The GLADUE PRINCIPLES

A GUIDE TO THE JURISPRUDENCE

USER GUIDE

FOR GLADUE
REPORT WRITERS

BENJAMIN A. RALSTON

The GLADUE PRINCIPLES

A GUIDE TO THE JURISPRUDENCE

USER GUIDE

FOR GLADUE REPORT WRITERS

PURPOSE

This guide has been created as a tool to be used in conjunction with *The Gladue Principles: A Guide to the Jurisprudence* ("*The Gladue Principles*"). It provides a short summary of relevant considerations specifically for *Gladue* report writers tasked with collecting case-specific information in support of the court's application of the *Gladue* principles. Discussion of the role of *Gladue* reports can be found in Chapters 10 & 11 of *The Gladue Principles* as well. The points summarized here are all derived from existing case law and citations are provided as endnotes for ease of reference. If more detailed discussion is provided in *The Gladue Principles*, pinpoint references are provided to the full-length text.

Published by the Indigenous Law Centre

BC First Nations Justice Council
Suite 103, 3500 Carrington Rd.
Westbank, British Columbia
Canada V4T 3C1
Phone: 778.940.1520 ext 103
Email: info@bcfnjc.com
https://bcfnjc.com/

Indigenous Law Centre
University of Saskatchewan
160 Law Building, 15 Campus Drive
Saskatoon, Saskatchewan
Canada S7N 5A6
Phone: 306.966.6189
https://indigenouslaw.usask.ca

BC FIRST NATIONS
JUSTICE COUNCIL

Indigenous Law Centre

While financially supported by the Law Foundation of British Columbia, the BC First Nations Justice Council, the Indigenous Law Centre and the author, Benjamin Ralston, are solely responsible for all content.

OVERVIEW

This document summarizes jurisprudence in relation to the following questions:

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

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

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

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

A non-exhaustive list of the *Gladue* principles

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

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

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

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

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

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

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

Several lower courts have provided lists of questions to guide counsel and the court when an Indigenous person is being sentenced.[3] These are useful for *Gladue* report writers to ensure reports are responsive to the sentencing judge's needs. Some of these inquiries will be explored in greater detail in subsequent sections. However, for ease of reference they have been merged to create the following list:

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

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

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

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

This list of questions can assist in determining whether there is an adequate level of case-specific information in your report to help the sentencing judge meaningfully apply the *Gladue* principles. However, it is by no means an exhaustive list. The *Gladue* jurisprudence continues to evolve and expand alongside the legal system's collective understanding of the unique circumstances of Indigenous peoples. *Gladue* report writers should remain open to new lines of inquiry as they emerge.

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

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

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

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

Case-specific information is key

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

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

Analogous considerations for non-Indigenous offenders

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

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

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

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

In sum, case-specific circumstances and information are critical when determining the impact of an Indigenous person's systemic and background factors on what is a fit and proper sentence. Someone's self-identification as an Indigenous person will have little to no impact without case-specific details, which could be either specific to them as an individual or at a collective or community level. Even non-Indigenous people may face some related or analogous systemic and background factors that need to be taken into account as part of an individualized approach to sentencing. As a result, the focus is not the validity of someone's Indigenous identity.[18] Instead, it will tend to be whether systemic and background factors are apparent within the case-specific details, whether there are culturally appropriate procedures and sanctions relevant to their particular heritage or connection, and how these unique circumstances bear upon the determination of a fit and proper sentence. As *Gladue* report writers often provide much if not most of the case-specific information taken into account under this analysis, you will make a critical contribution to these goals.

D) HOW DO *GLADUE* REPORT WRITERS HELP ENSURE THERE IS ADEQUATE CASE-SPECIFIC INFORMATION BEFORE THE COURT?

