Gladue: Oft-cited but still woefully misunderstood?

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> *The primary meaning of "justice" in an Aboriginal society would be that of restoring peace and equilibrium to the community through reconciling the accused with his or her own conscience and with the individual or family that is wronged. This is a fundamental difference. It is a difference that significantly challenges the appropriateness of many of the ways in which the present legal and justice systems deal with Aboriginal people in the resolution of their conflicts, in the reconciliation of accused with their communities and in maintaining community harmony and good order.*
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> – Murray Sinclair[1]

Introduction

This paper has been prepared for a presentation on "Gladue and the Current State of the Law" for the Continuing Legal Education Society of British Columbia's Gladue Submissions Course. While the presentation will focus on current trends in the jurisprudence in 2018, this paper provides a backgrounder on how these trends fit within guidance from *Ipeelee*, *Gladue*, *Wells*, and earlier cases. Nothing is necessarily new in the *Gladue* jurisprudence except what has been forgotten or ignored.

Parliament enacted a number of amendments to the *Criminal Code*'s sentencing provisions in 1996, including the addition of s 718.2(e) to the Code. This provision mandates restraint in the use of imprisonment as a sanction in the sentencing of any offender, yet it calls for particular attention to the circumstances of Aboriginal offenders. In 1999, the Supreme Court of Canada provided a nuanced and purposive interpretation of s 718.2(e)'s application to Aboriginal offenders in *R v Gladue*.[2] Among other things, the Supreme Court made it clear that this provision had a remedial purpose in responding to the over-incarceration of Aboriginal people in Canada, the systemic discrimination they experience throughout our criminal justice system, and their unique perspectives and traditions with respect to responding to wrongdoing. The following year, the Supreme Court reiterated and clarified its interpretation of s 718.2(e) in *R v Wells*.[3] And in 2012, the Supreme Court was again tasked with restating and further explicating its instructions in *Gladue* and *Wells* in its most recent decision on s 718.2(e) in *R v Ipeelee*.[4]

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[1] Associate Chief Judge of the Provincial Court of Manitoba (as he then was), "Aboriginal Peoples, Justice and the Law" in Richard Gosse et al, eds, *Continuing Poundmaker & Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon SK: Purich Publishing, 1994) ["Gosse et al"] at 178.
[2] [1999] SCJ No 19, 1 SCR 688 ["*Gladue*"].
[3] [2000] 1 SCR 207, 2000 SCC 10 ["*Wells*"].
[4] [2012] 1 SCR 433, 2012 SCC 13 ["*Ipeelee*"].

In *Ipeelee*, the Supreme Court noted that the promise of *Gladue* had yet to be borne out in the statistics on Aboriginal over-incarceration in Canada—if anything the crisis had only deepened since 1999. Yet rather than retreating from its initial views in *R v Gladue*, the Supreme Court instead pointed to persistent misconceptions and under implementation of the *Gladue* analysis as an important reason why the crisis of Aboriginal over-incarceration has continued unabated. Still today, over thirty years after s 718.2(e) was first enacted, and in spite of a trilogy of decisions from the Supreme Court interpreting this provision, there is reason to believe that the *Gladue* analysis remains woefully misunderstood and under-implemented.[5] *R v Gladue* is one of the most frequently cited decisions in the long history of the Supreme Court of Canada.[6] Yet the frequency at which appellate courts are tasked with restating its core principles supports the view that the *Gladue* analysis remains persistently resisted by many actors in the criminal justice system to this day.

In this short paper I will outline several key principles that govern the sentencing of Aboriginal people pursuant to s 718.2(e) in order to provide something of a refresher course on the nuanced and complex implications of the *Gladue* analysis. I will then summarize some of the latest jurisprudence and trends on s 718.2(e) and the *Gladue* analysis in order to highlight where its implementation continues to be curbed with the hope that this might contribute in some modest way to more effective advocacy within the current state of the law.

A return to first principles

A prologue to section 718.2(e) in *Fireman*, *Curley* & *Morin*

In order to better understand the Supreme Court's interpretation of s 718.2(e) in *R v Gladue*, it may be worthwhile to briefly consider what preceded it. The Supreme Court clearly stated in *R v Gladue* that s 718.2(e) amounts to "more than simply a re-affirmation of existing sentencing principles".[7] It recognized the risk that s 718.2(e) might be interpreted and applied in a manner which had "no real effect on the day-to-day practice of sentencing [A]boriginal offenders" and interpreted the provision

[5] See for example Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* et le devoir de résistance" (2016) 21 *Canadian Criminal Law Review* 73 ["Denis-Boileau & Sylvestre"]. Note that an English translation of this paper is forthcoming: Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 *UBC Law Review*.
[6] At the time of writing, *R v Gladue* appeared to be the 47th most cited decision from the Supreme Court of Canada in the CanLII database (cited 2,086 times). This was out of more than 11,000 Supreme Court of Canada decisions published in the database to date.
[7] *Gladue*, n 2, at para 33.

as creating "a judicial duty to give its remedial purpose real force".[8] Yet in order to understand a remedy we should first consider the ailment.

First of all, it bears noting that in the earliest periods of Canadian legal history colonial actors expressed greater hesitancy in imposing Western criminal law standards on Aboriginal nations that had their own traditions and processes for responding to wrongdoing and anti-social behaviours. For example, the *Shawanakiskie* case from the early 1820s indicates that at the very least, certain early colonial judges were prepared to entertain Aboriginal sovereignty arguments similar to the American courts in context to crimes committed between Aboriginal people.[9] Similarly, historian John H. Archer has described how First Nations in Saskatchewan still "dealt with theft, misdemeanours and even murder in accordance with established tribal customs" as late as the 1870s.[10]

A remarkable openness to pluralism in criminal law can also be seen in Monk J's well-known decision from 1867 on Cree customary marriage, *Connolly v Woolrich*:[11]

> …It is easy to conceive, in the case of *joint occupation* of extensive countries by Europeans and native nations or tribes, that <u>two different systems of civil and even criminal law may prevail</u>. History is full of such instances, and the dominions of the British Crown exhibit cases of that kind. The Charter did introduce the English law, but did not, at the same time, make it applicable generally and indiscriminately—it did not abrogate the Indian laws and usages. …
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> [Emphasis added]

Our contemporary legal history appears to be far more resistant to the idea of Aboriginal self-determination in the realm of criminal law. However, we can find examples of members of the judiciary showing, at the very least, a willingness to consider the "cultural background and social relationships" of Aboriginal offenders in the sentencing process prior to the introduction of s 718.2(e) in 1996.[12]

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[8] *Ibid* at para 34.
[9] Mark D. Walters, "The extension of colonial criminal jurisdiction over the Aboriginal peoples of Upper Canada: Reconsidering the *Shawanakiskie* case (1822-26)" (1996) 46 *University of Toronto Law Journal* 273 at 275.
[10] John H. Archer, *Saskatchewan: A History* (Saskatoon SK: Western Producer Prairie Books, 1980) at 53, cited in Gosse et al, n 1, at 3 & 436.
[11] *Connolly v Woolrich*, (1867) 11 LCJ 197, 1 CNLC 70 at para 41.
[12] Clayton C. Ruby et al, *Sentencing*, 8th ed (Markham ON: LexisNexis, 2012) ["*Sentencing*"] at §18.4, p 639. citing) at paras 2-18.

In one notable example from 1971, the Ontario Court of Appeal overturned a sentence imposing a period of 10 years incarceration for manslaughter in light of the unique circumstances of the offender, Gabriel Fireman, a Muskego Cree man from Attawapiskat First Nation.[13] Mr. Fireman was a trapper who spoke no English, had only a grade five education in the Western sense, and already faced ostracism within his community after killing his cousin in a fight over petty differences.[14]

The Court of Appeal found that the sentencing judge had erred in imposing such a lengthy period of incarceration and instead imposed one of two years less a day.[15] It held that Mr. Fireman's reformation and rehabilitation ought to be dominant considerations, along with "the respect of the community for our system".[16] Bearing in mind Mr. Fireman's cultural and linguistic needs, the Court was of the view that "even a short term of imprisonment in the penitentiary is substantial punishment to him" and "would no doubt dull every sense by which he has lived in the north".[17]

In a similar vein, the Northwest Territories Court of Appeal's 1984 decision in *R v Curley* addressed unique circumstances underlying a sex crime in the remote Inuit hamlet of Hall Beach.[18] The Court acknowledged that ignorance of Canadian criminal law may be a mitigating factor for the sentencing of three Inuit men for statutory rape, given that local understandings of the age of consent differed markedly at the time.[19] The Court also accepted that imprisoning three Inuit men in the "totally foreign environment" of a distant prison would add to the harshness of any sentence imposed.[20] Still, the Court fell short of accepting that "the members of an isolated community should be judged in and by that community and by the standards of that community".[21] According to the Court, "[t]here is one criminal law in Canada".[22]

