and the Supreme Court of Canada.

In *Wells*, the Court repeated its view that section 718.2(e) requires that a custodial sentence be "the penal sanction of last resort for all offenders" and that sentencing judges "pay particular attention to the fact that the circumstances of [A]boriginal offenders are unique in comparison with those of non-[A]boriginal offenders".[129] The Court also characterized the unique systemic and background factors that impact Indigenous people as being "mitigating in nature in that they may have played a part in the [A]boriginal offender's conduct".[130] Likewise, it reiterated the need to explore the possibility of "community-based sanctions".[131] In keeping with this collective or community-orientation for Indigenous sentencing, the Court went on to state that "the appropriateness of the sentence will take into account the needs of the victims, the offender, and the community as a whole".[132]

At the same time, the Supreme Court reiterated the existing limitations on the *Gladue* analysis. For example, it stated that it is "reasonable to assume that for some [A]boriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community".[133] The Court also emphasized that section 718.2(e) requires a different methodology for assessing a fit sentence for an Indigenous person, but it does not necessarily require a different result.[134] However, while more violent and serious offences are likely to attract similar terms of imprisonment for Indigenous people to those imposed on non-Indigenous people, the Court did accept there may be circumstances where there is "evidence of the community's decision to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice, notwithstanding the serious nature of the offences in question".[135] In the circumstances of Mr. Wells' case, however, the evidence suggested that the alcohol and drug treatment programming available in the community "would be inappropriate for the appellant as a sexual offender".[136]

In this way, the Supreme Court in *Wells* both affirmed the framework set out in the *Gladue* decision and placed additional emphasis on the role that Indigenous communities can play in determining how criminal activity affecting them and their members ought to be addressed.

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125 *R v Wells*, [2000] 1 SCR 207, 2000 SCC 10 ["*Wells*"] at para 10.
126 *Ibid* at para 8.
127 *Ibid* at para 11.
128 *Ibid* at para 12.
129 *Ibid* at para 36.
130 *Ibid* at para 38.
131 *Ibid*.
132 *Ibid* at para 36.
133 *Ibid* at para 42.
134 *Ibid* at para 44.
135 *Ibid* at para 50.
136 *Ibid* at para 52.

R v Ipeelee, [2012] 1 SCR 433

The Supreme Court did not revisit the *Gladue* analysis again for well over a decade. Finally, in *Ipeelee*, the Court addressed how the framework applies to long-term offenders subject to long-term offender supervision orders.[137] This decision arose from two separate appeals involving Indigenous people who had breached long-term supervision orders.[138]

Mr. Ipeelee is an Inuk man from Iqaluit, Nunavut who was designated a long-term offender in 2001, following convictions for assault causing bodily harm, aggravated assault, sexual assault, and sexual assault causing bodily harm, in addition to a lengthy earlier criminal record.[139] One of the conditions of Mr. Ipeelee's long-term supervision order was abstinence from alcohol.[140] The police charged him with breaching this condition in 2008 and he pleaded guilty to the offence.[141] Mr. Ipeelee was sentenced to three years' imprisonment for the breach, due in part to the role that alcohol abuse played in his offence cycle.[142] The sentencing judge reasoned that public protection is the paramount consideration for breaches of long-term supervision orders, whereas rehabilitation and *Gladue* factors are of "diminished importance" in this context.[143] The sentence was upheld by the Ontario Court of Appeal.[144]

The other appeal involved Mr. Ladue, a member of the Ross River Dena Council in the Yukon territory.[145] Mr. Ladue was designated a long-term offender in 2003 after being convicted of breaking and entering and committing sexual assault, due in part to the similarity between this sexual assault and three previous sexual assaults he had committed.[146] His long-term supervision order required that he abstain from intoxicants.[147] Mr. Ladue was charged with and pleaded guilty to a breach of this condition in 2010 after his urine tested positive for cocaine.[148] The sentencing judge imposed a three-year term of imprisonment, referring to the "tragic aspects" of Mr. Ladue's personal circumstances but apparently concluding they should not impact his sentence.[149] Mr. Ladue's appeal to the British Columbia Court of Appeal was successful, with the majority reducing his sentence to one year's imprisonment and the dissenting judge concluding that a two-year sentence would be appropriate.[150] The majority held that the sentencing judge had erred in failing to give any "tangible consideration" or "substantive weight" to Mr. Ladue's unique circumstances as an Indigenous person.[151]

Upon further appeals, a majority of the Supreme Court of Canada held that the Ontario courts had erred in giving little to no consideration to Mr. Ipeelee's circumstances as an Indigenous person.[152] His prison sentence was reduced from three years to a period of one year.[153] A majority of the Supreme Court also upheld and approved of the British Columbia Court of Appeal's reasons for

137 *R v Ipeelee*, [2012] 1 SCR 433, 2012 SCC 13 ["*Ipeelee*"].
138 *Ibid* at para 1.
139 *Ibid* at paras 3, 10.
140 *Ibid* at para 11.
141 *Ibid* at para 13.
142 *Ibid* at para 14.
143 *Ibid* at para 15.
144 *Ibid* at paras 16-18.
145 *Ibid* at para 19.
146 *Ibid* at paras 23-25.
147 *Ibid* at para 26.
148 *Ibid* at para 27.
149 *Ibid* at para 28.
150 *Ibid* at para 29.
151 *Ibid* at para 30.
152 *Ibid* at paras 89-90.
153 *Ibid* at para 93.

imposing a one-year sentence for Mr. Ladue in place of a three-year term.[154] Justice Rothstein dissented and would have dismissed both appeals.[155]

The Supreme Court took this as an opportunity to clarify its *Gladue* framework. It reiterated the need for sentencing judges to "take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[156] While this general background will not necessarily justify a different sentence for Indigenous people on its own, it provides the necessary context for understanding and evaluating the case-specific information that is presented by counsel or obtained through Gladue reports.[157] The Court affirmed that this kind of case-specific information about the circumstances of an Indigenous person is "indispensible" to a judge in fulfilling their duties under section 718.2(e).[158]

In *Ipeelee*, the Court also recognized that the crisis of Indigenous over-incarceration and Indigenous peoples' alienation through the criminal justice system had only worsened since the *Gladue* decision was issued.[159] This was found to be at least in part due to the fundamental misunderstanding and misapplication of section 718.2(e) and the *Gladue* analysis by sentencing judges, thus giving rise to the need for clarifications to the framework in this case.[160]

Among other things, the Supreme Court clarified the role that sentencing judges play in tackling Aboriginal over-incarceration. First, "sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders", which may require sentencing practices to change "so as to meet the needs of Aboriginal offenders and their communities".[161] Second, sentencing judges can "ensure that systemic factors do not lead inadvertently to discrimination in sentencing" by recognizing the different socioeconomic realities that Indigenous people face, including factors like employment status, level of education, and family situation, and being wary of relying on factors like these as a reason to continue to disproportionately sentence Indigenous people to jail.[162]

In this way, the Supreme Court once more linked the role sentencing judges play in addressing Indigenous over-incarceration to their role in creating this crisis, regardless of intentions. The Court also cited a passage from the Aboriginal Justice Inquiry of Manitoba where "the justice system" is urged "to assist in reducing the degree to which Aboriginal people come into conflict with the law" by "reduc[ing] the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation".[163]

Likewise, the Court again linked the *Gladue* analysis to the concept of substantive equality in *Ipeelee*.[164] It emphasized that "[j]ust sanctions are those that do not operate in a discriminatory manner".[165] It also reaffirmed that the *Gladue* analysis is not aimed at "affirmative action" or

154 *Ibid* at para 97.
155 *Ibid* at paras 140, 157.
156 *Ibid* at para 60.
157 *Ibid*.
158 *Ibid*.
159 *Ibid* at para 62.
160 *Ibid* at para 63.
161 *Ibid* at para 66.
162 *Ibid* at para 67.
163 *Ibid* at para 69.
164 See *R v Whitehead*, 2016 SKCA 165 ["*Whitehead*"] at paras 31-32.
165 *Ipeelee*, n 137, at para 69.

"reverse discrimination" but rather "an acknowledgment that to achieve real equality, sometimes different people must be treated differently".[166] The Court cited a publication by law professor Tim Quigley where he argues that equality rights under the Charter provide "a constitutional imperative for avoiding excessive concern about sentence disparity" given that "in an ethnically and culturally diverse society, there is a differential impact from the same sentence".[167]

The Court also sought to clarify how each prong of the *Gladue* analysis impacts the fitness and proportionality of a sentence imposed on an Indigenous person. For the first stage of the analysis, it repeated the statement in *Wells* that where systemic and background factors shed light on the level of moral blameworthiness of an Indigenous person, they are "mitigating in nature".[168] This is because many Indigenous people "find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development" and these "constrained circumstances may diminish their moral culpability".[169] Failure to account for these circumstances would violate the principle of proportionality by failing to recognize the degree of responsibility of the offender.[170]

The Court also clarified sentencing judges' role at the second step of the *Gladue* analysis—the examination of appropriate sanctions and processes for Indigenous people—as going to "the effectiveness of the sentence itself".[171] It emphasized the need for "sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different worldviews, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community".[172] In this way, the Court reiterated its suggestion in *Wells* that the *Gladue* analysis opens up space for greater pluralism in sentencing by encouraging judges to consider Indigenous community-specific decisions, perspectives, procedures, and sanctions for wrongdoing.

The Court also clarified how the *Gladue* analysis relates to the principle of parity. While some of the circumstances facing Indigenous people are shared by members of other minorities or similarly marginalized non-Indigenous groups, the levels of criminality among Indigenous peoples are "intimately tied to the legacy of colonialism" and in this way distinct.[173] While the *Gladue* analysis might lead to different sanctions being imposed on Indigenous people, these will be justified based on their unique circumstances and courts must not undermine the remedial purpose of section 718.2(e) by taking a formalistic approach to parity.[174]

Finally, the Court identified two critical errors with respect to how lower courts were applying the *Gladue* framework. First, it stated that lower courts were wrong to insist that Indigenous people must establish a "causal link" between their systemic and background factors and the offence in question before these factors would be considered.[175] Second, it denounced cases where it had been incorrectly stated that *Gladue* principles categorically do not apply to serious offences.[176] The Court emphasized that sentencing judges have a statutory duty to consider the *Gladue* principles in *all* cases involving Indigenous people, and a failure to do so is inconsistent with the principle of proportionality that may lead to a successful appeal.[177]

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166 *Ibid* at para 71, citing *R v Vermette*, 2001 MBCA 64 ["*Vermette*"] at para 39.
167 *Ipeelee*, n 137, at para 79.
168 *Ibid* at para 73, citing *Wells*, n 125, at para 38.
169 *Ipeelee*, n 137, at para 73.
170 *Ibid.*
171 *Ibid* at para 74.
172 *Ibid.*
173 *Ibid* at para 77.
174 *Ibid* at para 79.
175 *Ibid* at paras 81-83.
176 *Ibid* at paras 84-87.
177 *Ibid* at para 87.

Above all, the *Ipeelee* decision clarifies how the *Gladue* analysis fits into the overall sentencing process under section 718. The different methodology that sentencing judges must follow for Indigenous people does not take place outside the existing sentencing framework. Instead, it speaks to the need for greater attention to the unique circumstances that Indigenous people face due to the complex intergenerational legacies of colonialism so that the general sentencing principles in the *Criminal Code* are applied equitably to Indigenous people. It also speaks to the need for greater attention to Indigenous peoples' unique and autonomous perspectives on appropriate procedures and sanctions for responding to wrongdoing.

Ewert v Canada, [2018] 2 SCR 165

The Supreme Court has not comprehensively revisited the *Gladue* framework for sentencing Indigenous people since 2012, although some recent publications argue that widespread misunderstanding and misapplication of the framework still persists among sentencing judges across the country.[178] The Supreme Court has, however, recently clarified that decision-makers within the prison system must similarly bear in mind the negative consequences of colonialism and widespread racism against Indigenous people for individuals who are already incarcerated.[179]

In *Ewert*, the Court acknowledged the existence of continuing systemic discrimination in the correctional system and held that the Correctional Service of Canada ("CSC") must "advance substantive equality in correctional outcomes for, among others, Indigenous offenders".[180] In keeping with the *Gladue* and *Ipeelee* decisions, the Court again engaged in purposive statutory interpretation guided by equality rights, values, and jurisprudence from section 15 of the Charter.

The Court noted that substantive equality requires that "the CSC respect difference and be responsive to the special needs of various groups" as "identical treatment may frequently produce serious inequality".[181] It interpreted the CSC's legislative framework as requiring it to account for the unique systemic and background factors affecting Indigenous peoples, and "their fundamentally different cultural values and world views" in the correctional context.[182] The Court emphasized that "[f]or the correctional system, like the criminal justice system as a whole, to operate fairly and effectively, those administering it must abandon the assumption that all offenders can be treated fairly by being treated the same way".[183]

The *Ewert* decision was specifically focused on the potential for cultural bias against Indigenous inmates in the actuarial risk assessment tools being used to make decisions with respect to security classification, escorted temporary absences, and parole, among others.[184] An approach informed by substantive equality required the CSC to conduct further research into the possibility of cross-cultural variance and bias in how these tools apply to Indigenous inmates.[185]

In a narrow sense, this decision may have implications for the use of actuarial risk assessment tools in sentencing. Probation officers use similar tools in the preparation of pre-sentence reports.

178 See for example Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 *UBC Law Review* 548 ["Denis-Boileau & Sylvestre"]; see also Celeste McKay & David Milward, "Onashowewin and the Promise of Aboriginal Diversionary Programs" (2018) 41 *Manitoba Law Journal* 127 ["McKay & Milward"] at 136.
179 *Ewert v Canada*, [2018] 2 SCR 165, 2018 SCC 30 ["*Ewert*"].
180 *Ibid*, para 53.
181 *Ibid*, para 54.
182 *Ibid*, para 58.
183 *Ibid*, para 59.
184 *Ibid*, para 64.
185 *Ibid*, para 67.

More broadly, however, the *Ewert* decision helps clarify the substantive equality principle that undergirds the *Gladue* analysis. A different approach is required whenever one is dealing with Indigenous people in the criminal justice system as they have different needs, experiences, values, and worldviews, arising in part from the devastating legacies of systemic racism and settler colonialism.[186] The principle of substantive equality is far more expansive in its application than just sentencing. This may explain why a *Gladue*-like analysis has been applied in a wide variety of legal contexts beyond those where section 718.2(e) is directly applicable. Among other contexts, *Gladue* principles are being applied in bail hearings, parole hearings, extradition proceedings, and disciplinary hearings for Indigenous professionals and members of the military in at least some Canadian jurisdictions.[187]

C. Implementing the *Gladue* framework

The preceding summary of the Supreme Court's jurisprudence on section 718.2(e), the *Gladue* analysis, and the need for substantive equality in the criminal justice system provides a detailed introduction to the meaning and implications of these cases. Still, it may not be readily apparent how to implement the Court's two-pronged approach in *Gladue* by reviewing case law alone. In fact, some lawyers who attended the seminars admitted that while they were well aware of the *Gladue* and *Ipeelee* decisions, they were still unsure of exactly what unique systemic or background factors judges need individualized information on so as to meet their obligations under this framework. As judges are to rely on both defence and Crown counsel to provide them with relevant evidence with respect to both branches of the *Gladue* analysis, this is a significant concern and a considerable potential barrier to the implementation of the *Gladue* framework.

As part of this project, a non-exhaustive list of potential "*Gladue* factors" was prepared and published in an information booklet. Expanding on this list, the unique systemic and background factors that may have negatively affected Indigenous people include the following:

- The loss or denial of status under the *Indian Act*, which impacts an individual's ability to live on reserve, be a member of a First Nation, vote in First Nation elections, and access various benefits for members. This is linked to a long and complex history of Canadian laws, policies, and practices aimed at restricting the number of "status Indians".[188]

186 The Supreme Court of Canada has subsequently reiterated the need for reforms to all aspects of the criminal justice system in order to address systemic biases, prejudices, and stereotypes against Indigenous people in *R v Barton*, 2019 SCC 33 ["*Barton*"], paras 196-204. This has once again been linked to "substantive equality, which represents the animating norm of s. 15 of the *Charter*" (para 202). In *Barton*, the Court's recognition of systemic racism against Indigenous people in the criminal justice system arose from the prejudicial manner in which a deceased Indigenous woman was discussed as the victim of an alleged crime perpetrated by a non-Indigenous offender who was acquitted after a jury trial. The Supreme Court of Canada ordered a new trial.

187 See for example: *R v Robinson*, 2009 ONCA 205 (bail hearings); *Twin v Canada (Attorney General)*, 2016 FC 537 (parole hearings); *Hamm v Canada (Attorney General)*, 2016 ABQB 440 (segregation); *United States v Leonard*, 2012 ONCA 622 (extradition); *R v Levi-Gould*, 2016 CM 4003 (court martial); *Frontenac Ventures Co v Ardoch Algonquin First Nation*, 2008 ONCA 534 (civil contempt); *R v Ceballo*, 2019 ONCJ 612 (validity of guilty plea); *Alberta (Child, Youth and Family Enhancement Act, Director) v JSA*, 2019 ABPC 32 (child protection); *R v Miller*, 2019 ONCJ 480 (stay of proceedings based on pre-trial delay); *R v Doxtator*, 2019 ONCJ 420 (regulatory fine for failure to insure automobile); *R v Abram*, 2019 ONSC 3383 (faint hope application); *R c Kanatsiak*, 2019 QCCQ 1888 (request for discharge); *R c McConini Mitchell*, 2018 QCCS 5157 (period of parole ineligibility); *O'Shea v City of Vancouver*, 2015 BCPC 398 (exception from limitation period); *Law Society of Upper Canada v Robinson*, 2013 ONLSAP 18 (professional misconduct); *R v Sim*, (2005), 78 OR (3d) 183 (Ontario Review Board hearing); *R v Daybutch*, 2015 ONCJ 302 & 2016 ONCJ 595 (*Charter* challenge under section 15).

188 For a brief description of the discriminatory history of these laws, policies, and practices, see *Canada (Human Rights Commission) v Canada (Attorney General)*, 2016 FCA 200 at paras 9-19.

- Attendance or intergenerational effects from family and community members' attendance at residential schools, boarding schools, and day schools created for Indigenous children, which are known for widespread physical and sexual abuse, loss of language, culture, and traditions, disruption of family connections and community norms, and poor quality educational outcomes.
- Removal or dislocation of one's family, community, or ancestors from their traditional territories, which has led to loss of identity, culture, traditions, and ancestral knowledge, compounding feelings of isolation for individuals.
- Direct, indirect, and systemic racism in Canadian society at large, schools, workplaces, prisons, the foster care system, and the adoption system, among other areas.
- Loss of autonomy for Indigenous communities, families, and individuals, as compounded over generations due to government policies and legislation. Restrictions on collective and individual autonomy included the undermining of traditional governance systems through the *Indian Act*, the denial of voting rights until the 1960s, a prohibition against litigating land claims up until the 1950s, the pass system's restrictions on mobility off reserve until the 1950s, and the permit system and peasant farming policy's restrictions on participation in the agriculture economy until as late as the 1960s, among others.
- Loss of spiritual practices due to government policies and legislation prohibiting participation in traditional feasts, dances, and ceremonies.
- Remoteness, in that many Indigenous communities are distant from basic services and facilities that most Canadians take for granted.
- Lack of connection due to personal or family history and government practices (such as children of the Sixties Scoop[189] or those facing intergenerational impacts of the residential school system), or due to community breakdown and fragmentation.
- Sexual, physical, psychological, emotional, verbal, or spiritual abuse leading to dissociative disorders, learned behaviours, and intergenerational impacts.
- Past and present personal, family, and community impacts of alcohol and drug abuse, including Fetal Alcohol Spectrum Disorder (FASD), [190] Fetal Alcohol Effects (FAE), and the consequences of drug use during pregnancy.
- Personal criminal history that is linked to criminal histories of other family or community members.
- Experiences of premature deaths among family members and friends due to substance abuse, accidents, violence, and suicides.
- Personal, family, or community history of a lack of access to food, employment, healthcare, or educational opportunities.
- Family breakdown due to divorce, family violence, and alcohol or drug abuse.
- Negative experiences in the foster care system or out-adoption.[191]

189 For a brief discussion of some of the harms associated with the Sixties Scoop, see: *Brown v Canada (Attorney General)*, 2013 ONSC 5637 at paras 4-15; *Brown v Canada (Attorney General)*, 2017 ONSC 251 at paras 4-7; and *Riddle v Canada*, 2018 FC 641 at paras 4-12.

190 For examples of how an individual's Fetal Alcohol Spectrum Disorder might be linked with other *Gladue* factors, see: *R v Drysdale*, 2016 SKQB 312 at paras 7-17, 62; and *R v Charlie*, 2012 YKTC 5.

191 For a brief discussion of links between Indigenous over-representation in foster care, out adoption, and systemic issues, see: *Catholic Children's Aid Society of Hamilton v G.H.*, 2016 ONSC 6287 at para 68; and *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 86, 89-91.

- Poor health (mental or physical), including suicidal thoughts or attempts, depression, anxiety, trauma, and diagnosed disorders.
- Interventions, treatments or counseling for alcohol or drug abuse, trauma, grief, or other mental health concerns, or a lack of access to services such as these.
- Unstable living situations in the past, present, or future, including experiences of homelessness or overcrowded and inadequate housing on reserve.
- Other experiences of poverty, both past and present.

Some of an Indigenous person's *Gladue* circumstances may be either positive or negative and will have relevance to sentencing regardless. For example:

- Their quality of relationships with their spouse/partner, immediate family, extended family, and community members;
- Their support networks in terms of past and present spiritual, cultural, family, and community supports and resources; and
- Their individual strengths, including any special skills or achievements they have that might be relevant to an appropriate sentence.

Sentencing judges require individualized information that responds to both prongs of the *Gladue* analysis. In relation to the second branch, the following considerations are identified in the information booklet:

- What Indigenous justice traditions if any might be relevant to sentencing?
- Are culturally appropriate alternative sanctions available?
- Are restorative justice options available?
- Is community involvement possible?
- Are counseling programs available?
- What is the appropriate sentencing range in light of *Gladue* factors?
- Is appropriate programming likely to be available in jail for this offender?

Several court decisions have provided similar guidance on what needs to be considered at each stage of the *Gladue* analysis.[192] This question of *what* needs to be considered is often closely related to the question of *how* counsel and judges can obtain this information, which will be addressed later in this report in its discussion of pre-sentence reports, Gladue reports, and *Gladue* submissions from counsel.

192 See for example *R v Laliberte*, 2000 SKCA 27; *R v Macintyre-Syrette*, 2018 ONCA 259 ["*Macintyre-Syrette*"]; *R v Legere*, 2016 PECA 7 ["*Legere*"]; and *R v Rose*, 2013 NSPC 99.

V. Truth and Reconciliation Commission Calls to Action & Final Report

Before addressing the current state of the *Gladue* decision's implementation in Saskatchewan, it is important to note how this project has been responsive to several of the Calls to Actions issued by the Truth and Reconciliation Commission of Canada.[193] This is important context in order to understand both the scope of the project itself and the broader task that remains ahead in terms of ensuring the *Gladue* decision is fully implemented in this province. This report also builds on research and findings from other commissions of inquiry that have thoroughly studied the crisis of Indigenous over-incarceration in Canada. However, the project seminars were designed as an educational opportunity for members of organizations tasked with responding to the Truth and Reconciliation Calls to Actions in particular as part of their organizational mandates. For ease of reference, several relevant Calls to Action have been reproduced in full in this section, some of which have been supplemented by further discussion of their context.

CHILD WELFARE

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:
    i. Monitoring and assessing neglect investigations.
    ii. Providing adequate resources to enable Aboriginal communities and child-welfare organizations to keep Aboriginal families together where it is safe to do so, and to keep children in culturally appropriate environments, regardless of where they reside.
    iii. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the history and impacts of residential schools.

193 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg MB: Truth and Reconciliation Commission of Canada, 2012) ["TRC Calls to Action"]. A more meaningful implementation of the *Gladue* analysis can also be seen as consistent with the framework for reconciliation provided by the *United Nations Declaration on the Rights of Indigenous Peoples*: *R v Francis-Simms*, 2017 ONCJ 402 at paras 47-48. See also Chartrand 2012, n 64, at 410. Professor Larry Chartrand has argued that section 718.2(e) is relevant to upholding the Indigenous-specific human rights in the Declaration reflected in Articles 2, 9, 21, and 34. These articles enshrine Indigenous peoples' rights to be free from discrimination, particularly with respect to their Indigenous origin, identity, or belonging; their right to improve their economic and social conditions, and the concomitant obligation of states to take effective measures to ensure these continually improve; and their right to promote, develop, and maintain their institutional structures and their distinctive customs, practices, traditions, and juridical systems, among other things.

iv. Ensuring that social workers and others who conduct child-welfare investigations are properly educated and trained about the potential for Aboriginal communities and families to provide more appropriate solutions to family healing.
v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.