There are various means by which case-specific information regarding an Indigenous person's unique circumstances can be brought before the court. As long as an Indigenous person does not waive their right to have this kind of case-specific information collected and considered, the Supreme Court of Canada anticipated that it would be adduced by "counsel on both sides".[19] The Supreme Court also clearly anticipated that these unique circumstances would receive "special attention" in pre-sentence reports, potentially including representations from Indigenous communities.[20] Likewise, sentencing judges are expected to make further inquiries as reasonable and necessary, and they are entitled to seek witness testimony to address gaps if needed.[21] In *Ipeelee*, the Supreme Court expressly endorsed the practice of obtaining *Gladue* reports that canvass this case-specific information in detail as well.[22]

The two categories of unique circumstances

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

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

2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of their particular Indigenous heritage or connection.[23]

Gladue report writers play a critical role in ensuring there is adequate case-specific information before the court to address both categories of unique circumstances. They can also help ensure the sentencing proceeding is informed by Indigenous perspectives and values, as well as restorative justice practices. What follows is a summary of considerations for *Gladue* report writers tasked with collecting case-specific information, as derived from existing case law and institutional practices.[24]

Important considerations for *Gladue* report writers

Even prior to the Supreme Court of Canada's *Gladue* decision there were studies and reports calling for more culturally appropriate and detailed pre-sentence reports regarding the unique circumstances of Indigenous people, including the broader perspectives of Indigenous communities.[25] *Gladue* reports are responsive to this need. They are often prepared in a way that is "restorative in nature" by providing the individual who is being sentenced with an opportunity for introspection and critical contemplation of their personal history, "situat[ing] it in the constellation of family, land and ancestry that informs identity and worth".[26] Typically the diverse voices of those who are interviewed for *Gladue* reports are faithfully reflected in direct quotes that ensure they are "not being filtered or interpreted by the writer", providing a "valuable substitute to the speaker coming to court and saying it in person".[27] This also gives the Indigenous person who is being sentenced the opportunity to contemplate the input of their family members, their community, and their broader support network when they review their own *Gladue* report.

As the preparation of a *Gladue* report requires the interrogation of the factors that underlie someone's life circumstances and offence cycle, and they incorporate the perspectives of family and community members, it is an intrusive and challenging process for the report's subject. Be considerate when asking questions and mindful of the fact that this may be the first time either the subject or their collaterals are sharing some of this information. Not everyone is willing to undergo the same level of investigation and

introspection into their personal, familial, and community circumstances. Even if your interviewees willingly respond to all your questions they can be inadvertently retraumatized by some of these inquiries. For this reason, it is important for *Gladue* report writers to be aware of available supports and to be ready to bring them to the attention of the people they interview.

Sources of information for *Gladue* reports

Gladue reports that are prepared by members of local Indigenous agencies, justice committees, or justice programs may directly reflect Indigenous perspectives and community views, including the support for community-based dispositions. When *Gladue* reports are prepared by outside writers they can still canvass community perspectives by interviewing a variety of community collaterals, such as hereditary and elected leaders, Elders and other knowledge keepers, community counsellors, family members, teachers, social workers, spiritual leaders, or Indigenous court workers. It is important to bear in mind that someone's community may be their broader support network in an urban setting. In some jurisdictions *Gladue* reports will canvass the circumstances of any Indigenous victims as well.

The Indigenous person who is going to be sentenced will be the most obvious source of relevant information regarding their personal circumstances. However, there will often be systemic or background circumstances at the community or nation level that are beyond their personal knowledge. Not everyone is equally knowledgeable about their personal, familial, and community history. Some will struggle to describe their personal situation, perhaps as a result of their constrained circumstances (e.g. cognitive deficits from Fetal Alcohol Spectrum Disorder), their youth, or their level of maturity. Likewise, they may have very little to share about their family, culture, territory, and traditions as they have been disconnected from these supports due to some systemic and background factors of key relevance to the *Gladue* principles (e.g. survivors of the Sixties Scoop). For these reasons, it will be important to identify any family and community members who are willing and able to share this kind of knowledge with the court through the preparation of a *Gladue* report.