By the early 1990s, the judiciary had begun to experiment with other unique forms of cultural accommodation for Aboriginal offenders, including sentencing circles.[23] Yet these processes worked within narrow parameters set by the existing *Criminal Code*. For example, the lack of statutory authority for a sentencing circle meant a judge was "duty bound to ignore [its] recommendation to the degree that it varies

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[13] *R v Fireman*, [1971] OJ No 1642 (ONCA).
[14] *Ibid* at paras 2-8.
[15] *Ibid* at para 17.
[16] *Ibid*.
[17] *Ibid* at para 11.
[18] *R v Curley*, [1984] NWTJ No 45, 4 CNLR 72 (NWTCA).
[19] *Ibid* at paras 2-5.
[20] *Ibid* at para 5.
[21] *Ibid*.
[22] *Ibid*.
[23] See for example *R v Moses*, [1992] YJ No 10, 3 CNLR 116 (YKTC); see also *R v Joseyounen*, [1995] SJ No 362, [1996] 1 CNLR 182 (SKPC).

from what is a fit sentence" and these processes were considered to be "futile" where judicial precedent and the principle of parity called for a penitentiary term.[24]

Still, some members of the judiciary were already forecasting the Supreme Court's key holdings in *R v Gladue*. One notable example can be found in the dissenting opinion of former Chief Justice Bayda of the Saskatchewan Court of Appeal in *R v Morin*.[25] Bayda CJS (as he then was) was attentive to the crisis of Aboriginal over-incarceration and considered how it related back to the use of sentencing circles. If you can forgive a long-winded quote, you might find some prescience in his words:[26]

> …the argument that the need to eliminate the disparity in sentencing as it is understood in the traditional sense must defer to the need to eliminate the disparity reflected in the composition of the prison population is compelling indeed. That deference should not be misinterpreted. It should not be taken to mean that the reasons for the disparity in the prison population may be laid at the feet of the present justice system as it administered the principles of sentencing including the principle of sentence parity. The reasons are generally understood to be much more complicated and to be much more sociologically based than judicially based. But the deference does mean to recognize that our present justice system is flexible, accommodating and geared to do what must be done to achieve fairness and justice for all. That quality enables the system to embrace sentencing circles as part of the system and to ascribe to them a role in addressing the disparity in the prison population by empowering communities to help individuals break their personal cycles of misbehaviour. That accommodation not only respects the overarching principle of protection of the public into which all of the other sentencing principles are subsumed but enhances it. In that sense, the perpetuation of entrenched attitudes in relation to sentencing in the guise of maintaining sentence parity is not in the interests of the administration of justice in this province or the well-being of our society.
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> In the same spirit one is able to address the "two systems of justice" concern and say that although we now have only one system of justice an objective onlooker unfamiliar with our society would be surprised to learn that was the case were he or she to look only at the consequences or products produced by the system of justice. From the perspective of consequences we appear to have two systems of justice. Sentencing circles have a role to play in breaking down that apparent anomaly. …

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[24] *R v Morin*, [1995] SJ No 457, 4 CNLR 37 (SKCA) at pp 47-48, per Sherstobitoff JA.
[25] *Ibid* at p 53, per Bayda CJS.
[26] *Ibid* at pp 72-73, per Bayda CJS.

In sum, certain members of the judiciary were already experimenting with the accommodation of Aboriginal difference in the sentencing process prior to the enactment of s 718.2(e). Most notably, there was recognition that incarceration could be a harsher punishment for Aboriginal people from remote communities, especially those who would face linguistic barriers in prison. There was also some recognition that an Aboriginal community's response to wrongdoing like ostracism could be relevant to criminal sentencing, as well as local understandings of criminal law. While emphasis was still placed on parity with existing ranges and many members of the judiciary clearly intended to be seen as enforcing 'one criminal law' for all, *Gladue* sentencing certainly did not materialize out of a vacuum.

Gladue's purposive approach to section 718.2(e)

In 1999, the Supreme Court of Canada took the opportunity to weigh in on how sentencing judges might break down this anomaly of two systems of justice from the perspective of consequences in Canada—namely, the crisis of Aboriginal over-incarceration. Yet the Court did so in circumstances that were markedly different from prior cases like *Fireman* and *Curley*. In *Gladue*, the Supreme Court was asked to consider whether the sentencing of an Aboriginal offender living in an urban setting warranted any special attention.

Prior judicial history in *R v Gladue*

Jamie Tanis Gladue pleaded guilty to manslaughter, having stabbed her fiancé in the chest and killed him following a physical altercation between the two of them.[27] She was born in northern Alberta to a Cree mother and a Métis father, but moved to Nanaimo, British Columbia where the offence took place after her daughter was born.[28] At trial, Ms. Gladue's Aboriginal background was only raised by defence counsel when the judge specifically inquired about it.[29] Counsel clarified that Ms. Gladue was Cree but the Albertan community she was born in was "just a regular community", as opposed to an Aboriginal one.[30] The trial judge found it relevant that while both Ms. Gladue and her fiancé were Aboriginal, they were living in an urban area off-reserve and not "within the [A]boriginal community as such".[31] The judge concluded on this basis that there were no special circumstances arising from their Aboriginal status for him to consider.[32]

While the Court of Appeal was unanimous that the trial judge erred in concluding that s 718.2(e) did not apply to Ms. Gladue due to where she was living, a majority

[27] *Gladue*, n 2, at paras 2-10.
[28] *Ibid* at para 2.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid* at para 18.
[32] *Ibid*.

held that he did not err in finding no basis for special consideration of her Aboriginal background in light of the seriousness of the offence.[33] Rowles JA dissented and pointed to various reports and parliamentary debates on the disproportionately high number of Aboriginal people who are imprisoned as "the mischief that s. 718.2(e) was designed to remedy".[34] Among other things, Rowles JA stated that s 718.2(e) invites recognition and amelioration of systemic discrimination against Aboriginal people in the criminal justice system, and found it important for their different conceptions of criminal justice and appropriate criminal sanctions to be acknowledged and implemented.[35] Rowles JA also referred favourably to fresh evidence showing Ms. Gladue's efforts to maintain links with her Aboriginal heritage.[36] In her view, the sentence of three years' imprisonment was excessive whereas a sentence could have been designed to advance Ms. Gladue's rehabilitation through a period of supervised probation.[37]

Remedial purpose(s) of section 718.2(e)

When the Supreme Court of Canada finally weighed in, like Rowse JA it emphasized that s 718.2(e) had an important remedial purpose. This provision requires Aboriginal offenders to be sentenced "differently" so as to "endeavour to achieve a truly fit and proper sentence" in each case.[38] The Supreme Court also drew on evidence from academic and government publications to take judicial notice of "the serious problem of [A]boriginal overrepresentation in Canadian prisons".[39] According to the Court, it is reasonable to assume that Parliament intended s 718.2(e) "to attempt to redress this social problem to some degree" by directing sentencing 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".[40]

The Supreme Court also helpfully traced s 718.2(e)'s remedial purpose to three related reasons for restraint in imposing prison sentences on Aboriginal offenders:

1) ***Recognition that prison may be less appropriate for Aboriginal offenders***

   The Court held that s 718.2(e) amounts to legislative recognition that while overuse of incarceration is a problem for all offenders, "it is of much greater concern in the sentencing of [A]boriginal Canadians".[41] Section 718.2(e)

[33] *Ibid* at para 20.
[34] *Ibid* at para 21.
[35] *Ibid*.
[36] *Ibid* at para 22.
[37] *Ibid* at para 23.
[38] *Ibid* at para 33.
[39] *Ibid* at para 59.
[40] *Ibid* at para 64.
[41] *Ibid* at para 58.

demands restraint in the use of imprisonment for Aboriginal offenders in particular, suggesting "that there is something different about [A]boriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction".[42]

2) ***Recognition of bias, racism and discrimination in the justice system***

The Court held that s 718.2(e) must be understood in context to the existence of "widespread bias", widespread racism" and resulting "systemic discrimination" against Aboriginal people in the Canadian criminal justice system, with Aboriginal people "overrepresented in virtually all aspects of the system".[43] The Court took note of "bias against [A]boriginal people and an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for [A]boriginal offenders".[44] Elsewhere, it also noted Aboriginal people's adverse experiences of rampant discrimination and culturally inappropriate milieus in penal institutions.[45]