The Call to Action with respect to the child welfare system was at least indirectly engaged by this project. While the link between the *Gladue* decision and the child welfare system may not be intuitive to all readers, complex connections between the residential school system, child welfare, and Indigenous over-incarceration are addressed in the Truth and Reconciliation Commission's final report.[194] In summary, the Commission found that residential schools were "an early manifestation of a child welfare policy of child removal that continues today", with more Indigenous children "removed from their families today than attended residential schools in any one year".[195] Likewise, the legacy of residential schools—including high rates of poverty, family violence, sexual violence, and substance abuse—continues to play a role in the over-representation of Indigenous youth in care.[196] More recent research has confirmed this analysis, finding that family exposure to the residential school system makes children more than twice as likely to end up in care as those without any intergenerational exposure to residential schools.[197] As just one example, one-third of all individuals who brought claims for serious physical or sexual abuse that they suffered during their attendance at residential schools also reported involvement in the criminal justice system, which in turn would make them "particularly vulnerable to child welfare investigations and apprehensions".[198]

The Commission also concluded that discriminatory assumptions about the inferiority of Indigenous parenting may continue to influence the perception that the best interests of Indigenous children lie in separation from their families, just as they did during the operation of the residential schools.[199] Indigenous children who have been placed into non-Indigenous homes were found to suffer many of the same effects as children who were placed in residential schools, including occasions of abuse and disparagement, identity confusion, low self-esteem, addictions, lower levels of educational achievement, and higher levels of unemployment.[200] As already summarized, these are among the unique systemic factors that must be considered when Indigenous people are sentenced because Indigenous people suffer from them at higher rates.

Indigenous victims of the residential school system appear to be more likely to have their children taken away. Their removed children in turn may suffer forms of trauma and impacts similar to those faced by the direct victims of the residential school system. Thus a negative feedback loop is created between child removals and a propensity towards criminal involvement. In keeping with this, the social science literature confirms that even in a non-Indigenous context, child welfare-involved youth are more likely to become involved in the justice system.[201] Statistics

194 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5* (Montreal QC & Kingston ON: McGill-Queen's University Press, 2015) ["TRC Vol. 5"].
195 *Ibid* at 11.
196 *Ibid*.
197 Brittany Barker et al., "Intergenerational Trauma: The Relationship Between Residential Schools and the Child Welfare System Among Young People Who Use Drugs in Vancouver, Canada" (2019) 65:2 *Journal of Adolescent Health* 248.
198 TRC Vol. 5, n 194, at 32.
199 *Ibid* at 11.
200 *Ibid* at 15.
201 See for example Melissa Jonson-Reid & Richard P. Barth, "From Placement to Prison: The Path to Adolescent Incarceration from Child Welfare Supervised Foster or Group Care" (2000) 22 *Children and Youth Services Review* 493; Magda Stouthamer-Loeber et al., "Maltreatment of boys and the development of disruptive and delinquent

also suggest a strong correlation between increasing rates of Aboriginal over-incarceration and over-representation of Aboriginal children in care, as already discussed.

For all these reasons, greater awareness of the *Gladue* decision is quite relevant to those involved in the child welfare system, just as greater awareness of the child welfare system is no doubt relevant to those who are more directly involved in implementing the *Gladue* decision.

JUSTICE

27. We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

This Call to Action warrants further discussion as it was issued as a result of the Commission's conclusion that the Canadian legal system failed the successive generations of Indigenous children who were victimized by the residential school system.[202] The Commission's final report takes note of not only RCMP enforcement of attendance at the residential schools but also initial indifference of legal professionals to instances of abuse and deaths at the schools. It summarizes a history of access to justice barriers for Indigenous peoples, including the *Indian Act*'s former prohibition against First Nations bringing lawsuits against the government without permission or raising money for this purpose. It also draws attention to challenges residential school survivors faced in seeking justice for the abuses perpetrated against them, including culturally insensitive conduct from lawyers.

According to the Commission, when the legal system finally began to respond to claims of abuse in the late 1980s, it initially did so "inadequately and in a way that often re-victimized the [s]urvivors", leaving the impression that the system was "tipped in favour of the school authorities and school administrators".[203] It also concluded that the justice system still "denies Aboriginal people the safety and opportunities that most Canadians take for granted", pointing to both disproportionate imprisonment of Indigenous people and an inadequate response to their criminal victimization.[204]

This Call to Action is of particular relevance to the Law Society of Saskatchewan ("LSS") and other law societies across Canada who collaborate together through the Federation of Law Societies of Canada. The LSS pre-approved this project's seminars for six hours of Continued Professional Development credits for any lawyers who attended them, and all these credits qualified as "ethics" hours. This provided a valuable incentive for practising lawyers to attend one of the seminars and likely helped boost attendance by members of the Saskatchewan bar.

It is hoped that this final report for the Gladue Awareness Project will also contribute to dialogue and education within the legal profession regarding the complex legacies of settler colonialism as these arise in sentencing proceedings within Saskatchewan.

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behavior" (2001) 13 *Development and Psychopathology* 941; Joseph P. Ryan & Mark F. Testa, "Child maltreatment and juvenile delinquency: Investigating the role of placement and placement instability" (2005) 27 *Children and Youth Services Review* 227.

202 TRC Vol. 5, n 194, at 185.

203 *Ibid* at 185-86.

204 *Ibid* at 186.

JUSTICE

30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.
31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.
32. We call upon the federal government to amend the *Criminal Code* to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

[…]

38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

These Calls to Action go to the heart to this project as they are specifically directed at addressing the crisis of Indigenous over-incarceration. It is hoped that the seminars and this final report will contribute to the public's understanding of the context behind these Calls to Action and the issues they are aimed at addressing, with particular attention to on-the-ground experiences and jurisprudence with respect to Indigenous over-representation in Saskatchewan's criminal justice system. These Calls to Action speak directly to the principles outlined by the Supreme Court of Canada in its *Gladue* decision, as repeated, refined, and reinforced in subsequent decisions, and provide an evidence-based course of action for responding to their policy implications.

JUSTICE

33. We call upon the federal, provincial, and territorial governments to recognize as a high priority the need to address and prevent Fetal Alcohol Spectrum Disorder (FASD), and to develop, in collaboration with Aboriginal people, FASD preventive programs that can be delivered in a culturally appropriate manner.
34. We call upon the governments of Canada, the provinces, and territories to undertake reforms to the criminal justice system to better address the needs of offenders with Fetal Alcohol Spectrum Disorder (FASD), including:
    i. Providing increased community resources and powers for courts to ensure that FASD is properly diagnosed, and that appropriate community supports are in place for those with FASD.
    ii. Enacting statutory exemptions from mandatory minimum sentences of imprisonment for offenders affected by FASD.
    iii. Providing community, correctional, and parole resources to maximize the ability of people with FASD to live in the community.
    iv. Adopting appropriate evaluation mechanisms to measure the effectiveness of such programs and ensure community safety.

These Calls to Action with respect to Fetal Alcohol Spectrum Disorder (FASD) and the criminal justice system are also quite relevant to this project. In brief, the Commission's final report carefully links Indigenous over-incarceration and the residential school system to an "alarmingly high rate" of FASD in Indigenous communities.[205] FASD is a permanent brain injury caused by alcohol consumption during pregnancy that creates challenges for those who suffer from it, including poor performance in school, disordered lives, conflict within families, and eventually conflict with the law.[206] The disabilities associated with FASD—including memory impairments, poor judgment,

205 *Ibid* at 154.
206 *Ibid*.

difficulties with abstract reasoning, and poor adaptive functioning—also appear to lead to higher rates of criminal involvement for those living with it.[207] Furthermore, various barriers to diagnosing FASD "can result in the unjust imprisonment of Aboriginal people who are living with a disability".[208]

According to the Commission, FASD is thus "one of the least well-understood but most insidious afflictions borne by the inheritors of the residential school legacy".[209] While Indigenous people in Canada have statistically lower than average rates of alcohol consumption and higher than average rates of abstinence from alcohol, alcohol consumption has nevertheless had "devastating consequences" for many Indigenous people.[210] The Commission pointed to estimates that between 10% and 25% of Canadian prisoners suffer from FASD, as well as research indicating that people with FASD more frequently come into conflict with the law.[211]

Of particular note, the Commission cites a report for the Aboriginal Healing Foundation that linked the intergenerational trauma of residential schools with alcohol addictions and FASD. According to its author, Dr. Tait of the University of Saskatchewan College of Medicine:[212]

> [The] residential school system contributed to the central risk factor involved, substance abuse, but also to factors shown to be linked to alcohol abuse, such as child and adult physical, emotional and sexual abuse, mental health problems and family dysfunction. The impact of residential schools can also be linked to risk factors for poor pregnancy outcomes among women who abuse alcohol, such as poor overall health, low levels of education and chronic poverty.

Other academic research reinforces the links between criminal involvement, FASD, and the legacy of the residential school system.[213] FASD has been found to lead to attention deficits, impulsivity, and hyperactivity in approximately 60-75% of individuals living with this disorder.[214] Symptoms vary between individuals, but people with FASD generally have low impulse control, low executive functioning, and a tendency towards explosive episodes.[215] While the link between these symptoms and criminal involvement are obvious, it has also been found that individuals with FASD can succeed if proper resources are in place to support them.[216]

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207 *Ibid* at 8.
208 *Ibid*.
209 *Ibid* at 222.
210 *Ibid*.
211 *Ibid*.
212 *Ibid*, citing Caroline L. Tait, *Fetal Alcohol Syndrome among Aboriginal People in Canada: Review and Analysis of the Intergenerational Links to Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2003) at 75.
213 See for example David Milward, "The Sentencing of Aboriginal Accused with FASD: A Search for Different Pathways", (2014) 47:3 *UBC Law Review* 1025 ["Milward 2014"]; see also Patricia H. MacPherson, Albert E. Chudley & Brian A. Grant, "Fetal Alcohol Spectrum Disorder (FASD) in a Correctional Population: Prevalance, Screening and Characteristics" (Ottawa: Correctional Service of Canada, 2011), as cited in Milward 2014; see also Denis C. Bracken, "Canada's Aboriginal People, Fetal Alcohol Syndrome & the Criminal Justice System" (2008) 6:3 *British Journal of Community Justice* 21, as cited in Milward 2014.
214 Larry Burd et al., "Recognition and Management of Fetal Alcohol Syndrome" (2003) 25 *Neurotoxicology & Teratology* 681; Ann P. Streissguth et al., "Risk Factors for Adverse Life Outcomes in Fetal Alcohol Syndrome and Fetal Alcohol Effects" (2004) 25:4 *Developmental & Behavioural Pediatrics* 228 ["Streissguth et al."].
215 Kathryn Page, "The Invisible Havoc of Prenatal Alcohol Damage" (2003) 4 *Journal of the Center for Families, Children & the Courts* 67 at 76, as cited in Kelly Herrmann, "Filling the Cracks: Why Problem-Solving Courts are Needed to Address Fetal Alcohol Spectrum Disorders in the Criminal Justice System" (2016) 18 *St. Mary's Law Review on Race and Social Justice* 241 at 245.
216 See Streissguth et al, n 214; see also Ann Streissguth, *Fetal Alcohol Syndrome: A guide for Families and Communities* (Baltimore: Paul H. Brooks Publishing Co., 1997).

In light of all this, bringing greater attention to the link between the systemic and background factors identified in the *Gladue* decision and FASD in Indigenous communities has fallen within the scope of this project. It is hoped that the project's seminars and final report bring more attention to this important topic for all residents of Saskatchewan, though especially those directly involved in responding to the *Gladue* decision in the justice system.

JUSTICE

35. We call upon the federal government to eliminate barriers to the creation of additional Aboriginal healing lodges within the federal correctional system.
36. We call upon the federal, provincial, and territorial governments to work with Aboriginal communities to provide culturally relevant services to inmates on issues such as substance abuse, family and domestic violence, and overcoming the experience of having been sexually abused.
37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.

The relevance of these Calls to Action is clear. They speak to the need for more rehabilitative and restorative justice measures to assist Indigenous people with issues that might contribute to their involvement in the criminal justice system. The Truth and Reconciliation Commission has called for more culturally relevant programming not only within the prison system, but also outside prison, whether within or outside Indigenous communities. More culturally relevant programming of this kind ought to assist sentencing judges in fulfilling their obligation to ensure they are sentencing Indigenous people with procedures and sanctions that are appropriate in light of their particular Indigenous heritage or connection.

JUSTICE

39. We call upon the federal government to develop a national plan to collect and publish data on the criminal victimization of Aboriginal people, including data related to homicide and family violence victimization.
40. We call on all levels of government, in collaboration with Aboriginal people, to create adequately funded and accessible Aboriginal-specific victim programs and services with appropriate evaluation mechanisms.

These TRC Calls to Actions address the criminal victimization of Indigenous people. The Commission found that many of the same factors that lead to disproportionate levels of incarceration for Indigenous people are also linked to disproportionate rates of criminal victimization for Indigenous people. For example, the Commission took note of a study that found Indigenous people who reported using drugs were four times more likely to also report being the victims of crime than those who did not report using drugs.[217] It also canvassed studies linking poverty and lack of employment opportunities to high crime rates in Indigenous communities and pathways to gang membership.[218]

Of particular relevance to this project, the Commission linked the lack of accessible, reasonable, and culturally relevant alternatives to incarceration for Indigenous people to both the over-incarceration and the over-victimization of Indigenous people in Canada:[219]

217 TRC Vol. 5, n 194 at 230.
218 *Ibid* at 232-233.
219 *Ibid* at 238.

> The Supreme Court's landmark decisions in *Gladue* and *Ipeelee* remind trial judges to take a different approach in applying the purposes and principles of sentencing to Aboriginal offenders, including those related to deterrence, denunciation, and retribution. These decisions recognize that the application of a uniform one-size-fits-all approach to punishment will be discriminatory and ineffective given the treatment of Aboriginal people in Canadian society, including the intergenerational legacy of residential schools. However, there is a pressing need for sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and will respond to the underlying causes of offending by them. Without adequate and stable funding of community sanctions and evaluation of their success, it is likely that the overrepresentation of Aboriginal people in prison and among crime victims will continue to grow.
>
> [Emphasis added]

Notably, the more recently issued final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls ("MMIWG") has further expanded on the systemic issues facing Indigenous people with respect to links between disproportionate levels of incarceration and criminal victimization—albeit with a particular focus on the experiences of Inuit, Métis and First Nations women, girls, and 2SLGBTQQIA people.[220] The MMIWG Inquiry also issued its own Calls for Justice with respect to the implementation of the *Gladue* decision.[221]

> **EQUITY FOR ABORIGINAL PEOPLE IN THE LEGAL SYSTEM**
>
> 50. In keeping with the *United Nations Declaration on the Rights of Indigenous Peoples*, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.

This Call to Action also has relevance to the Gladue Awareness Project even if this may not be immediately apparent to all readers. Among other intergenerational legacies of the residential school system, the Truth and Reconciliation Commission examined the role this system played in undermining Indigenous peoples' traditional culture, knowledge, and customary laws, which "could have acted as a positive mechanism of social control and restraint against criminal behaviour".[222] In illustrating this point, the Commission cited the following passage from criminologist Carole LaPrairie with respect to colonialism's impacts on the James Bay Cree:[223]

> Residential schools, the decline of traditional activities, the emergence of the reserve system which binds people together in unnatural ways, and the creation of band government which locates power and resources in the hands of a few have dictated the

220 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019), online: <https://www.mmiwg-ffada.ca/final-report/>.

221 *Ibid.* Among others, the Calls for Justice include a call for federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right, to resource them appropriately, and to create national standards (5.15). Other Calls for Justice address a range of related topics, including the expansion of restorative justice programs and Indigenous Peoples' courts (5.11), increased Indigenous representation on all Canadian courts (5.12), expansion and adequate resourcing of legal aid (5.13), evaluation of the impact of mandatory minimum sentences on Indigenous women, girls, and 2SLGBTQQIA people (5.14), community-based and Indigenous-specific options for sentencing (5.16), and the evaluation of the impacts of *Gladue* principles on sentencing for violence against Indigenous women, girls, and 2SLGBTQQIA people (5.17).

222 TRC Vol 5, n 194 at 228.

223 *Ibid*, citing Carol LaPrairie, "Aboriginal Crime and Justice: Explaining the Present, Exploring the Future" (1992) 34 *Canadian Journal of Criminology and Criminal Justice* 281 at 287.

> form of reserve life across the country and have profoundly affected institutions such as kinship networks, families, as well as the unspoken rules of behavior in traditional societies… The lack of respect for others, and the absence of shame about one's bad behaviour and about harming another or the community were, to many Cree for example, the most troubling aspects of contemporary life.

The Truth and Reconciliation Commission is by no means unique for concluding that the crisis of Indigenous over-incarceration is linked to the suppression of Indigenous legal traditions, nor is it unique for prescribing the revitalization of these traditions as being essential to any solution. According to the final report of the Aboriginal Justice Inquiry of Manitoba issued in 1991, for example, a response to this crisis ought to include space for "[t]he use of Aboriginal social and cultural institutions, such as the Aboriginal family and the role of [E]lders in maintaining peace and good order in their communities, and in transmitting knowledge about acceptable and unacceptable behaviour".[224] A few years later, the Royal Commission on Aboriginal Peoples issued its own detailed report asserting that any effective response to Indigenous over-incarceration will require respect for and revitalization of Indigenous laws and justice systems.[225] Both reports contrasted perspectives on justice within Indigenous legal traditions against the perspective manifested through Canada's mainstream criminal justice system as well.

As already discussed, the Supreme Court's *Gladue* decision itself calls for consideration of sentencing procedures and sanctions which may be appropriate for an Indigenous person based on their "particular [A]boriginal heritage or connection".[226] Echoing the findings of the earlier commissions of inquiry cited in its reasons, the Court acknowledged that Indigenous peoples often hold different perspectives on justice, wrongdoing, and appropriate responses that differ from mainstream sentencing ideals of deterrence, separation, and denunciation set out in the *Criminal Code*.[227] The Court encouraged judges to craft their sentencing processes and sanctions to be consistent with the "[A]boriginal perspective".[228] Doing so may require greater sensitivity to and understanding of Indigenous peoples' own laws, as well as further resources in support of this challenging task.[229]

The *Gladue* decision calls on sentencing judges and counsel to take a different approach to the existing sentencing framework that is more consistent with the unique needs, experiences, and perspectives of Indigenous peoples. In doing so, it calls for an approach that is more effective and consistent with the principle of substantive equality and more sensitive to Indigenous legal perspectives on justice. This is a complex task that requires greater understanding and sensitivity to the many links between the crisis of Indigenous over-incarceration and other legacies of settler colonialism and systemic racism faced by Indigenous people in Canada. Along with the reports from other relevant commissions of inquiry, the final report of the Truth and Reconciliation Commission provides a critical resource in this regard.

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224 *Aboriginal Justice Inquiry of Manitoba*, n 83, at 264.
225 *Bridging the Cultural Divide*, n 83.
226 *Gladue*, n 5, at para 66.
227 *Ibid* at para 70.
228 *Ibid* at para 74.
229 A detailed list of primary and secondary source resources on Indigenous laws and legal traditions is provided in Rudin, n 7, at 253-265. A brief review of this non-exhaustive list suggests a lack of readily available introductory resources with respect to the laws and legal traditions of the Denesuline, Nakoda, or Dakota peoples that have traditional territories and significant populations within Saskatchewan, by way of example. Complex questions also remain outstanding as to how sentencing judges might respectfully and meaningfully engage with Indigenous law.

VI. Saskatchewan & *Gladue*

A. The identification of existing gaps

The following summary is based on a review of past reports and publications, supplemented by information provided to the Gladue Research Officer during the course of the project seminars or to the author of this report during its finalization.

Saskatchewan has long been identified as a jurisdiction in which the rates of Indigenous over-incarceration are particularly distressing.[230] As noted by law professor Michael Jackson, a study of admissions to Saskatchewan's correctional system for 1977-1978 found that "male treaty Indians" over 15 years of age were 37 times more likely to be admitted to a provincial correctional institution than their non-Indigenous counterparts, and a "treaty Indian woman" was 131 times more likely to be admitted.[231] Jackson also made the following haunting observation:

> The Saskatchewan study brings home the implications of its findings by indicating that a treaty Indian boy turning 16 in 1976 had a 70% chance of at least one stay in prison by the age of 25 (that age range being the one with the highest risk of imprisonment). The corresponding figure for non-status or Métis was 34%. For a non-native Saskatchewan boy the figure was 8%. Put another way, this means that in Saskatchewan, prison has become for young native men, the promise of a just society which high school and college represent for the rest of us. Placed in a historical context, the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.

The suggestion that Canadian prisons represent the "new residential schools" continues to be echoed in popular discourse.[232] According to sociology professor Vicki Chartrand, "[w]hile the prison is not a residential school per se, […] it was born of the same modern logics of segregation and reformation of the individual".[233]

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230 See for example, John Hylton, "Locking Up Indians in Saskatchewan: Some Recent Findings" in T. Fleming & L. A. Visano, eds, *Deviant Designations, Crime, Law and Deviance in Canada* (Toronto: Butterworths, 1983), as cited in Michael Jackson, "Locking Up Natives in Canada" (1989) 23 *UBC Law Review* 215 ["Jackson"] at 216.

231 Jackson, n 230, at 216.

232 See for example Isobel M. Findlay & Warren Weir, *Aboriginal Justice in Saskatchewan 2002-2021: The Benefits of Change* (A Report Presented to the Commission on First Nations and Métis Peoples and Justice Reform, February 2004) ["Findlay & Weir"] at 9-23; see also Nancy Macdonald, "Canada's prisons are the 'new residential schools'" (18 February 2016), online: *Maclean's* <https://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>.

233 Canada, Parliament, Status of Women Committee, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 83 (7 December 2017) ["Chartrand Evidence"].

As addressed in more detail earlier in this report, Saskatchewan continues to send alarmingly high numbers of Indigenous people to jail today. This crisis continues in spite of the fact that the Supreme Court of Canada's *Gladue* decision was released over two decades ago and has been consistently reaffirmed by the Court since then. It is clear that something is not working.

Disproportionately high incarceration rates for Indigenous people across Canada were not being reported until the 1960s. According to the findings of the Aboriginal Justice Inquiry of Manitoba, Indigenous people were incarcerated at roughly proportionate rates prior to the Second World War.[234] According to historians, Canada's criminal justice system was first introduced to what is now Saskatchewan in the 1870s, but in northern Saskatchewan, Indigenous laws and processes may have continued to address wrongdoing unimpeded until as late as the 1950s.[235] Nevertheless, the disproportionate incarceration of Indigenous people within the Canadian justice system had become an apparent problem by 1965 and it has rapidly grown since then.[236]

Some of the individuals who participated in the project seminars expressed the opinion that there needs to be greater awareness of the *Gladue* decision among all individuals involved in the criminal justice system, as well as the broader public. Some expressed the view that judges, prosecutors, defense counsel, and offenders all need more education about the meaning of the *Gladue* case. It was suggested on more than one occasion that if only more education were provided, we would no longer see such high rates of incarceration for Indigenous people in Saskatchewan. The degree to which these views are substantiated is unclear and hard to verify.

Today, a great deal of information on the *Gladue* decision is readily available to all those involved in the criminal justice system in Saskatchewan.[237] It is clear that some good faith efforts are being made towards an improved implementation of the *Gladue* analysis within the legal profession and the criminal justice system more broadly in Saskatchewan. At the very least, the situation appears to be far more complicated than a mere failure to educate those involved in the system. As canvassed in the final report of the Truth and Reconciliation Commission, many different complex factors have contributed to the over-incarceration of Indigenous people since settlers' governments, laws, and systems were first imposed upon Indigenous peoples.

Some of the seminar participants made it clear that they believe the police, prosecutors, and courts in Saskatchewan are too quick to charge, convict, and imprison Indigenous people on the basis that public safety is at risk. During one seminar, some of the participants claimed there was a prosecutor in a rural Saskatchewan community who took it as a personal win or loss every time

234 *Aboriginal Justice Inquiry of Manitoba*, n 83, at 101. See also Chartrand Evidence, n 233.