Gladue report writers should also review existing court reports and assessments for the subject of their report. This includes prior court-ordered pre-sentence reports, *Gladue* reports, and psychiatric reports, as well as any other assessments diagnosing mental health issues or other long-term conditions. *Gladue* report writers should also endeavour to locate and review any child welfare records, corrections records, and past legal cases that involve the subject of their report, such as prior sentencing decisions and decisions from the Independent Assessment Process under the Indian Residential Schools Settlement Agreement. You may need counsel to assist you with access to some of this sensitive personal information, especially for a young person.

The importance of objectivity, independence, and balance

Gladue reports must be balanced and objective.[28] In other words, they will generally include both positive and negative information about the subject. They are intended to provide contextualized information. For example, if the subject of the report has a prior criminal record but ten years have passed since their last offence, the report may be able to shed light on the reasons for this gap in their record so that counsel and the sentencing judge can identify the supports they might need to be successful again in the future. They are not meant to convey your personal opinions or strongly recommend any specific sentences, although they generally include suggestions or proposals for restorative or rehabilitative options.

As the author of a *Gladue* report you should always clearly indicate your training and background in the report as this may influence the weight the court gives it.[29] You must also maintain your independence from the Crown and defence counsel to avoid any potential appearance of compromised objectivity.[30] Independence from the criminal justice system may also improve your rapport with interviewees for candid and detailed discussions about sensitive topics of relevance to sentencing.[31] For instance, some *Gladue* report writers have been able to confirm for the court that the subject of their report has been diagnosed with Fetal Alcohol Spectrum Disorder or that the subject's mother consumed alcohol while pregnant in support of a medical expert's diagnosis of this disorder.[32]

It is also important to ensure key details are verified and corroborated wherever possible through collateral interviews or other sources of information. In-depth research into the subject's personal records and any past reports about them can assist with this. In some jurisdictions *Gladue* reports will draw a sentencing judge's attention to secondary source materials that expand on the social context that sentencing judges take judicial notice of, such as statistics for relevant Indigenous communities or social science research related to systemic and background factors. However, a *Gladue* report is not used as an expert report. Its primary purpose is to provide case-specific information collected from the person who will be sentenced, their family, their broader support network, and their community, and anyone else who will be involved in alternative sentencing options. This information should be presented in direct quotations to the extent possible rather than being summarized, paraphrased, or interpreted for the court. While the different agencies that oversee the preparation of *Gladue* reports may have different views on how to best cite your sources (e.g. footnotes, endnotes, or a bibliography), you will need to consistently and transparently attribute all information to its original source.

Critical issues or omissions to avoid

As addressed in detail in *The Gladue Principles*, sentencing judges have occasionally identified issues with *Gladue* reports that resulted in them receiving less weight in sentencing. For example, they have taken issue with *Gladue* report writers:

- appearing to engage in advocacy on behalf of the subject of the report in terms of the language they use in presenting case-specific information;
- using leading questions in their interviews that prompt their interviewees to respond in a particular way, which can produce false or slanted information;
- engaging in "cut-and-paste" of information from previous reports that gets presented as though it were unique to the subject of the more recent report (as opposed to generalizable information from secondary sources); or

- otherwise lacking in objectivity or specificity (e.g. setting out generalizable information about the direct and intergenerational harms associated with colonialism while failing to thoroughly explore the individual, family, and community-specific circumstances of the person being sentenced).

Some *Gladue* reports have been given little to no weight due to inconsistencies with information set out in other reports or assessments before the court that the *Gladue* report writer failed to address, or because the report's author neither corroborated nor challenged controversial or disputed statements from their interviewees. These are potential issues that all *Gladue* report writers must keep in mind to ensure these reports remain the preferable source of case-specific information.