3) ***Recognition of different Aboriginal values and experiences of justice***

The Court held that s 718.2(e) should be understood in context to the "substantially different cultural values and experiences of [A]boriginal people".[46] The Court noted that "traditional [A]boriginal conceptions of sentencing" place greater emphasis on restorative justice than deterrence, separation, or denunciation.[47] And while diversity among Indigenous legal traditions was acknowledged, the Court held that "for many if not most [A]boriginal offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of [A]boriginal people or [A]boriginal communities".[48] The Court emphasized that underlying these varied legal traditions is "the importance of community-based sanctions" and "[i]n all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the [A]boriginal perspective".[49]

In this way, the Supreme Court of Canada's interpretation of s 718.2(e)'s remedial purposes went beyond what earlier decisions like *Fireman*, *Curley* and *Morin* had to

[42] *Ibid* at para 37.
[43] *Ibid* at para 61.
[44] *Ibid* at para 65.
[45] *Ibid*.
[46] *Ibid* at para 64.
[47] *Ibid* at para 101.
[48] *Ibid* at para 102.
[49] *Ibid* at para 103.

offer. Not only did the Supreme Court recognize incarceration as a potentially less effective and harsher sanction for Aboriginal offenders, it opened up space for different Aboriginal values and traditions to be given primacy in sentencing, especially (albeit not exclusively) in the crafting of community-based sanctions. In today's parlance, the Court recognized that many Aboriginal peoples respond to wrongdoing differently within their own legal traditions and held that these differences should inform a sentencing judge's approach.[50]

Two distinct elements of the *Gladue* analysis

The Supreme Court also prescribed a two-pronged approach to guide the remedial role of sentencing judges under s 718.2(e). Sentencing judges must consider both:[51]

1) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and

2) The types of sentencing procedures and sanctions which may be appropriate in the circumstances of the offender because of his or her particular Aboriginal heritage or connection.

First, the sentencing judge must inquire into the systemic or background factors that make Aboriginal offenders unique—their so-called "*Gladue* factors". An Aboriginal offender's background factors may stem in part from a history of dislocation, which "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".[52] These and other factors were recognized as contributing to both a higher incidence of crime and a higher rate of incarceration among Aboriginal peoples.[53] While similar factors may underpin crime and recidivism among non-Aboriginal offenders too, the circumstances of Aboriginal offenders are unique in how they relate back to systemic and direct discrimination and a legacy of dislocation.[54]

Second, the sentencing judge must inquire into appropriate sentencing procedures and sanctions for Aboriginal offenders. This stems from the fact that Aboriginal peoples 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 Aboriginal offenders

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[50] See for example *R v Itturiligaq*, 2018 NUCJ 31 at paras 63-64 (discussed in detail below).
[51] *Gladue*, n 2, at para 66.
[52] *Ibid* at para 67.
[53] *Ibid*.
[54] *Ibid* at para 68.

and their communities.[55] The Supreme Court noted that most traditional Aboriginal conceptions of sentencing give primacy to ideals of restorative justice and share a common thread in the importance of community-based sanctions.[56]

Community-based sanctions reflecting Aboriginal concepts of sentencing and the needs of Aboriginal people and communities should be implemented where "reasonable in the circumstances".[57] Even when such sanctions may not be reasonably available, it is appropriate to "attempt to craft the sentencing process and the sanctions imposed in accordance with the [A]boriginal perspective".[58] And "even where an offence is considered serious, the length of the term of imprisonment must be considered".[59] However, some violent and serious offences may call for similar terms of imprisonment between Aboriginal and non-Aboriginal offenders "even taking into account their different concepts of sentencing".[60]

While the Supreme Court of Canada ultimately dismissed Ms. Gladue's appeal, this was in part due to the fact that she had already been granted full parole with rehabilitative conditions by the time they heard her appeal.[61] The Court also noted it would be difficult to determine a fit sentence for Ms. Gladue according to its own guidelines based on the very limited evidence presented with respect to her Aboriginal background.[62] In addition to this, the Court noted Ms. Gladue's offence amounted to "near murder" and its seriousness meant the original sentence was not unreasonable.[63] The Supreme Court likely did not anticipate how much attention this explanation would garner alongside its generalized statement that "the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for [A]boriginals and non-[A]boriginals will be close to each other or the same, even taking into account their different concepts of sentencing".[64]

Doubling down on the analysis in *Wells* & *Ipeelee*

The controversy and complex implications of the decision *R v Gladue* appear to have encouraged the Supreme Court to revisit its analysis for clarification. Yet while the

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[55] *Ibid* at para 70.
[56] *Ibid* at paras 70 & 74.
[57] *Ibid* at para 74.
[58] *Ibid*. It is worth noting that the phrase "Aboriginal perspective" is generally invoked by courts in reference to Indigenous laws, customs, practices, and traditions. See for example *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257, 2014 SCC 44 at para 35. See also *Spookw v Gitxsan Treaty Society*, [2017] 3 CNLR 221, 2017 BCCA 16 at para 52.
[59] *Gladue*, n 2, at para 79.
[60] *Ibid*.
[61] *Ibid* at para 97.
[62] *Ibid* at para 96.
[63] *Ibid*.
[64] *Ibid* at para 79.

Court has reiterated and refined its guidance in two subsequent decisions, it has never backed down from its initial interpretation of s 718.2(e).

Emphasis on mitigating factors & the role of the community in *Wells*

In *R v Wells*, the Supreme Court of Canada reminded lower courts that s 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".[65] The Court also characterized the unique systemic and background factors that impact Aboriginal offenders as "mitigating in nature in that they may have played a part in the [A]boriginal offender's conduct".[66] And it once more emphasized the need to explore the possibility of "community-based sanctions".[67] In a new focus on the collective dimension of *Gladue* sentencing, the Court also stated that "the appropriateness of the sentence will take into account the needs of the victims, the offender, and the community as a whole".[68]

In *Wells*, the Court also suggested 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".[69] Again, emphasis was placed on the community's perspective. The Court also emphasized that s 718.2(e) requires a different methodology for assessing a fit sentence for an Aboriginal offender, but does not necessarily mandate a different result.[70] Yet while the *Wells* decision restates the generalization from *Gladue* that more violent and serious offences are likely to attract similar terms of imprisonment for Aboriginal offenders to those imposed on non-Aboriginal offenders, it also added that there may be circumstances where an Aboriginal community has decided "to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice".[71]

While the Court did not back down from the *Gladue* analysis in *Wells*, this decision does seem to clarify how Aboriginal communities and collectives can play a significant role in its implementation. Sentencing judges must consider the needs of victims and the community in addition to those of the offender, and must take note

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[65] *Wells*, n 3, at para 36.
[66] *Ibid* at para 38.
[67] *Ibid*.
[68] *Ibid* at para 36.
[69] *Ibid* at para 42.
[70] *Ibid* at para 44.
[71] *Ibid* at para 50.

of an Aboriginal community's "decisions" (rather than simply their views) when it comes to addressing criminal activity associated with social problems in their midst.

Dispelling myths & reinvigorating the purposive approach in *Ipeelee*

In *R v Ipeelee*, the Supreme Court of Canada revisited the *Gladue* analysis once more, this time in context to long-term offenders subject to long-term supervision orders.[72] The Court reiterated the need for *Gladue* factors to be considered in *all* cases where Aboriginal offenders are being sentenced, including the most serious ones.[73] Providing further specificity as to the uniqueness of Aboriginal offenders, the Court stated that sentencing judges "must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[74]

The Court also reiterated its view that *Gladue* factors will not necessarily justify a different sentence for an Aboriginal offender.[75] Yet it stated that this background information provides necessary context for understanding and evaluating the case-specific information presented by counsel or obtained through a "*Gladue* report".[76] Such case-specific information about the circumstances of an Aboriginal offender was said to be "indispensible" to a judge in fulfilling their duties under s 718.2(e).

Furthermore, the Court recognized that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system had only worsened since the *Gladue* decision was released.[77] However, this was not taken to mean that *Gladue*'s promise was a false one. Instead, the Court identified various fundamental misunderstandings and misapplications of s 718.2(e) among lower courts as impeding *Gladue*'s implementation, which will be discussed further below.[78]

Two roles for sentencing judges in responding to Aboriginal over-incarceration

In addition to this, the Supreme Court helpfully set out to clarify the role sentencing judges can play in responding to Aboriginal over-incarceration:

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[72] *Ipeelee*, n 4.
[73] *Ibid* at paras 84-86.
[74] *Ibid* at para 60.
[75] *Ibid*.
[76] *Ibid*.
[77] *Ibid* at para 62.
[78] *Ibid* at para 63.

