



BACKGROUND PAPER

INDIGENOUS PEOPLE AND SENTENCING IN CANADA

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(Background Paper)

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EXECUTIVE SUMMARY

Indigenous people are incarcerated at a much higher rate than non-Indigenous individuals in Canada, and the gap between the incarceration rates for these two groups continues to grow. The problem of the overincarceration of Indigenous people has been examined by numerous commissions, including the Aboriginal Justice Inquiry of Manitoba, the Royal Commission on Aboriginal Peoples, and the Truth and Reconciliation Commission. These commissions identified numerous factors that have contributed to this problem, including colonialism, racism and intergenerational trauma caused by residential schools and the “Sixties Scoop.”

The *Criminal Code* (Code) was amended by Parliament in 1996 to include section 718.2(e), which requires sentencing judges to consider the unique background and circumstances of Indigenous offenders, as well as all available alternatives to incarceration that may be appropriate. This provision is aimed at reducing the rate of incarceration of Indigenous people in Canada.

The Supreme Court of Canada (SCC) first considered section 718.2(e) in *R v. Gladue* (1999). In this case, the SCC decided that when sentencing an Indigenous offender, sentencing judges must consider the following: 1) “[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts”; and 2) “[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.” These considerations are known as the “*Gladue* principles.” In *R v. Ipeelee* (2012), the SCC reaffirmed and expanded on the *Gladue* principles.

The *Gladue* principles have been applied through a variety of means. Certain jurisdictions have implemented specialized *Gladue* courts for individuals who identify as Indigenous. Another common method of implementing the *Gladue* principles is through the preparation and consideration of special reports, known as *Gladue* reports, that can provide a sentencing judge with information about the background and circumstances of an Indigenous offender, as well as suitable alternatives to incarceration that are available in the community of the offender.

A variety of alternatives to incarceration may be considered by a sentencing judge, such as restorative justice processes or serving a sentence in a healing lodge, which is specifically tailored to Indigenous offenders. Alternative measures (also known as diversion) are an additional option, which allow an accused to avoid prosecution while still holding them responsible for their actions.

The *Gladue* principles, as well as their application, have been criticized as being unfair by establishing sentencing considerations that differ based on whether an individual is Indigenous or non-Indigenous. However, the SCC has attributed such criticisms to a lack of understanding of the *Gladue* principles and has affirmed that potential differences in sentences for Indigenous and non-Indigenous offenders will be based on the circumstances of each individual as they relate to sentencing principles.

The implementation of the *Gladue* principles has faced a variety of challenges. Despite the principles being designed to address the high incarceration rate of Indigenous people in Canada, the number and proportion of Indigenous offenders in federal correctional facilities has continued to rise. One challenge is the difficulty of coordinating *Gladue* programs, as each province and territory is responsible for the implementation of the principles within its jurisdiction. This has led to great differences in the availability of programming and *Gladue* reports across the country. A lack of funding and resources for *Gladue* programming and reports has also been a consistent obstacle nationwide. A final obstacle are provisions in the Code that require mandatory minimum sentences for certain criminal acts. These provisions constrain the discretion of a sentencing judge and may interfere with the application of the *Gladue* principles.

INDIGENOUS PEOPLE AND SENTENCING IN CANADA

1 INTRODUCTION

Determining a fit sentence for a criminal offence is no easy task. The task can be especially complex when determining a fit sentence for an Indigenous¹ offender.² This Background Paper, which examines the principles of sentencing Indigenous offenders, is a companion paper to the Library of Parliament publication by Julia Nicol, entitled *Sentencing in Canada*, which presents an overall examination of sentencing in Canada.³

1.1 OVERREPRESENTATION OF INDIGENOUS PEOPLE IN CANADA'S CRIMINAL JUSTICE SYSTEM

1.1.1 Incarceration Statistics

The Supreme Court of Canada (SCC) has recognized the overrepresentation of Indigenous people in the Canadian prison and criminal justice systems as a “crisis” and a “pressing social problem.”⁴

Despite representing only 5% of the Canadian population, as of January 2020, 30% of individuals in federal correctional facilities were Indigenous, compared to 18% in 2001.⁵ Statistics from 2016 show that the incarceration rates are similar in provincial and territorial facilities.⁶

The incarceration statistics for Indigenous women are even more dramatic. As of January 2020, Indigenous women represented 42% of the female inmate population in federal correctional facilities.⁷ According to Lorraine Whitman, President of the Native Women’s Association of Canada, these statistics “are a symptom of historical and current systems of colonialism, racism and sexism against First Nations, Métis, and Inuit women.”⁸ The National Inquiry into Missing and Murdered Indigenous Women and Girls concluded that “[p]overty, food insecurity, mental health issues, addiction, and violence, all parts of Canada’s past and present colonial legacy, are systemic factors that lead to the incarceration of Indigenous women.”⁹

Indigenous youth are also overrepresented in Canadian correctional facilities. While they represent approximately 8% of the Canadian youth population, in 2017–2018, Indigenous youth (aged 12 to 17) accounted for 43% of youths admitted to correctional services in the nine jurisdictions that kept this data.¹⁰