The expected length, level of detail, and process for preparing a *Gladue* report may vary from one service provider to the next so you must be attentive to the timelines, protocols, and guidelines prescribed for the jurisdiction in which your report will be used. In general, *Gladue* reports tend to be far lengthier and more detailed than the pre-sentence reports prepared by probation officers. Sentencing judges have often distinguished *Gladue* reports from ordinary pre-sentence reports in terms of the depth of their interviews with Indigenous community and family members who can provide a richer context for the personal circumstances of the subject.

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

The first category of unique circumstances that must be accounted for whenever an Indigenous person is being sentenced relates to the history of colonialism and maltreatment of Indigenous peoples in Canada, its legacy in disproportionate rates of social and economic marginalization, and how these contribute to systemic discrimination throughout the criminal justice system.[33] More specifically, the Supreme Court of Canada has directed sentencing judges to take judicial notice of both: (i) "such matters as the history of colonialism, displacement, and residential schools"; and (ii) "how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[34] Taken together, these factors provide the necessary context for understanding and evaluating case-specific information before the court.[35]

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

Frequently considered systemic and background factors

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

These bullets are not meant to function as a list of "*Gladue* factors" to be checked off whenever an Indigenous person is being sentenced. As the Saskatchewan Court of Appeal pointed out in *Chanalquay*, the *Gladue* analysis requires sentencing judges to do more than "simply stack up of all *Gladue*-type considerations at play in a case and, if the list is long or severe, automatically proceed on the assumption that such factors have

had a substantial limiting effect on the offender's culpability".[36] Instead, sentencing judges need to examine how they cast light on an Indigenous person's moral blameworthiness, among other relevant sentencing considerations.[37] As the Alberta Court of Appeal has repeatedly noted, an Indigenous person's unique circumstances may be relevant in more than one way and sentencing judges may need to consider their relevance to sentencing from both an individual-focused perspective and a broader community-level or societal perspective.[38] The unique circumstances of Indigenous people are "both general and specific in nature".[39] A thorough *Gladue* report assists the sentencing judge with this challenging analysis.

The relevance of systemic and background in sentencing

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

- Assessing why an Indigenous person ended up before the courts;
- Assessing whether prison will impact them more adversely than others;
- Assessing whether prison is less likely to rehabilitate them;
- Assessing whether prison is likely to deter or denounce their conduct in a way that is meaningful to their community; and
- Assessing whether restorative sentencing principles ought to be given primacy to address crime prevention and bring about individual and broader social healing.[40]

While *Gladue* report writers should not be providing any analysis or submissions on the relevancy of the information set out in their reports, being aware of the different ways in which the information could be relevant should help guide the direction of your interviews and research.

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

This second category of unique circumstances is analytically distinct from the first. In *Gladue*, the Supreme Court of Canada first called for close attention to sentencing procedures and sanctions that may be appropriate for an Indigenous person based on their particular heritage or connection.[41] In *Wells*, the Court clarified this to mean courts must both "conduct the sentencing process and impose sanctions taking into account the perspective of the aboriginal offender's community" and it suggested courts may need to consider whether an Indigenous community has decided to address criminal activity associated with social problems with a restorative focus.[42] In *Ipeelee*, the Court further explained that these culturally appropriate sentencing procedures and sanctions respond to a need to "abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community".[43]

In short, an Indigenous nation or community's distinct conception of sentencing and understanding of the meaningfulness of particular sanctions could be relevant to the application of the *Gladue* principles. And the meaning of 'community' in this context extends to any network of support and interaction available to the Indigenous person being sentenced, whether they reside in a rural area or an urban centre.[44]