235 See R.C. Macleod & Heather Rollason, "Restrain the Lawless Savages: Native Defendants in the Criminal Courts of the North West Territories, 1878-1885" (1997) 10:2 *Journal of Historical Sociology* 157 at 159; David M Quiring, *CCF Colonialism in Northern Saskatchewan: Battling Parish Priests, Bootleggers, and Fur Sharks* (Vancouver: UBC Press, 2004); *Aboriginal Justice Inquiry of Manitoba*, n 83, at Chapter 3; James T.D. Scott, "Sentencing Indigenous Offenders: Taking Judicial Notice of the History of Colonization, Displacement and Residential Schools" (16 May 2018), online *Scott & Beaven Law Office* <http://sblo.ca/2018/05/16/taking-judicial-notice-of-the-history-of-colonization/> ["Scott 2018"] at 14.

236 *Ibid*.

237 For example, the Gladue Research Officer obtained an outline of the *Gladue*-related training that Saskatchewan Corrections was providing as of June 2018, as well as copies of various publicly available and detailed resources and handbooks on the *Gladue* decision, the writing of Gladue reports, and the preparation of *Gladue* submissions that have been published by the Legal Services Society of British Columbia, the Nishnawbe-Aski Legal Services Corporation, and the University of Manitoba, among others. The author of this report has also contributed to a professional development course dedicated to the preparation of *Gladue* submissions for the British Columbia Continuing Legal Education Society. See Benjamin Ralston, "*Gladue*: Oft-cited but still woefully misunderstood?" (Prepared for British Columbia Continuing Legal Education's Gladue Submissions Course, Vancouver, 15 & 16 November 2018), online: <http://perma.cc/FS9V-APM3>.

he sought to have an Indigenous person sentenced to jail. In another session, several participants asserted that Regina was notorious for its hardline approach to prosecutions. It is unclear what substance there is to anecdotal claims such as these without conducting further research beyond the scope of this project. Yet if the views expressed by these participants are widespread, such perceptions do matter. To paraphrase a common refrain among Canadian lawyers and judges, it is not enough for justice to be done if it is not also *seen* to be done.

As discussed in the Truth and Reconciliation Commission's final report, many contributing factors to the disproportionately high incarceration rates for Indigenous people have been linked to the continued roll out of direct and intergenerational effects from the settler colonial project in Canada, including the imposition of the residential school system, the *Indian Act*, the Sixties Scoop, and many other discriminatory laws, policies, and practices. The crisis of Indigenous over-incarceration has been clearly linked to the results of settler governments trying to outlaw and suppress Indigenous governance systems, legal traditions, protocols, cultural norms, languages, familial and community relations, and territorial uses and ownership since contact.

The residential school system's impacts are a subset of many other impacts and intergenerational effects of settler colonialism that have been identified and discussed at length by the Truth and Reconciliation Commission, the Royal Commission on Aboriginal Peoples, Saskatchewan's Commission on First Nations and Métis Peoples and Justice Reform, the Aboriginal Justice Inquiry of Manitoba, the Missing and Murdered Indigenous Women and Girls Inquiry, and many, many others. The Canadian colonial project has deeper roots than the residential school system alone and its many legacies are devastatingly pervasive. It has left a grossly disproportionate number of Indigenous people living in poverty, struggling with addictions, and facing many social and economic barriers both within and outside of Indigenous communities. Responding to and remedying these deep-seated issues remains an intergenerational project.

Between 2006 and 2016, the Indigenous population in Canada grew by 42.5%—over four times the growth rate for the non-Indigenous population over the same period.[238] The number of Indigenous people in Canada who are grappling with the direct and intergenerational effects identified in the Truth and Reconciliation Commission's final report is therefore rising fast. Despite the fact that high school and post-secondary education rates have significantly improved over this same period, the overall demographic trend suggests a steady growth in the number of individuals who are statistically more likely to be brought into contact with the criminal justice system as offenders, victims, or both due in part to systemic and background factors.[239]

Saskatchewan has made efforts to respond to this crisis. This province has a number of innovative therapeutic court processes available that relate back to the need for the accommodation of difference that undergirds the *Gladue* decision. For example, the Saskatoon Mental Health Strategy Court seeks to address the unique needs and challenges of individuals with mental health, Fetal Alcohol Spectrum Disorder, or cognitive issues who have been charged with a crime.[240] The Regina Drug Treatment Court aims to address drug addiction as an underlying cause of criminal activity through the involvement of an interdisciplinary team of professionals.[241] The Domestic

238 Key Results from 2016 Census, n 11. However, the authors note that the growth in Canada's Indigenous population over this period is at least partly related to changes in self-reported identification as "more people are newly identifying as Aboriginal on the census—a continuation of a trend over time".

239 Statistics Canada, "Education in Canada: Key results from the 2016 Census" (29 November 2017), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/daily-quotidien/171129/dq171129a-eng.htm>.

240 "Saskatoon Mental Health Strategy", online: *Courts of Saskatchewan* <https://sasklawcourts.ca/index.php/home/provincial-court/adult-criminal-court/saskatoon-mental-health-strategy>.

241 "Regina Drug Treatment Court", online: *Courts of Saskatchewan* <https://sasklawcourts.ca/index.php/home/provincial-court/adult-criminal-court/rg-drug-court>.

Violence Court offers a counseling and substance abuse treatment option for those willing to take responsibility for their actions that precedes sentencing and may reduce the final sentence offenders receive.[242]

Saskatchewan was also an early innovator with respect to the use of sentencing circles in the years leading up to the *Gladue* decision. These alternative sentencing procedures were first initiated in northern Saskatchewan by Provincial Court judges who were unsatisfied with the solutions they were able to provide through the existing justice system.[243] Judge Fafard initiated the first sentencing circle in Saskatchewan in 1992—having been inspired by Judge Stuart's approach in the Yukon case of *R v Moses*[244]—and it soon after became a common practice throughout the north.[245] The Saskatchewan Court of Appeal has provided detailed guidance with respect to the appropriate circumstances and process for sentencing circles.[246] However, the use of sentencing circles in this province appears to have precipitously declined since then.[247]

Saskatchewan is also home to the innovative Cree Court for criminal and child protection matters, which operates as a circuit court and conducts its hearings entirely or partially in Cree.[248] Among other things, Cree Court judges are able to emphasize traditional Cree values of respect for one's family and community alongside the sentencing principles set out in the *Criminal Code* or the *Youth Criminal Justice Act*.[249] This is one of the clearest examples in Saskatchewan of a sentencing process creating space for the "Aboriginal perspective".

All of these innovative responses to over-incarceration—therapeutic courts, the Cree Court, and the use of sentencing circles alike—rely on joint participation, support, and mutual buy-in from defence counsel and Crown prosecutors. In this way they exemplify the need for a systemic response to the systemic issues underlying this crisis.

There has also been some experimentation with the use of Gladue reports in this province. Saskatchewan Legal Aid conducted an internally funded pilot project between 2014 and 2016 that provided approximately 30 Gladue reports until this funding was exhausted. The pilot project received an interim evaluation by Dr. Jane Dickson of Ryerson University and a final evaluation by retired criminal defence lawyer James Scott. Overall, the pilot project and the Gladue reports it produced appear to have been well received by those who participated in the assessment, especially defence counsel and their clients. If made publicly available, these evaluations could provide a basis for improving the consistency and quality of future reports.

While Legal Aid has not provided any funding for Gladue reports since 2016, sentencing judges in Saskatchewan have continued to engage with reports that were either funded directly by defendants or paid for by Court Services. It was not possible to determine a precise number

242 "Domestic Violence Court", online: *Courts of Saskatchewan* <https://sasklawcourts.ca/index.php/home/provincial-court/adult-criminal-court/domestic-court>.

243 Bonnie Orchard, *Sentencing Circles in Saskatchewan* (Master of Laws, University of Saskatchewan, 1998) [unpublished] at 81.

244 *R v Moses*, [1992] 3 CNLR 116 (YKTC).

245 *R v Joseyounen*, [1996] 1 CNLR 182 (SKPC) at para 4. Judge Fafard estimated that he had personally dealt with approximately 60 cases by way of sentencing circles between 1992 and 1996.

246 *R v Morin*, [1995] 4 CNLR 37 (SKCA); *R v WBT*, [1998] 2 CNLR 140 (SKCA).

247 Betty Ann Adam, "Sentencing circles fall out of favour" (2 January 2014) *Saskatoon StarPhoenix*, online: <www.pressreader.com/canada/saskatoon-starphoenix/20140102/281487864186496>. See also Rudin, n 7, at 207-233 for an extended discussion of the declining use of "first wave" sentencing circles and a more recent trend towards smaller "second wave" sentencing circles.

248 "Cree Court", online: *Courts of Saskatchewan* <https://sasklawcourts.ca/index.php/home/provincial-court/cree-court-pc>.

249 *Ibid*.

of Gladue reports that have been provided in Saskatchewan since the end of Legal Aid's pilot project, but it appears that at least three independent contractors have produced reports privately or on contract with Court Services in Saskatchewan since 2016, and trained staff at the File Hills Qu'Appelle Tribal Council have also been preparing Gladue reports for sentencing proceedings since then.[250] Saskatchewan's Community Corrections is also undertaking a review of its process for the preparation of ordinary pre-sentence reports in order to better reflect the informational needs of the *Gladue* analysis and the types of information set out in standalone Gladue reports.

Public Prosecutions with the Ministry of Justice for the Government of Saskatchewan has also created a five-page practice memorandum regarding the *Gladue* principles that directs prosecutors to familiarize themselves with key cases and encourages them to remind sentencing judges of their statutory duty to consider the *Gladue* provision, "speak[ing] to it to the extent [they] are able".[251] While this practice memorandum is not as detailed as the policies and directives addressing the Crown's role in the implementation of the *Gladue* principles federally or in Quebec, Ontario, and British Columbia, it does recognize that prosecutors have a responsibility in responding to Indigenous over-representation in the justice system and jail.[252]

At the same time, the memorandum clearly sets out an argument in opposition to sentencing judges ordering Gladue reports without explicit statutory authority, although it recognizes that directly opposing such applications is a role for Court Services rather than prosecutors.[253] This position fits within a broader strategy of Saskatchewan's Ministry of Justice to present *Gladue* information through improved pre-sentence reports, linking in with Community Corrections' ongoing work to improve the quality and depth of information set out within these reports.

In addition, several participants in the Gladue Awareness Project and its seminars highlighted that judges, court staff, probation officers, parole officers, court workers, prosecutors, and defence counsel in Saskatchewan, among others, have all had opportunities to receive cultural sensitivity training and education with respect to more general Indigenous content and the *Gladue* decision. In fact, this has been made mandatory for all Crown prosecutors.

Nevertheless, in spite of the actions taken to date, the crisis of Indigenous over-incarceration in Saskatchewan has continued to grow. Based on the experience thus far, further training and education alone will likely not suffice. Instead, the systemic nature of the crisis will require a systemic response in which all those involved in the criminal justice system take stock of current gaps and work together to meet the unique needs of communities across Saskatchewan.

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250 This information was obtained through telephone interviews with Saskatoon-based Gladue report writers Lisa Hill and Christine Goodwin and email correspondence with Ottawa-bases Gladue report writer Mark Marsolais-Nahwegahbow in late September 2019.

251 Saskatchewan, Public Prosecutions, *Practice Memorandum – Subject: Gladue Principles* (December 2018), provided by Anthony B. Gerein, Q.C., Assistant Deputy Attorney General via private correspondence on September 30, 2019 ["*Practice Memorandum*"] at 3.

252 *Ibid* at 1. For publicly available examples of prosecutorial policies and directives addressing *Gladue* principles, see: Canada, Public Prosecution Service of Canada, *Public Prosecution of Canada Deskbook*, 3.18 Judicial Interim Release, online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch18.html#section_3>; British Columbia, *Crown Counsel Policy Manual*, Bail – Adult (BAI 1), online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/bai-1.pdf>; Ontario, Crown Prosecution Manual, D.20: Indigenous Peoples, online: <https://www.ontario.ca/document/crown-prosecution-manual/d-20-indigenous-peoples>; Quebec, *Directives du Directeur des poursuites criminelles et pénales du Québec*, ACC-3, online: <https://www.dpcp.gouv.qc.ca/ressources/pdf/envoi/ACC-3.pdf> at 9, 17 & 19. For a discussion of how *Gladue* principles might apply to prosecutorial decision-making in spite of *R v Anderson*, [2014] 2 SCR 167, see Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons" (2015) 71:11 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 277.

253 *Practice Memorandum*, n 251, at 4-5.

While this project's seminars were well attended overall, the Gladue Research Officer observed that very few prosecutors participated. This was tempered by Public Prosecutions' expression of interest in receiving further *Gladue* training and hearing feedback from this project at an annual conference instead. Yet by declining to participate in knowledge-sharing opportunities such as this one, key players in the criminal justice system may have missed out on the chance to learn directly from one another. Going forward, unidentified gaps in current responses and potential solutions to existing barriers may remain undiscovered in the absence of greater openness and willingness to share and hear diverse experiences, perspectives, and insights.

Government alone cannot address the Indigenous over-incarceration crisis. Courts alone cannot tackle this problem. Indigenous peoples themselves cannot deal with all the factors involved, nor are they likely to be in a position to address all the complex factors and barriers that feed into this crisis. Such deep-rooted, systemic issues will require holistic and collaborative responses.

Based on a thorough review of relevant literature and case law, in addition to the Gladue Research Officer's detailed notes from discussions with seminar participants and other key players in the criminal justice, the following gaps have been identified:

i Capacity building for professionals who still struggle to meaningfully apply the *Gladue* analysis and principles. As discussed elsewhere in this report, misunderstandings with respect to the decision's implications and application can be seen in reported cases. Periodic environmental scans of cases from Saskatchewan and other jurisdictions may assist organizations like Public Prosecutions and Legal Aid in ensuring greater consistency in how the *Gladue* framework is understood and implemented by counsel. While continuing professional development education is available on the *Gladue* principles and more general Indigenous content in Saskatchewan, more detailed, hands-on training and guidance on how to make effective and responsive *Gladue* submissions may be needed.

ii Greater recognition of the increased effort, time commitment, and background knowledge required of defence counsel in order to make effective *Gladue* submissions. Legal aid funding in British Columbia and Ontario has acknowledged the many challenges involved in the preparation of meaningful and thorough *Gladue* submissions through the creation of an additional tariff for these submissions, as well as quality control mechanisms.[254]

iii Improved coordination between policing, corrections, social services, and community-based services of relevance to offenders. Seminar participants identified this as a needed strategy in order to prevent young people from getting caught up in criminal activity in the first place. Further research may be necessary in support of such a goal.

iv Conveying information, materials, and insights directly to offenders with respect to the purposes of *Gladue* submissions and reports, as well as the processes through which they are prepared. Seminar participants acknowledged this to be a barrier to the effective identification of *Gladue* factors for the purposes of fulfilling the Court's obligations.

254 See Legal Services Society of British Columbia, "Summary of the May 7, 2018 Criminal Tariff changes", online: <https://legalaid.bc.ca/lawyers/criminalTariffChangesSummaryMay2018>; Legal Aid Ontario, "Block fees: Getting paid", online: <https://www.legalaid.on.ca/en/info/block_fees_getting_paid.asp>; Legal Aid Ontario, "*Gladue* panel standards", online: <https://www.legalaid.on.ca/en/info/panel_standards_gladue.asp>.

v Ensuring offenders and counsel alike are better informed on the alternative sanctions and procedures that are currently available in Saskatchewan. This was identified as being required so that counsel are in a position to prepare more thorough and community-specific submissions for alternative sanctions consistent with the second prong of the *Gladue* analysis. Aboriginal courtworkers may play a key role in this regard.

vi Development of context-specific approaches to obtaining and providing relevant *Gladue* information for decisions on sentencing, bail, parole, and other matters. This will ensure the approach is tailored to the differing considerations at issue in each statutory context, as well as the differing procedural and time constraints involved.

vii Hiring and appointing more Indigenous people to all branches of the criminal justice system, from police officers and social services providers to members of the judiciary. Many participants argued that making the justice system more reflective of all the communities it serves would increase trust and public acceptance of its processes.

viii Increased programming, autonomy, and respect for Indigenous community-based sanctions and processes, such as sentencing and healing circles. This was identified as necessary in order to address community and family-level issues that underlie criminal involvement rather than placing the sole focus on the individual. It was also linked to ensuring that Indigenous legal traditions play a key role in responding to criminal conduct.

ix Increased programming and facilities for individuals afflicted with Fetal Alcohol Spectrum Disorder (FASD). Many participants were of the view that there was a significant link between FASD and high rates of incarceration for Indigenous people in Saskatchewan.

One further issue that came up repeatedly during the seminars and other discussions with stakeholders in the course of this project relates to the differences between the methodology and substantive content of stand-alone Gladue reports as compared to the pre-sentence reports with *Gladue* information prepared by Community Corrections in Saskatchewan. As this remains a live issue before Saskatchewan's courts and is a particularly contentious topic among the various stakeholders, it will be given closer attention in its own section later in this report.

B. Differing perceptions of prison due to systemic and background factors

One of the most consistent comments from seminar participants was that jail is not always a significant deterrent for those involved in Saskatchewan's criminal justice system. For most people, the thought of going to jail is terrifying. It involves a clear loss of individual freedom, including job, education, recreation, and travel opportunities. It is also commonly feared that incarceration puts one at risk of serious physical, mental, and emotional harms at the hands of guards or other inmates. Yet for some, prison may not evoke any of these fears—especially if they already bear many lived experiences of violence, trauma, isolation, and institutionalization.

Participants in the seminars mentioned that for some offenders in Saskatchewan, violence may be an ever-present part of their daily lives outside prison. What many of us take for granted—individual autonomy, community safety, adequate housing, a steady job, and educational opportunities—may not seem realistic or achievable for all residents of this province. Imprisonment may simply confirm already existing limitations on one's life and liberty.

For some, a prison sentence may even be seen as a natural extension of the institutional environments in which they were raised. Several participants suggested incarceration could have much in common with one's experiences in residential schools or foster care, for example. It was argued that some incarcerated Indigenous people find community, connection, and acceptance in prison, especially when they are housed alongside family members. Some participants spoke anecdotally about individuals intentionally breaking the law to be incarcerated within these captive communities. Others suggested that prisons hold a promise of comparative stability, safety, and the necessaries of life for those who may struggle to with FASD or face difficulties in obtaining adequate food and housing, especially during wintertime.

Many participants asserted that incarceration could become a 'rite of passage' for certain offenders. It was suggested that prisons are closely associated with gang recruitment and representation, as well as access to drugs. Several participants questioned the value of housing individuals who are struggling alongside more hardened criminals and those already involved in organized crime, especially where offenders suffer from FASD or other impairments that make them particularly susceptible to abuse or manipulation by others.

Several participants suggested that imprisonment allows some offenders to avoid dealing with the underlying issues behind their offending. Many individuals are in provincial custody on remand for very lengthy periods of time before they are tried or sentenced, during which time they cannot access any institutional programming. Participants also suggested that inmates could fail to take advantage of programming while serving prison sentences whereas community-based programs could be made mandatory through carefully crafted conditions.

These perspectives were not all universally shared and some likely warrant further study. Still, an overwhelming number of seminar participants across the province were of the view that prison has become normalized for many Indigenous people in Saskatchewan. Bearing in mind the statistics addressed earlier in this report, this normalization of imprisonment should be particularly worrisome in light of the trajectory of institutionalization and over-incarceration for Indigenous youth in Saskatchewan.

C. Recent judicial treatment of the *Gladue* analysis in Saskatchewan

In the past, Saskatchewan has been singled out in studies of Canadian sentencing practices for comparative barriers and institutional resistance to the implementation of the *Gladue* analysis.[255] As just one example, a study of sentencing decisions between 1999 and 2014 found Saskatchewan to be sentencing Indigenous men to some of the longest periods of incarceration for manslaughter of any Canadian jurisdiction, second only to Nunavut.[256] The study also identified Saskatchewan as a jurisdiction where judges failed to apply section 718.2(e) in almost half of all sentencing decisions for Indigenous people (46%) between 1999 and 2014.[257] Judges were less likely to receive Gladue reports or personal background information prior to sentencing as well. Saskatchewan has also been singled out for its disproportionately high success rate for Crown appeals from sentences for Indigenous people as compared to non-Indigenous people, potentially discouraging sentencing judges from placing emphasis on the *Gladue* framework in their decisions.[258] Furthermore, Saskatchewan's judges were apparently not yet receiving any specialized training on how to implement the *Gladue* analysis at the time.[259]

Building on earlier studies, this summary of the judicial treatment of the *Gladue* framework in Saskatchewan will focus on the past four years of case law. Currently there are fewer than 300 reported decisions from the Saskatchewan Provincial Court, Court of Queen's Bench, and Court of Appeal involving the sentencing of Indigenous people since 1999. Yet the majority of sentencing decisions go unreported. It is therefore impossible to say with any certainty whether the *Gladue* analysis is being given due consideration by all sentencing judges across the province. It is also unknown at this time whether all judges are now being provided with consistent levels of reliable information about the systemic and background factors faced by Indigenous people and their communities, or on culturally appropriate sentencing procedures and alternatives to incarceration that reflect the specific Indigenous heritage or connection of these individuals. Due to the limitations around access to reasons for sentence, what follows will be limited to a discussion of several recent published decisions from Saskatchewan courts with respect to the current state of the jurisprudence here.

The most consistently flagged issue in Saskatchewan's *Gladue* jurisprudence over the last few years appears to be persistent concerns with the quality of *Gladue* information and submissions judges are provided with. In keeping with this, many seminar participants strongly asserted that judges in Saskatchewan continue to receive little to nothing from counsel with respect to either branch of the *Gladue* analysis. Yet the Supreme Court of Canada has made it clear that a thorough *Gladue* analysis is legally required in each and every sentencing proceeding involving an Indigenous person. The Court has described counsel as having "a duty to bring [case-specific] individualized information before the court in every case, unless the offender expressly waives his right to have it considered".[260] The Court went on to describe such case-specific information as being "indispensible to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*".[261]

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255 See for example Scott James, "Reforming Saskatchewan's Biased Sentencing Regime" (2017) 65:1/2 *Criminal Law Quarterly* 91 ["Scott 2017"]; Kent Roach, "One Step Forwards, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 *Criminal Law Quarterly* 470; Lindsay Hjorth, "Saskatchewan's Incarceration Epidemic" (2017) [unpublished], online: *Scott & Beavin Law Office* <http://sblo.ca/2017/11/14/saskatchewans-incarceration-epidemic/>.

256 Anna Johnson, *Equitable Access: A Comparison of the Sentencing of Aboriginal Offenders across Canada* (Master of Arts, Criminology, University of Guelph, 2016) [unpublished] ["Johnson"] at 82-85, 87.

257 *Ibid* at 89, 98, 104, 110.

258 *Ibid* at 28-29.

259 *Ibid* at 128, 135, citing Department of Justice, *Gladue Practices in the Provinces and Territories* (Ottawa: Research and Statistics Division - Department of Justice Canada, 2013).

260 *Ipeelee*, n 137, at para 60 (emphasis added).

261 *Ibid* (emphasis added).

The Court has also made it clear that the obligation to adduce case-specific information into the sentencing process falls on "counsel on both sides"—in other words, the duty is not exclusive to defence counsel.[262]

This is no small task. Justice Wakefield of the Ontario Court of Justice has recently expressed concerns with the assumption that Crown and defence counsel have adequate funding, training, and time to fulfill the rigorous demands of the *Gladue* framework without the assistance of specialized reports.[263] The institutional barriers to counsel assisting judges in this manner should not be underestimated, nor should they go unexamined:[264]

> Just as there is a substantial cost in money and time to produce a formal Gladue Report taking up to three months to complete, so there will be a substantial cost imposed on either or both Defence and Crown counsel if the duty to provide the individualized information devolves to them. I am unaware of any additional funding to either in order to fulfill their *Gladue* obligations to the Court and to the Defendant.[265]

Judge Wolf of the British Columbia Provincial Court has likewise brought attention to the barriers facing both defence and Crown counsel in terms of gathering adequate *Gladue* information on their own, particularly where the individual being sentenced has limited knowledge about their own community and background circumstances.[266]

According to the Manitoba Court of Appeal, if both Crown and defence counsel fail to place sufficient case-specific information before a sentencing judge:[267]

> …the court may have an obligation to act further. The sentencing judge has the power to request further evidence if the court determines it is appropriate and/or practical (see *Gladue* at para 84; and *R v Wells*, 2000 SCC 10 (CanLII) at para 54, [2000] 1 SCR 507). As a matter of fact, if the information before the court seems insufficient or the offender is unrepresented, the court has a duty to at least make further inquiries (see *Gladue* at para 83; and *Wells* at para 54).