Although the proportion of incarcerated offenders who are Indigenous has been increasing, overall incarceration rates have been decreasing for both the Indigenous and non-Indigenous populations. However, the incarceration rate of the Indigenous population has been decreasing much more slowly. Between 2006 and 2016, the federal incarceration rate for non-Indigenous offenders decreased by 11.6%, while during the same period, the incarceration rate for Indigenous offenders decreased by 2.2%.¹¹ Despite the decreasing incarceration rates, the overall number of incarcerated Indigenous offenders increased by 43.4% between 2010 and 2020.¹² This has been linked to the overall increase in the Indigenous population in Canada.¹³

In addition to the overall higher rates of incarceration for Indigenous people, according to the Office of the Correctional Investigator of Canada, Indigenous inmates are also

disproportionately classified and placed in maximum security institutions, over-represented in use of force and self-injurious incidents, and historically, were more likely to be placed and held longer in segregation (solitary confinement) units.¹⁴

Indigenous offenders are also more likely to serve more of their sentence before being granted parole than non-Indigenous offenders and have a much higher recidivism rate, meaning that they are more likely to be convicted of a new offence or to be otherwise returned to custody following their release.¹⁵

1.1.2 Reports, Commissions, Declarations and Commentaries

The experiences of Indigenous people with the criminal justice system have been thoroughly examined through numerous inquiries and in many reports from a variety of governments, institutions and other organizations. One of the first reports on the challenges facing Indigenous people in the criminal justice system, entitled *Indians and the Law*, was completed by the Canadian Corrections Association in 1967.¹⁶ That report paved the way for various studies and reports addressing similar and broader issues facing Indigenous people. For instance, the *Report of the Aboriginal Justice Inquiry of Manitoba*, published in 2001, is recognized as one of the more comprehensive inquiries into the experiences of Indigenous people with the criminal justice system.¹⁷ A variety of commissions, such as the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission of Canada (TRC), were created to examine and address the issues facing Indigenous people in Canada and to propose and advocate for changes that could have a positive impact on Indigenous people and on reconciliation efforts.¹⁸

The reports of these commissions have identified factors that contribute to the disproportionate incarceration rates for Indigenous people, such as a history of colonialism, discrimination and intergenerational trauma linked to residential schools and the “Sixties Scoop.”¹⁹ According to the TRC,

[c]urrent conditions such as the disproportionate apprehension of Aboriginal children by child-welfare agencies and the disproportionate imprisonment and victimization of Aboriginal people can be explained in part as a result or legacy of the way that Aboriginal children were treated in residential schools and were denied an environment of positive parenting, worthy community leaders, and a positive sense of identity and self-worth.²⁰

In order to address this issue, National Chief of the Assembly of First Nations, Perry Bellegarde, advocates for “a justice system that embraces First Nations legal traditions and puts First Nations laws on the same footing as civil law and common law.”²¹

Both the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the TRC Calls to Action call for the inclusion of traditional Indigenous customs within the criminal justice system.²² UNDRIP outlines ways to build a respectful relationship between states and the Indigenous communities within their borders and to acknowledge the unique cultural and political institutions of Indigenous peoples.²³ Articles 5 and 34 explicitly acknowledge the importance of traditional Indigenous forms of justice:

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. ...

Article 34

Indigenous people have the right to promote, develop, and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.²⁴

Similarly, the TRC Calls to Action address reconciliation between Indigenous and non-Indigenous communities. In its final report, the TRC makes 18 specific recommendations for the justice system, such as education and training on Indigenous issues for lawyers and law students, funding for additional healing lodges, and culturally themed correctional programs.²⁵

Call to Action 42 states,

We call upon the federal, provincial and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.²⁶

Chief Bellegarde further argued that “judges and crown attorneys need to be more responsive to the circumstances of Indigenous offenders and offer other alternatives to incarceration.”²⁷ This point of view has been taken up by both Parliament and the SCC. The SCC, in referring to *Gladue*, has affirmed that “Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process.”²⁸ However, the effectiveness of the legislative and judicial responses to date to the issue of the disproportionate representation of Indigenous people in the correctional system has been the subject of much debate.

1.1.3 Legislative Response

In 1996, Parliament passed Bill C-41, which modified various sentencing provisions of the *Criminal Code* (Code).²⁹ One provision in particular, section 718.2(e), was adopted “to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of Aboriginal peoples.”³⁰ The provision, as amended in 2015, reads as follows:

718.2 A court that imposes a sentence shall also take into consideration the following principles: ...

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

This provision aims to acknowledge and address the historic injustices faced by Indigenous peoples and to recognize that many Indigenous groups may have a different conception of justice than one based primarily on incarceration. Section 718.2(e) has been subject to different interpretations by the courts and has been met with mixed reactions from the legal community, Indigenous groups and the public, based both on its underlying principles and how it has been implemented.