1) Modify sentencing practices to accommodate Aboriginal difference

> Sentencing judges "can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders", but doing so may require sentencing practices to change "so as to meet the needs of Aboriginal offenders and their communities".[79]

2) Be alert to systemic and adverse impact discrimination in sentencing

> Sentencing judges can "ensure that systemic factors do not lead inadvertently to discrimination in sentencing" by recognizing the different socioeconomic realities of Aboriginal offenders, including factors like employment status, level of education, and family situation, and being wary of relying on these circumstances to disproportionately sentence Aboriginal people to jail.[80]

Substantive equality is key to the *Gladue* analysis.[81] According to the Supreme Court in *Ipeelee*, "[j]ust sanctions are those that do not operate in a discriminatory manner".[82] The *Gladue* analysis is not aimed at "affirmative action" or "reverse discrimination" but it amounts to "an acknowledgment that to achieve real equality, sometimes different people must be treated differently".[83] While the full implications of *Gladue* outside of the sentencing process are well beyond the scope of this paper, it is worth noting that its basis in human rights concepts like substantive equality has given it currency in a wide variety of contexts.[84]

The Court in *Ipeelee* sought to clarify how each prong of the *Gladue* analysis impacts the fitness and proportionality of a sentence imposed on an Aboriginal offender. In terms of the first prong, it reiterated its statement in *Wells* that where systemic and background factors shed light on the level of moral blameworthiness of an Aboriginal offender, these factors are "mitigating in nature".[85] Many Aboriginal offenders "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".[86] Failure to

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[79] *Ibid* at para 66.
[80] *Ibid* at para 67.
[81] *R v Whitehead*, 2016 SKCA 165 at paras 31-32, [2017] 5 WWR 222 ["*Whitehead*"].
[82] *Ipeelee*, n 4, at para 69.
[83] *Ibid* at para 71, citing *R v Vermette*, 2001 MBCA 64, 156 Man R (2d) 120 at para 39.
[84] See for example *United States v Leonard*, 2012 ONCA 622 at para 60 (re: extradition); *R v Sim*, 2005 ONCA 37586 at paras 14-16 (re: Ontario Review Board decisions); *Twins v Canada (Attorney General)*, 2016 FC 537 at paras 64-67 (re: Parole Board decisions).
[85] *Ipeelee*, n 4, at para 73, citing *Wells*, n 3, at para 38.
[86] *Ibid* at para 73.

account for these circumstances would violate the principle of proportionality by failing to recognize the degree of responsibility of the offender.[87]

This clearly relates back to the need for judges to be alert to systemic and adverse impact discrimination in the sentencing process. The *Gladue* analysis ensures that Aboriginal offenders are treated equally by being treated differently in terms of giving recognition to the unique barriers and struggles they face.

The Court also clarified the role of the second prong of the *Gladue* analysis in *Ipeelee*, the examination of appropriate sanctions and processes for Aboriginal offenders, as bearing on "the effectiveness of the sentence itself".[88] 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".[89] This relates back to the need for judges to modify sentencing practices to account for Aboriginal difference. The *Gladue* analysis opens up space for alternative worldviews and Indigenous legal traditions in a way that most courts prior to s 718.2(e) were clearly reluctant to do.

The Court in *Ipeelee* went on to clarify how the *Gladue* analysis relates to the principle of sentencing parity. While some of the circumstances facing Aboriginal offenders are shared by members of other minority or similarly marginalized non-Aboriginal groups, the levels of criminality among Aboriginal peoples are "intimately tied to the legacy of colonialism" and in this way distinct.[90] While the *Gladue* analysis might lead to different sanctions being imposed on Aboriginal offenders, these will be justified based on their unique circumstances and courts must not undermine the remedial purpose of s 718.2(e) through a formalistic approach to parity.[91] In this way, the Court clearly rejected continued emphasis on parity between sentences for Aboriginal and non-Aboriginal offenders to the extent that unique systemic and background factors and distinct worldviews justify this.

Finally, the Court identified two critical problems in how lower courts were applying the *Gladue* analysis. First, it repudiated cases where it was erroneously suggested that offenders must establish a causal link between their systemic and background factors (i.e. their "*Gladue* factors") and the offence in question before these factors would be considered.[92] Second, the Court rejected cases where it had

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[87] *Ibid.*
[88] *Ibid* at para 74.
[89] *Ibid.*
[90] *Ibid* at para 77.
[91] *Ibid* at para 79.
[92] *Ibid* at paras 81-83.

been erroneously generalized that *Gladue* principles do not apply to serious offences.[93] The Supreme Court emphasized that sentencing judges have a statutory duty to consider the *Gladue* principles in every case involving an Aboriginal offender, and stated that a failure to do so would be inconsistent with the principle of proportionality and invite appellate intervention.[94]

To recap, the Supreme Court of Canada's decision in *Ipeelee* reaffirmed the Court's commitment to the *Gladue* analysis. It set out to dispel misconceptions about that analysis and encourage broader implementation of its directions in all cases, including those involving the most serious offences. In doing so, the Court provided clearer guidance as to how the *Gladue* analysis has roots in both (a) equality and human rights law, and (b) Indigenous legal traditions and legal pluralism.[95] In terms of the former, the *Gladue* analysis reflects Canadian law's commitment to substantive equality in context to the sentencing of Aboriginal offenders. In terms of the latter, the analysis creates space for the different values and worldviews of Aboriginal societies to inform and guide the sentencing process. Finally, the Supreme Court took the opportunity to clarify *Gladue*'s place within other sentencing principles, including the central principle of proportionality. In this way, the Court provides guidance as to how *Gladue* principles are to be reconciled with other sentencing principles and objectives.

Everything old is new again: current trends in the jurisprudence

Persistent resistance from the courts of first instance

We are now rapidly approaching the 30th anniversary of the *Gladue* decision. Yet rather than seeing this analysis become a naturalized and intuitive part of the sentencing process over the past decades, there is every reason to believe that *Gladue* sentencing principles are still frequently misunderstood, ignored or otherwise marginalized in the sentencing of Aboriginal offenders in Canada.

This conclusion is perhaps made most abundantly clear in the recent scholarship of Professors Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre cited at the beginning of this paper.[96] The authors conducted a comprehensive analysis of 635 published sentencing decisions in relation to Aboriginal offenders since *Ipeelee*.

In terms of the first prong of the *Gladue* analysis, only 66% of these decisions made any explicit reference to the offender's systemic or background factors (i.e. "*Gladue*

[93] *Ibid* at paras 84-87.
[94] *Ibid* at para 87.
[95] See Denis-Boileau & Sylvestre, n 5.
[96] *Ibid*.

factors").[97] In 15% of these decisions the judge concluded that an Aboriginal offender's *Gladue* factors were either not applicable or less relevant due to the seriousness of the offence or the absence of a causal link between them and the offence in question.[98] In other cases, judges placed less weight on *Gladue* factors due to a lack of relevant *Gladue* information before the court, condemnation of the offender's individual life choices, an offender's apparent 'waiver' of their *Gladue* rights, or the need for public safety to take primacy over *Gladue*.[99] In other words, sentencing judges continue to place reduced emphasis on *Gladue* factors for reasons that closely parallel the "errors" identified by the Supreme Court in *Ipeelee*, indicating continued resistance to the implementation of *Gladue*.

In terms of *Gladue*'s second prong, the authors observed an even more underwhelming uptake by sentencing judges in the wake of *Ipeelee*. They found that in 87.7% of the sentencing decisions they reviewed the sentencing judges had still imposed periods of incarceration.[100] They also found very little evidence of sentencing judges being open to the role of Aboriginal culture and Indigenous legal orders in the sentencing process, finding only seven decisions where a judge attempted to adapt the type of sanction and procedure to reflect the Aboriginal heritage or connection of the individual being sentenced.[101] And even in such exceptional cases, the sentencing judge felt obliged to simultaneously frame the sentence within the 'traditional' sentencing objectives of Canadian criminal law.[102]

Yet another clear sign of judicial resistance to the Supreme Court's instructions in *Gladue* can be deduced from the frequency with which appellate courts are finding it necessary to restate and clarify the obligations of sentencing judges under s 718.2(e). Attention to some of the most recent decisions from our courts of first instance can demonstrate where progress is being made, as well as where barriers persist. In the remainder of this paper, I intend to summarize some of the contemporary jurisprudence in context to these first principles.[103]

The Gladue analysis applies to cases of violent and serious offences

As noted above, one of the post-*Ipeelee* trends most clearly identified by Professors Denis-Boileau and Sylvestre is a continued resistance to the application of the

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[97] *Ibid* at 86.
[98] *Ibid* at 87-88.
[99] *Ibid* at 88.
[100] *Ibid* at 96.
[101] *Ibid* at 99.
[102] *Ibid* at 100-101.
[103] Most of the case summaries that follow are taken from my own periodic *Gladue* case law updates that I distribute via email to select subscribers. Others are taken from research I previously conducted with regard to Bill S-215's impact on the *Gladue* analysis.