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

Frequently considered culturally appropriate procedures and sanctions

- **Justice committees** allowing for Indigenous community members to inform the sentencing process with regards to community perspectives, needs, and conditions.[45] They may assist with sentencing recommendations, pre-sentence reports, healing and sentencing circles, diversion and community-based sentences, and other culturally appropriate processes and sanctions.
- **Sentencing and healing circles** that provide a way for an Indigenous person's community, service providers, family, or victim to inform the sentencing process.[46] Participation in these processes can also contribute to meeting substantive sentencing objectives like rehabilitation, community reintegration, acknowledgment of harm, and deterrence as well.
- **Family group conferencing** where an Indigenous person's community, service providers, victim, or family inform the sentencing process, especially for Indigenous youth.[47] Like sentencing and healing circles, conferencing can contribute to substantive sentencing objectives in addition to providing case-specific information.
- **Elder panels, participation, and input** to address community perspectives, needs, and conditions.[48] Elders may wish to speak to the values, worldview, and legal traditions of their community, provide views on an appropriate disposition or conditions, or admonish, encourage, and otherwise counsel the person being sentenced, among other things.

- **Specialized sentencing courts** that incorporate restorative justice practices into the sentencing process for an Indigenous person, often in conjunction with other culturally appropriate sentencing procedures or sanctions.[49]
- ***Gladue* reports** that provide the person being sentenced with an opportunity for introspection and critical contemplation of their personal circumstances in context to those of their family and community.[50] These should include as broad a range of perspectives as possible.
- **Community banishment** or a period of **land-based isolation** where this provides an Indigenous community with greater control over reintegration, protects victims, or facilitates rehabilitation.[51] Banishment may be culturally relevant for some Indigenous collectives, but it is a rare and controversial option that needs to be carefully designed to meet these objectives.
- **Community service orders** tailored to the needs of a particular community, such as those that require someone to contribute through culturally relevant activities (e.g. chopping wood for Elders) or public speaking regarding their offence or their background circumstances.[52] These may be tailored to foster pro-social skills and interests of the person being sentenced as well.
- **Indigenous programming** in the community or even the correctional system (e.g. sweat lodges) where it supports an Indigenous person's reintegration and rehabilitation, among other sentencing objectives.[53]

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

Sentencing judges have taken into account unique circumstances ranging from Nisga'a shame feasts in northern British Columbia to the sacred and spiritual values associated with eating game meat and hunting for Cree in northern Quebec.[54] Some sentencing judges have considered how certain community-specific initiatives relate to the Supreme Court of Canada's direction to consider Indigenous peoples' distinct perspectives and conceptions of justice and sentencing as well, such as Judge Krinke's

assessment of the Kainai Peacemaking Project in *Callihoo*.[55] In most sentencing decisions, however, the connection between Indigenous peoples' distinct worldviews and legal traditions and the culturally appropriate procedures and sanctions available to the court receives less explicit attention. A thorough *Gladue* report can help enrich the sentencing judge's understanding of these connections.

Similar to the first category of unique circumstances, sentencing judges may require detailed case-specific information regarding any culturally appropriate procedures and sanctions that are available. For instance, the Ontario Court of Appeal set an exacting standard in *Macintyre-Syrette* by insisting on details of broader community perspectives and the specific institutions, ceremonies, or individuals that would be involved in carrying out any alternative to incarceration.[56] A *Gladue* report should provide as much of this detail as possible in support of any culturally appropriate procedure, sanction, or programming it outlines for the court, including timelines, eligibility requirements, and the substantive content for each option.

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

Gladue report writers are sometimes asked to canvas the unique circumstances of an Indigenous victim of crime as well. Indigenous people are more likely to be victims of crimes due to many of the same systemic and background factors that drive disproportionate rates of incarceration and this is relevant to the sentencing process as well.[57] In *Gladue*, the Supreme Court directed sentencing judges to "take into account all of the surrounding circumstances regarding the offence, the offender, the

victims, and the community, including the unique circumstances of the offender as an aboriginal person".[58] It also contemplated the possibility that an Indigenous victim's family and community might hold a distinct conception of sentencing of relevance to the analysis under s 718.2(e).[59] Furthermore, the Court concluded that most traditional Indigenous conceptions of sentencing place a primary emphasis upon the ideals of restorative justice and that this tradition is extremely important to the analysis under s 718.2(e).[60] It described this restorative approach as one where "[t]he appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender".[61]