1.1.4 Judicial Response

In 1999, the SCC released its decision on the sentencing of Jamie Tanis Gladue, an Indigenous woman who had pleaded guilty to manslaughter in the death of her

common-law husband. This was the first time that the SCC had considered section 718.2(e) of the Code. While the court upheld the sentence imposed by the sentencing judge, it used the opportunity to unanimously provide guidance on the application of section 718.2(e). Specifically, the SCC held that the sentencing judge has an obligation to take judicial notice of both the systemic and background factors that may have led to the Indigenous offender being before the courts, as well as the potential sentencing procedures and sanctions that may be appropriate for the particular offender as a result of their Indigenous heritage or connection.³¹

In *R. v. Ipeelee*, released in 2012, nearly fifteen years after the *Gladue* decision, the SCC again addressed the sentencing of Indigenous offenders in the context of section 718.2(e) of the Code. *Ipeelee* considered the cases of two Indigenous offenders, Manasie Ipeelee and Frank Ralph Ladue, who had been convicted of violating their long-term supervision orders. The SCC used *Ipeelee* as an opportunity to clarify and correct what it viewed as “errors” in the application of section 718.2(e) post-*Gladue*.³²

2 THE GLADUE SENTENCING FRAMEWORK

2.1 CIRCUMSTANCES OF INDIGENOUS OFFENDERS

The SCC in *Gladue* emphasized that the language of section 718.2(e) of the Code requires “the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders.”³³ According to the court, those circumstances encompass two main elements:

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

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.³⁴

2.1.1 Systemic and Background Factors

Factors such as “[y]ears of dislocation and economic development” have led to a variety of disadvantages felt more predominantly by Indigenous peoples than the general population.³⁵ Some of the background factors to consider when sentencing an Indigenous offender, as suggested by the SCC in *Gladue*, include

- low incomes;
- high unemployment;

- lack of opportunities and options;
- lack or irrelevance of education;
- substance abuse;
- loneliness; and
- community fragmentation.³⁶

While the SCC acknowledged that a variety of systemic and background factors can also have negative impacts on offenders who are not Indigenous, it argued that Indigenous offenders are distinct from non-Indigenous offenders since many Indigenous people are “victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions.”³⁷ In the case of Indigenous individuals, the SCC also determined that, as a result of these systemic and background factors, they are more adversely affected by incarceration since the correctional system is often culturally inappropriate, and discrimination “is so often rampant” in correctional facilities.³⁸

The decision in *Gladue* requires sentencing judges to examine the unique systemic and background factors that may have contributed to bringing the particular Indigenous individual before the courts.³⁹ However, it is not necessary to establish a causal link between the unique circumstances of the Indigenous offender and the specific crime for which they find themselves before the courts.⁴⁰ The Ontario Court of Appeal has adopted the following approach to determine whether or not there is a sufficient link between the specific circumstances of an Indigenous offender and the offence that they committed:

For an offender’s Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender’s life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender’s case.⁴¹

This approach has not been formally adopted in other jurisdictions. According to the SCC in *Gladue*, if it is determined that these factors have played a significant role in bringing the particular Indigenous offender before the courts, then the sentencing judge must consider whether incarceration would be in the best interests of the community of which the offender is a member or whether alternatives to incarceration would be more beneficial.⁴²

In many cases, restorative sentencing practices, such as community service or the writing of an apology letter, may be deemed more appropriate, as they may be the only means to prevent further crime and promote individual and social healing.⁴³

2.1.2 Appropriate Sentencing Procedures and Sanctions

According to the SCC in *Gladue*, a common problem with the conventional sentencing procedures used in the Canadian criminal justice system when applied to Indigenous offenders is that “traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community.”⁴⁴ While the Code emphasizes restorative sentencing principles for all offenders,⁴⁵ these principles are of paramount importance in the application of section 718.2(e) to Indigenous offenders, as restorative principles of justice are an integral part of many traditional Indigenous conceptions of sentencing.⁴⁶ Restorative justice principles prioritize holding the offender accountable while addressing the harm caused by crime by providing an opportunity for the parties affected by a crime – victim, community and offender – to identify and address their respective needs.⁴⁷ Determining an appropriate remedy using a restorative justice approach to sentencing must take these needs into account.⁴⁸

In *Gladue*, the SCC highlighted that “[i]t is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences.”⁴⁹ According to the court, community-based sanctions better reflect Indigenous concepts around sentencing and, in general, better serve the needs of Indigenous communities and offenders.⁵⁰ When identifying alternatives to incarceration within or outside the community, the term “community” must be broadly defined “so as to include any network of support and interaction that might be available in an urban centre.”⁵¹

Many Indigenous legal traditions and systems integrate practices and goals of restorative justice, which have in turn inspired a variety of restorative justice practices in the Canadian criminal justice system. Historically, in many Indigenous legal systems, “healing, reconciliation, and reintegration were priorities, if not the first response.”⁵² This is not to say that restorative approaches to justice always took priority over more punitive measures when the safety of individuals or the Indigenous community required them.⁵³ Many Indigenous legal systems are very adaptable and have been described as “a source of complex proactive and reactive mechanisms that attempted to produce and maintain a stable and predictable social world for Indigenous communities.”⁵⁴

2.2 A FIT SENTENCE

The fundamental goal of sentencing, whether or not the offender is Indigenous, is “to determine a fit sentence taking into account all of the circumstances of the offence, the offender, the victims, and the community.”⁵⁵ This fundamental principle is not modified by section 718.2(e) of the Code. However, this section does require the sentencing judge to alter their method of analysis used to determine a fit sentence by taking into account the unique circumstances of Indigenous offenders.⁵⁶