Gladue analysis in cases of violent and serious offences in spite of the Supreme Court's clear instructions to the contrary in *Ipeelee*.

On some occasions this persistent error remains premised on quotes taken out of context from the *Gladue* decision itself, *Ipeelee* notwithstanding. However, a similar form of categorical resistance to the *Gladue* analysis can be seen forming in cases where, for example, sentencing judges emphasize the need for deterrence and denunciation of violent crimes against Aboriginal victims so as to preclude any tangible impact of *Gladue* on the sentencing process.[104]

R v Denis-Damée

One recent example of the persistent refusal to apply *Gladue* to serious and violent offences can be seen in the reasons of the Quebec Court of Appeal's 2018 decision in *R v Denis-Damée*.[105] The Court of Appeal overturned a six-year sentence for manslaughter due to the sentencing judge's failure to properly and transparently apply the *Gladue* analysis.

Ms. Denis-Damée is an Atikamekw woman from Opitciwan who pleaded guilty to manslaughter in her father's death. The Court of Appeal acknowledged that she was young at the time of the offence (age 21), living in a dysfunctional family environment of rampant substance abuse, and having developed her own drug dependencies as early as age nine.[106] Both her parents and all four of her grandparents were residential school survivors.[107] Among other tragic details, the Court of Appeal took careful note of Ms. Denis-Damée's life experiences in foster care, a home for young offenders, and a hostel for Atikamekw youth, her suicide attempts and stays in psychiatric wards, and her history of addictions to drugs and solvents, as well as sex work as a teenager to financially support her addictions.[108] The Court of Appeal also carefully considered information set out in a *Gladue* report that linked a contemporary prevalence of addiction and violence in Opitciwan to a history of displacement and colonialism faced by this Atikamekw community.[109]

The Court also noted that Ms. Denis-Damée's father had threatened her with a knife just a few weeks prior to the offence, and the two came to blows while she was

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[104] See for example *R v Huskey*, 2018 NWTTC 2 at para 29; *R v RDC*, 2016 BCPC 388 at paras 52-55; *R v Woodford*, 2016 MBQB 72 at para 21; *R v MKI*, 2017 NWTSC 11 at 13; *R v Villeneuve*, 2017 NWTSC 6; *R v LHR*, 2016 NWTSC 48 at 18; *R v Romie*, 2015 NWTSC 11 at 8; *R v Paul*, 2013 BCSC 1331 at para 13; *R v Peter*, 2014 NUCJ 28 at paras 101-109; *R v ALW*, 2018 NLSC 4 at para 30.
[105] *R v Denis-Damée*, 2018 QCCA 1251.
[106] *Ibid* at para 5.
[107] *Ibid* at paras 15-17.
[108] *Ibid* at paras 23-30.
[109] *Ibid* at paras 33-41.

intoxicated on drugs and alcohol, shortly after she confronted him over having a sexual relationship with a woman of her same age.[110]

In terms of the first branch of the *Gladue* analysis, the sentencing judge at the Court of Quebec, Judge Boudreault, determined Ms. Denis-Damée's level of responsibility for the offence was high due to the seriousness of the offence.[111] In doing so, the Court of Appeal found that Boudreault J failed to make any connection between Ms. Denis-Damée's *Gladue* factors and her moral blameworthiness.[112] Boudreault J confined his analysis to the relationship between the gravity of the offence and her degree of moral blameworthiness without considering the Aboriginal dimension embodied by systemic and historic factors.[113] By failing to explicitly address how Ms. Denis-Damée's *Gladue* factors impacted her moral blameworthiness, Boudreault J made it impossible for the Court of Appeal to review this aspect of his decision.[114] This was held to be an error in principle that justified appellate intervention, especially since the evidence before Boudreault J revealed how Ms. Denis-Damée's actions stemmed from substance abuse related to systemic and historic factors.[115] The Court of Appeal found Ms. Denis-Damée's tragic childhood circumstances were at "the edge of human indignity"[116] and held that Boudreault J's finding of elevated moral blameworthiness did not correspond to reality.[117]

With respect to the second prong of the analysis, the Court of Appeal directly quoted from the alternatives to incarceration cited in the *Gladue* report.[118] The report writer recommended a sentence favouring Ms. Denis-Damée's physical and moral rehabilitation, one with judicial follow-up and possibly a six-month or longer stay in a therapeutic centre.[119] It also recommended a sentence that would encourage her to achieve her academic goals quickly, given her sincere position on rehabilitation and her intellectual capacities.[120] In spite of the information set out in the *Gladue* report, Boudreault J was found to have given no consideration whatsoever to alternatives to incarceration in his reasons, in spite of it being his duty to do so.[121]

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[110] *Ibid* at paras 6-9.
[111] *Ibid* at para 89.
[112] *Ibid* at para 90.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid* at para 91.
[116] This is from my own translation of a line in para 103: "…Nous sommes ici, n'ayons pas peur des mots, aux confins de l'indignité humaine." I would translate this into English as: "…We are here—let us not mince our words—at the edge of human indignity."
[117] *Ibid* at para 107.
[118] *Ibid* at para 93.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid* at para 94.

The Court of Appeal also took exception to his reliance on case law and analysis with respect to non-Aboriginal offenders where s 718.2(e) was not engaged.[122]

In substituting a two-year prison sentence followed by three years of probation, the Court of Appeal noted that Ms. Denis-Damée ought to benefit from supervisory measures when she is released that might allow her to anchor a new life project.[123] While Ms. Denis-Damée's own circumstances were found to be remarkably similar to those of Ms. Tanis Gladue, the Court of Appeal declined to impose the same sentence of three years incarceration here as a probationary framework was seen as critical to Ms. Denis-Damée's successful social reintegration.[124]

I thought it worthwhile to provide a detailed summary of this case as its similarity to the circumstances in the original *Gladue* decision make it one particularly interesting application of this analysis. The Court of Appeal took this as an opportunity to emphasize the need for sentencing judges to be careful and explicit in their application of the *Gladue* analysis. It also demonstrates the persistent problem of sentencing judges declining to meaningfully apply *Gladue* in cases involving serious and violent offences.

R v Andersen

Another recent example can be found in the Newfoundland and Labrador Court of Appeal's 2018 decision in *R v Andersen*.[125] The Court of Appeal overturned an Inuk man's four-year sentence for aggravated assault and breach of probation. Mr. Andersen stabbed his intimate partner in the lower back during a domestic confrontation involving physical violence.[126] The sentencing judge had some basic information on Mr. Andersen's Aboriginal status before him in a pre-sentence report.[127] Yet the judge failed to consider how it might have been relevant to the sentencing analysis, which amounted to an error justifying appellate intervention.[128]

The Court of Appeal was also concerned with the sentencing judge's reliance on a passage in *Gladue* stating "s. 718.2(e) should not be taken as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is Aboriginal".[129] The Court of Appeal noted that the passage was taken out of context and the judge ignored the Supreme Court's

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[122] *Ibid* at para 101.
[123] *Ibid* at para 113.
[124] *Ibid*.
[125] *R v Andersen*, 2018 NLCA 41.
[126] *Ibid* at para 3.
[127] *Ibid* at para 28.
[128] *Ibid* at para 31.
[129] *Ibid* at paras 29-30.

subsequent guidance in *Ipeelee*.[130] The sentencing judge erred in focusing on the seriousness of the offence and the offender's degree of responsibility without any consideration of Mr. Andersen's Aboriginal status.[131] The Court of Appeal found that this error had an impact on the sentence and proceeded to re-weigh the various aggravating and mitigating factors itself.[132]

The Court of Appeal replaced Mr. Andersen's four-year custodial sentence with one of two years less a day followed by three years probation with conditions.[133] The Court of Appeal held that a lengthy period of probation with conditions was important for Mr. Andersen, "particularly requiring Mr. Andersen to participate in rehabilitative programs available to him as a member of the Inuit of Labrador".[134]

Similar to *Denis-Damée*, *Andersen* indicates continued resistance to the implications of *Ipeelee* and *Gladue* in cases of serious and violent offences. This pattern can also be observed in the *Wolflegs* decision discussed later in this paper. Both *Denis-Damée* and *Andersen* also emphasize the need to consider alternative sanctions and procedures even in serious cases that might otherwise call for lengthy periods of incarceration. Probationary frameworks offer one possible route for a meaningful application of the second prong of the *Gladue* analysis in such cases.