This same point was also made by Justice Ryan-Froslie of the Saskatchewan Court of Appeal, who wrote in 2015 that "[w]here counsel fail to present such evidence, the sentencing judge must act to ensure that information is put before the court".[268] Yet while the need for individualized, case-specific information in order to fulfill the *Gladue* analysis is undisputed, there remains a great deal of uncertainty as to how this information (and how much) should be brought before sentencing judges in Saskatchewan. As the following summary of recent cases suggests, there may also be lingering uncertainty as to the precise role that this information plays in the justice system, especially outside the confines of ordinary sentencing proceedings.

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262 *Gladue*, n 5, at para 83. Public Prosecutions' *Practice Memorandum*, n 251, states that *Gladue* information will typically come from defence counsel or the offender (at 4). However, it does suggest that *Gladue* information may be found in the file, current or past pre-sentence reports, or communities histories from the University of Saskatchewan Department of History database discussed at the end of this final report.

263 *R v Parent*, 2019 ONCJ 523 ["*Parent*"] at paras 71-81.

264 *Ibid* at para 72.

265 As already noted, Ontario's legal aid system does provide an extra five hour tariff for the preparation of *Gladue* submissions.

266 *R v CJHI*, 2017 BCPC 121.

267 *R v Park*, 2016 MBCA 107 ["*Park*"] at para 32. See also *R v Kakekagamick* (2006), 81 OR (3d) 644 (ONCA) ["*Kakekagamick*"] at paras 51-55.

268 *R v Moise*, 2015 SKCA 39 at para 26.

The Gladue Research Officer and her research assistant conducted a thorough review of the numerous reported Indigenous sentencing decisions in Saskatchewan since 1999. They found several decisions that illustrate apparent misunderstandings, mischaracterizations, or counter-productive applications of the *Gladue* analysis by counsel. For example, in one case Crown counsel unsuccessfully attempted to argue that the *Gladue* analysis provides "some lesser form of justice" and that it is "not fair" to apply *Gladue* in cases where a victim is also Indigenous.[269] In another case, both Crown and defence counsel appear to have declined to provide any detailed *Gladue* submissions on the basis that *Gladue* had minimal relevance due to the seriousness of the offence, in apparent contradiction to the Supreme Court of Canada's instructions in *Ipeelee*.[270]

In a more recent case, a Crown prosecutor successfully argued before the Provincial Court that an Indigenous youth's FASD and other *Gladue* factors could be used as evidence for why she ought to be sentenced as an adult since they rebutted the presumption that her immaturity, impulsivity, and concomitant diminished moral blameworthiness were due to her age alone.[271] Considering the Court's finding that the Indigenous youth in this case "is at best operating at an elementary school aged level", with all due respect, it is shocking that her incurable disability and other *Gladue* factors could be relied upon as justification for sentencing her as an adult.[272] If the *Gladue* analysis is aimed at achieving substantive equality for Indigenous people by recognizing and accommodating their different needs, experiences, perspectives, and worldviews, then reliance on an individual's FASD and other *Gladue* factors in order to impose a harsher and potentially more punitive sentencing framework is clearly counter-productive.

It was also noted that a large proportion of the published sentencing decisions for Indigenous people in Saskatchewan involved Dangerous Offender applications. Professor Tim Quigley of the University of Saskatchewan College of Law has commented on the gross over-representation of Indigenous people among those for whom Dangerous Offender applications are being pursued by the Crown, as well as the limited attention that Saskatchewan's courts were found to be paying to the *Gladue* analysis in this context.[273]

Saskatchewan courts have also been imposing a challenging burden of proof on Indigenous defendants to "show that [their] personal circumstances or historical factors are relevant to the gravity of the offence, the degree of the offender's responsibility, or how sentencing objectives such as rehabilitation can be realized".[274] There is some logic to this position as defence counsel generally bears the burden of proving mitigating circumstances. However, it is unclear how this evidentiary burden on defendants can be reconciled with the sentencing judge's own independent obligation to undertake a *Gladue* analysis in all cases involving Indigenous people, or the shared obligation of defence *and* Crown counsel to provide adequate *Gladue* information in support of this analysis. It may be for this reason that the Alberta Court of Appeal has decisively reached the opposite conclusion, stating as follows:[275]

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269 *R v Fehr*, 2016 SKPC 87 ["*Fehr*"] at para 20. For a more nuanced consideration of how a victim's Indigeneity might factor into the *Gladue* analysis see: *R v P.J.B.*, 2015 BCPC 390; *R v Ledesma*, 2012 ABPC 10; *R v Quock*, 2015 YKTC 32; and *R c Neashish*, 2016 QCCQ 10775; among others.

270 *R v Sparvier*, 2014 SKQB 200 at para 33.

271 *R v Henderson*, 2018 SKPC 27 ["*Henderson*"] at paras 6, 47-64. Notably, appellate courts in Manitoba, Alberta, and British Columbia have all since come to the opposite conclusion that an Indigenous youth's *Gladue* factors will favour a youth sentence where these reinforce their diminished moral blameworthiness. See *R v Anderson*, 2018 MBCA 42 ["*Anderson*"]; *R v AWB*, 2018 ABCA 159, leave to appeal to SCC refused, 38604 (10 October 2019) ["*AWB*"]; and *R v Choi*, 2018 BCCA 179 at para 61.

272 *Henderson*, n 271, at para 47.

273 Tim Quigley, "*R v Toutsaint*: Dangerous Offender Proceedings in Saskatchewan" (2016) 25 CR (7th) 17. See also Scott 2017, n 255. For a more recent counterexample, however, see *R v Keenatch*, 2019 SKPC 38.

274 See for example *R v Worm*, 2014 SKCA 94 at para 142; *R v Arcand*, 2019 SKQB 131 at para 72; *R v Wolfe*, 2016 SKQB 11 at para 60; *R v Okemahwasin*, 2015 SKPC 71 at para 59.

275 *R v Crazyboy*, 2012 ABCA 228 at para 32; *R v Laboucane*, 2016 ABCA 176 at para 71.

> There is no onus on the offender to bring his [A]boriginal person circumstances into the framework of relevance for sentencing purposes. Such facts can be relevant in more than one way and even judicial notice is available.

The Gladue Research Officer and her research assistant also found that in many sentencing decisions—especially those issued earlier than 2015—judges expressly cited the *Gladue* decision and affirmed they were cognizant of *Gladue* factors, yet provided little to no explanation of how they were applying these factors within their sentencing decisions.[276] This type of opaque and unelaborated approach to the *Gladue* analysis appears to have been condoned by the Saskatchewan Court of Appeal as recently as 2013.[277] In contrast, the appellate courts in Ontario, Manitoba, Alberta, and British Columbia have all since come to require greater transparency from sentencing judges through explicit reasons with respect to the *Gladue* analysis.[278]

In keeping with this, it appears that Saskatchewan's Court of Appeal has followed this same jurisprudential trend by imposing greater demands on sentencing judges through its detailed reconsideration of the *Gladue* analysis in a series of decisions over the past four years. These decisions therefore provide a logical starting point for a discussion of current trends and issues identified in Saskatchewan. Although the cases selected for analysis in the following section are by no means comprehensive, they can help clarify the current status of *Gladue*'s implementation in Saskatchewan from the vantage point of the courts themselves.

R v Chanalquay, 2015 SKCA 141

In *Chanalquay*, Chief Justice Richards reiterated and further analyzed the Supreme Court's guidance in *Ipeelee* and *Gladue* on behalf of a unanimous panel of the Saskatchewan Court of Appeal.[279] He stressed that "*Gladue* and *Ipeelee* are not unvarnished calls to impose shorter jail terms on Aboriginal offenders".[280] Instead, the analysis is more "nuanced" and "very much tied to the concept of restorative justice".[281] The Chief Justice asserted that the analysis "involves the subtler idea of attempting to limit or minimize jail time by using restorative justice approaches when and if such approaches are appropriate".[282] He cautioned against sentencing judges reducing an otherwise fit sentence in order to adjust for *Gladue* factors.[283] He also emphasized that the *Gladue* analysis is part of a holistic approach to sentencing that considers what is an appropriate sanction for the particular offence, offender, victim, and community.[284]

The Chief Justice went on to articulate his perspective on the two prongs of the *Gladue* analysis.[285] First, sentencing judges must consider the systemic and background factors affecting an Indigenous person as part of the assessment of their moral culpability.[286] Second, sentencing judges must consider "the types of sanctions which might be appropriate", which he described

276 See for example *R v Jimmy*, 2009 SKQB 124 at para 33; *R v Knife*, 2013 SKQB 197 at para 92; *R v Wolfe*, 2013 SKQB 341 at paras 16-17; and *R v Papequash*, 2013 SKQB 369 at para 121.
277 See *R v Ross*, 2013 SKCA 45 at para 53.
278 See *Kakekagamick*, n 267, at para 51; *Park*, n 267, at para 35; *R v Laboucane*, 2016 ABCA 176 at para 64; *R v Wheatley*, 2016 BCCA 397 at para 19; and *R v Fontaine*, 2014 BCCA 1 at para 35.
279 *R v Chanalquay*, 2015 SKCA 141 ["*Chanalquay*"] at paras 33-43.
280 *Ibid* at para 36.
281 *Ibid*.
282 *Ibid*.
283 *Ibid* at para 37.
284 *Ibid* at paras 38, 42.
285 *Ibid* at para 39.
286 *Ibid* at para 40.

as "ultimately the most important aspect of the *Gladue* framework".[287] Notably, the Supreme Court's original reference is to both appropriate sentencing sanctions *and* procedures in *Gladue* and *Ipeelee*.[288] Here, however, the second prong of the analysis is limited to an inquiry into the "available alternatives to incarceration", including community-specific programming.[289] Chief Justice Richards emphasized that "restorative-type aspects of a sentence will normally be brought into play by way of the terms of a conditional sentence or probation order".[290]

Finally, the Chief Justice's reasons ended with further emphasis on the holistic and collective nature of the *Gladue* analysis, echoing the Supreme Court's reasons in *Wells*:[291]

> I note that this means a sentencing judge must attempt to understand not just the situation and background of the offender and the particulars of the crime in issue. He or she must also, to the extent reasonably possible, attempt to understand the relevant dynamics of the community and the circumstances of the victim. After all, the victims of crimes committed by Aboriginal offenders are all too frequently other Aboriginals, often ones with precisely the same *Gladue* backgrounds as the offenders. They must not be overlooked. In order to understand all of this, it may sometimes be necessary for a trial judge to demand more than is typically provided in this province by way of a pre-sentence report.

The *Chanalquay* case arose from the Crown's appeal from a decision in which a Dene man from Buffalo River Dene Nation was sentenced to two years less a day in prison for sexually assaulting a woman after she fell asleep during a "drinking party".[292] The sentencing judge "decided to give significant weight to various *Gladue* factors that he saw as shedding light on Mr. Chanalquay's moral culpability with respect to the offence" and "considered several of Mr. Chanalquay's personal circumstances to be mitigating".[293] Clearly this was a case where more than mere 'lip service' was paid to the *Gladue* analysis.

Nevertheless, the Chief Justice pointed to what he saw as two errors in the sentencing judge's approach. First, while the judge had identified various "*Gladue* considerations"—such as a culture of alcohol abuse in Mr. Chanalquay's community, Mr. Chanalquay's own relationship with alcohol, and sexual abuse that Mr. Chanalquay suffered as a child—he failed to address how these "cast light on the degree of the offender's blameworthiness for the specific offence".[294] Chief Justice Richards failed to see how these considerations could be taken as saying anything particularly revealing about Mr. Chanalquay's culpability for the sexual assault of the victim in this case so as to justify giving them "significant" weight.[295]

Second, the sentencing judge concluded that these considerations should reduce Mr. Chanalquay's sentence from the normal starting point of three years, which was seen as an application of *Gladue* "as if it was a directive to shorten jail terms imposed on Aboriginal offenders".[296] Instead, Chief Justice Richards held that the judge "should have asked himself how a restorative justice approach might have allowed him to reduce or limit the term of imprisonment imposed on Mr. Chanalquay while still meeting the sentencing objectives of the case before him".[297]

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287 *Ibid* at para 41.
288 See *Gladue*, n 5, at paras 66, 70; *Ipeelee*, n 137, paras 59, 72.
289 *Chanalquay*, n 279, at para 41.
290 *Ibid*.
291 *Ibid* at para 43.
292 *Ibid* at para 2.
293 *Ibid* at para 3.
294 *Ibid* at para 52.
295 *Ibid* at para 53.
296 *Ibid* at para 54.
297 *Ibid*.

Ultimately, the Chief Justice held that a "bare sentence of two years less a day" failed to properly account for the gravity of the offence, the situation of his victim, the need to reintegrate the offender, or the offender's own need to address his issues with alcohol.[298] However, he went on to find that the jail term could be sustained by supplementing it with an 18 month probation order aimed at restorative justice goals, including 180 hours of community service, programming in relation to alcohol or sexual offending as directed by the probation officer, and reasonable efforts to seek and maintain employment.[299]

In *Chanalquay*, the Saskatchewan Court of Appeal described the *Gladue* analysis as nuanced, subtle, involving difficult concepts, and challenging to operationalize.[300] Unfortunately, the decision provided relatively little guidance to lower court judges in terms of operationalizing when and how *Gladue* factors might cast light on moral blameworthiness so as to require consideration of the length of the term of imprisonment, as suggested by the Supreme Court in *Gladue*.[301] It did, however, draw renewed attention to the second prong of the *Gladue* analysis, at least with respect to the requirement that sentencing judges consider alternative *sanctions* that might be appropriate based on an offender's particular Indigenous heritage or connection. The decision also sent a clear message that the Court of Appeal is ready to engage in more intensive review of sentencing judges' approaches to the *Gladue* analysis if necessary.

R v Slippery, 2015 SKCA 149

In *Slippery*—a decision released shortly after *Chanalquay*—Chief Justice Richards again clarified how lower courts ought to apply both prongs of the *Gladue* analysis in a unanimous decision for the Court of Appeal.[302] This case arose from another Crown appeal from a sentencing decision. The Crown argued that a sentence of 23 months in jail and 12 months of probation for assault, robbery, and three counts of breaching conditions was "demonstrably unfit" and she asked the Court of Appeal to increase the sentence to a term of five years.[303] Among other things, the Crown argued that as the convictions related to a situation of domestic violence, the sentencing objectives of general denunciation and deterrence must be emphasized over rehabilitation and individual deterrence.[304] The Crown also argued that the sentencing judge erred when she concluded that Mr. Slippery's upbringing "moderated" the level of his moral blameworthiness by virtue of the *Gladue* analysis.[305]

The appeal was dismissed in its entirety. The Chief Justice took this as another opportunity to summarize key principles of the *Gladue* analysis, referring explicitly to both prongs.[306] In parallel to his reasons in *Chanalquay*, he stated that the second prong's attention to "the types of sanctions" addressed the "ultimately most important set of issues".[307] He described the second prong as meaning that "sentencing judges must recognize that different or alternative restorative justice-type sanctions may effectively achieve necessary sentencing objectives in a particular community".[308] Again, Chief Justice Richards' approach echoes the Supreme Court's focus on Indigenous communities and the collective dimensions of the *Gladue* analysis in *Wells*.

298 *Ibid* at para 58.
299 *Ibid* at paras 58-59.
300 *Ibid* at paras 5, 36, 48.
301 *Gladue*, n 4, at para 79.
302 *R v Slippery*, 2015 SKCA 149.
303 *Ibid* at para 1.
304 *Ibid* at para 27.
305 *Ibid* at para 38.
306 *Ibid* at paras 40-46.
307 *Ibid* at para 43.
308 *Ibid*.

The Crown had also argued that there was no "sufficient or adequate connection between Mr. Slippery's history and the offending in issue".[309] According to the Chief Justice, this line of argument disregarded the Supreme Court's clear instructions in *Ipeelee* that there is no burden of proof on an offender to establish a "causal link" between their *Gladue* factors and an offence in order for these factors to be relevant.[310] He found that "it was open to the sentencing judge to find that Mr. Slippery's extremely difficult background of childhood abuse, abandonment, and addictions shed at least some light on his moral blameworthiness for the offences in issue".[311] At the same time, he also pointed out other considerations that made it clear that Mr. Slippery had a high level of personal responsibility for the crimes he committed notwithstanding his *Gladue* factors, such as his breach of a court order to stay away from the victim, the short period between his two successive attacks, and the degree of humiliation and degradation involved.[312]

In the end, the Chief Justice concluded that the sentencing judge had reasonably accounted for the sentencing objectives of denunciation and deterrence through the jail term, while at the same time providing the type of restorative approach called for in *Gladue* by imposing a probationary term that would have Mr. Slippery get assistance for addictions, domestic violence, and anger management.[313]

In this way, *Slippery* provides a helpful counterpoint to *Chanalquay* in that the Chief Justice provided lower courts with an example of how both prongs of the *Gladue* analysis could be successfully actualized in a manner that would withstand appellate scrutiny. At the same time, both decisions place most of their emphasis on the second branch of the *Gladue* analysis and rely heavily on probationary terms to fulfill sentencing judges' *Gladue* obligations, while providing a more perfunctory explanation of the first branch's import. Likewise, both decisions have been criticized for viewing moral blameworthiness "through the narrow lens of mens rea and recognized defences".[314] Heavy reliance on lengthy probationary terms may also bring mixed results in tackling Indigenous over-incarceration in light of how administrative sanctions for breaches can contribute to this crisis.[315]

R v Whitehead, 2016 SKCA 165

In *Whitehead*, Justice Caldwell provided another detailed reappraisal of the *Gladue* analysis on behalf of a unanimous Court of Appeal that appears to pick up where *Slippery* left off.[316] This case arose as a defense appeal from a nine-year sentence for manslaughter.[317] Mr. Whitehead challenged his sentence on the basis that the judge had erred in his *Gladue* analysis and overemphasized the secondary sentencing principle of parity in such a way as to fail to give effect to "the fundamental principle of sentencing, namely, proportionality".[318] Justice Caldwell allowed the appeal and varied the sentence from nine years to eight.[319] He described the case as "squarely raising the issue of

309 *Ibid* at para 44.
310 *Ibid* at para 45.
311 *Ibid* at para 46.
312 *Ibid* at paras 48-49.
313 *Ibid* at para 56.
314 Kent Roach, "*Ipeelee* in the Courts of Appeal: Some Progress but Much Work Remains" (2019) [unpublished], online: *SSRN* <https://ssrn.com/abstract=3367161> ["Roach"] at 16.
315 Carolyn Camman, John-Etienne Myburgh, & J. Stephen Wormith, *Review of Administration of Justice Charges and Administrative Sanctions in Canada and the United States* (University of Saskatchewan, 2015) at 2.
316 *Whitehead*, n 164.
317 *Ibid* at para 1.
318 *Ibid*.
319 *Ibid* at para 3.

when and *how* a court is to give effect to s. 718.2(e) in circumstances where the gravity of the offence and the offender's moral culpability call for the imposition of a sentence *in excess of two years of imprisonment*".[320] In other words, *Whitehead* speaks to the application of the *Gladue* analysis in circumstances where neither a probationary order nor a conditional sentence is legally available under the *Criminal Code* (i.e. those that require a sentence of two years or more served in a federal penitentiary).

The facts underlying this case involved Mr. Whitehead and two cousins beating another man to death at a party on the Red Earth First Nation.[321] Mr. Whitehead's cousins were both sentenced before he was by different judges and each received a 9-year prison sentence.[322] When it came to Mr. Whitehead's sentencing, the judge received information on his personal circumstances through both a standard pre-sentence report and a full Gladue report.[323] The sentencing judge appears to have provided explicit reasons with respect to his application of the *Gladue* analysis.[324] He accepted that Mr. Whitehead and the Red Earth First Nation had been impacted by colonization even though Mr. Whitehead downplayed the impacts on him as an individual in his own testimony.[325] He also accepted that Mr. Whitehead's *Gladue* factors "had affected—to some degree—his culpability for the killing".[326] In the end, however, the sentencing judge found that a 9-year sentence was appropriate due to the similarities between Mr. Whitehead's personal circumstances and those of his co-accused cousins.[327]

Justice Caldwell found that the sentencing judge had erred by emphasizing the principle of parity to the detriment of the individualized and restorative justice approach contemplated by section 718.2(e).[328] He noted that this case was unusual in that the principle of parity is usually raised in an appeal due to an apparent *disparity* in the sentences imposed on co-accused.[329] However, Justice Caldwell noted that the inverse should also true: differences with respect to the degree of responsibility of co-accused may account for variations in their respective sentences.[330] He noted that the fundamental sentencing principle of proportionality is served by having sentencing judges look to the ways in which the circumstances of Indigenous people are different "due to the effects of colonisation and a history of discrimination".[331]

Justice Caldwell gave sustained attention to the role that the principle of substantive equality plays in the *Gladue* analysis.[332] He noted that "[t]his goes beyond formalistic comparisons of whether two individuals are given identical treatment to consider how the circumstances of each individual affect *just* treatment".[333] He cited a paper in the *Saskatchewan Law Review* where Professors Jonathan Rudin and Kent Roach clarified how the *Gladue* analysis relates back to this *Charter* principle.[334] Quoted text from the paper explains how similar treatment that fails to take account of the disadvantaged positions of groups in Canadian society (i.e. 'formal equality') can amount to a

320 *Ibid* at para 2.
321 Ibid at para 4.
322 *Ibid* at paras 6-8.
323 *Ibid* at para 9.
324 *Ibid* at paras 14.
325 *Ibid* at paras 6-8.
326 *Ibid* at para 16.
327 *Ibid* at para 18.
328 *Ibid* at para 20.
329 *Ibid* at para 25.
330 *Ibid* at paras 26-27.
331 *Ibid* at para 30.
332 *Ibid* at paras 30-32.
333 *Ibid* at para 31.
334 *Ibid*, citing Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 *Saskatchewan Law Review* 3.

form of discrimination, whereas substantive equality calls for distinctions to be made in attempts to ameliorate these disadvantages.[335]

Justice Caldwell goes on to explain that substantive equality is given effect in sentencing by considering how offenders' circumstances differ and might favour a different sentence or a sentence other than jail.[336] As he summarizes later in his reasons, "*R v Gladue* and *R v Ipeelee* plainly serve to institutionalise in our sentencing regime the practice of treating unequals unequally so as to achieve *substantive equality* before and under the law…by fairly and appropriately reducing the impact of social and economic disparities as between offenders".[337]

Justice Caldwell notes that the broad systemic and background factors described in the *Gladue* decision provide a context for considering case-specific information about the offender.[338] When there is no alternative to incarceration available to a sentencing judge, they must still consider the length of the jail term being imposed in light of these factors if they bear on the offender's culpability or indicate which sentencing objectives can or should be actualized.[339] He suggested that sentencing judges critically rethink the role of parity in sentencing with respect to Indigenous people and recognize that the *Gladue* framework for sentencing is "an inherently individualized process".[340]

Mr. Whitehead pointed to the fact that he had submitted a Gladue report for the sentencing judge's consideration whereas neither of his co-accused had done so, instead relying on pre-sentence reports.[341] Justice Caldwell found this to be matter of form over substance since the Gladue report and the pre-sentence report for Mr. Whitehead provided substantially the same content.[342] However, he did find it noteworthy that the sentencing decisions for each of Mr. Whitehead's co-accused involved little to no reference to or discussion of *Gladue* factors.[343] Likewise, Justice Caldwell distinguished pre-2015 case law partly on the basis that "like the sentencing decision in this case, [it] pre-dates the direction in *R v Chanalquay* for a 'more demanding' analysis".[344] In doing so, he has confirmed that the Court of Appeal is now insisting on a more detailed, transparent, and justifiable analysis from sentencing judges.

Justice Caldwell went on to note that the sentencing judge had recognized that Mr. Whitehead's *Gladue* factors lowered his moral culpability "at least in some measure".[345] However, the judge failed to explain how this affected his overall determination of a fit sentence.[346] Justice Caldwell found that the judge's approach to parity meant that Mr. Whitehead's individual circumstances "were not properly explored to determine the extent to which they had a bearing on *his* moral culpability for the offence *he* committed or might suggest the appropriateness of a prison term of a different length than that imposed on his co-accused".[347]

335 *Ibid*.
336 *Ibid* at para 32.
337 *Ibid* at para 69.
338 *Ibid* at para 39.
339 *Ibid*.
340 *Ibid* at para 41.
341 *Ibid* at para 43.
342 *Ibid.*
343 *Ibid* at paras 44-45.
344 *Ibid* at para 46.
345 *Ibid* at para 47.
346 *Ibid.*
347 *Ibid* at para 51.