Frequently, the community of the Indigenous offender may have a view of justice that is not based on conventional sentencing principles.⁵⁷ In some cases, it will be appropriate to place a greater emphasis on restorative justice principles in determining a fit sentence. Section 718.2(e) has been interpreted as recognizing this potential difference in sentencing priorities and provides discretion for “sentencing judges to craft sentences in a manner which is meaningful to aboriginal peoples.”⁵⁸ The result of this discretion is that “[i]n some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender.”⁵⁹ This discretion also allows sentencing judges, where appropriate for the offender and their Indigenous community, to consider alternatives to incarceration,⁶⁰ as described in section 3.3 of this paper. The more violent the offence for which an Indigenous offender is found guilty, the more likely that the sanctions imposed on the individual will more closely resemble the sanctions that would likely be imposed on a non-Indigenous offender who committed the same offence.⁶¹

In *Ipeelee*, Justice Lebel maintained that “sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case.”⁶² Even for the most serious offences, the sentencing judge must apply the *Gladue* principles in every case involving an Indigenous offender. A failure to do so would “result in a sentence that was not fit and not consistent with the fundamental principle of proportionality” and “constitutes an error justifying appellate intervention.”⁶³ The impact of mandatory minimum sentences on the sentencing of Indigenous offenders is an important factor to consider and is discussed in section 4.2 of this paper.

2.3 DUTY OF THE SENTENCING JUDGE

As a result of the introduction of section 718.2(e) of the *Code*, the sentencing judge is required to consider “all available sanctions other than imprisonment that are reasonable in the circumstances” and “the unique situation of the Aboriginal offender.”⁶⁴ This is not discretionary. The only judicial discretion in this regard is “the determination of a just and appropriate sentence.”⁶⁵ While there is no set manner in which the sentencing judge must meet their duty to consider the specific systemic factors and background circumstances of an Indigenous offender, they must take judicial notice of these factors.⁶⁶ An individual is permitted to waive their right to have their circumstances as an Indigenous offender considered in the determination of their sentence.⁶⁷

Regardless of whether the Indigenous offender lives on reserve or in another setting, the sentencing judge is required to become aware of alternatives to incarceration that exist, whether within or outside the offender’s Indigenous community.⁶⁸

Whether or not a trial judge has met their statutory duty to consider the specific circumstances of an Indigenous offender is a matter that can be reviewed if a sentence is appealed to a higher court.⁶⁹ This process can be greatly assisted if the sentencing judge provides reasons that outline the procedure that they followed in their consideration of the specific circumstances of the Indigenous offender.⁷⁰

2.4 TO WHOM DOES SECTION 718.2(E) APPLY?

For the purposes of section 718.2(e) of the *Code*, who is considered an Aboriginal offender “must be, at least, all who come within the scope of s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*.”⁷¹ This includes all individuals who choose to identify as First Nations, Métis or Inuit.⁷² According to data from the 2016 Census, the Indigenous population in Canada was 1,673,785, or 4.9% of the total population.⁷³

In *Gladue*, the SCC confirmed that section 718.2(e) applies to all Indigenous offenders, regardless of whether or not they were living in an Indigenous community, in a rural community or in an urban centre.⁷⁴ Even when there is no support or appropriate alternative to incarceration within the Indigenous offender’s community, the sentencing judge is still required to make every effort to find a “sensitive and helpful alternative.”⁷⁵

The *Gladue* principles have been found to apply not just to offenders who are being sentenced, but also in a variety of other circumstances where “an Indigenous person’s liberty is at stake.”⁷⁶ Examples of situations where the *Gladue* principles have been applied include Review Board decisions regarding individuals found to be not criminally responsible or unfit to stand trial, extradition proceedings and parole decisions.⁷⁷ The *Gladue* principles also apply to correctional decisions affecting Indigenous offenders made under the *Corrections and Conditional Release Act*.⁷⁸ Specifically, “the circumstances of an Aboriginal offender must be considered in security classification, penitentiary placement, institutional transfers and administrative segregation decisions.”⁷⁹

3 IMPLEMENTATION OF THE GLADUE PRINCIPLES

3.1 GLADUE COURTS

Gladue courts were established as a means of implementing the guidelines set out by the SCC. *Gladue* courts are regular criminal courts that follow Canadian law by adjudicating bail, sentencing Indigenous offenders and, on occasion, conducting trials while simultaneously incorporating Indigenous knowledge and traditions.⁸⁰ Typically, when the accused self-identifies as Indigenous, a court worker provides them with information about the *Gladue* court process. In some courthouses with a

Gladue court, the *Gladue* court only sits on a specified number of days in a week or month. Examples of modifications in a *Gladue* court could include traditional ceremonies, such as smudging, to open the court, or the use of sentencing circles, where all participants sit together in a non-hierarchical seating arrangement to discuss the offence and possible remedies.

The first *Gladue* court was established in 2001 in Toronto's Old City Hall. To date, five provinces (British Columbia, Alberta, Saskatchewan, Ontario and Nova Scotia) and all three territories have established criminal courts that specialize in Indigenous matters.⁸¹ However, these specialized courts are not necessarily available in all areas of the specific province or territory.