There is no need for a causal link between Gladue factors and the offence

Another post-*Ipeelee* trend identified by Professors Denis-Boileau and Sylvestre is the continued insistence on the need for there to be some sort of "linkage" between *Gladue* factors and the offence for which an Aboriginal offender is being sentenced. While *Ipeelee* clearly repudiated the need for any "causal link", some subsequent decisions have attempted to require some lesser form of connection than a "causal" one. Several appellate decisions since *Ipeelee* have identified and rejected this persistent misconception with regards to the analysis.[135] I will not address any of these cases in detail as this aspect of the *Gladue* analysis should be self-explanatory at this point in time. As recently noted by the Yukon Court of Appeal in *R v Joe*:[136]

> …for Gladue principles to apply, no link or causal connection between the offender's Aboriginal heritage and his offence need be demonstrated as a

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[130] *Ibid* at para 30.
[131] *Ibid* at para 31.
[132] *Ibid* at para 39-48.
[133] *Ibid* at para 48.
[134] *Ibid*.
[135] See for example *R v Predham*, 2016 ABCA 371 at para 10; *R v JLM*, 2017 BCCA 258 at para 32; *R v Joe*, 2017 YKCA 13 ["*R v Joe*"] at para 84; *R v Swampy*, 2017 ABCA 134 at para 31.
[136] *R v Joe*, n 134, at para 77.

> pre-condition. Indeed, in most cases such a link would be impossible to establish….

Gladue factors are mitigating in nature

Another area of continued misunderstanding in the *Gladue* jurisprudence appears to be whether *Gladue* factors ought to be considered mitigating factors in terms of the proportionality of an Aboriginal offender's sentence. The British Columbia Court of Appeal may have contributed to this confusion by stating in *R v Eustache* that "while "*Gladue* factors are 'mitigating in nature', it is also true that they are not 'traditional' mitigating factors, such as the lack of a criminal record, a guilty plea, a good work history, or the countless other circumstances personal to an offender that may operate to moderate the nature and severity of a sentence".[137] But the Court appears to have been providing a generous and contextual reading of language in the sentencing judge's reasons in *Eustache* rather than making a general statement as to how *Gladue* factors should be factor into a sentence.

More recently, the British Columbia Court of Appeal clearly affirmed that *Gladue* factors are in fact "mitigating in nature" and must be accounted for in a sentencing judge's assessment of an Aboriginal offender's moral blameworthiness.[138] This appears to be consistent with the practice in other jurisdictions where *Gladue* factors are less controversially considered mitigating factors or at least factors favouring a less severe sentence.[139] However, the Saskatchewan Court of Appeal expressed words of caution in *R v Chanalquay*:[140]

> A sentencing judge should not simply stack up all of the *Gladue*-type considerations at play in a case and, if the list is long or severe, automatically proceed on the assumption such factors have had a substantial limiting effect on the offender's culpability. The required analysis is more demanding than that. To determine the extent to which *Gladue* factors impact on an offender's moral culpability, a sentencing judge must examine both the nature of the relevant factors and the particulars of the crime in issue. He or she should then consider the extent to which the unique circumstances of the offender "bear on his or her culpability" (*Ipeelee* at para 83) in the specific context of the case at hand. As mandated by the Supreme Court, the search here is not for a cause-and-effect relationship but for circumstances that cast light on the degree of the offender's blameworthiness for the specific offence in issue. It

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[137] *R v Eustache*, 2014 BCCA 337 at para 13.
[138] *R v GF*, 2018 BCCA 339 at paras 39-41.
[139] See for example *R v Anderson*, 2017 MBCA 31 at para 30; *R v Savard*, 2014 ABCA 219 at para 7; *R v Courtoreille*, 2013 ABCA 215 at para 11; *R v Souvie*, 2017 ABCA 148 at paras 53-55.
[140] *R v Chanalquay*, 2015 SKCA 141 at para 52.

> might be that the *Gladue* considerations impact the offender's culpability a great deal, not at all, or only to some intermediate extent.

On the other hand, this statement in *Chanalquay* may in turn need to be reconciled with case law rejecting any requirement for "linkage" between *Gladue* factors and a particular offence, as set out in the section above.

Adequate *Gladue* information is indispensible

There are also recent court decisions emphasizing why comprehensive and timely information on an Aboriginal offender's Gladue factors "is indispensible to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*".[141]

Currently there are significant regional differences with respect to how sentencing judges are able to obtain *Gladue* information across Canada, which in turn may impact how much information they are able to obtain.[142] For example, formal *Gladue* reports are not available in all provinces and jurisdictions. There are also jurisdictions where pre-sentence reports authored by probation officers contain *Gladue* information and may be labelled "*Gladue* reports" in a way that obscures key differences between these reports and the formal *Gladue* reports available elsewhere.[143] In a few cases judges have gone so far as to find provincial authorities guilty of "state misconduct" in their failure to ensure proper programming to provide *Gladue* reports for the purposes of sentencing Aboriginal offenders.[144]

There may also be internal and regional restrictions in the jurisdictions that do have robust *Gladue* report programs in place. In British Columbia, for example, concerns have been expressed in the past over the inability of a sentencing judge to obtain these reports on demand.[145] Similar concerns have arisen in Ontario due to regional differences in the availability of these reports.[146]

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[141] *Ipeelee*, n 4, at para 60.
[142] Denis-Boileau & Sylvestre, n 5 at 104-105.
[143] See for example *R v Nepinak*, 2017 MBPC 62 where Judge Pollack notes how pre-sentence reports with a *Gladue* component in Manitoba can consider *Gladue* factors to be risk factors due to the actuarial tests around which they are structured. For more information on this critical issue, see Kelly Hannah-Moffat and Paula Maurutto, "Re-contextualizing pre-sentence reports: Risk and race" (2010) 12:3 *Punishment & Society* 262.
[144] See *R v Knockwood*, 2012 ONSC 2238 at paras 70-72 & *R v Noble*, 2017 CanLII 32931 (NLPC) at paras 53 & 106-108.
[145] *R v McCook*, 2015 BCPC 1 at paras 75-78. See also *R v CJHI*, 2017 BCPC 121.
[146] *R v Corbiere*, 2012 ONSC 2405 at para 28. See also *R v Doxtator*, 2013 ONCJ 79 at para 64.

R v Legere

One well-known decision on the need for comprehensive *Gladue* information comes from the Prince Edward Island Court of Appeal in *R v Legere*.[147] Mr. Legere, a Mi'kmaw man, appealed a sentence to eight months incarceration for possession of marihuana for the purpose of trafficking.[148] His appeal was solely premised on the fact that he had been sentenced "without the benefit of a specialized pre-sentence report known as a Gladue report".[149] The Court of Appeal considered a full *Gladue* report as fresh evidence on appeal, among other evidence on this topic. It noted that "[t]here is no magic in the word 'Gladue' or in any particular style or structure of report" and that these reports "may be prepared by a variety of people with diverse backgrounds".[150] The Court of Appeal also acknowledged that Mr. Legere's Aboriginal status was "a live issue" when he was being sentenced and the sentencing judge had access to a "detailed and apparently thorough" pre-sentence report by a probation officer that reported on his Aboriginal heritage and connection.[151] Yet while the pre-sentence report gave the court "a snap shot of Legere's unhappy life", it failed to deal with the unique systemic or background factors that played a role in bringing him before the courts and made no reference to particular programming that might be appropriate for him.[152]

In contrast to the pre-sentence report, the *Gladue* report delved "deeply into the unique systemic and background factors that played a role in bringing this offender to this point in his life".[153] It canvassed the harm done to Mr. Legere's mother by the residential school system and spoke to the effects of inter-generational and multi-generational trauma.[154] The *Gladue* report spoke to addictions counselling and mental health counsellors as well as employment opportunities in the Aboriginal community on Lennox Island.[155] The *Gladue* report's authors spoke to several members of the Aboriginal community as well as non-Aboriginal relatives of Mr. Legere.[156]

In light of all this, the Court of Appeal held that the sentencing judge committed a reviewable error in proceeding to sentence Mr. Legere without adequate *Gladue* information.[157] The original 18-month custodial sentence was substituted with a

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147 *R v Legere*, 2016 PECA 7.
148 *Ibid* at para 1.
149 *Ibid*.
150 *Ibid* at para 13, citing *R v Lawson*, 2012 BCCA 508 at para 27.
151 *Ibid* at paras 18-20.
152 *Ibid* at para 21.
153 *Ibid* at para 22.
154 *Ibid*.
155 *Ibid* at para 23.
156 *Ibid*.
157 *Ibid* at para 24.

sentence of time served and 18 months of probation.[158] The *Legere* decision demonstrates why the line between making formal *Gladue* reports mandatory (which courts have been reluctant to do) and making adequate *Gladue* information mandatory (which courts have been willing to do) may be vanishingly thin.