Justice Caldwell provided his own explicit analysis for the benefit of sentencing judges:[348]

> In Mr. Whitehead's case, the way in which *R v Gladue* considerations have manifested themselves alongside his commendable post-offence conduct indicate Mr. Whitehead is receptive to rehabilitation (s. 718(d)) and to the promotion of a sense of responsibility and acknowledgment of the harm he has done to [the victim], [the victim's] family and friends, and the Red Earth First Nation (s. 718(f)). Looking to Mr. Whitehead's individual circumstances—which differ markedly from those of his co-accused in this sense—*R v Ipeelee* required the sentencing judge to give effect to these objectives when imposing a sentence on Mr. Whitehead. That is, it is the actualisation of the relevant objectives through the sentence imposed on the offender that gives meaningful effect to the restorative justice principles that underpin Parliament's direction in s. 718.2(e) to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victims or to the community".

Justice Caldwell's analysis sketches out clearer guidance with respect to how submissions from counsel can be more responsive to the *Gladue* analysis by expressly linking *Gladue* factors to other sentencing principles under section 718, even where the circumstances are such that a federal penitentiary sentence is called for. He clearly states that sentencing decisions "will be open to appellate variance" where the sentencing judge fails to show they have considered both: (i) the extent to which an Aboriginal offender's unique circumstances may have had a bearing on their moral culpability; and (ii) whether and how the relevant sentencing objectives can be actualized by way of alternative sanctions *or* the term of imprisonment.[349]

Justice Caldwell then set out the analysis of moral blameworthiness that the sentencing judge failed to provide at first instance. He emphasized that the link between *Gladue* factors and moral blameworthiness is analyzed "based on inferences drawn from the evidence based on the wisdom and experience of the sentencing judge" and does not require any detailed chain of causative reasoning.[350] Justice Caldwell also affirmed the need for sentencing judges to "pay careful attention to the complex harms that colonisation and discrimination have inflicted on Aboriginal peoples".[351] This requires judges to understand the full direct and intergenerational effects of settler colonialism and discrimination on Indigenous peoples so as to avoid blaming the victims for harms such as substance abuse and violence that are products of past treatment.[352]

Justice Caldwell reproduced extensive portions of the evidence set out in the Gladue report for Mr. Whitehead, which he found to be "a poignantly idiosyncratic articulation of the systemic and background factors manifest in Mr. Whitehead's particular circumstances".[353] While it was not possible to draw direct relationships or connections between Mr. Whitehead's circumstances and the offence, the fact that he grew up in "an environment where substance abuse and violence were common" shed light on the broader circumstances of Mr. Whitehead's life that brought him before the court and thus mitigated his moral culpability to some degree.[354]

Justice Caldwell found that Mr. Whitehead's personal circumstances indicated he was likely to benefit from rehabilitation.[355] He had also "exhibited commendable post-offence conduct" by expressing genuine remorse for his crime, adhering strictly to his release conditions, and

348 *Ibid* at para 55.
349 *Ibid* at para 56.
350 *Ibid* at para 63.
351 *Ibid* at para 64.
352 *Ibid*.
353 *Ibid* at para 67.
354 *Ibid* at paras 70-71.
355 *Ibid* at para 78.

successfully engaging in self-improvement and rehabilitation already.[356] As Mr. Whitehead's circumstances confirmed he was receptive to rehabilitation efforts and the promotion of a sense of responsibility and acknowledgement of the harm he had done to the victim, the victim's family and friends, and the Red Earth First Nation, they differed markedly from those of his co-accused.[357] As a sentence in excess of two years was nevertheless required, the restorative justice principles that underlie section 718.2(e) could only be given effect through the length of his sentence.[358] Justice Caldwell finally concluded with his own fresh analysis to arrive at an 8-year prison sentence, stressing that he was not providing a 'discount' from the original sentence in light of *Gladue* considerations.[359]

Whitehead provides clearer, more detailed guidance to sentencing judges and counsel with respect to how *Gladue* factors can be connected with other sentencing principles. In addition to this, Justice Caldwell's explanation of how judges ought to take an inferential and inductive approach to finding links between *Gladue* factors and a particular offence may provide clearer guidance to lower courts than the outcome-oriented analyses in *Chanalquay* and *Slippery*. Yet nothing in *Whitehead* makes the analysis any less demanding for courts and counsel alike.

R v Ahpay, 2018 SKQB 147

The *Ahpay* decision of the Court of Queen's Bench suggests that critical misunderstandings may remain over the role to be played by the *Gladue* analysis among some counsel in the province.[360] The prosecutor in this case argued that Mr. Ahpay was inappropriately using the *Gladue* decision as a "bargaining chip", trying to raise it in order to manipulate the criminal justice system to his advantage, and relying on his *Gladue* factors as an "excuse" for his criminal conduct.[361] Justice Danyliuk rightly pointed out that as a sentencing judge he has "an overriding legal duty…to consider *Gladue* factors and to consider the moral responsibility of Mr. Ahpay as the offender... free of any intentions of this offender".[362] A judge is obliged to consider and properly apply *Gladue* factors when sentencing an Indigenous person.[363] The analysis is aimed at ensuring substantive equality in sentencing and it is clearly mandatory rather than discretionary.

In *Ahpay*, Justice Danyliuk also took the opportunity to call for more effective *Gladue* submissions from counsel in Saskatchewan. He was quick to point out that the approach of defence counsel in this particular case was appropriate, with counsel's submissions focusing on Mr. Ahpay's personal background and how his *Gladue* factors might interact with his overall moral culpability.[364] However, Justice Danyliuk went on to assert that many lawyers in Saskatchewan "instead present a sort of 'stump speech', an almost politicized presentation as to the sins of past authorities and societal generations".[365] He suggested that sentencing judges are now well-educated with respect to the history of settler colonialism in Canada, but they still are in need of "cogent information as to the individual offender's background factors".[366]

356 *Ibid* at para 79.
357 *Ibid* at para 82.
358 *Ibid* at para 85.
359 *Ibid* at paras 86-87.
360 *R v Ahpay*, 2018 SKQB 147.
361 *Ibid*, at paras 73-74.
362 *Ibid*.
363 *Ibid*, at para 80.
364 *Ibid*, at para 82.
365 *Ibid*.
366 *Ibid*.

Justice Danyliuk's comments strongly suggest there are still lawyers in the province who fail to grasp the difference between: (a) the broad, generalizable systemic and background factors facing Indigenous peoples that are the subject of judicial notice—including those detailed in the Truth and Reconciliation Commission's final report and countless other reports from other commissions of inquiry; and (b) the information specific to the case and individual, their family, and their community that must be presented to a sentencing judge, whether by way of thorough *Gladue* submissions, witness testimony, detailed reports, or a combination of these sources.

The Supreme Court has been clear that the *Gladue* analysis requires more than just a bare self-identification from the individual being sentenced as Indigenous and more than just general statements from counsel about the many damaging legacies of settler colonialism for Indigenous peoples overall. With all due respect for the contrary view expressed by some members of the Saskatchewan bar in the past, the analysis is not directed at such generalizable information.[367] Nor is it amenable to a fill-in-the-blank approach to sentencing or submissions. Instead, it requires access to individualized, case-specific, detailed, and reliable *Gladue* information.

Another unique aspect of the *Ahpay* decision is Justice Danyliuk's reliance on an adjudicator's award from the Independent Assessment Process ("IAP") under the Indian Residential School Settlement Agreement for information with respect to Mr. Ahpay's *Gladue* factors.[368] An IAP award would undoubtedly provide relevant and reliable information about the direct harms an individual faced while attending residential school. However, it is worth noting that it would be largely limited to a discussion of the most serious physical and sexual abuses an individual faced as a residential school survivor, with most harms captured by other processes under the Agreement, such as the Common Experience Payment. Likewise, an IAP award would be a poor substitute for a formal *Gladue* report on its own, limited as it is to questions of serious physical and sexual abuse in residential schools without addressing the many other *Gladue* factors an individual might have been affected by, as well as their positive traits, strengths, and goals. Nor would it provide much in the way of community history or information on the victim or the community's dynamics or perspectives. In *Ahpay*, however, Justice Danyliuk appears to have relied on the award alongside a pre-sentence report and thorough submissions from counsel.[369]

R v Heathen, 2018 SKPC 29

In another recent decision, a Provincial Court judge openly questioned the relevance of *Gladue* principles to decisions on judicial interim release (i.e. bail). Judge Agnew concluded in *Heathen* that "*Gladue* has no place in bail hearings" in spite of explicit statements to the contrary from provincial, superior, and appellate courts in Saskatchewan, Alberta, Ontario, among other jurisdictions.[370] He acknowledged that the Supreme Court has referred to the existence of bias and institutional restrictions preventing Indigenous people from obtaining bail in the *Gladue* decision.[371] However, he also noted that the Supreme Court declined to explicitly direct judges to

367 Legal Aid Saskatchewan appears to have taken a similar position in the past, asserting that an "in depth discussion" of *Gladue* factors was not necessary in Saskatchewan due to the province's comparatively higher proportion of Indigenous people to non-Indigenous people. See Johnson, n 256, at 130.

368 *Ibid*, at paras 7-19.

369 *Ibid*, at para 81.

370 *R v Heathen*, 2018 SKPC 29 ["*Heathen*"] at para 47. Judge Agnew cites over 20 previous judgments that arrived at a contrary view. Of particular note, these include two decisions from Saskatchewan: *R v Cyr*, 2012 SKQB 534 and *R v Daniels*, 2012 SKPC 189. They also include the following appellate level decisions: *R v Oakes*, 2015 ABCA 178; *R v Hope*, 2016 ONCA 648 ["*Hope*"]; and *R v Robinson*, 2009 ONCA 205.

371 *Ibid* at para 41, citing *Gladue*, n 5, at para 65. See also *Ipeelee*, n 137, at para 61; and *R v Summers*, 2014 SCC 26 at para 67.

apply the *Gladue* analysis in past jurisprudence.[372] Judge Agnew went on to make the important point that applying *Gladue* principles to bail without modification could violate the presumption of innocence by turning a judge's attention to rehabilitation at a stage at which the individual remains legally innocent.[373]

By pointing to the risks inherent in any blunt call for *Gladue* to be applied to bail, Judge Agnew has brought attention to a potential area of misunderstanding and misapplication.[374] In addition to the concerns set out in *Heathen*, other judges and commentators have pointed to the potentially counterproductive role that the overuse of conditions, the setting of inappropriate conditions, or the use of Indigenous peoples' unique circumstances as reasons for denying bail can play in Indigenous over-incarceration in remand.[375]

At the same time, the *Heathen* decision unfortunately employs a narrow view of the *Gladue* analysis in support of the conclusion that it has nothing to do with the statutory considerations for bail. For example, Judge Agnew acknowledges that the Saskatchewan Court of Queen's Bench has already set a framework for how bail conditions ought to be applied to Indigenous people in the *Cyr* decision, but he seems to suggest this framework is unrelated to *Gladue* principles as there is nothing unique about Indigenous people in terms of the need to take a culturally sensitive approach to the statutory considerations for bail.[376] Judge Agnew goes on to suggest that there is nothing unique to Indigenous people in terms of the potential relevance of their "culture's laws and customs" and the potentially different level of control a "grandmother" might have over their behaviour as compared to non-Indigenous accused.[377]

As the Supreme Court has clarified in *Gladue*, *Ipeelee*, and *Ewert*, remedying the over-incarceration of Indigenous people requires judges to pay closer attention to the differences between Indigenous and non-Indigenous individuals, including cultural differences and their different legal perspectives. Other courts have recognized the unique status and role of Elders in many if not most Indigenous societies across the country.[378] Whether the relevance of an Indigenous person having an Elder stand as their surety is considered part of a *Gladue* analysis for bail or part of some more generally applicable approach, it must be remembered that judges must be more attentive to the unique circumstances of Indigenous individuals in all aspects of the criminal justice system due to their disproportionate rates of interaction with this system.[379]

The Supreme Court also recognized in *Gladue* that Indigenous people are more adversely affected by incarceration.[380] And it directed that judges, as frontline workers in the criminal justice system, need to be alert to the potential that they might be contributing to Indigenous over-incarceration by failing to recognize the differential impact of their actions on the Indigenous people who appear before them.[381] A failure to recognize the different circumstances of Indigenous accused at bail, such as how *Gladue* factors might make it more difficult for them to provide an adequate surety, could mean falling back into the trap of discriminating through formal equality, contrary to the

372 *Ibid* at para 42. It is worth noting that the Supreme Court of Canada could have only done so in obiter.
373 *Ibid* at para 29. See also Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada (2017) 95:2 *Canadian Bar Review* 325 ["Rogin"] at 334; and Rudin, n 7, at 149-151.
374 Again, for a thorough discussion of why the *Gladue* analysis needs to be adapted to this unique context and how this might be accomplished in practice see Rogin, n 373, and Rudin, n 7, at 151-167.
375 See Rogin, n 373; Rudin, n 7, at 154-161; *R v Omeasoo*, 2013 ABPC 328; and *R v Rowan*, 2018 ABPC 208.
376 *Heathen*, n 370, at paras 18-19.
377 *Heathen*, n 370, at paras 18-19.
378 See for example *Pastion v Dene Tha' First Nation*, 2018 FC 648 at paras 24-26.
379 *Ewert*, n 179, at para 59; *Barton*, n 186, at paras 196-204.
380 *Gladue*, n 5, at para 68.
381 *Ipeelee*, n 137, at para 67.

Supreme Court's clear instructions on this more general point of law.[382] The need for judges to be aware of how bail decisions contribute to systemic discrimination and Indigenous over-incarceration can be gleaned from the Supreme Court expressly pointing to bail decisions as contributing to Indigenous over-incarceration in the *Gladue* decision, as well the numerous studies and reports that have highlighted this issue since the early 1990s.[383] It is important to recognize that the *Gladue* analysis is more expansive than the characterization it is given in *Heathen*, focused as it is on the consideration of individual-specific *Gladue* factors under the first branch of the analysis.[384]

In any event, the reasons in *Heathen* suggest agreement that the cultural factors mentioned in *Cyr* are relevant to bail, but disagreement with the suggestion that they are somehow unique to Indigenous people or should be associated in some way with the *Gladue* decision.[385] In light of this, the *Heathen* decision appears to provide a critique of the misnaming of the *Cyr* analysis as a *Gladue* analysis rather than disagreement with this substantive guidance from a higher court.[386]

In keeping with this, the *Heathen* decision was recently followed in the *Jaypoody* decision of the Nunavut Court of Justice.[387] Justice Bychok agreed with Judge Agnew in *Jaypoody* that the *Gladue* analysis has been wrongly imported into bail decisions without any statutory direction to do so, but he insisted that bail decisions nevertheless require consideration of the unique socio-cultural circumstances and traditions of the Inuit of Nunavut by the Court of Justice.[388] Again, the concern appears to be with the conflation of this kind of culturally sensitive approach to bail for Indigenous peoples with the standard *Gladue* framework for sentencing.

Other courts in Canada have affirmed that a *Gladue*-type analysis applies to bail decisions since the release of Judge Agnew's detailed reasons.[389] Yet the *Heathen* case still draws attention to the need for a more context-specific and thoughtful approach to submissions from counsel regarding Indigenous over-incarceration in bail hearings, regardless of what label this is given.

An amendment to the *Criminal Code* provisions governing bail will come into force by the end of the year that explicitly directs peace officers, justices, and judges to give particular attention to the circumstances of "Aboriginal accused" and "accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part".[390] Yet while statutory reform may put to rest any lingering doubts about a judge's duty to ensure substantive equality in bail decisions for Indigenous people, the debate generated by cases like *Heathen* will have continuing relevance to questions of implementation.

382 See, for example, *R v Sledz*, 2017 ONCJ 151 at paras 15-20; *Hope*, n 370, at paras 32-33;

383 See Rudin, n 7, at 147, citing *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on Indian and Métis People of Alberta* (Alberta: Task Force on the Criminal Justice System and Its Impact on Indian and Métis People of Alberta, 1991), vol 1 at 3-5, 4-44; Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 97; *Aboriginal Justice Inquiry of Manitoba*, vol 1, n 83, at 1-2, 221-24, 737.

384 *Heathen*, n 370, at paras 20-22.

385 *Ibid* at para 19.

386 *Ibid* at paras 22-24.

387 *R v Jaypoody*, 2018 NUCJ 36.

388 *Ibid* at paras 95-99.

389 See *R c Penosway*, 2018 QCCQ 8863; and *R v Louie*, 2019 BCCA 257.

390 Canada, Parliament of Canada, "Bill C-75 (Royal Assent)" (21 June 2019), online: *Parliament of Canada* <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-75/royal-assent>.

R v J.P., 2018 SKQB 96

Another recent decision from the Saskatchewan Court of Queen's Bench raises questions with respect to how FASD is being dealt with in context to *Gladue* sentencing in Saskatchewan. In this decision, Justice Elson describes how the possibility that the offender suffered from FASD only came to light through a Gladue report writer's interview process.[391] While this condition is by no means exclusive to Indigenous people, he also accepted that FASD often comes into play in sentencing "as a *Gladue* factor that may weigh against an [I]ndigenous offender's moral blameworthiness".[392] Yet while the Gladue report process led to defence counsel requesting a formal FASD assessment funded by the Minister of Justice, Justice Elson found that he had no jurisdiction to issue an order to this effect.[393] In other words, while FASD may play a role in the implementation of the *Gladue* analysis for some individuals, courts may nevertheless lack the necessary jurisdiction to fully grapple with it.[394]

In this case, defence counsel managed to secure funding for an FASD assessment through some other means and a positive diagnosis of FASD was made.[395] The offender was found to indeed have "pervasive and severe cognitive impairments, with a couple of exceptions".[396] It was also determined that his condition "precludes him from fully understanding the impact of the disability upon his life" and may require "close observation of any difficulties that may emerge from under the mask of [his] drug and alcohol addiction".[397]

Justice Elson accepted that "[o]ffenders with such a disorder can bear no responsibility for a condition predetermined by events that occurred before they were born" and "[s]uch a reality might arguably impact the moral blameworthiness of an offender's conduct".[398] Yet he went on to note that "a sentencing court must be mindful of its objective to protect the public, particularly from offenders whose diminished insight reduces their ability to appreciate the objectives of denunciation and deterrence".[399] Justice Elson pointed out that the FASD assessment for J.P. did not offer any 'optimism' for his prognosis or his prospects for rehabilitation, and relied on this as a reason for emphasizing public protection over other sentencing objectives.[400] With respect, to the degree these reasons imply that longer sentences ought to be imposed on people who suffer from FASD—which amounts to a permanent brain injury and lifelong disability—because of the fact that they suffer from cognitive deficits, they are difficult to square with the principle of substantive equality as it applies to the differential needs of those living with a mental or physical disability. This aspect of the decision has already attracted some academic criticism.[401]

Aside from their treatment of FASD, Justice Elson's reasons also call attention to an apparent lack of analysis in the *Gladue* submissions presented by counsel in this case and others. Justice Elson notes that the extent to which systemic and background factors bear on an individual's moral

391 *R v JP*, 2018 SKQB 96 ["*R v JP*"] at para 28.
392 *Ibid* at para 78.
393 *Ibid* at paras 29-30, citing *R v Gray*, 2002 BCSC 1192.
394 A similar issue was addressed by the Saskatchewan Court of Appeal in *R v K.(L.E.)*, 2001 SKCA 41, setting aside conditions in a Youth Court probation order issued by Judge Turpel-Lafond that had specified the need for the assignment of a youth worker trained to deal with an organic brain impairment and the creation of a case plan for an Indigenous youth suffering from FASD.
395 *R v JP*, n 391, at paras 31-41.
396 *Ibid*, at para 35.
397 *Ibid*, at para 41.
398 *Ibid*, at para 79.
399 *Ibid*.
400 *Ibid* at para 92.
401 See Zoe Johansen-Hill, "Proportionate Justice: An Examination of Fetal Alcohol Spectrum Disorders and the Principles of Sentencing in Saskatchewan" (2019) 82:1 *Saskatchewan Law Review* 75.

blameworthiness for particular offences is "difficult to assess".[402] He goes on to state that "as is all too common in the presentation of such factors, the evidence is presented in a discrete way, and without any guidance as to the manner in which that evidence may impact other sentencing imperatives".[403] In the circumstances of this case, which involved a robbery, he called for more analysis as to how systemic and background factors might influence the Court's emphasis on denunciation, deterrence, and public protection, as set out in the applicable jurisprudence.[404] In this respect, Justice Elson's reasons echo those of Justice Danyliuk in *Ahpay* in that they call for more detailed and sophisticated *Gladue* submissions from counsel. They also call to mind the detailed guidance provided by Justice Caldwell in the *Whitehead* decision.

The *J.P.* decision also highlights issues with the Gladue report that was presented to the Court. Justice Elson noted that the report included restorative justice options that were responsive to the second prong of the *Gladue* analysis.[405] However, they were all "premised on the expectation that J.P. will be released at the time this sentence is pronounced or shortly thereafter" and none "address[ed] the type of programming, counselling or treatment that J.P. might require in the event he remains incarcerated, either in a provincial correctional facility or a penitentiary".[406] Justice Elson also affirmed the need for Gladue reports to be balanced and objective in his reasons and suggested that there were some defects in the report before him.[407] His reasons therefore suggest that the use of Gladue reports in Saskatchewan remains a work in progress.

R v Whitstone, 2018 SKQB 83

Another recent Court of Queen's Bench decision strongly suggests the need for Crown and defence counsel to be more systematic in how they determine whether a particular individual charged with an offence is Indigenous in the first place. It is this threshold question that will trigger the need for the investigation and presentation of detailed *Gladue* information and submissions. In this unusual decision, Justice Zuk was obliged to address what he described as "the obligation of a sentencing judge to ascertain whether the offender being sentenced is [A]boriginal and the resulting obligation to address *Gladue* factors […], when neither the Crown [n]or defence make the sentencing judge aware that the offender is [A]boriginal".[408] As it is logically impossible for a judge to fulfill their duties under section 718.2(e) without first knowing that an offender is Indigenous, it should be no surprise that he reached the following conclusion in this case:[409]

> …a sentencing judge has a statutory duty to determine if the offender is [A]boriginal and the failure of a sentencing judge to consider *Gladue* factors when sentencing an [A] boriginal offender renders the decision open to appellate review.

In *Whitstone*, Justice Zuk was addressing an appeal from a Provincial Court sentencing decision.[410] Not only did he find that neither the Crown nor defence counsel made the sentencing judge aware that the offender was Indigenous, but there was sufficient evidence before the Provincial Court that "should reasonably have caused the sentencing judge to make inquiries to determine whether

402 *R v JP*, n 391, at para 88.
403 *Ibid*.
404 *Ibid* at para 89.
405 *Ibid* at para 90.
406 *Ibid*.
407 *Ibid* at para 91.
408 *R v Whitstone*, 2018 SKQB 83 at para 1.
409 *Ibid*.
410 *Ibid* at para 3.

the offender was of [A]boriginal ancestry".[411] More specifically, both the Information before the sentencing judge and the submissions of Crown counsel made mention of Ms. Whitstone's residency on the Thunderchild First Nation.[412] This ought to have been enough for the sentencing judge to be aware of the need for further *Gladue*-related inquiries.[413]

As urged by the Crown, Justice Zuk noted that it was "possible that the sentencing judge was aware of Ms. Whitstone's [A]boriginal status and considered the implications of those circumstances without engaging either counsel or Ms. Whitstone in that process, but rendered a sentencing decision that makes no reference to having engaged in that process and provides no reasons regarding his s. 718.2(e) analysis".[414] However, he reasoned that even if this were the case, the sentencing judge would have failed to meet the standard for adequacy of reasons for his decision.[415] While Justice Zuk acknowledged that the *Gladue* decision itself did not call for explicit reasons with respect to the analysis, he affirmed that reasons will make it easier for a reviewing court to determine how and whether attention has been paid to an Indigenous person's unique circumstances.[416] As discussed above, this push for more detailed reasons is also clearly implied by the Court of Appeal's decisions in *Chanalquay*, *Slippery*, and *Whitehead*.

R v Desjarlais, 2019 SKQB 18

One of the most dynamic issues before the Saskatchewan courts at present appears to be the question of whether sentencing judges have the jurisdiction to order full Gladue reports at the Government of Saskatchewan's expense. This is an issue that has arguably attracted more sustained judicial attention in Saskatchewan than in other jurisdictions, possibly due to the lack of any formal process for the preparation of Gladue reports in this province.[417] As the law currently stands in Saskatchewan, sentencing judges have the power to order the production of full Gladue reports at state expense. However, they also take the position that this power ought to be exercised sparingly as sufficient *Gladue* information may be available by other means.