3.2 GLADUE REPORTS

The importance of *Gladue* reports was highlighted in the *Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. Call for Justice 5.15 states,

We call upon federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right and to resource them appropriately, and to create national standards for Gladue reports, including strength-based reporting.⁸²

A *Gladue* report is usually a pre-sentence report or a bail hearing report and is often prepared by specialized *Gladue* caseworkers when requested by the judge, defence counsel or Crown attorney. A *Gladue* report contains information about the Indigenous offender and their family and community background, all of which helps a sentencing judge determine the most appropriate sentence for an Indigenous offender. It assists the judge in applying *Gladue* principles by providing information on the circumstances that may have contributed to the Indigenous offender coming before the courts, as well as the alternative sentencing options to incarceration that are available in the community of the Indigenous offender.⁸³ A *Gladue* report may contain information such as the offender's individual and family history related to the following:

- residential school attendance;
- abuse;
- physical and mental health conditions;
- substance use; and
- contact with the child welfare system.⁸⁴

The preparation of a *Gladue* report ideally involves in-depth interviews with family members, the community and the accused; however, the extent of this process can be limited by the availability of resources.

Gladue reports can be created outside the *Gladue* court system. Individual provinces and territories – even those without *Gladue* courts – have their own guidelines, either formal or informal, for the preparation and use of *Gladue* reports.⁸⁵ There have been calls to make *Gladue* reports mandatory for all Indigenous offenders who are facing a potential period of incarceration. Currently, the only jurisdiction that requires a formal *Gladue* report in this situation is Alberta.⁸⁶ In other jurisdictions, appellate courts have generally established what is sufficient to fulfill the requirements in *Gladue*, which could include a full *Gladue* report or a pre-sentence report with a *Gladue* component.⁸⁷

Access to *Gladue* reports and, in particular, funding for *Gladue* reports, varies greatly in each province and territory.⁸⁸ In some jurisdictions, the provincial or territorial government directly funds the preparation of *Gladue* reports or *Gladue* sections in pre-sentence reports.⁸⁹ In others, legal aid may assist in helping Indigenous offenders obtain these services.⁹⁰ In certain jurisdictions, no public funding is available for *Gladue* reports.⁹¹

3.3 ALTERNATIVES TO INCARCERATION

Section 718.2(e) of the *Code* requires the court to consider, “all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community.” This applies to all offenders, but special consideration is to be given to the circumstances of an Indigenous offender. When considering alternatives to incarceration, there are many options, some of which are aimed specifically at assisting Indigenous offenders. It should be noted that the sentencing judge is not bound to accept sentencing recommendations made by defence counsel or the Crown attorney, even when both agree.⁹²

Examples of alternatives to incarceration could include, for example, restorative justice processes, such as victim–offender mediation, restorative conferencing, or circle processes.⁹³ The goal of restorative justice programs is to heal and repair the harm that has been caused and to reintegrate the offender back into the community.⁹⁴

Many options in an alternative measures program take a restorative justice approach. “Alternative measures” are defined by the *Code* as “measures other than judicial proceedings.”⁹⁵ They allow the person in question, whether Indigenous or non-Indigenous, to be diverted from the regular criminal justice system while still being held accountable for their actions through other means, for example, through requiring community service, treatment or counselling programs, or victim–offender reconciliation programs, among others.⁹⁶ Alternative measures can be applied either

before or after charges are laid. Some alternative measures programs are geared specifically to Indigenous people.

3.3.1 Healing Lodges

Another alternative to serving a custodial sentence in a prison is serving a sentence in a healing lodge. Healing lodges are designed to address the needs of Indigenous offenders.⁹⁷ Once an Indigenous offender has been sentenced, they may request to serve all or part of their sentence in a healing lodge. Healing lodges aim to offer Indigenous offenders an opportunity to access services that are culturally relevant and adhere to the traditional beliefs and values of Indigenous communities. Programs offered in healing lodges aim to aid in the rehabilitation of offenders and provide the necessary skills to reintegrate offenders back into the community. Healing lodges work closely with Elders and promote engagement with traditional ceremonies and practices to heal and help prepare the offender for their release. Indigenous and non-Indigenous offenders can participate in healing lodges; however, all participants must comply with the regulations and procedures of the healing lodge.⁹⁸ There are 10 healing lodges in operation across Canada. They are either run by Correctional Service Canada (CSC) or by an Indigenous community partner organization funded by CSC.⁹⁹

Offenders may request to be transferred to a healing lodge to serve their sentence or they can make a request to go to a healing lodge upon their release from custody to serve a conditional release period, which is a form of gradual release from the correctional system. When CSC receives a request for a transfer to a healing lodge, it examines the risk that an offender poses to public safety, such as the risk of escape and their capacity to adapt to the structure and expectations of the healing lodge. Offenders must be classified as minimum security, or, on a case-by-case basis, medium security, in order to be eligible for transfer to a healing lodge.¹⁰⁰