In short, the circumstances and needs of victims are therefore clearly relevant to sentencing under the *Gladue* framework, which requires judges to ask: "[f]or this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?"[62]

Many courts have also raised the concern that s 718.2(e) should not be interpreted in a way that appears to discount harms done to Indigenous victims or afford them less protection under the law.[63] Some have taken into account the disproportionate rates of victimization suffered by Indigenous people as well, especially Indigenous women and girls.[64] In *Friesen*, the Supreme Court of Canada acknowledged that Indigenous children and youth are more vulnerable to sexual violence due in part to the same systemic and background factors that fuel the disproportionate rates at which Indigenous people are incarcerated.[65] Likewise, Parliament has amended the *Criminal Code* to ensure more consistent attention to the vulnerability of Indigenous victims to abuse and violence.[66]

It is for these reasons that sentencing judges might ask *Gladue* report writers to incorporate an Indigenous victim's systemic and background factors into their reports. The victim's circumstances could be relevant context for a more holistic approach to sentencing pursuant to the *Gladue* framework.[67] If an Indigenous person has been victimized, their systemic and background factors could justify greater emphasis on denunciation and deterrence due to their vulnerability or higher rates of certain forms of violence in the community.[68] The need for attention to the vulnerability of Indigenous women and girls to abuse is now codified in ss 718.04 and 718.201 of the *Criminal Code*. However, it does not follow that an Indigenous offender's unique circumstances are rendered irrelevant if

they commit a violent crime against another Indigenous person.[69] On the contrary, this could indicate that a restorative approach to sentencing is most appropriate.[70] Likewise, the disproportionate rates of victimization and disproportionate rates of criminalization faced by Indigenous people are inter-related phenomena that may problematize categorical distinctions between victims and offenders.[71] These are all topics that a *Gladue* report writer could conceivably canvass if directed to do so.

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

Sometimes a *Gladue* report will be requested for something other than a standard sentencing proceeding. It is clear that the relevance of an Indigenous person's unique circumstances within Canadian law is not restricted to determinations of moral culpability, the weighing of various sentencing objectives, or the crafting of culturally appropriate procedures and sanctions in criminal sentencing. In *Wells* and *Ipeelee* the Supreme Court not only reiterated the *Gladue* framework, but went on to detail how it functions alongside other provisions in the *Criminal Code* for conditional sentencing and long-term offenders, respectively. As summarized in Chapter 8 of *The Gladue Principles*, the Supreme Court subsequently addressed how the unique circumstances of Indigenous people relate to systemic discrimination in the correctional system and the jury process, as well as how they relate to the vulnerability of Indigenous children to abuse. In Part D of *The Gladue Principles* a number of other topics are explored in terms of how these principles have been further elaborated and extended by lower courts.

The broader relevancy of an Indigenous person's unique circumstances

- In **joint sentencing submissions** an Indigenous person's unique circumstances may need to be explored in detail to justify the submission or its rejection by the court (see Chapter 12 of *The Gladue Principles*).
- In **bail hearings** courts need to carefully assess bail criteria, conditions, and release plans to avoid perpetuating systemic discrimination and to ensure adequate attention is paid to cultural differences (see Chapter 13). For example, no-contact or no-go conditions may be unreasonable in light of overcrowding or transportation challenges in a community and unique cultural considerations may strengthen or contextualize the release plan.
- In **dangerous and long-term offender proceedings** an Indigenous person's unique circumstances are relevant to the proportionality of their sentence and might also shed light on future treatment prospects and the potential for systemic discrimination in the assessment of risk and dangerousness (see Chapters 7 and 14).
- In the **sentencing of young persons** an Indigenous youth's unique circumstances are relevant under a standard *Gladue* analysis and might also be relevant to the assessment of whether an adult sentence is appropriate, among other considerations (see Chapter 15). For example, an Indigenous youth's unique vulnerabilities might indicate that they should remain in a youth custody facility even after reaching the age of 20.
- When considering the **collateral consequences** of an offence, conviction, or sentence for an Indigenous person their systemic and background factors may amplify these consequences or there may be collateral consequences unique to their circumstances (see Chapter 16). For example, impacts on an Indigenous person's employment may be amplified by systemic factors like a high unemployment rate in their community or their offence might result in banishment from the community or loss of a hereditary title.
- In applications for **absolute and conditional discharges** an Indigenous person's unique circumstances might shed light on their best interests or whether a discharge is contrary to the public interest (see Chapter 17).