In the first decision in this trilogy, *Desjarlais*, counsel for an Indigenous woman attempted to obtain funding for a full Gladue report through Legal Aid Saskatchewan but her request was denied.[418] The matter was then adjourned so that counsel could prepare a *Charter* application in support of a court order for a state-funded Gladue report.[419] Counsel for the Government of Saskatchewan intervened to oppose the application on the basis that probation officers in the province received training on the inclusion of *Gladue* factors in pre-sentence reports in 2014 and have since been directed to include *Gladue* information in all such reports that are ordered for Indigenous people.[420] The Court also heard evidence from the Chief Executive Officer of Legal Aid Saskatchewan confirming that they have not funded Gladue reports since the end of their pilot project in or around 2016.[421]

411 *Ibid* at para 2.
412 *Ibid* at para 36.
413 *Ibid*.
414 *Ibid* at para 39.
415 *Ibid* at paras 40-42.
416 *Ibid* at para 41.
417 At least one notable exception can be found in *R v HGR,* 2015 BCSC 681 ["*R v HGR*"].
418 *R v Desjarlais*, 2019 SKQB 6 ["*Desjarlais*"].
419 *Ibid* at para 9.
420 *Ibid* at para 13.
421 *Ibid* at para 15.

Professor Glen Luther of the University of Saskatchewan College of Law also testified as an expert witness with respect to the differences between a pre-sentence report ordered under section 721 of the *Criminal Code* and a full Gladue report.[422] He pointed out that pre-sentence reports are written by probation officers and are mainly focused on risk assessments.[423] Professor Luther also drew attention to the comparatively summary treatment of *Gladue* information in pre-sentence reports authored by probation officers.[424]

Justice Gabrielson noted that there is no specific requirement in the *Criminal Code* for the Court to order a standalone Gladue report and there are several jurisdictions in Canada where there is still no formal process for obtaining them—namely, Newfoundland, New Brunswick, Manitoba, Saskatchewan, the Northwest Territories, and Nunavut.[425] He also noted that while many cases in Saskatchewan have referred to full Gladue reports as being 'helpful', our Court of Appeal has nevertheless taken the position that they are not mandatory as adequate *Gladue* information may be obtained through a comprehensive pre-sentence report, a Gladue report, oral testimony, or some combination of these methods.[426] Echoing the issues that arise with respect to FASD assessments, Justice Gabrielson also concluded that the Court lacks any specific jurisdiction to order Gladue reports.[427] Likewise, he rejected counsel's *Charter* argument on the basis that a Gladue report was not essential to a fair trial for Ms. Desjarlais.[428]

R v Sand, 2019 SKQB 18

Justice Danyliuk's decision in *Sand* was released just a few days after the Justice Gabrielson's decision in *Desjarlais*.[429] In *Sand*, Justice Danyliuk was faced with a similar application for a state-funded Gladue report that was opposed by counsel for the Government of Saskatchewan's Court Services branch.[430] Defence counsel insisted that a standalone Gladue report was necessary whereas Court Services argued that the Court had no jurisdiction to order a full report and its powers are limited to ordering a pre-sentence report under section 721 of the *Criminal Code*.[431] Justice Danyliuk ultimately came to the conclusion that the Saskatchewan Court of Queen's Bench does in fact have jurisdiction to order a Gladue report at the Government of Saskatchewan's expense, but he nevertheless declined to issue such an order in this case.[432]

Justice Danyliuk expressed the view that "in many (even most) cases, a [pre-sentence report] with a section canvassing *Gladue* factors will place sufficient information before the sentencing judge", but the Court still has the authority to obtain further information through other means as necessary, including through an order for a government-funded Gladue report.[433] He noted that the obligation to ensure adequate *Gladue* information is available for sentencing is shared between the judge, defence counsel, and Crown counsel.[434] In light of this shared obligation, he was of the view that it is implicit that a court must have the jurisdiction to ensure they have adequate *Gladue* information

422 *Ibid* at paras 18-20.
423 *Ibid* at para 18.
424 *Ibid*.
425 *Ibid* at para 26.
426 *Ibid* at para 27, citing *R v Peekeekoot*, 2014 SKCA 97 at para 118.
427 *Desjarlais*, n 418, at para 30.
428 *Ibid* at paras 32-33.
429 *R v Sand*, 2019 SKQB 18 ["*Sand*"].
430 *Ibid* at para 2.
431 *Ibid*.
432 *Ibid* at para 58.
433 *Ibid* at para 30.
434 *Ibid* at para 32.

in the event that an ordinary pre-sentence report proves to be insufficient.[435] Justice Danyliuk also suggested that the authorities on point were clear that concerns over cost and timing must yield to the demands of the *Gladue* analysis itself.[436] Likewise, he pointed out that the lack of any explicit jurisdiction for ordering Gladue reports could not be determinative since many basic aspects of the Court's powers over criminal procedure have no clear statutory basis either.[437]

Justice Danyliuk also provided a detailed discussion of the differences between a standalone Gladue report and a pre-sentence report authored by a probation officer. Echoing Professor Luther's testimony in *Desjarlais*, he noted that the latter reports "are primarily about risk, risk of recidivism" and every one of them "contains a criminogenic risk assessment which, in turn, informs the assessment of the viability of non-custodial dispositions".[438] In contrast, Gladue reports are aimed at providing "culturally situated information which places the offender in a broader socio-historical context… and reframes the offender's risks/needs by holistically positioning the individual as part of a community and as a product of many experiences".[439] Justice Danyliuk noted that both the purpose and the methodology underlying a Gladue report are different.[440] They are designed to be restorative in nature as they are drafted based on extensive meetings with an "emphathic peer" and they allow the offender to "critically contemplate his or her personal history and situate it in the constellation of family, land and ancestry that informs identity and worth".[441]

Nevertheless, Justice Danyliuk took the position that "[i]n Saskatchewan, at least, most if not all [pre-sentence reports] will have the information needed, particularly where amplified by contributions by counsel".[442] However, he did agree that sometimes a pre-sentence report will be insufficient and the sentencing judge will need to either request fuller and better information from its author or seek a full Gladue report at that juncture.[443] In the circumstances of this case, he decided that it would be more appropriate to order a pre-sentence report with information on *Gladue* factors, but Mr. Sand was entitled to renew his application if this proved insufficient.[444]

R v Peepeetch, 2019 SKQB 132

In the most recent decision in this trilogy, *Peepeetch*, Justice Kalmakoff allowed an application for a Gladue report to be ordered at the expense of the Government of Saskatchewan, relying on the *Sand* decision for his authority to do so.[445] First, Justice Kalmakoff ordered an ordinary pre-sentence report authored by a probation officer that would canvass Mr. Peepeetch's *Gladue* factors.[446] Then defence counsel sought an adjournment to seek a full Gladue report with a more detailed treatment of Mr. Peepeetch's individual circumstances, as well as to canvass more information regarding appropriate sentencing options based on his Indigenous heritage or connection.[447] Further adjournments and changes to Mr. Peepeetch's counsel took place.[448]

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435 *Ibid* at paras 34-35.
436 *Ibid* at para 36.
437 *Ibid* at paras 37-39.
438 *Ibid* at para 45.
439 *Ibid* at para 46, citing Debra Parkes, "*Ipeelee* and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33:3 *For the Defence* 22 ["Parkes"] at 24.
440 *Sand*, n 429, at para 2.
441 *Ibid* at para 47, citing Justice Melvin Green, "The Challenge of Gladue Courts" (2012), 89 *Criminal Reports* (6th) 363 ["Green"].
442 *Sand*, n 429, para 48.
443 *Ibid*.
444 *Ibid* at paras 56-57.
445 *R v Peepeetch*, 2019 SKQB 132 ["*Peepeetch*"].
446 *Ibid* at para 5.
447 *Ibid* at para 9.
448 *Ibid* at paras 10-12.

Rather remarkably, one defence lawyer who briefly represented Mr. Peepeetch suggested to Justice Kalmakoff that "the application for a publicly-funded *Gladue* report would not need to proceed, as he had learned that much of the necessary information could be obtained through a study prepared by the University of Saskatchewan".[449] It is unclear what study counsel was referring to, but since Gladue reports are almost entirely comprised of individualized information obtained from interviews with the offender, victim, family, community members, and those involved in relevant programming and sentencing procedures, it should be obvious to anyone familiar with the format and content of Gladue reports that no one academic study could provide such case-specific information. This statement echoes the concern expressed by Justice Danyliuk in *Ahpay* that some counsel fail to differentiate between general information on systemic and background factors facing Indigenous people—which is subject to judicial notice—and the individualized, case-specific information that judges need to fulfill the *Gladue* analysis.

Once Mr. Peepeetch's counsel was settled, the application for a publicly funded *Gladue* report was renewed.[450] His counsel then pointed out that the pre-sentence report was not as detailed as a full Gladue report would be and noted that Mr. Peepeetch had suffered a significant brain injury in a car accident that severely limited his ability to provide adequate *Gladue* information to a probation officer himself.[451] He also pointed out that Mr. Peepeetch's mother was unwilling to speak about her residential school experience.[452] Likewise, it was noted that Mr. Peepeetch's brain injury made him particularly at risk if sentenced to a significant period of incarceration, making a focus on alternative methods of sentencing and programming even more critical.[453]

Counsel for Mr. Peepeetch outlined various deficiencies in the pre-sentence report, including: a failure to provide sufficient evidence regarding his childhood and family history; a failure to provide sufficient information about the residential school his mother attended and how this impacted his upbringing and development; a failure to explore his childhood experiences with familial drinking and driving, and how exposure to this impacted his own pattern of offending; a failure to provide adequate information about relationship difficulties with his daughters in context to his familial history and background; and a failure to provide adequate information about the programs and supports available in the First Nations to which he is connected.[454]

Justice Kalmakoff followed the reasoning of Justice Danyliuk in *Sand* to conclude that he had the jurisdiction to order a state-funded Gladue report where a pre-sentence report authored by a probation officer is incapable of providing adequate *Gladue* information.[455] He stated that it is "axiomatic" that a judge must have access to the information they need in order to conduct the demanding analysis required by the *Gladue* decision.[456] Further to this, he noted the Ontario Court of Appeal's decision in *Macintyre-Syrette* where even a full Gladue report was found to be lacking in information regarding the second prong of the *Gladue* analysis and a supplementary report was therefore ordered.[457] Yet he also emphasized that "[t]he key is information" and while "[t]he analysis required by s. 718.2(e) and *Gladue*/*Ipeelee* is not discretionary, the format in which the court receives the evidence necessary to inform the analysis is".[458]

449 *Ibid* at para 12.
450 *Ibid* at para 13.
451 *Ibid* at para 15.
452 *Ibid* at para 17.
453 *Ibid* at para 18.
454 *Ibid* at para 16.
455 *Ibid* at paras 22-28.
456 *Ibid* at para 40.
457 *Ibid*, citing *Macintyre-Syrette*, n 192.
458 *Peepeetch*, n 445, at paras 41-44.

In the circumstances of this case, Justice Kalmakoff was satisfied that the current pre-sentence report was insufficient.[459] It did include personal information about Mr. Peepeetch, including a detailed reference to his family and significant current relationships, his health, education, and employment history, his history of criminal involvement, a criminogenic risk assessment, and intervention strategies.[460] It also contained a section entitled "*Gladue* Factors" that touched on his First Nations ancestry, briefly mentioned his mother's attendance at residential school, and his experiences being subject to racism.[461] However, this section lacked detail and failed to "venture much below the surface with respect to any of the areas particular to Mr. Peepeetch's Aboriginal heritage that it mentions".[462] It provided little detail about his childhood, failed to explore intergenerational impacts from his mother's residential school experience, and failed to explore the history and pattern of alcohol abuse and drinking and driving that persisted in his family throughout his childhood.[463] And with respect to the second prong of the *Gladue* analysis, it failed to explore in any detail the resources available in the First Nations communities to which Mr. Peepeetch is connected or to give any insight into how these resources might be part of viable sentencing alternatives.[464]

Justice Kalmakoff emphasized that "[t]his is the kind of information that is required to properly carry out the court's sentencing function".[465] It is this "richness of detail" and "individualized information" that courts in other jurisdictions have treated as essential to a sentencing judge's duties under section 718.2(e).[466] This information was lacking and Justice Kalmakoff was satisfied that he needed more before he could properly engage in the type of analysis called for in *Gladue*, *Ipeelee*, *Chanalquay*, and other cases.[467] He accepted that a full Gladue report "should only be ordered sparingly and with caution, and only in specific and exceptional circumstances", but found this to be one case where such circumstances exist.[468] These circumstances included: Mr. Peepeetch's inability to pay for a Gladue report himself; the unique challenges related to his offence, record, and personal circumstances, including his brain injury, and the possibility these might require more attention to alternatives; his uncertainty as to whether "a probation officer would have the necessary resources or the necessary mandate to delve into aspects of Mr. Peepeetch's familial history (such as his mother's residential school experience and the intergenerational pattern of drinking and driving offences) in the way that a *Gladue* report writer could"; Mr. Peepeetch's limited ability to provide assistance to his lawyer by recounting relevant information or identifying witnesses due to his brain injury; and the potentially prejudicial impact that a further adjournment would have on Mr. Peepeetch if a supplementary pre-sentence report proved inadequate as well.[469]

Justice Kalmakoff's detailed reasons in *Peepeetch* demonstrate the complexity and nuance to the debate over the use of standalone Gladue reports as opposed to pre-sentence reports that contain *Gladue* information. His conclusion that substance must be given precedence over form echoes the conclusions reached by appellate courts in other jurisdictions, as cited in his detailed reasons. Yet, as Justice Kalmakoff himself duly notes, an emphasis on substance over form still requires close attention to the sufficiency of the substance of *Gladue* information provided in any given case, regardless of the means by which it is obtained.

459 *Ibid* at para 46.
460 *Ibid* at para 47.
461 *Ibid* at para 48.
462 *Ibid* at para 49.
463 *Ibid* at para 48.
464 *Ibid*.
465 *Ibid* at para 50.
466 *Ibid*, citing *R v Corbiere*, 2012 ONSC 2405 and *R v Lawson*, 2012 BCCA 508.
467 *Peepeetch*, n 445, at para 50.
468 *Ibid* at para 52.
469 *Ibid* at paras 52-57.

The Courts of Appeal in Alberta, Ontario, and Prince Edward Island have all engaged in similar close scrutiny of the sufficiency of *Gladue* information provided within pre-sentence reports and Gladue reports.[470] On occasion, sentencing judges have denounced the limited *Gladue* information available through ordinary pre-sentence reports in their respective jurisdictions.[471] As already noted, a recent judgment from Ontario has likewise brought greater attention to the institutional limits on defence and Crown counsel's capacities for providing adequate *Gladue* information in the absence of a detailed report.[472] These decisions from outside Saskatchewan strongly suggest that the demanding analysis called for by the Supreme Court of Canada and the Saskatchewan Court of Appeal must be understood as placing weighty informational demands on counsel and sentencing judges alike.

In light of the troubling suggestion from former counsel for Mr. Peepeetch that an academic study might be interchangeable with the kind of case-specific information required for a *Gladue* analysis, *Peepeetch* also suggests a need for more education around the depth and quality of individualized information required by the *Gladue* analysis regardless of the method by which it is gathered. On the other hand, the effective submissions of Mr. Peepeetch's eventual counsel for the application indicate a more nuanced understanding of what will constitute sufficient *Gladue* information and the existing barriers to acquiring it. If members of the bar are to assist sentencing judges in obtaining sufficient *Gladue* information—by whatever means available—it is clear they will need to know with some precision what it is they ought to be looking for and where they might find it in sufficient detail. This is particularly important in order for sentences to be reoriented towards restorative justice outcomes that are more holistic and inclusive of the perspectives of Indigenous communities, as well as those of victims.

Concluding remarks

In closing, a review of this recent case law suggests that the full implementation of the *Gladue* analysis in Saskatchewan remains a work in progress. Recent published decisions indicate ongoing debates over how *Gladue* information ought to be placed before sentencing judges, how *Gladue* factors can be effectively linked to sentencing objectives in *Gladue* submissions from counsel, and how a *Gladue*-like analysis can be tailoured to fit unique statutory contexts. At the same time, a review of these recent decisions also demonstrates that this is a rapidly evolving area of jurisprudence in the province that is trending towards deeper engagement with the *Gladue* analysis and closer attention to the sufficiency of *Gladue* information and submissions.

Saskatchewan is by no means the only jurisdiction in Canada where sentencing judges and appellate courts are still grappling with many difficult questions regarding the meaningful implementation of the Supreme Court's instructions in *Gladue* and *Ipeelee.* For example, a number of appellate courts in other jurisdictions have recently overturned sentencing decisions where lower courts are still failing to properly apply the analysis.[473] Appellate courts in other areas of the

470 *Kakekagamick*, n 267; *Macintyre-Syrette*, n 192; *Legere*, n 192; *R v Wolfleg*, 2018 ABCA 222 ["*Wolfleg*"].

471 See for example *R v Derion*, 2013 BCPC 382 at para 7. A pre-sentence report's two paragraphs on *Gladue* factors were described as "woefully inadequate" and "of absolutely no assistance" to the sentencing judge. See also *R v Noble*, 2017 CanLII 32931 (NL PC) at para 52. Judge Joy refers to being "served up the thin gruel of 'Pre-Sentence Reports (Gladue Perspective)'" in place of formal *Gladue* reports as ordered by the Court. Other cases in which the level of *Gladue* information in a pre-sentence report was found wanting include: *R v Karau*, 2014 ONCJ 207 at paras 6, 8; *Kakekagamick*, n 267, at paras 52-55; *R v G.(L.L.)*, 2012 MBCA 106 at paras 30-31; *R v Irvine*, [2007] MJ No 102 (MBPC) at para 22; *Legere*, n 192.

472 See *Parent*, n 263.

473 See for example *R v Souvie*, 2018 ABCA 148; *R v Grandjambe*, 2018 ABCA 191; *R v Denis-Damée*, 2018 QCCA 1251; *R v Andersen*, 2018 NLCA 41; *R v G.F.*, 2018 BCCA 339; *R v Martin*, 2018 ONCA 1029; *R v McInnis*, 2019 PECA 3; *R v Matchee*, 2019 ABCA 251; and *R v Isbister*, 2019 BCCA 135.

country have also recently intervened in cases where sentencing judges failed to obtain sufficient *Gladue* information in order to conduct this analysis.[474] Other appellate courts have also recently had to clarify and reiterate how the *Gladue* analysis is to be applied in unique sentencing contexts such as the determination of whether someone should be designated a dangerous offender or whether a youth should be sentenced as an adult under the *Youth Criminal Justice Act*.[475] A recent case before the Nunavut Court of Appeal has also engaged the even more challenging question of whether a sentencing judge can take judicial notice of Inuit perspectives on justice for the purposes of applying *Gladue*, as opposed to obtaining evidence from Elders, experts, or pre-sentence reports in this regard.[476]

Moreover, as recent writing by Professor Kent Roach points out, even these latest appellate level decisions fail to relate *Gladue* factors to the effectiveness of deterrence, denunciation or incapacitation, in keeping with the Supreme Court's instructions in *Gladue* and *Ipeelee*, or to consider what it means for judges to attempt to meaningfully engage with Indigenous legal perspectives in sentencing.[477] It has also been suggested that the *Ipeelee* decision's implications for a conventional understanding of the principle of proportionality is not yet being fully explored and engaged with in the post-*Ipeelee* jurisprudence.[478]

The sheer frequency with which appellate courts intervene in the *Gladue* analyses of lower courts across Canada should make it clear that the implementation of this nuanced and demanding analysis—as aptly described by Chief Justice Richards—will continue to challenge counsel and sentencing judges for the foreseeable future. It is hoped that this summary of recent cases might contribute to further research, writing, and advocacy in support of greater clarification and recalibration of the Supreme Court of Canada's instructions and how they can be meaningfully implemented within Saskatchewan.

474 See for example *Macintyre-Syrette*, n 192; and *Wolfleg*, n 470.

475 See for example *R c Kritik*, 2019 QCCA 1336; *Anderson*, n 271; & *AWB*, n 271.

476 An appeal from Justice Bychok's decision in *R v Itturiligaq*, 2018 NUCJ 31 ["*Itturiligaq*"] was heard by the Nunavut Court of Appeal on September 17, 2019. The Court of Appeal's decision remains under reserve at the time of writing. For a brief discussion of arguments raised at the appeal hearing see: Thomas Rohner, "Nunavut appeal court to rule on mandatory sentences for first-time firearms offenders" (25 September 2019), online: *Nunatsiaq News* <https://nunatsiaq.com/stories/article/nunavut-appeal-court-to-rule-on-mandatory-sentences-for-first-time-firearms-offenders/>.

477 Kent Roach, "Plan B for Implementing Gladue: The Need to apply Background Factors to the Punitive Sentencing Purposes" (2019) [unpublished], online: *SSRN* <https://ssrn.com/abstract=3367159>; Roach, n 314. The Nunavut Court of Justice decision in *Itturiligaq*, n 476, is one exception to this as it does attempt to engage with an Inuit legal perspective in context to the *Gladue* analysis. See also Hilary Peterson, *Applying Gladue Principles Requires Meaningful Incorporation of Indigenous Legal Systems and Values, including Consideration of Community-Based Alternatives to Incarceration* (Master of Laws, University of Saskatchewan, 2019) [unpublished].

478 Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63:2 *Supreme Court Law Review* 461; Noah Wernikowski, "Negative Retributivism: A Response to *R v Ipeelee*'s Innovative Call" (Master of Laws, London School of Economics and Political Science, 2019) [unpublished].

D. Summary of key differences between Gladue reports and pre-sentence reports

There is nothing at all novel to the suggestion that responding to the crisis of Indigenous over-incarceration requires greater attention to the unique circumstances, customs, practices, and traditions of Indigenous peoples in the sentencing process, nor is there anything new to the suggestion that this information could be adduced through specialized reports.

As one particularly notable example, in 1991 the Law Reform Commission of Canada called for reforms to the pre-sentence reports used for Indigenous people, recommending something akin to a Gladue report in its publication *Aboriginal peoples and criminal justice: equality, respect and the search for justice*.[479] Among other things, the Commission recommended that pre-sentence reports must be "considerably more detailed than at present" and cautioned that solely relying on information like "the offender's age, employment, family situation, personal history, education and financial situation" in a pre-sentence report could be problematic for Indigenous people due to "chronic unemployment in Aboriginal communities, family environments that have been disrupted, substandard educational facilities and general conditions of poverty".[480] To place this recommendation in context, the Commission was also concerned more generally with systemic discrimination in the criminal justice system due in part to a failure to recognize systemic factors such as these and their potential consequences for substantive equality.[481]

The Law Reform Commission also suggested that "[t]he *Criminal Code* should provide that pre-sentence reports shall set out and consider the special circumstances of Aboriginal offenders".[482] In its view, these special circumstances include the community's views on an individual's potential for reintegration, any rehabilitative measures undertaken or planned for them in conjunction with the community, and their suitability for any particular disposition or programs.[483] The Commission also recommended that "[o]nly persons familiar with the general condition of Aboriginal peoples and with their customs, culture and values should prepare pre-sentence reports".[484] To put these statements in context, the Commission made several broader recommendations for more Indigenous community involvement in sentencing, as well as more research into Indigenous peoples' own legal traditions (i.e. "Aboriginal customary law").[485] Furthermore, the Commission called for more consistent use of such pre-sentence reports whenever incarceration is being considered at sentencing, especially for first offences.[486]

It ought to be clear from the preceding summaries of Saskatchewan case law that similar concerns to those identified by the Law Reform Commission of Canada in 1991 are still being grappled with today. Several key differences between pre-sentence reports, Gladue reports, and other available sources of *Gladue* information continue to generate debate over the sufficiency of detail in pre-sentence reports, the potentially discriminatory impact of certain information and analyses these reports might emphasize, the adequacy of Indigenous community involvement in their preparation, and the degree to which the authors of these reports are familiar with the unique circumstances, customs, practices, and legal traditions of Indigenous peoples.

479 Law Reform Commission of Canada, *Aboriginal peoples and criminal justice: equality, respect and the search for justice* (Ottawa: Law Reform Commission of Canada, 1991) ["Law Reform Commission of Canada"].
480 *Ibid* at 77.
481 *Ibid* at 9-12.
482 *Ibid* at 77.
483 *Ibid*.
484 *Ibid* at 78.
485 *Ibid* at 34-39.
486 *Ibid* at 78.

This topic is particularly controversial in Saskatchewan as there is no existing formal process or agency tasked with the preparation of Gladue reports here, with one regional exception being the File Hills Qu'Appelle Tribal Council. Many stakeholders in Saskatchewan are more invested in improving the pre-sentence reports produced by Community Corrections, especially within the Government of Saskatchewan. Regardless of the future direction of this debate, attention is warranted to the differences between these forms of pre-sentence reports as they speak to the question of substance in terms of what *Gladue* information could be available for sentencing.