R v Wolflegs

Another recent appellate restatement of the importance of comprehensive *Gladue* information comes from Alberta. The Alberta Court of Appeal recently dismissed an appeal from a decision designating Mr. Wolflegs a dangerous offender and sentencing him to an indeterminate period of incarceration following convictions for assault causing bodily harm, uttering threats, and sexual assault.[159] Yet while Mr. Wolflegs' appeal was ultimately unsuccessful, the Court of Appeal did find "significant errors" in the sentencing judge's decision, including a failure to "ensure she had sufficient evidence of the appellant's systemic and background *Gladue* factors" and a failure to "correctly apply *Gladue* principles".[160] Most notably, the decision to designate Mr. Wolflegs a dangerous offender was made without the benefit of a full *Gladue* report. The Court of Appeal agreed with Mr. Wolflegs that the sentencing judge erred in misapplying *Gladue* principles to "the scant evidence available to her relating to the appellant's background" and by failing to obtain sufficient *Gladue* information to fulfill her obligations.[161]

The Court of Appeal allowed a formal *Gladue* report to be admitted as fresh evidence and explained in detail how it filled crucial informational gaps in the record as compared to the cursory, incomplete information relied upon by the sentencing judge.[162] Inadequate *Gladue* information meant that the sentencing judge could not properly weigh the criteria relevant to a dangerous offender application, and meant that the application was determined without evidence of sanctions or procedures appropriate to Mr. Wolflegs based on his Aboriginal heritage.[163] This failure was sufficient cause for appellate scrutiny of the underlying decision.[164] The Court of Appeal also found error in the sentencing judge's conclusion that Mr. Wolflegs' moral blameworthiness was not diminished by his *Gladue* factors.[165] Even a diagnosed condition of psychopathy could not excuse the judge's failure to consider his *Gladue* factors as "important context as to why he may be before the courts".[166]

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[158] *Ibid* at para 33.
[159] *R v Wolflegs*, 2018 ABCA 222.
[160] *Ibid* at para 50.
[161] *Ibid* at para 81.
[162] *Ibid* at para 112.
[163] *Ibid* at para 115.
[164] *Ibid* at para 124.
[165] *Ibid* at para 117.
[166] *Ibid* at para 120.

In the end, the Court of Appeal held that the *Gladue* information on Mr. Wolflegs was not sufficient to "bridge the divide between the dangerous offender designation and that of a long term offender".[167] However, in doing so the Court also reaffirmed the need for comprehensive *Gladue* information and clearly endorsed a full application of the *Gladue* analysis in even the most serious of matters. Again, the difference between mandating adequate *Gladue* information and requiring a formal *Gladue* report to be tendered is somewhat muddled here.

R v Macintyre-Syrette

Whereas *Legere* and *Wolflegs*, suggest that "adequate *Gladue* information" will sometimes be synonymous with the availability of a formal *Gladue* report, a pair of recent decisions from the Ontario Court of Appeal show that even a full *Gladue* report may fall short of the former requisite standard.[168] In this matter, the Ontario Court of Appeal found that neither an ordinary pre-sentence report nor a *Gladue* report before the sentencing judge were sufficient to "put the sentencing judge in a position where he could meaningfully assess the appropriateness of a non-custodial sentence".[169] The Court of Appeal held that it was "an error for the sentencing judge to proceed without taking further steps to address the shortcomings in the reports" and concluded that a supplementary report was necessary before it could re-sentence the appellant.[170]

The Court of Appeal in this case was particularly concerned with the paucity of information in response to the second prong of the *Gladue* analysis. It noted the need for "an understanding of available alternatives to ordinary sentencing procedures and sanctions".[171] In its view, where "the offender lives as a member of a discrete Indigenous community, the sentencing judge needs to be told what institutions exist within that community and whether there are specific proposals from community leadership or organizations for alternative sentencing to promote the reconciliation of the offender to his or her community".[172] The ordinary source of this information is a *Gladue* report.[173] It was an error for the sentencing judge to proceed without this information.[174]

While the *Gladue* report before the sentencing judge recommended participation in sweat lodges, powwows, ceremony, and workshops focusing on healing, among

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[167] *Ibid* at para 166.
[168] *R v Macintyre-Syrette*, 2018 ONCA 259 ["*Macintyre-Syrette* #1"] & 2018 ONCA 706 ["*Macintyre-Syrette* #2"].
[169] *Macintyre-Syrette* #1 at para 2.
[170] *Ibid* at para 2.
[171] *Ibid* at para 14.
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid* at para 19.

other things, these recommendations "were prepared without interviewing anyone outside the appellant's family".[175] There was "no indication of any broader engagement with the community" and the judge therefore could not "understand what could be done, specifically, to promote reconciliation within that community and other goals of restorative justice".[176] There was some evidence that he had been ostracized and left out of ceremonies because his peers were unwilling to be seen with him and the *Gladue* report failed to address "the difficult question of reconciling him to this particular community".[177] Furthermore, the report failed to canvass "information about the institutions in the appellant's community, what opportunities exist for the appellant to participate in the various ceremonies recommended, whether the cooperation of other persons would be required, or whether that cooperation would be forthcoming".[178] The Court was also concerned by the lack of any proposal for specific reconciliation of this offender with his community or explanation of how participation in ceremonies would benefit him.[179]

After obtaining a supplementary *Gladue* report, the Court of Appeal released a follow up decision that confirmed the original sentence of six months incarceration followed by three years probation for a historic sexual assault. The Court of Appeal approved of the fact that the author of the supplementary report had sought input from the leadership of the appellant's First Nation.[180] The most salient information in the supplementary report, however, was the fact that the First Nation did not have "formal" restorative justice practices or programs".[181] The Court of Appeal noted that the First Nation was under no obligation to establish any institutional structure for restorative justice but considered it relevant that it had chosen not to do so.[182] The Court also found some information gaps remained in the supplementary *Gladue* report in terms of how options for Elder counselling and mentoring "would relate to the offence or to restorative justice in the sense of reconciling the appellant with the community".[183]

In this way, *Mcintyre-Syrette* reminds us of the Supreme Court's guidance in *Wells* that it is open to an Aboriginal community to decide "to address criminal activity associated with social problems, such as sexual assault, in a manner that emphasizes the goal of restorative justice".[184] However, the decision also suggests that

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[175] *Ibid* at paras 20-21.
[176] *Ibid* at para 21.
[177] *Ibid* at para 22.
[178] *Ibid* at para 23.
[179] *Ibid*.
[180] *Macintyre-Syrette* #2 at para 12.
[181] *Ibid*.
[182] *Ibid*.
[183] *Ibid* at para 14.
[184] *Wells*, n 3, at para 50.

sentencing judges will not assume this to be the case without specific information from the community, which in turn will require extensive "*Gladue* information" to be presented in the form of a *Gladue* report or through significant investments of time and labour from counsel.

Systemic discrimination against Aboriginal people exists within prisons

Outside of the sentencing jurisprudence, some recent court decisions relating to conditions within Canadian prisons provide insight into why there might be "something different about [A]boriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction".[185] I will summarize two of these here and address how they might relate back to the *Gladue* analysis.

BC Civil Liberties Association v Canada (Attorney General)

The British Columbia Supreme Court's recent findings with respect to a constitutional challenge to sections of the *Corrections and Conditional Release Act* provide important insight into the differential impacts of solitary confinement on Aboriginal inmates.[186] Justice Leask found that even in context to the overall over-incarceration of Aboriginal people within federal institutions, Aboriginal inmates are further over-represented in the use of solitary confinement.[187] This is particularly true of Aboriginal women for whom it is "particularly burdensome".[188] Solitary confinement can exacerbate distress for those with a history of physical or sexual abuse, both of which Aboriginal women suffer at disproportionately high rates.[189] Echoing the concerns expressed long ago in *Fireman* and *Curley*, Leask J noted that Aboriginal women are more frequently placed in institutions far from their home communities due to scarcity of correction institutions for women, which is problematic given "their identity is often inextricably linked with the land".[190]

Leask J concluded that solitary confinement has a disproportionate impact on Aboriginal inmates in general and Aboriginal women in particular.[191] Leask J found that Aboriginal over-representation within solitary placements is linked to *Gladue* factors such as the impacts of the Sixties Scoop and intergenerational effects from the residential school system.[192] He also noted the limited understanding and consideration of *Gladue* factors in correctional decision-making, along with a lack of

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[185] *Gladue*, n 2, at para 37.
[186] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62. Note that the Government of Canada has filed an appeal in this matter.
[187] *Ibid* at paras 466-469.
[188] *Ibid* at para 470.
[189] *Ibid*.
[190] *Ibid*.
[191] *Ibid* at para 471.
[192] *Ibid* at paras 473-475.

cultural awareness and restricted access to healing lodges.[193] Cumulatively, the status quo was held to breach the section 15 rights of Aboriginal inmates, and, among other things, Leask J called for greater availability of Aboriginal Elders, greater accessibility to healing lodges, and a program to assist Aboriginal inmates leaving prison gangs or associations.[194]

While the Supreme Court's own trilogy of cases on s 718.2(e) makes it clear that prison sentences are less appropriate for Aboriginal offenders than non-Aboriginal offenders, Leask J's judgment provides careful insight into precisely why this is the case and reminds us of how the *Gladue* analysis is couched in equality rights.