- Likewise, in **civil and administrative law sentencing proceedings** an Indigenous person's unique circumstances will remain relevant, as will broader concerns around Indigenous alienation from the justice system, among other things (see Chapter 18).

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

- A court martial sentencing decision;[72]
- Judicial review of a decision of the Ontario Review Board relating to an accused found not criminally responsible on account of mental disorder;[73]
- Judicial review of extradition decisions;[74]
- Judicial review of a decision of the Parole Board of Canada;[75]
- *Habeas corpus* applications related to further restrictions on the liberty of Indigenous people within the correctional system;[76]
- An application to withdraw a guilty plea prior to sentencing;[77]
- An application for a stay of proceedings based on pre-charge delay;[78]
- A *Corbett* application to have an Indigenous person's criminal record edited before cross-examination on it before a jury;[79]
- An application to change the terms of a non-communication order pursuant to s 516 of the *Criminal Code*;[80]
- An application for the use of a firearm or restricted weapon for sustenance purposes as an exception from a firearms prohibition;[81]
- The judicial screening stage of a faint hope application to obtain a reduced period of parole ineligibility;[82]
- Determining whether an Indigenous person has a reasonable excuse for failing to provide requisite notice for a tort claim against a municipality;[83]
- Determining the voluntariness of an Indigenous person's statements to the police;[84] and
- Contextualizing the assessment of credibility and reliability for testimony from an Indigenous witness.[85]

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

If you are asked to prepare a *Gladue* report for a proceeding or application other than a standard sentencing hearing then you should carefully review any policies or guidance put in place by the agency overseeing the preparation of your report. It may be worth reviewing relevant chapters of *The Gladue Principles* to ensure you understand what kind of information is relevant in each specific context as well.

While some elements of a *Gladue* report will be the same regardless of the purpose for which it is prepared, other elements may take on greater or lesser importance. For example, when an Indigenous person is facing a dangerous offender application, the sentencing judge may need to know how they have fared in any programming they completed in the past, whether this was in prison or out in the community. Likewise, the same level of detail for community-based sentencing options will not be as helpful in cases where there is no chance of the subject beginning community programming in the near future due to a mandatory minimum penalty, for example. Likewise, bail hearings focus on objectives like public protection and managing the flight risk of the accused, whereas sentencing principles are not yet relevant at this stage. Understanding the general relevancy of an Indigenous person's case-specific information in each of these unique contexts should help you focus on gathering the information that will be of greatest assistance to the court and counsel.

ENDNOTES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 Rudin, *supra* note 6 at 104.

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

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

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

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

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

24 See Ralston, *supra* note 3 at 221-222 and 243-246 for further discussion of these topics and more comprehensive citations to relevant case law.

25 See especially Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991) at 77-78.

26 *R v Sand*, 2019 SKQB 18 at para 47, citing Justice Melvyn Green, "The Challenge of Gladue Courts" (2012) 89 CR (6th) 362.

27 *R v Armitage*, 2015 ONCJ 64 at para 21.

28 *R v Lawson*, 2012 BCCA 508 at para 28.

29 *Ibid* at paras 30-32.