4 CRITICISMS AND CHALLENGES IN IMPLEMENTING THE *GLADUE* PRINCIPLES

4.1 CRITICISMS

There has been criticism of the distinction that the *Gladue* principles make between Indigenous and non-Indigenous offenders. As *Ipeelee* describes, some critics have suggested that sentencing is not the most appropriate means of addressing the overincarceration of Indigenous offenders.¹⁰¹ It has also been suggested that the sentencing guidelines of *Gladue* are essentially a “race-based discount” for Indigenous offenders and that *Gladue* provides for special treatment and lesser sentences for Indigenous offenders.¹⁰²

The SCC attributed these criticisms primarily to “a fundamental misunderstanding and misapplication of both s. 718.2(e) and [the Supreme] Court’s decision in *Gladue*.”¹⁰³ While acknowledging that “sentencing will not be the sole – or even the primary – means of addressing Aboriginal overrepresentation in penal institutions,” the SCC stressed that “[t]he sentencing judge has an admittedly limited, yet important role to play.”¹⁰⁴

The SCC emphasized in *Gladue* that while the goal behind section 718.2(e) “is to reduce the tragic overrepresentation of aboriginal people in prisons,”¹⁰⁵ it specified that this provision should not be viewed “as requiring an automatic reduction of a sentence, or a remission of a warranted period of incarceration, simply because the offender is aboriginal.”¹⁰⁶ The SCC stressed that it is fair for courts to consider the unique circumstances of Indigenous offenders in a different way than for non-Indigenous offenders.¹⁰⁷ Justice Lebel, in addressing criticism that the specific attention paid to Indigenous offenders in this provision is contrary to the parity principle,¹⁰⁸ explained that

[i]n practice, similarity is a matter of degree. No two offenders will come before the courts with the same background and experiences, having committed the same crime in the exact same circumstances. Section 718.2(b) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances – circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(e).¹⁰⁹

4.2 IMPLEMENTATION CHALLENGES

Over the years, section 718.2(e) of the *Code* has faced multiple challenges in achieving its remedial purpose of reducing the overincarceration of Indigenous people in Canada. While overall incarceration rates continue to fall in Canada, including for Indigenous offenders, the number and proportion of Indigenous offenders in federal correctional facilities continue to rise.¹¹⁰

One key challenge to the effectiveness of section 718.2(e) and the *Gladue* principles is a lack of resources. There is no nationwide coordination of *Gladue* programming, and not all provinces and territories provide full *Gladue* services such as *Gladue* courts and specialized *Gladue* report writers. Even in jurisdictions where programs have been established, *Gladue* reports are not necessarily provided for all Indigenous offenders, “due to a lack of resources and awareness.”¹¹¹ Common problems include a limited number of *Gladue* report writers for the courts to utilize and insufficient funds to meet the demand for the reports. This shortage can result in a *Gladue* report that does not properly contextualize the offender’s actions, a pre-sentence report with

a minimal *Gladue* component, or the absence of a *Gladue* report or component altogether.¹¹²

Another challenge that has been identified is the conflict between the *Gladue* principles and legislation that imposes mandatory minimum sentences for certain offences.¹¹³ These provisions limit the discretion of the sentencing judge to consider the circumstances of an Indigenous offender in the determination of a fit sentence. While the *Gladue* principles are still to be considered in all cases involving Indigenous offenders, judges cannot consider alternatives to incarceration or a sentence that is less than a mandatory minimum sentence for a particular offence.¹¹⁴ Furthermore, the Crown is not required to consider the Indigenous identity of an accused when deciding whether to seek a mandatory minimum sentence, which may limit the options available to the sentencing judge.¹¹⁵

NOTES

1. The term “Indigenous” will be used throughout this Background Paper as an inclusive term in reference to the First Nations, Inuit and Métis people in Canada. The term has gained popularity over recent years and is generally preferred to the term “Aboriginal” in official terminology. Nevertheless, the term “Aboriginal” is still employed in a variety of statutes (for example the *Canadian Charter of Rights and Freedoms* and the *Criminal Code*), as well as in the two major Supreme Court of Canada decisions that will be referred to in this text (*R. v. Gladue* and *R. v. Ipeelee*). For this reason, the term “Aboriginal” will be employed in this text when part of direct quotations. For the purposes of this paper, the terms “Indigenous” and “Aboriginal” will be treated as synonyms, and no inferences should be drawn from the use of one of these terms over the other. For more context see Olivier Leblanc-Laurendeau, [Indigenous Peoples: Terminology Guide](#), HillNotes, Library of Parliament, 20 May 2020.
2. The use of the term “offender” throughout this paper represents the terminology used in statutes such as the *Criminal Code* and the *Correctional Conditions and Release Act*, in the key Supreme Court decisions in *R v. Gladue* and *R v. Ipeelee*, as well as by the Office of the Correctional Investigator of Canada, and in the final reports of the Truth and Reconciliation Commission of Canada and the National Inquiry into Missing and Murdered Indigenous Women and Girls. Other sources have indicated a preference for alternative terms.
3. Julia Nicol, [Sentencing in Canada](#), Publication no. 2020-06E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 22 May 2020.
4. [R. v. Gladue](#), [1999] 1 S.C.R. 688, para. 64.
5. Office of the Correctional Investigator, [“Indigenous People in Federal Custody Surpasses 30%: Correctional Investigator Issues Statement and Challenge.”](#) News release, 21 January 2020.
6. Department of Justice, [“Indigenous overrepresentation in the criminal justice system,” JustFacts](#), Research and Statistics Division, May 2019. In 2013–2014, the proportion of offenders admitted to provincial territorial custody who were Indigenous ranged from 1.7% in Prince Edward Island to 98% in Nunavut; however, the proportion of the population that is Indigenous varies greatly in each province and territory: Department of Justice Canada, [Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System](#), Research and Statistics Division, September 2017, p. 8.
7. Office of the Correctional Investigator (2020).
8. Native Women’s Association of Canada, [“Number of Incarcerated Indigenous Women at New High.”](#) News release, 21 January 2020.
9. National Inquiry into Missing and Murdered Indigenous Women and Girls [NIMMIWG], [Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls](#), 2019, Vol. 1a, p. 636.