Ewert v Canada

The Supreme Court of Canada has also recently considered provisions within the *Corrections and Conditional Release Act* and in doing so reiterated its judicial notice of systemic discrimination within the criminal justice system.[195] A majority of the Supreme Court found that the Act obliges the Correctional Service of Canada (CSC) to take steps to ensure it is not using actuarial tools that discriminate against Aboriginal people. Most notably, the Court considered various reports and past decisions with respect to how Aboriginal people experience justice in Canada in order to take judicial notice that systemic discrimination against Aboriginal people extends throughout this system, including the prison system.[196] Going forward, CSC's practices "must not perpetuate systemic discrimination against Indigenous persons".[197] It "must ensure that its policies and programs are appropriate for Indigenous offenders and responsive to their needs and circumstances, including needs and circumstances that differ from those of non-Indigenous offender populations".[198] The *Ewert* decision suggests that CSC will need to start implementing its own *Gladue*-like lens going forward, but it also suggests serious issues with the status quo and reinforces past Supreme Court jurisprudence that incarceration has a disproportionate impact on Aboriginal inmates.

Sentencing processes & sanctions should accord with the Aboriginal perspective

One aspect of the Supreme Court of Canada's guidance in *Gladue* that has still received relatively little attention from sentencing judges is its statements that "current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of [A]boriginal people or [A]boriginal communities" and "it is appropriate to attempt to craft the sentencing

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[193] *Ibid* at paras 473-483.
[194] *Ibid* at para 490.
[195] *Ewert v Canada*, 2018 SCC 30.
[196] *Ibid* at paras 57, 60, 61 & 65.
[197] *Ibid* at para 66.
[198] *Ibid* at para 59.

process and the sanctions imposed in accordance with the [A]boriginal perspective".[199] As already noted above, the "Aboriginal perspective" is something of a term-of-art used by the Supreme Court of Canada—shorthand for Aboriginal peoples' unique laws, customs, practices, and traditions.[200] In light of this, it may be a surprise that few *Gladue* decisions make any specific reference to Indigenous legal traditions, with at least a few notable exceptions.[201]

There may be reason to believe that sentencing judges and appellate courts are becoming increasingly open to explicitly referencing and drawing from Indigenous legal traditions in criminal law jurisprudence.

In a recent example from the Nunavut Court of Appeal, *R v Ippak*, Justice Ronald Berger (in concurring reasons) recognized a tension arising "between Inuit law and traditions and the protection of individual liberty through *Charter* remedies".[202] Berger JA felt it necessary to reconcile the two and concluded that "Inuit law's restorative justice approach, providing as it does an alternative form of justice, furnishes a just solution in the case at bar that is not inconsistent with Canadian legal principles".[203] Berger JA also made the broad statement that "[A]boriginal legal principles and perspectives on criminal law and the application of the *Charter* must be taken into account in pursuit of the objective of mutually enriching and harmonizing Canadian and Indigenous legal orders".[204] Whether Berger JA applies a similar philosophy to criminal law matters before him on the Alberta Court of Appeal still awaits to be seen.

R v Itturiligaq

Much more could be said about how Indigenous legal traditions might be incorporated into the *Gladue* analysis than the scope of this paper will allow. However, another recent decision from Nunavut may be worth briefly outlining here in terms of the potential for the *Gladue* analysis to develop in this direction. In *R v Itturiligaq*, Bychok J of the Nunavut Court of Justice considered the unique culture, circumstances and social governance of Inuit in the *Gladue* analysis as it related to a constitutional challenge to a mandatory minimum penalty for a firearm offence.[205]

In *Itturiligaq*, Bychok J cited a decision he authored earlier this year to acknowledge that "Inuit social governance continues in parallel to the application of pan-

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[199] *Gladue*, n 2, at para 103.
[200] See n 58.
[201] See especially *R v Morris*, 2004 BCCA 305, [2004] 3 CNLR 295 at para 63.
[202] *R v Ippak*, 2018 NUCA 3 at para 70.
[203] *Ibid*.
[204] *Ibid* at para 84.
[205] *R v Itturiligaq*, 2018 NUCJ 31.

Canadian criminal law".[206] He also stated that the Court of Justice therefore "strive[s] to incorporate the precepts of Inuit Qaujimajatuqangit into our judgments and all our practices".[207] Similar to the approach followed by Berger JA in *Ippak*, albeit without citing that decision, Bychok J proceeded to analyze the offence through dual lenses of Canadian criminal law and Inuit Quajimajatuqangit ("IQ") or "Inuit societal values".[208] Bychok J noted that his reference to IQ was "a meaningful application of the clear *Gladue* direction to judges that Aboriginal persons are to be sentenced 'differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case'".[209] He also took note of the reference in *Gladue* to the emphasis that Aboriginal peoples' "traditional conceptions of sentencing" place on restorative justice being "extremely important to the analysis under s. 718.2(e)".[210]

Bychok J explained that the "norms of Inuit social governance were based, in part, on the primacy of the interests of the group" and the need to maintain "cohesion and security of the group" through "cooperation and mutual support in a harsh and unforgiving climate".[211] In this context, Bychok J found it unsurprising that "forgiveness, reconciliation, reintegration, restitution and understanding became hallmarks of Inuit social governance".[212] In Bychok J's view, "these Inuit norms *must* be considered by the judge when crafting a just and fit sentence".[213]

Bychok J ultimately struck down the mandatory minimum sentence in this case, with his decision resting on not only Inuit norms and values but also unique impacts that the Canadian criminal justice system has on Inuit from remote hamlets in Nunavut. He noted how infrequent circuit court sittings in Nunavut can trigger stress and resentment when the justice system insists on a legal resolution months after the fact and after "many parties have already reconciled and have moved on with their lives".[214] Harkening back to the practical concerns in *Fireman* and *Curley*, Bychok J also spoke to resentment, stress and anger often arising when "offenders are sent to jail outside the community against the express wishes of the victim, family and sometimes the community".[215]

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[206] *Ibid* at para 61, citing *R v Anugaa*, 2018 NUCJ 2 at para 42.
[207] *Ibid*. The term "Inuit Qaujimajatuqangit" is often translated as "Inuit traditional knowledge", "Inuit societal values" or "things long known to Inuit".
[208] *Ibid* at para 62.
[209] *Ibid* at para 63, citing *Gladue*, n 2, at para 33.
[210] *Ibid* at para 64, citing *Gladue*, n 2, at para 70.
[211] *Ibid* at para 107.
[212] *Ibid*.
[213] *Ibid* at para 108.
[214] *Ibid* at para 120.
[215] *Ibid*.

In this way, not only does Bychok J attempt to craft the sentencing process and sanctions in accordance with the Aboriginal perspective as per *Gladue*, he also brings to the forefront the views of victims, families and communities as per *Wells*. It awaits to be seen whether such an approach will be seriously pursued elsewhere in Canada but it is likely that Indigenous legal traditions will be increasingly raised in criminal sentencing proceedings as judges, lawyers, and law students become increasingly educated with respect to Indigenous law in response to the Truth and Reconciliation Commission's Calls to Action.

Conclusion

In summary, the Supreme Court of Canada provided detailed and nuanced guidance in its trilogy of *Gladue*, *Wells*, and *Ipeelee* with respect to how judges must approach s 718.2(e) and the sentencing of Aboriginal offenders going forward. The complexity of these foundational decisions becomes increasingly apparent as their first principles are reviewed and revisited by appellate courts each year. Almost thirty years after the *Gladue* decision was first rendered, appellate courts are still regularly called upon to police the implementation of some of its most basic tenets. Yet at the same time, some of this decision's most powerful and transformational statements are being actively explored in many jurisdictions as we speak, suggesting that *Gladue* still might be bearing late blooms.