30 See for example: *R v DR*, 2000 BCSC 136 at para 23; *R v Sparrow and Grant*, 2018 BCPC 53 at para 40.

31 *R v Lewis and Lewis*, 2014 BCPC 93 at para 14; *R v TLC*, 2019 BCPC 314 at para 43.

32 See for example: *R v Okimaw*, 2016 ABCA 246 at para 42; *R v RDF*, 2019 SKCA 112, per Jackson JA at paras 121, 126, 130, 197-201, dissenting, leave to appeal to SCC refused, 38996 (16 April 2020).

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

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

35 *Ibid*.

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

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

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

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

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

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

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

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

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

45 Ralston, *supra* note 3 at 202-205.

46 *Ibid* at 205-212.

47 *Ibid* at 212-215.

48 *Ibid* at 215-217.

49 *Ibid* at 217-220.

50 *Ibid* at 221-222.

51 *Ibid* at 222-226.

52 *Ibid* at 227-228.

53 *Ibid* at 228-230.

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

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

56 *R v Macintyre-Syrette*, 2018 ONCA 259 at paras 19-24.

57 See for example: *R v Atkinson*, 2012 YKTC 62 at para 33; *Chanalquay*, *supra* note 36 at paras 42-43; *R v Iqalukjuak*, 2020 NUCJ 15 at para 35.

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

59 *Ibid* at para 94.

60 *Ibid* at para 70.

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

62 *Ibid* at para 80.

63 See for example: *R v Wells*, 1998 ABCA 109 at para 48; *R v Nikal*, 1999 BCCA 738, Lambert JA at para 41, concurring; *R v Morris*, 2004 BCCA 305 at paras 62, 67-70; *R v Suarak*, 2007 NLTD 5 at para 74; *R v RRM*, 2009 BCCA 578 at paras 22-23; *R v Whitehead*, 2016 SKCA 165 at para 83, citing Sanjeev Anand, "The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: a comment on the decision in *R. v. Gladue*" (2000) 42 Can J Crim 412.

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

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

66 See especially ss 718.04 and 718.201. For judicial interpretation of their relevance to the *Gladue* principles see for example: *R v PMM*, 2019 BCPC 276 at paras 36-40; *R v LP*, 2020 QCCA 1239, Ruel JA at paras 71-101; *R v West*, 2020 BCSC 352 at paras 33-37; *R v Kolola*, 2020 NUCJ 38 at paras 56-73.

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

68 See for example: *R v Zarpa*, 2009 NLTD 175 at para 27; *RDC*, *supra* note 64 at para 55; *R v Huskey*, 2018 NWTTC 2 at paras 29-30.

69 *Johnny*, *supra* note 67 at para 21; *AD*, *supra* note 64 at paras 27-28; *Friesen*, *supra* note 65 at paras 92, 104, 124.

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

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

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

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

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

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

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

77 *Ceballo*, *supra* note 6.

78 *R v Miller*, 2019 ONCJ 480.

79 *R v King*, 2019 ONSC 6851.

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

81 *R v Shobway*, 2017 ONCJ 476.

82 *R v Abram*, 2019 ONSC 3383.

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

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

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

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

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

BENJAMIN A. RALSTON

Benjamin received his JD from the University of British Columbia (2010) and his LLM from the University of Otago in New Zealand (2014). He is currently completing a PhD in Law at the University of Saskatchewan College of Law in Saskatoon where he has been teaching continuously since 2015. He has also taught in the University of Saskatchewan's Nunavut Law Program and Kanawayihetaytan Askiy land governance program.

Benjamin was first called to the British Columbia bar in 2011 and he transferred to the Saskatchewan bar in 2015. He has been involved in the implementation of the *Gladue* principles since 2014 when he began assisting as an editor and co-author for *Gladue* reports in Saskatchewan as part of a pilot project. Since then he has authored several publications in this area, including the Indigenous Law Centre's *Gladue Awareness Project: Final Report* (2020).

BC FIRST NATIONS JUSTICE COUNCIL

Indigenous Law Centre