10. Excludes Alberta, Quebec, Nova Scotia and Yukon due to the unavailability of data: Department of Justice (2019).
11. Department of Justice, "[Trends in Adult Federal Custody Populations](#)," *JustFacts*, Research and Statistics Division, March 2018.
12. Office of the Correctional Investigator (2020).
13. As the Department of Justice points out, "the slight decrease in the incarceration rate of the Indigenous population [between 2006 and 2016] is not reflective of a decrease in the Indigenous population in federal custody, but rather an increase of Indigenous adults in the Canadian population." Department of Justice (2018). Between 2006 and 2016, the Indigenous population in Canada grew by 42.5%, four times faster than the rest of the population of Canada. See Statistics Canada, [First Nations People, Métis and Inuit in Canada: Diverse and Growing Populations](#), 20 March 2018.
14. Office of the Correctional Investigator (2020).
15. Ibid.
16. Canadian Corrections Association, *Indians and the Law: A Survey Prepared for the Honourable Arthur Laing, Department of Indian and Northern Development*, Ottawa, 1967.
17. Aboriginal Justice Implementation Commission, "[Report of the Aboriginal Justice Inquiry of Manitoba](#)," *Final Report*, 29 June 2001.
18. Royal Commission on Aboriginal People, [Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada](#), 1996; and Truth and Reconciliation Commission of Canada [TRC], [Honouring the Truth. Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada](#), 2015.
19. The term "Sixties Scoop" refers to "the widescale national apprehension of Aboriginal children by child-welfare agencies. Child-welfare authorities removed thousands of Aboriginal children from their families and communities and placed them in non-Aboriginal homes without taking steps to preserve their culture and identity," TRC (2015), p. 138.
20. TRC (2015), p. 135.
21. Assembly of First Nations [AFN], "[AFN National Chief Bellegarde says Canada's Correctional Investigator's Report is an Alarming Call for Immediate Action to Reduce First Nations Incarceration](#)," News release, 22 January 2020.
22. United Nations [UN], [United Nations Declaration on the Rights of Indigenous Peoples](#), UN Doc. A/RES/61/295, adopted 13 September 2007, 2 October 2007; TRC, [Truth and Reconciliation Commission of Canada: Calls to Action](#) [Calls to Action], 2015.
23. Larry Chartrand and Kanatase Horn, [A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada](#), Department of Justice Canada, October 2016, p. 10.
24. UN (2007), pp. 5 and 9.
25. TRC, Calls to Action (2015), pp. 3–5.
26. Ibid., p. 4.
27. AFN (2020).
28. [R. v. Ipeelee](#), 2012 SCC 13, para. 75.
29. [Bill C-41, An Act to Amend the Criminal Code \(sentencing\) and other Acts in consequence thereof](#), 1st Session, 35th Parliament; and [Criminal Code](#) [Code], R.S.C. 1985, c. C-46.
30. *R. v. Gladue*, para. 50.
31. Ibid., para. 66.
32. *R. v. Ipeelee*, paras. 80–87.
33. *R. v. Gladue*, para. 66.
34. Ibid.
35. Ibid., para. 67.
36. Ibid.

37. Ibid., para. 68.
38. Ibid.
39. Ibid., para. 69.
40. *R. v. Ipeelee*, paras. 81–83.
41. [R. v. F.H.L.](#), 2018 ONCA 83, para. 40.
42. *R. v. Gladue*, para. 69.
43. Ibid.
44. Ibid., para. 70.
45. Code, ss. 718(d), 718(e) and 718(f).
46. *R. v. Gladue*, para. 70.
47. Department of Justice, [Restorative Justice](#). For information on specific restorative justice programs, see Department of Justice, ["Find Restorative Justice Programs across Canada."](#)
48. *R. v. Gladue*, para. 71.
49. Ibid., para. 74.
50. Ibid.
51. Ibid., para. 92.
52. Chartrand and Horn (2016), p. 8.
53. Ibid.
54. Ibid., p. 6. For more information on efforts to integrate Indigenous legal traditions into the current Canadian legal framework see, for example, John Borrows, ["Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education,"](#) *McGill Law Journal*, Vol. 61, No. 4, June 2016, pp. 795–846; Val Napoleon and Hadley Friedland, ["An Inside Job: Engaging with Indigenous Legal Traditions through Stories,"](#) *McGill Law Journal*, Vol. 61, No. 4, June 2016, pp. 725–754; and Hadley Friedland, ["Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws,"](#) *Indigenous Law Journal*, Vol. 11, No. 1, 2012, pp. 1–40.
55. *R. v. Gladue*, para. 75.
56. Ibid.
57. Ibid., para. 77.
58. Ibid.
59. Ibid., para. 79.
60. Ibid., para. 81.
61. Ibid., para. 79.
62. *R. v. Ipeelee*, para. 75.
63. Ibid., para. 87.
64. *R. v. Gladue*, para. 82.
65. Ibid.
66. Ibid., para. 83. When a court is required to take judicial notice of facts, it means that neither the Crown nor the defence has the burden of establishing them through the presentation of evidence.
67. Ibid. The New Brunswick Court of Appeal has found that if a sentencing judge chooses to order a *Gladue* report (discussed in section 3.2 of this Background Paper) despite a waiver, that report must be "done, and then considered, properly." See [Jackson v. R.](#), 2019 NBCA 37, para. 30.
68. *R. v. Gladue*, para. 84.
69. Ibid., para. 85.