Methodological differences

As summarized in the *Sand* and *Peepeetch* decisions, Gladue reports and pre-sentence reports with a *Gladue* component are each prepared according to their own distinctive methodology.[487] Several past studies and publications suggest that Gladue reports provide more thorough and comprehensive information on an individual's *Gladue* factors in support of the first prong of the analysis, as well as more comprehensive information on available community-based sanctions and sentencing procedures in support of the second prong.[488] The greater level of detail within Gladue reports has been linked in part to more generous time allotments available to their writers for investigation and research, as well as their writers' greater access to information from community members and other collateral interviewees due to deeper community connections and their perceived independence from the criminal justice system.[489]

As noted by law professors David Milward and Debra Parkes, the preparation of Gladue reports involves interviewing a greater number of collateral contacts like family members, community members, and Elders, and requires in-person interviews and a meaningful rapport with members of the Indigenous community due to the nature of the information collected.[490] Gladue reports may also provide culturally appropriate sentencing options that a standard pre-sentence report would not contemplate due to the institutional assumptions or internal policies that govern the work of probation officers.[491]

Some studies have also focused attention on the restorative, therapeutic value Gladue reports can have for a report's 'subject' by providing them with greater insight into the context underlying their own offence.[492] According to doctoral research by Dr. Lavandier at the University of Prince Edward

487 See for example Kelly Hannah-Moffat & Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12:3 *Punishment & Society* 262 ["Hannah-Moffat & Maurutto 2010"]; Green, n 441; Parkes, n 439; Kelly Hannah-Moffat & Paula Maurutto, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 *Canadian Journal of Law and Society* 451 ["Hannah-Moffat & Maurutto 2016"].

488 See for example Legal Services Society of BC, *Gladue Report Disbursement: Final Evaluation Report* (Vancouver BC: Legal Services Society of BC, 2013) ["LSSBC Final Report"]; Campbell Research Associates, *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Three, October 2006—September 2007* (Mississauga ON: Campbell Research Associates, 2008); Rudin, n 7, at 107-121; Tim Quigley, "Gladue Reports: Some Issues and Proposals" (2016) 31 *Criminal Reports* (7th) 405; Benjamin Ralston, "Making the case for the use of formal *Gladue* reports" (Paper delivered at the Legal Services Society Gladue Writers' Conference, Whistler, BC, 22-23 November 2018), online: <https://perma.cc/W4WH-LK82>.

489 See for example LSSBC Final Report, n 488, at 36; Frank T. Lavandier, *Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of* R. v. Gladue *in Prince Edward Island (PEI)* (Doctor of Philosophy, University of New Brunswick, 2019) [unpublished] ["Lavandier"] at 200-201; *R v HGR*, n 417, at para 10; David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35 *Manitoba Law Journal* 84 ["Milward & Parkes"] at 88.

490 Milward & Parkes, n 488, at 88. See also Anna Louisa Flaminio, *Gladue through wahkotowin: Social History through Cree Kinship Lens in Corrections and Parole* (Master of Laws, University of Saskatchewan, 2013) [unpublished] at 97-98, 103-104.

491 Milward & Parkes, n 488, at 89.

492 See for example Lavandier, n 489.

Island, it is often a highly emotional experience for these individuals to hear their own Gladue report read back to them at the end of the interviewing process.[493] This may be in part due to the tendency for Gladue reports to include lengthy verbatim quotes from interviewees. This allows the reports "to provide the court with many voices and perspectives on the individual before the court".[494] When the individual undergoing sentencing hears their own report, these diverse voices and perspectives are brought directly to their attention as well.

It is, however, worth noting that the length, content, and structure of pre-sentence reports varies from one jurisdiction to the next so that some caution may be warranted when generalizing with respect to pre-sentence reports.[495] The same limitation is also true of generalizations regarding the length, content, and structure of Gladue reports in the absence of any standardized oversight or guidance for writers in Saskatchewan.[496] Nevertheless, the author of this final report has edited over a dozen Gladue reports in Saskatchewan and reviewed over a dozen redacted examples of Gladue reports from other writers across Canada and can confirm that the majority reflected the statements from studies, publications, and jurisprudence cited in this report.

The use of risk assessments in pre-sentence reports

One topic that may warrant closer attention is whether it is appropriate for certain *Gladue* factors to be relied upon as risk factors favouring incarceration when incorporated into pre-sentence reports or used elsewhere within the criminal justice system.[497] This concern remains almost three decades after being flagged by the Law Reform Commission of Canada in 1991.

Indigenous people in the system tend to exhibit more risk factors than their non-Indigenous comparators.[498] For example, they tend to be younger and less educated, to have lengthier criminal histories, higher rates of unemployment, and more behavioural and learning difficulties, and to report more negative childhood histories, including poverty, abuse victimization, parental absence or substance abuse.[499] These factors are often relied upon as predictive risk factors for criminality even if they may be traced back to Indigenous people's "unique backgrounds and ongoing harms caused by colonization (e.g., the legacy of residential schools, history of discrimination, higher levels of poverty and substance abuse)".[500] In other words, there are *Gladue* factors that are statistically associated with criminality and therefore used to classify Indigenous people as posing higher risks for criminal offending. Indigenous people are particularly likely to be classified as higher risk when their criminal histories are factored into risk assessments, which could in part relate to systemic discrimination in the form of "disproportionate detection and prosecution of crime among Indigenous offenders".[501]

One Provincial Court judge in Manitoba has pointed out that this overlap between *Gladue* factors and the risk factors relied on in actuarial tools for pre-sentence reports appears to contradict

493 *Ibid* at 302.
494 Rudin, n 7, at 112.
495 See James Bonta et al, *Presentence Reports in Canada, 2005-03* (Ottawa: Minister of Public Safety and Emergency Preparedness, 2005) at 2, 21, 24; see also Hannah-Moffat & Maurutto 2010, n 479, at 268-272.
496 It is worth noting that the National Working Group on Gladue headed by Dr. Jane Dickson is in the process of preparing a discussion paper on the viability of uniform structure and content for *Gladue* reports and has generated draft uniform precedents for discussion. At the time of writing these resources are not yet publicly available.
497 See for example LSSBC Final Report, n 488, at 3, 27, 37-38, 46.
498 Bronwen Perley-Robertson, L. Maaike Helmus & Adelle Forth, "Predictive accuracy of static risk factors for Canadian Indigenous offenders compared to non-Indigenous offenders: Implications for risk assessment scales" (2018) *Psychology Crime and Law*, online: <http://dx.doi.org/10.1080/1068316X.2018.1519827> ["Perley-Robertson et al"].
499 *Ibid* at 5.
500 *Ibid* at 6.
501 *Ibid* at 23, 27.

the Supreme Court's explicit direction in *Ipeelee* that sentencing judges must guard against perpetuating systemic discrimination in their decisions.[502] In a recent decision of the Northwest Territories Supreme Court, a forensic psychiatrist candidly acknowledged this same potential inherent bias within actuarial tools due to the higher prevalence of certain risk factors among Indigenous people, although he testified that it can be managed through a more cautious approach to the scoring of such factors.[503]

The potential for statistical discrimination through the application of risk assessment tools is the subject of research and controversy in other common law jurisdictions like the United States and New Zealand.[504] In Canada, these issues have been raised in the past by the Canadian Human Rights Commission, Justice Louise Arbour's 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, the Auditor General of Canada, and the Office of the Correctional Investigator, among others.[505]

More recently, it appears that greater attention is being paid to a somewhat separate but equally important question of whether these risk assessment tools have been validated as predictive for Indigenous people in light of the *Ewert* decision.[506] One post-*Ewert* study recently confirmed that actuarial risk assessments have lower predictive accuracy for Indigenous people, which the authors suggested may be due to the failure to consider culturally specific risk factors or a lack of attention to the different implications of these factors for Indigenous people as compared to non-Indigenous people.[507] Nevertheless, the study also confirmed a reasonable level of predictive accuracy for many common risk factors for Indigenous people even if they were less predictive than when applied to non-Indigenous people.[508]

Still, the more far-reaching concern that actuarial tools may lead to statistical discrimination against Indigenous people leaves a 'paradox' for the implementation of *Gladue* through risk-focused pre-sentence reports.[509] As Professor Hannah-Moffat points out:[510]

> …marginalized groups [including Aboriginal people in Canada] unavoidably score higher on risk instruments because of their increased exposure to risk, racial discrimination, and social inequality—not necessarily because of their criminal propensities or the crimes perpetrated. Marginalized individuals' lives tend to be mired in a variety of criminogenic and other needs, and consequently their risk scores reflect systemic factors. …

502 *R v Nepinak*, 2017 MBPC 62. See also Hannah-Moffat & Maurutto 2010 and Hannah-Moffat & Maurutto 2016, n 487.
503 *R v Durocher*, 2019 NWTSC 37 at paras 145-147, 204.
504 For relatively recent contributions to this debate in the United States, see Chelsea Barabas et al., "Interventions over Predictions: Reframing the Ethical Debate for Actuarial Risk Assessment" (Paper delivered at the Fairness, Accountability and Transparency in Machine Learning Conference, New York, NY, February 2018), online: *Cornell University* <https://arxiv.org/abs/1712.08238>; Sonja B. Starr, "Evidence-based Sentencing and the Scientific Rationalization of Discrimination" (2014) 66 *Stanford Law Review* 803; Andrew Lee Park, "Ex Machina: Predictive Algorithms in Criminal Sentencing" (2019), online: *UCLA Law Review* <https://www.uclalawreview.org/injustice-ex-machina-predictive-algorithms-in-criminal-sentencing/>. For a recent discussion of the debate in New Zealand, see Joel McManus, "Why a pastor who abused children served half as much prison time as a low-level cannabis dealer" (13 August 2019), online: *STUFF* <https://www.stuff.co.nz/national/114692088/why-a-pastor-who-abused-children-served-half-as-much-prison-time-as-a-lowlevel-cannabis-dealer>.
505 Ivan Zinger, "Actuarial Risk Assessment and Human Rights: A Commentary" (2004) 46 *Canadian Journal of Criminology and Criminal Justice* 607 at 610.
506 S*e*e for example *R v Penosway*, 2019 QCCS 4016 where the Quebec Superior Court rejected a post-*Ewert Charter* application arguing that the use of actuarial tools by CSC is discriminatory and thus breaches section 15.
507 See also Perley-Robertson et al, n 498, at 26-27.
508 *Ibid* at 29.
509 See Alexandra Hebert, "Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice" (2017) 43:1 *Queen's Law Journal* 149.
510 Kelly Hannah-Moffat, "Actuarial Sentencing: An 'Unsettled' Proposition" (2013) 30:2 *Justice Quarterly* 270 at 281.

In contrast to ordinary pre-sentence reports, Gladue reports are not framed around the assessment of risk. Aboriginal Legal Services Program Director Jonathan Rudin describes the information contained within Gladue reports as follows:[511]

> …Gladue reports contextualize risk factors and explain them in a way that allows the court to understand them as considerations other than risks. By understanding where the risk factors come from and what the offender either has done or can do to address certain issues these factors raise, the court can find a way to sentence Aboriginal offenders differently, which is, after all, the core idea in *Gladue* and *Ipeelee*.

With particular attention to the second prong of the analysis, Mitch Walker, Vice-Chairperson of the Gladue Writers Society of British Columbia, asserts that a well-crafted Gladue report will match the subject's unique *Gladue* factors with detailed and targeted options for sentencing that promote healing and rehabilitation.[512] In doing so, Gladue reports move beyond the standard conditions that are typically recommended by a probation officer in an ordinary pre-sentence report. For example, if an individual is facing an educational barrier but has a realistic goal for how to overcome this, a Gladue report can go beyond a surface level statement that the individual wishes to 'go back to school'.[513] Instead, an experienced writer will get into such logistics as the subject's eligibility for upgrading, the availability of relevant programming, and the application process and deadlines so as to clearly spell out how they might address this factor.[514] Mr. Walker also suggested that Gladue report writers liaise with the subject's Indigenous community to find out "their solution and their version of healing".[515]

Bearing in mind that the *Gladue* analysis is directed at substantive equality for Indigenous people in sentencing, more attention may be warranted to how the presentation of *Gladue* information to the courts for both prongs of the analysis ensures not only better recognition of differences, but also better accommodation of these differences. In light of this discussion, it should be no surprise that many commentators still express skepticism over any unreflective infusion of *Gladue* information into existing systems and processes like pre-sentence reports.

Further evolution in the provision of Gladue reports

Studies have also identified barriers to the effective implementation of the *Gladue* decision even where Gladue reports are more readily available due to a lack of follow up mechanisms for the alternatives to incarceration they propose or a lack of standards for the thoroughness, objectivity, and quality of information set out in these reports.[516] This has led Gladue report service providers in several jurisdictions to integrate aftercare supports and many other related services with the reports that articulate alternative sanctions and procedures.[517] Coincidentally, this too echoes a recommendation made by the Law Reform Commission of Canada in 1991, which asserted that the most effective means of providing for the needs of Indigenous people involved in the criminal justice system and ensuring reintegration "is to involve Aboriginal communities and service organizations in after-care".[518]

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511 Rudin, n 7, at 114 (references omitted).
512 Personal conversation with Gladue report writer Mitch Walker (16 August 2019).
513 *Ibid*.
514 *Ibid*.
515 *Ibid*.
516 LSSBC Final Report, n 488.
517 See for example the discussion of the programming available in Ontario through Aboriginal Legal Services in *Yukon Gladue Research & Resource Identification Project* (Whitehorse: Council of Yukon First Nations, 2015) ["Council of Yukon First Nations"] at 9, 12-13, 47. It is worth noting that *Gladue* programming in Nova Scotia and Prince Edward Island links Gladue report recommendations with aftercare as well, and Alberta is developing post-*Gladue* navigators within Indigenous communities to address this need.
518 Law Reform Commission of Canada, n 479, at 82.

Other evolutions in the preparation of Gladue reports are taking place at the level of individual writers as well as service providers, including the tailoring of reports to better suit specific statutory contexts like dangerous offender applications, bail hearings, and even child protection matters.[519] Several Gladue report writers also advised that their reports now regularly engage with or at least summarize relevant Indigenous legal traditions.

While proposed national standards and templates are being drafted and debated by the National Working Group on Gladue led by Dr. Dickson, practices on the ground are also quickly evolving as Gladue report writers and service providers further develop their field sensitivity and best practices, based on feedback they regularly receive from counsel, judges, subjects, victims, community members, and academics with an interest in their work. The complex, systemic issues that the *Gladue* analysis seeks to address require "more creative and innovative solutions" than past sentencing practices were able to provide.[520] Those seeking to standardize access to *Gladue* information through pre-sentence reports will need to ensure they are expanding the available space for creativity and innovation in sentencing and not stifling this gradual shift.

519 Based on personal correspondence and discussions with service providers in British Columbia, Saskatchewan, and Ontario, including Anisa White, Mitch Walker, Patricia Barkaskas, Lisa Hill, and Jonathan Rudin. Please note that the use of Gladue reports in bail and child protection matters is neither widespread nor uncontroversial due to concerns that Gladue information may be particularly prone to being misused and misinterpreted in these contexts.

520 *Ipeelee*, n 137, at para 71, citing *Vermette*, n 166, at para 39.

E. Unique resources for the implementation of the *Gladue* analysis in Saskatchewan

While many of the details canvassed earlier in this report highlight shortcomings in the current state of the *Gladue* decision's implementation in Saskatchewan, there are also reasons to be at least cautiously optimistic about moving forward. In what follows, some of the unique resources created for the implementation of the *Gladue* analysis in Saskatchewan will be summarized, beginning with those created through this Gladue Awareness Project. These resources will not replace the need for skillful and nuanced *Gladue* submissions from counsel or detailed, case-specific information on the individuals being sentenced. Yet they demonstrate positive momentum towards a fuller appreciation of the *Gladue* decision's implications in Saskatchewan, as well as its more meaningful implementation.

Deliverables from the Gladue Awareness Project offered through the Centre

First of all, the Gladue Research Officer produced several deliverables in her administration of this Gladue Awareness Project. She amassed and reviewed numerous cases, academic publications, and reports with respect to the crisis of Indigenous over-incarceration and the *Gladue* analysis, both in general and with a specific focus on Saskatchewan. Among other things, she collected 290 published decisions on Indigenous sentencing in Saskatchewan from between 1999 and the end of her term in November 2018. Hard copies of these cases are held at the Native Law Centre and electronic copies are all available on CanLII. The significant number of publications cited in the footnotes of this final report likewise speaks to the thoroughness of research conducted at the Centre during this project. This final report's summary coverage of the literature and case law to date ought to facilitate more focused research in the future.

The Gladue Research Officer also created a series of brochures and booklets regarding the *Gladue* decision that can be widely disseminated throughout the province upon request. These are drafted in plain language in order to ensure that the information they contain on *Gladue* factors and the *Gladue* analysis is made accessible to lay persons, including those directly caught up in the criminal justice system. These resources may be productively disseminated through correctional facilities, courthouses, tribal councils, band offices, law firms, and other offices and workplaces of those involved in the criminal justice system throughout the province. Finally, this final report has been produced with the intention that its findings serve to stimulate further inquiry and evolution in the *Gladue* decision's implementation in Saskatchewan.

CLASSIC's Rehabilitative Alternatives to Incarceration Handbook

A Saskatoon-based legal clinic, the Community Legal Assistance Services for Saskatoon Inner City ("CLASSIC"), has also produced a detailed handbook on community-based and government programming across Saskatchewan to assist counsel, probation officers, and Gladue report writers with the identification of rehabilitative sentencing alternatives responsive to the second prong of the *Gladue* analysis.[521] The handbook is aimed at reducing the over-representation of Indigenous people in the criminal justice system "by providing viable programming alternatives that address criminogenic factors and promote healing in the lives of Indigenous people, their

521 Community Legal Assistance Services for Saskatoon Inner City Inc. (CLASSIC), *Rehabilitative Alternatives to Incarceration: A Handbook of Community & Government Programs in Saskatchewan* (Saskatoon: CLASSIC, 2015), online: <http://www.classiclaw.ca/community-resources.html>.

families and communities".[522] This lengthy resource provides addresses and contact information for numerous different programs and organizations relevant to the use of alternative sanctions and sentencing processes within Saskatchewan, organized alphabetically by community. The current version of this resource reflects information that was last updated in 2016.[523]

The handbook lists a number of alternative sanctions and procedures—such as healing, talking, and sentencing circles, victim services, community-based supports for offenders, community justice forums, alternative measures programs, probation services, community-based correctional services, mediation, and community integration programs—available through First Nations, Métis organizations, and tribal councils across the province. It also lists a wide variety of other counseling, mental health, addictions, and alternative measures opportunities available in urban and rural communities across the province.

Many of the program descriptions in the handbook specify the services offered by a particular organization or agency, limits on eligibility for participation, whether they accept court-mandated clients or referrals, and what the estimated timelines are for access. These general descriptions have much in common with the descriptions of programming that one might expect to find in full *Gladue* reports, albeit without any information on a particular individual's eligibility or willingness to participate. On the other hand, some entries are limited to addresses and contact information. Either way, the handbook provides a helpful starting place for further research in support of submissions or a report speaking to alternative sanctions and processes.

CLASSIC's handbook has been described as a living document that will be updated as old programs cease and new ones start up. With ongoing updates it will clearly facilitate more efficient preparation of thorough *Gladue* submissions and reports.

The University of Saskatchewan's Gladue Rights Research Database

The University of Saskatchewan's History Department launched a project entitled the Gladue Rights Research Database on April 25, 2018.[524] According to its information page, the database is "an ever-expanding work in progress" that "is designed to provide Indigenous people, their legal counsel, and others working within the justice system with information that will assist in the protection of Gladue rights after a person's conviction and prior to sentencing".[525] It is also described as being "designed to provide much, but not all, the information required to write or review a Gladue report", including "solid comprehensive information explaining the unique circumstances that have impacted and shaped Indigenous people's lives in Saskatchewan—the essential historical backgrounds and contexts to the situations Aboriginal people face today".[526]

Open access to the database has been made possible through funding from the Law Society of Saskatchewan, Legal Aid Saskatchewan, the Saskatchewan Ministry of Corrections and Policing, and the Community-engaged History Collaboratorium, Department of History at the University of Saskatchewan.[527] It has been set up by University of Saskatchewan students under the supervision of Professor Keith Carlson of the History Department.[528]

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522 *Ibid* at 2.
523 *Ibid* at 3.
524 University of Saskatchewan, "Gladue Rights Research Database" (2018), online: *University of Saskatchewan* <http://drc.usask.ca/projects/gladue/index.php>.
525 *Ibid*.
526 *Ibid*.
527 *Ibid*.
528 *Ibid*.

The information set out in this database appears to be aimed at supporting a better understanding of the broader dynamics underlying the first branch of the *Gladue* analysis—namely, how the unique systemic and background factors that have impacted Indigenous peoples in Saskatchewan play a role in bringing Indigenous people before the courts, at least at a level of generality. At present, the database houses videos in which University of Saskatchewan faculty members explain some of the complex issues that underlie the crisis of Indigenous over-incarceration, including intergenerational trauma, structural violence, and the many impacts of the *Indian Act*. It also provides short primers and suggested readings on general topics like Indigenous women and gender, the *Indian Act*, and settler colonialism, as well as summary descriptions of the Dakota, Métis, Anishinaabeg, Assiniboine, and Cree.[529] Likewise, it provides citations to publications setting out information on specific Indigenous communities, as well as specific residential schools that were once operated in the province, although this portion of the database remains relatively undeveloped. In addition to this, it hosts an extensive timeline document that sets out various key events in the history of Indigenous-settler relations in Saskatchewan.

Undoubtedly, this database has a great deal of potential as an educational resource for lawyers, judges, probation officers, and Gladue report writers, among others, in support of the *Gladue* decision's implementation in Saskatchewan. However, it is important to note that most if not all of the general information it provides will fall within the existing scope of judicial notice under the *Gladue* decision and related case law. 'Judicial notice' refers to information that judges can accept as fact without proof on the basis that it is either: (a) so notorious as to not be the subject of dispute among reasonable persons; or (b) capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy.[530] In other words, facts subject to judicial notice need not be proven through evidence like pre-sentence reports or direct witness testimony. For this reason, the information contained in this database is not what one ordinarily finds set out in Gladue reports or pre-sentence reports with *Gladue* information.

The Supreme Court of Canada has clearly instructed sentencing judges to take judicial notice of widespread prejudice and racism against Indigenous peoples, including stereotypes that relate to their credibility, worthiness, and criminal propensity, and how this has translated into systemic discrimination in the criminal justice system.[531] Judges are also instructed to take judicial notice of the general systemic or background factors that underpin *Gladue*, as well as the prioritization of restorative approaches to sentencing in most Indigenous legal traditions and cultures.[532] To the degree that the database fleshes out these topics, it may assist with the education of judges, lawyers, and others working in the criminal justice system, but the information it provides is only supplementary to the individualized information legally required for the *Gladue* analysis.

The Supreme Court of Canada's judicial notice in *Gladue* was based on their review of various academic publications, governmental reports, and reports from commissions of inquiry such as the Royal Commission on Aboriginal Peoples and the Aboriginal Justice Inquiry of Manitoba. Sentencing judges may better inform themselves of what they are taking judicial notice of by reference to these and other documents, including the summary information provided by this database. Likewise, probation officers, Gladue report writers, and lawyers will no doubt benefit from learning as much as they can about the many complex topics within the scope of this broad judicial notice. One local lawyer has made a similar attempt to elaborate on the content of judicial notice under *Gladue* as it relates to Saskatchewan by summarizing key elements of the history of Indigenous-settler relations in this province.[533] Resources such as these will no doubt provide

529 A summary regarding the Denesuline was not yet available at the time of writing.
530 *Williams*, n 85, at para 54.
531 *Ibid* at para 58.
532 *Gladue*, n 5, at paras 83, 93.
533 See Scott 2018, n 224.

a useful means by which individuals can better educate themselves on generalizable issues, especially those who might be learning about these topics for the very first time.

Nevertheless, describing the information in this database as providing "much, but not all the information" required to write or review a Gladue report reflects a critical misunderstanding of the content and purpose of these reports. As ought to be clear from the cases summarized above, judges do not order Gladue reports and pre-sentence reports in order to obtain more detailed information on the *general* systemic and background factors of which they are already obliged to take judicial notice, even though references to secondary sources might provide helpful context. The purpose of these reports is to ensure sentencing judges have adequate information about the person being sentenced, including their own individual-specific experiences of *Gladue* factors linked to these broader dynamics, such as a personal or familial history of abuse, racism, lack of connection, unemployment, negative experiences with foster care or out-adoption, FASD, and many others. In addition, in keeping with their restorative justice focus, they may also canvass community-specific resources, histories, or perspectives on sentencing, and even the perspectives and circumstances of victims. Yet the overall focus remains on 'case-specific information'.

A review of recent Saskatchewan case law from all levels of court makes it abundantly clear that *Gladue* submissions from counsel and supporting court reports must be primarily focused on the individual before the court and information specific to them, as acquired through interviews and research into their personal circumstances. As the Ontario Court of Appeal has repeatedly explained, the *Gladue* analysis requires sufficient information for a court to understand how broader factors have impacted an offender's own experiences, "lift[ing] his life circumstances and Aboriginal status from the general to the specific".[534] Recent decisions from the Saskatchewan Court of Appeal and Court of Queen's Bench echo this emphasis on the need for individual and case-specific information to connect their broad judicial notice of the many harms of settler colonialism in Canada with the individual before them.

Furthermore, while some Gladue reports include references to secondary source research, this is by no means a generalizable feature. For example, the *Gladue Report Guide* published by the Legal Services Society of British Columbia explicitly instructs Gladue report writers to "[a]void generalizations and the use of secondary sources" when addressing *Gladue* factors.[535] It also instructs them to "[r]ely on secondary sources only when many attempts to get relevant information from the community have been unsuccessful" with respect to community supports and resources.[536] In other jurisdictions where secondary sources are more commonly referred to in Gladue reports, their role is still secondary to the case-specific information acquired through interviews.[537] In the relatively rare cases where Gladue reports have placed significant reliance on generalizable information and secondary sources rather than connecting systemic factors to the particular circumstances of an individual through interviews and case-specific research, the relevance of these reports has been questioned if not outright rejected by sentencing judges.[538]

To the degree that this database is advertised as providing similar information to what is set out in Gladue reports or pre-sentence reports with a *Gladue* component, it is misleading and may be contributing to existing misconceptions over what these reports ought to contain and what they are meant to accomplish. Yet in spite of this caveat the database still holds great promise

534 *R v Monckton*, 2017 ONCA 450 at para 117; *R v F.H.L.*, 2018 ONCA 83 at para 45.
535 Legal Services Society of British Columbia, *Gladue Report Guide: How to prepare and write a Gladue report* (Vancouver: Legal Services Society of BC, 2018) at 54.
536 *Ibid* at 25.
537 S*ee* for example the "Mock Gladue Report" in Rudin, n 7, at 268-288.
538 See for example *R v Taylor*, 2016 BCSC 1326 at paras 45-48; *R v Bourdon*, 2018 ONSC 3431 at paras 755-768.

as an educational resource. As canvassed earlier in this report, many of the complex dynamics that are subject to judicial notice as a result of the *Gladue* decision are less than intuitive to those who have not received extensive education on these topics. Judges, counsel, and report writers may, for example, benefit from access to detailed community histories as a starting point for their own research and investigations. In addition to this, they may benefit from greater access to summaries of peer-reviewed social science research that investigates and substantiates the connections between settler colonialism, systemic discrimination against Indigenous peoples, and other factors of relevance to sentencing under the *Gladue* framework, such as experiences with the child welfare system, out-adoption, gang involvement, or conditions like FASD. As discussed in the next section of this report, pilot projects in Australia may provide useful models.

It is hoped that the database continues to grow and evolve in ways that support more detailed and nuanced *Gladue* submissions, as well as better informed sentencing decisions across the province. This may, however, require closer attention to the perspectives of counsel, report writers, and sentencing judges who are directly engaged in fulfilling the informational demands of the analysis.

VII. Analogous sentencing practices in Australia & New Zealand

For a comparative perspective, it warrants attention that academics, lawyers, and judges in Australia and New Zealand are engaged in strikingly similar debates over the best means by which sentencing courts might meaningfully respond to parallel crises of Indigenous over-incarceration.[539] Courts in Australia and New Zealand have also considered how systemic and background factors and differing cultural values and Indigenous legal traditions might relate to individualized sentencing for Indigenous people, and have canvassed Canada's *Gladue* and *Ipeelee* decisions in doing so.[540] This is not surprising given there is a long tradition of legislative and jurisprudential borrowing between these three Commonwealth countries in matters involving Indigenous peoples.[541] As noted by Professor Newman of the University of Saskatchewan College of Law, transnational dialogues such as these help us learn from challenges rules have faced in other jurisdictions, participate in the elaboration of international norms, and find "just approaches" to the relationship between Indigenous peoples and the state.[542]

Similar to section 718.2(e) of the *Criminal Code*, New Zealand's *Sentencing Act 2002* includes specific statutory direction for addressing the over-incarceration of Māori (the Indigenous people

539 See for example Elena Marchetti & Thalia Anthony, "Sentencing Indigenous Offenders in Canada, Australia, and New Zealand" (2016) 27 *University of Technology Sydney Law Research Series*, online: *AustLII* <http://classic.austlii.edu.au/au/journals/UTSLRS/2016/27.html> ["Marchetti & Anthony"]; Thalia Anthony, Lorana Bartels & Anthony Hopkins, "Lessons lost in sentencing: welding individualised justice to indigenous justice" (2015) 39:1 *Melbourne University Law Review* 47; Valmaine Toki, *Indigenous Courts, Self-Determination and Criminal Justice* (New York: Routledge, 2018); Valmaine Toki, "Seeking Access to Justice for Indigenous Peoples" (2017) 15 *Yearbook of New Zealand Jurisprudence* 25; Thomas Clark, "Sentencing Indigenous Offenders" (2014) 20 *Auckland University Law Review* 245.

540 In New Zealand, see: *R v Mason* [2012] NZHC 1361; *R v Mason* [2012] NZHC 1849; *Mika v R* [2013] NZCA 648; *Solicitor-General v Heta* [2018] NZHC 2453. See also Max Harris, "More on Mason: Cultural factors in sentencing" (2013) *February Māori Law Review*, online: <https://maorilawreview.co.nz/2013/02/more-on-mason-cultural-factors-in-sentencing/>. In Australia, see: *R v Fernando* (1992) 76 A Crim R 58; *Bugmy v The Queen* [2013] HCA 37; *Munda v Western Australia* [2013] HCA 38. See also Justice Stephen Rothman, "The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders" [2014] *New South Wales Judicial Scholarship* 6, online: <http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/NSWJSchol/2014/6.html>.

541 See for example Paul G McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (New York: Oxford University Press, 2011); Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (New York: Oxford University Press, 2010); Dwight Newman, "*Wakatū* and Transnational Dimensions of Indigenous Rights Discourse" (2019) *New Zealand Law Review* 61 ["Newman"].

542 Newman, n 541, at 83.

of New Zealand), requiring sentencing judges to account for an offender's personal, family, whānau (extended family), community, and cultural background in imposing a sentence or otherwise dealing with the offender for a rehabilitative purpose.[543] New Zealand sentencing judges can receive and consider specialized pre-sentence reports for Māori that are similar to Gladue reports, documenting an individual's exposure to background factors like familial alcohol abuse, parental absenteeism, violence, educational barriers, and domestic abuse, as well as how Māori legal traditions and cultural values relate to that individual's circumstances.[544]

In Australia, sentencing courts in the Australian Capital Territory, Queensland, and the Northern Territory are all directed by state or territorial criminal legislation to consider cultural factors during sentencing.[545] Legislation in Australia's Northern Territory authorizes a sentencing court to receive information about Indigenous customary law and the views of members of an Indigenous community.[546] Specialized Indigenous pre-sentence reports are used in Queensland and the Northern Territory, and Indigenous justice groups in these jurisdictions are also given an opportunity to make submissions regarding the sentencing of Indigenous people that address topics such as their relationship to the community, cultural considerations, and sentencing options for rehabilitation and punishment.[547] While this is not yet true of all states and territories within Australia, the Australian Law Reform Commission has also recently called for nation-wide availability of "Indigenous Experience Reports" that address the unique systemic and background factors that impact Indigenous peoples in Australia.[548]

Australia also has much to teach us in terms of how sentencing submissions can be improved through the collation of information for counsel. There is already a publicly available database cataloguing Australia's superior court criminal law decisions that consider "Aboriginality – that is, the factor of disadvantage experienced by a defendant due to their Aboriginality, the cultural practice of their community or Aboriginal customary law".[549] Another database called the "Bugmy Evidence Library" is cataloguing "narrative and statistical information about Aboriginal communities in [New South Wales] where the essential aim of the project is to provide background community evidence supporting an individual's personal experience in that community, which is often of social disadvantage."[550]

Furthermore, an additional resource for sentencing called the Bar Book Project will provide counsel in Australia with a collation of recognized studies and research addressing particular categories of disadvantage and depravation, "including experiences of disadvantage specific to Aboriginal and Torres Strait Islander peoples flowing from the effects of colonisation, dispossession and related hardships".[551] This project will dedicate chapters to various topics that directly correlate to

543 Marchetti & Anthony, n 539, at 3, citing sections 8 and 27 of the *Sentencing Act 2002* (NZ), 2002/9.

544 *Purua-King v R* [2019] NZHC 1698 at paras 23-24. Four examples of these "Section 27 Reports" were obtained by the author from Professor Khylee Quince, Auckland University of Technology in preparing this final report.

545 Marchetti & Anthony, n 539, at 3.

546 *Ibid*.

547 *Ibid* at 20-21.

548 Austl, Commonwealth, Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133) (Canberra: Australian Government Publishing Service, 2018), Recommendations 6-2 & 6-3, online: *Australian Law Reform Commission* <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/6-sentencing-and-aboriginality/indigenous-experience-reports-for-australian-sentencing-courts/> ["*Pathways to Justice*"].

549 Aboriginal Legal Service (NSW/ACT) Limited, "Considering Aboriginality – Australian Courts Considering Aboriginality Case Summaries", online: <https://www.alsnswact.org.au/our-work/current-projects/considering-aboriginality/>.

550 *Pathways to Justice*, n 548, at 6.138.

551 Sophia Beckett, "The Bar Book Project: Presenting Evidence of Disadvantage" (Paper delivered at the Public Defenders Criminal Law Conference 2019, Sydney, 16-17 March 2019), online: <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx> at 15.

recognized *Gladue* factors, including FASD, the impact of out of home care, racism, intergenerational trauma, childhood exposure to family violence, childhood exposure to drug and alcohol abuse, cultural dispossession, exposure to sexual abuse, intergenerational incarceration, and homelessness, among others.[552] This may provide a particularly useful model for those working in Canada's criminal justice system to emulate in the future. Depending on the generality of the information it provides, the Bar Book Project may even prove to be a helpful resource for Canadian counsel to directly reference once it is made public later this year.

Clearly Canada's criminal justice system is not an outlier in its engagement with the unique circumstances and legal traditions of Indigenous peoples during sentencing. Further research into the analogous jurisprudence and institutional responses in Australia and New Zealand may provide fruitful reference points for best practices beyond the tentative observations made here. Yet this comparative exercise is also indicative of the many challenges that remain ahead in reforming and adjusting mainstream sentencing practices and assumptions in order to meaningfully accommodate difference and achieve substantive equality for Indigenous peoples.

While differing on the question of judicial notice, all three jurisdictions have identified a need for the presentation of evidence during sentencing that can assist courts in addressing how Indigenous peoples' unique circumstances and legal perspectives might be accommodated. It appears that the use of specialized pre-sentence reports for Indigenous people is fast becoming one of the more common responses to the informational needs associated with individualized, non-discriminatory sentencing of Indigenous people. In addition to this, databases addressing community histories and social science research on disadvantage may further assist in strengthening submissions from counsel.

552 *Ibid* at 15-16.

VIII. What are the costs?

As something of an afterword, this report will close with a brief discussion of the existing costs associated with the crisis of Indigenous over-incarceration so that these might be contrasted against the costs of potential new programming. It should go without saying that any efforts towards a more meaningful implementation of the *Gladue* decision will have associated costs, including any efforts towards addressing the gaps identified earlier in this report.

The potential cost of making standalone Gladue reports more readily accessible in Saskatchewan is a particularly clear example. A 2015 study of Gladue report programs across Canada found that these specialized reports cost an average of approximately $2,300 each to produce.[553] At that point in time, the highest average cost per report across Canada was that of the Legal Aid Saskatchewan pilot, which had been partially reliant on out-of-province writers traveling to Saskatchewan for interviews ($3,600 per report).[554] As of September 2019, three independent contractors who have since prepared Gladue reports for sentencing hearings in Saskatchewan suggested the average cost of their reports ranges between $1,500 and $3,500.[555] By way of comparison, writers in Alberta are paid $1,200 per completed Gladue report;[556] the Legal Services Society of British Columbia pays $1,500 for standard Gladue reports and $2,100 for lengthier reports used in dangerous offender applications;[557] and the average cost of a Gladue report from Aboriginal Legal Services in Ontario is roughly $3,500, inclusive of administrative expenses and travel.[558] If caseworkers and aftercare workers were to be incorporated into an integrated agency like Aboriginal Legal Services it would require even greater investment.

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553 Council of Yukon First Nations, n 517, at 12-21.

554 *Ibid* at 19.

555 Personal email correspondence and telephone interviews with Christine Goodwin, Lisa Hill, and Mark Marsolais-Nahwegahbow (September 2019). Ms. Goodwin estimated billing an average of $3,500 per report (inclusive of editing and travel costs). Ms. Hill estimated billing an average of $3,000 per report (inclusive of editing and travel costs). Mr. Marsolais-Nahwegahbow estimated billing between $1,500 and $3,000 per report in Saskatchewan, with all interviews conducted via telephone. Ms. Goodwin has given a higher estimate per report ($5,000) elsewhere: Lauren McIvor & Crystal Oag, "Barriers to justice: Gladue reports underused in Canada's courtrooms" (11 April 2019), online: *Capital Current* <https://capitalcurrent.ca/gladue/2019/04/11/gladue-reports-underused-in-canadas-courtrooms/>.

556 Personal correspondence with Randy Sloan, Manager, Indigenous Initiatives Alberta Justice and Solicitor General (6 September 2019). These costs would not include any administrative costs of Alberta Justice and Solicitor General.

557 Personal correspondence with independent Gladue report writer Anisa White (16 August 2019). These costs do not include travel costs for which writers can bill up to an additional $137.50 (250km at $0.55/km). Nor do these costs include the administrative costs incurred by the Legal Services Society of British Columbia.

558 Personal correspondence with Jonathan Rudin, Program Manager, Aboriginal Legal Services (19 August 2019). This is a very rough estimate as Aboriginal Legal Services provides Gladue reports through its own employees rather than independent contractors. Unlike the per report estimates from Alberta and British Columbia, this would be inclusive of all administrative costs.

And Gladue reports are by no means a panacea. Nor is there a clear consensus in Saskatchewan that standalone Gladue reports should be made more readily available in the future. At the time of writing, there appears to be greater momentum within the Government of Saskatchewan to refine the process by which *Gladue* information is currently provided through the pre-sentence reports produced by Community Corrections. Yet this too will have its costs, especially if the level of detail and quality of information demanded by sentencing judges continues to stretch the limited time allocations and training currently available to the authors of these reports.

According to information gathered by the Gladue Research Officer, pre-sentence reports are only prepared for one-third of all adults and half of all youth cases in which there is a Community Corrections disposition.[559] It is estimated that Community Corrections staff spend an average of two to five additional hours per case on the gathering of *Gladue* information in the preparation of these reports.[560] If these pre-sentence reports remain the primary means by which *Gladue* information is made available to sentencing judges in Saskatchewan, it may be necessary to expand both their level of detail and their overall availability, thus raising the costs incurred. The content and structure of the reports themselves may also need to be more responsive to the shifting demands of the judiciary, which are clearly trending towards requiring more detailed and clearly corroborated information. It is beyond the scope of this present study to determine whether the majority of pre-sentence reports produced by Community Corrections are in fact providing sufficient information to not only link systemic and background factors to an individual's circumstances, but also to articulate what sanctions and processes would be most appropriate in light of their particular Indigenous heritage or connection. Yet the *Peepeetch* decision does suggest that further improvements may be needed in the near future.

Improved access to *Gladue* information is just one piece of this puzzle. It is reasonable to anticipate that various other costs will be associated with meaningful reform as well, and some of these may even deserve greater priority. There is a wealth of existing research into the factors that contribute to the crisis of Indigenous over-incarceration—a topic that was described as "done to death" as early as 1991.[561] As addressed elsewhere in this report, there is an abundance of past reports summarizing research and recommending evidence-based responses to this crisis. Expanded options for community-based sentencing processes and sanctions is one particularly common recommendation that could materially contribute to the amelioration of Indigenous over-incarceration in Saskatchewan if adequate funding were available.

Any change to the status quo will require the re-prioritization of existing resources. In light of this, it may be worth briefly surveying the existing costs associated with incarceration. To put it rather crudely—especially considering the devastating *human* costs of the crisis of Indigenous over-incarceration—the existing crisis also has significant fiscal implications. This brief discussion can only provide a snapshot of the costs associated with incarceration to put the estimated costs of alternative sanctions and procedures into context. A far deeper and more methodologically rigorous comparison of the existing costs of Indigenous over-incarceration in Saskatchewan against the cost of doing nothing can be found in the 2004 report produced by Professors Isobel M. Findlay and Warren Weir for Saskatchewan's Commission on First Nations and Métis Peoples and Justice Reform.[562]

559 Government of Saskatchewan, Gladue Review Committee, *An Interim Approach to Gladue in Saskatchewan* (1 November 2017) [unpublished] at 17.

560 *Ibid*.

561 Findlay & Weir, n 232, referencing Samuel W Corrigan & Lawrence J Barkwell, *The Struggle for Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991).

562 See Findlay & Weir, n 232.

First of all, consideration of the differing costs of federal and provincial incarceration is relevant since prison sentences over two years must be served in a federal penitentiary. Between 2011 and 2016, the average cost per inmate per year in federal institutions ranged from $103,295 to $110,230.[563] The costs associated with provincial custody in Saskatchewan were significantly lower per inmate, ranging from $53,290 to $60,590 during this same period.[564] The differences in cost may be at least partially attributable to the high proportion of offenders in provincial custody who are there on remand—awaiting trial or sentencing—and therefore not eligible for any programming, as compared to the higher programming needs of the presumably more serious offenders placed in federal custody.[565] It may also be linked to current overcrowding within provincial facilities.[566] Yet as offenders sentenced to incarceration for periods longer than two years are placed in federal custody, it should be possible to generalize that sentencing people to longer periods of imprisonment will be associated with significantly higher *annual* costs to the public, in addition to the higher costs incurred over the course of their entire sentence.

At the same time, particularly in light of the restorative focus of the *Gladue* analysis, access to programming for those who are already incarcerated ought to be a central consideration as well. Some sentencing judges have accepted that more extensive programming is available in federal institutions, including programming specifically created for Indigenous inmates.[567] Yet other sentencing judges have noted that even in a federal penitentiary, "what is theoretically available for programming on paper, is not always available, accessible and beneficial, and particularly so in the case of Aboriginal offender programming".[568] In the *Ewert* decision, the Supreme Court has likewise reiterated the view expressed in *Gladue* that prison is harsher and less appropriate for Indigenous people due to various ongoing systemic issues within the prison system itself.[569] Anecdotes of barriers to accessing programming and discrimination within the prison system were frequently raised by participants in this Gladue Awareness Project's seminars as well.

In light of this, the costs of incarceration in comparison to community-based sentencing may be of particular interest. Imprisoning offenders is significantly more costly than community-based sentencing. During the 2017-2018 period, the Correctional Service of Canada (CSC)'s total expenditures were over $2.8 billion.[570] Of these total expenditures, approximately 63% (~$1.8 billion) were spent in relation to the custody program for the 14,015 offenders held in federal custody during that period.[571] In contrast, only an approximate 6% (~$164 million) was spent on the community supervision program for the 9,045 offenders under community supervision during this time.[572] The remainder of CSC's expenditures went to assessment activities and program interventions for federal offenders (19%) or to its internal services (12%).[573] Presumably, these

563 Ben Segel-Brown, "Update on Costs of Incarceration" (Ottawa: Office of the Parliamentary Budget Officer, 2018) at 13.
564 *Ibid*.
565 *Ibid*.
566 John Demers, *Warehousing Prisoners in Saskatchewan: A Public Health Approach* (Regina SK: Canadian Centre for Policy Alternatives, 2014).
567 See for example *Fehr*, n 251; *R v Doolan*, 2018 BCPC 28 at paras 102-104.
568 See *R v Charlie*, 2018 YKTC 44 at para 58, citing *R v Taylor*, 2017 YKTC 3 at paras 115-143, 151, 152.
569 *Ewert*, n 179, at paras 57, 66; *Gladue*, n 5, at paras 61, 68. See also *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62. Among other issues, Justice Leask found over-representation of Indigenous inmates among those subject to solitary confinement with the prison system (paras 466-469); disproportionate reliance on solitary confinement for Indigenous women in particular, for whom it is "particularly burdensome" (para 470); and a failure to recognize the unique capacities and needs of Indigenous inmates with respect to the use of solitary confinement in the prison system (paras 472-483). The disproportionate and culturally inappropriate use of solitary confinement was also linked to less frequent availability of parole (para 487).
570 "2017-18 Departmental Results Report", online: *Correctional Service Canada* <https://www.csc-scc.gc.ca/publications/005007-4500-2017-2018-en.shtml#n24>.
571 *Ibid*.
572 *Ibid*.
573 *Ibid*.

costs are shared between those in custody and those under community supervision, but it is unclear at what respective proportion. Regardless, it is clear that community supervision provides a far less costly option in comparison to incarceration.

It is also important to note that the cost of incarceration is just one component of the far greater costs associated with crime and the operation of the criminal justice system as a whole. It is far more complex to attempt to estimate those overall costs. According to one study, however, it cost Canadians approximately $20.3 billion in 2011-2012 to operate the entire criminal justice system, including policing, courts, and corrections at the federal, provincial, and territorial levels.[574] Presumably, these costs are closely tied to the overall crime rate, which in turn is closely linked to rates of recidivism.

Quantitative research on the impacts of Gladue reports on sentencing outcomes is very limited to date. Most evaluations of Gladue reports focus on qualitative measures, which are valuable but not easily linked to the costs associated with incarceration. However, an evaluation of a Gladue report pilot program in British Columbia did conclude that the reports led to shorter sentences and greater recourse to alternatives to incarceration in at least some cases in that jurisdiction.[575] The evaluation also found that Gladue reports provided greater access to information on available resources in rural and remote communities that were otherwise unfamiliar to counsel and judges.[576]

A more thorough and meaningful implementation of the *Gladue* decision ought to lead to not only lower rates of imprisonment for Indigenous people but also lower rates of recidivism. Empirical research in support of restorative justice programming is also limited, yet it appears to be non-contentious that it offers a significantly lower cost option in comparison to more punitive approaches to criminal justice in Canada.[577] It may also provide greater satisfaction to both victims and offenders in terms of process and outcome as compared to what the criminal justice system generally provides.[578] Of relevance to the question of costs, restorative justice programs are also associated with at least modest reductions in rates of recidivism overall as compared to the mainstream criminal justice system.[579] More specific to the *Gladue* analysis, evaluations of community-based justice programming funded under the federal Aboriginal Justice Strategy indicate far more pronounced decreases in recidivism for Indigenous people who participate in these programs.[580] And a recent study of an Indigenous non-profit organization's diversionary program in Winnipeg, Manitoba found a remarkably low recidivism rate of 30%.[581]

Canada's criminal justice system cannot be solely focused on questions of public expenditures. However, if the full implementation of the *Gladue* analysis can be expected to lead to lower rates of recidivism through greater recourse to restorative justice processes, as well as shorter prison terms and more community-based sentences for Indigenous people, there is a clear 'business case' for more proactive investment in support of such reforms. This is important context for

574 Rod Story & Tolga R. Yalkin, *Expenditure Analysis of Criminal Justice in Canada* (Ottawa: Office of the Parliamentary Budget Officer, 2013) at 23.
575 LSSBC Final Report, n 488, at pp 32-33.
576 LSSBC Final Report, n 488, at pp 39-41.
577 "The Effects of Restorative Justice Programming: A Review of the Empirical Evidence" (18 January 2018), online: *Department of Justice* <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr00_16/p3.html>.
578 *Ibid*.
579 *Ibid*.
580 For example, the December 2016 evaluation of the Aboriginal Justice Strategy found that program participants were "about 40% less likely to reoffend than those eligible but not participating". Evaluation Division – Corporate Services Branch, Government of Canada, *Evaluation of the Aboriginal Justice Strategy December 2016* (Ottawa: Department of Justice, 2016) at 40.
581 McKay & Milward, n 178.

the assessment of the costs associated with any future policy and programming changes that might further the implementation of *Gladue* in Saskatchewan. It should be clear to all that there are numerous societal costs associated with the crisis of Indigenous over-incarceration in Saskatchewan, with its fiscal implications being just one.

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