70. Ibid.
71. Ibid., para. 90. See also [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 25; and “[Rights of the Aboriginal Peoples of Canada](#),” Part II of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35.
72. Aboriginal Legal Services, [Gladue \(Aboriginal Persons\) Court: Ontario Court of Justice – Old City Hall](#), Fact sheet, 3 October 2001.
73. Statistics Canada, “[Aboriginal peoples in Canada: Key results from the 2016 Census](#),” *The Daily*, 25 October 2017.
74. *R. v. Gladue*, para. 91.
75. Ibid., para. 92.
76. Department of Justice Canada (2017), p. 19.
77. For a review of non-sentencing decisions where the Gladue principles have been applied, see Ibid., p. 20.
78. [Corrections and Conditional Release Act](#), S.C. 1992, c. 20, s. 79.1.
79. Office of the Correctional Investigator, [Office of the Correctional Investigator: Annual Report 2017–2018](#), 29 June 2018, p. 65.
80. Paula Maurutto and Kelly Hannah-Moffat, “Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts,” *Canadian Journal of Law and Society*, Vol. 31, No. 3, 2016.
81. Sébastien April and Mylène Magrinelli Orsi, [Gladue Practices in the Provinces and Territories](#), Department of Justice Canada, Research and Statistics Division, 2013, p. 5.
82. NIMMIWG, [Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls](#), 2019, Vol. 1b, p. 185.
83. Legal Services Society (BC), [Gladue Primer](#), 2011, pp. 5–8.
84. Ibid.
85. For a review of the Gladue programs in the provinces and territories where funding is available (as of 2015), see Council of Yukon First Nations, [Yukon Gladue: Research & Resource Identification Project](#), 2015, pp. 10–23.
86. Alexandra Hebert, “Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice,” *Queen’s Law Journal*, Vol. 43, No. 1, Autumn 2017, p. 164.
87. Ibid., pp. 165–167.
88. Ibid., pp. 168–170.
89. Council of Yukon First Nations (2015), pp. 10–23. In 2018, following the publication of this report, the Government of Yukon implemented a three-year pilot project to develop a Gladue report writing program. See Government of Yukon, “[Government of Yukon funds Gladue pilot project](#),” News release, 20 February 2018.
90. Ibid.
91. As of 2019, six provinces and territories had no formal process for the preparation of Gladue reports (Saskatchewan, Manitoba, New Brunswick, Newfoundland and Labrador, the Northwest Territories and Nunavut). See Jonathan Rudin, *Indigenous People and The Criminal Justice System: A Practitioner’s Handbook*, Criminal Law Series No. 7, Emond Publishing, Toronto, 2019, p. 109.
92. Code, s. 606(1.1)(b)(iii).
93. Correctional Service Canada [CSC], [Restorative Justice Factsheet](#), Fact sheet.
94. For a summary of some of the principles of restorative justice, see CSC, [Restorative Justice Principles and Values](#).
95. Code, s. 716.
96. Nicol (2020), p. 5. See also Code, s. 717.
97. CSC, [Indigenous healing lodges](#).

98. Ibid.
99. CSC, [About the different lodges](#).
100. CSC, [Process to transfer an inmate to a healing lodge](#).
101. *R. v. Ipeelee*, para. 64.
102. Ibid.
103. Ibid., para. 63.
104. Ibid., para. 69.
105. *R. v. Gladue*, para. 87.
106. Ibid., para. 88.
107. Ibid., para. 87.
108. The parity principle dictates that sentences imposed on offenders should be similar for similar offences committed in similar circumstances.
109. *R. v. Ipeelee*, para. 79.
110. Department of Justice (2018).
111. Hebert (2017), para. 46.
112. Maurutto and Hannah-Moffat (2016), p. 458.
113. Marie Manikis, "[The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons](#)," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*. For context, see also Charlie Feldman, [Mandatory Minimum Sentences and Section 12 of the Canadian Charter of Rights and Freedoms](#) HillNotes, Library of Parliament, 28 April 2015.
114. Manikis (2015), p. 280.
115. R. E. Salhany, *Canadian Criminal Procedure*, 6th ed., Thomson Reuters Canada, Toronto, 2019, para. 8.538; and [R. v. Anderson](#), 2014 SCC 41.