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# BEYOND *GLADUE*: ADDRESSING INDIGENOUS ALIENATION FROM THE JUSTICE SYSTEM IN CIVIL LITIGATION

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## ABSTRACT

In 1999, the Supreme Court of Canada's seminal decision R v *Gladue* enunciated principles that recognized systemic bias and inter-generational trauma leading to the overrepresentation of Indigenous Peoples in incarcerated populations. Now, nearly a quarter century later, long-evolving efforts to meaningfully include Indigenous Peoples within colonial legal systems have focused primarily on Indigenous Peoples' interactions with the criminal justice system. Such efforts have yet to meaningfully reconcile Indigenous legal orders with Canada's civil justice system. This paper surveys the historical development of Canada's judicial approaches to reconciliation, and within that context, posits applications of *Gladue* principles to contemporary civil litigation.

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## INTRODUCTION

This paper was motivated by the belief that true reconciliation is predicated on the meaningful inclusion of Indigenous legal orders within the Canadian legal system. That end goal requires the intermediate process of accommodating Indigenous differences, in order to ensure an equitable justice system in all contexts. The meaningful extension of *Gladue* principles to the civil justice system is an essential part of achieving judicial equity.

Part I of this paper surveys some of the jurisprudence and commissions of inquiry which pre-date *R v Gladue.*[1] This survey provides the necessary legal and social context to understand not only the principles enunciated by the Supreme Court of Canada in *Gladue*, and later affirmed in *R v Ipeelee*,[2] but their applicability to the justice system beyond criminal law. In this work I am indebted to Benjamin Ralston's book, *The Gladue Principles: A Guide to the Jurisprudence,*[3] which identifies, organizes, and neatly summarizes many of these cases and materials. While I have borrowed somewhat from his organization, I have elaborated on his sources to extract ideas that are outside of the strict ambit of criminal law.

These sources identify ways in which the Canadian justice system has failed Indigenous Peoples. Fundamental differences between European settler and Indigenous cultures produce wide-spread collateral consequences when Canadian law is crudely applied. As is evident from these materials, these collateral consequences include inter-generational trauma and persistent social and economic inequality, in addition to the over-incarceration of Indigenous Peoples. Identifying these systemic effects have led to executive, legislative, and judicial endeavours to apply the law in more tailored ways. The broad goal of these remedial actions is a yet unrealized functional equality before the law for Indigenous Canadians.[4]

Part II identifies the judicial principles emanating from these early inquiries. Both *Gladue* and *Ipeelee* were criminal proceedings; however, they paved the way for stronger judicial responses to systemic discrimination outside criminal law. There are two principles emanating from *Gladue* which are particularly applicable outside criminal sentencing:

1. The judicial notice of the presence and effects of systemic discrimination; and
2. The alienation of Indigenous Peoples from the justice system.

Part III explores components of the civil litigation context in which these broad *Gladue* principles have been, or ought to be, considered. It reflects on the systemic challenges identified in Part I and demonstrates the wide applicability of the broadest *Gladue* principles surveyed in Part II. Three interactions between *Gladue* principles and aspects of the civil litigation process are considered:

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1 *R v Gladue*, [1999] 1999 CanLII 679 (SCC), 1 SCR 688 [*Gladue SCC*]

2 *R v Ipeelee*, [2012] 1 SCR 433 [*Ipeelee*].

3 Benjamin Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre, University of Saskatchewan, 2021).

4 Canada, Task Force on Aboriginal Peoples in Federal Correction, *Final Report* (Ottawa: Solicitor General of Canada, 1988) at 5, online (pdf): Government of Canada <publications.gc.ca> [perma.cc/L4MM-BQ7B].

1. The acknowledged applicability of *Gladue* principles to sentencing for civil contempt of Court;

2. The recognition of Indigenous alienation from the justice system as a basis to remedy the under-inclusion of Indigenous individuals within the civil jury selection process; and

3. The judicial notice of systemic discrimination mandated by *Gladue,* to offset inherent biases in the assessment of Indigenous witness credibility in civil proceedings.

# I. PRE-*GLADUE*

## A. Commissions of Inquiry and Review Committee Reports

Efforts were made, prior to the enactment of *Criminal Code* section 718.(2)(e)[5] and the Supreme Court's guidance in *Gladue*, to understand the sociological conditions giving rise to the over-representation of Indigenous people in the criminal justice system. These efforts include commissions of inquiry and pre-*Gladue* jurisprudence, which developed "in dialogue"[6] with one another, and which identified systemic barriers facing Indigenous communities within Canada's legal system.

Notwithstanding these early efforts' focus on criminal justice, many have enunciated principles of broader application. One of the earliest of such inquiries[7] was Justice William Morrow's *Inquiry into the Administration of Justice in the Hay River Area of the Northwest Territories*.[8] The Commission to which Justice Morrow's report is addressed was created in response to a suite of editorials in a local paper in Hay River, Northwest Territories, alleging, among other things, that "all individuals do not receive equal treatment in the courts".[9] In 1967, when the inquiry took place, Hay River was a predominately Indigenous community, with 1545 of approximately 2575 residents, being either First Nations or Métis.[10]

Justice Morrow identified several social factors afflicting Indigenous people within Hay River, including "lack of understanding of what court process means, language difficulties, and lack of communication with his people"[11] that led to disproportionate rates of custodial orders. His report identified systemic barriers affecting the administration of justice in the civil context, including poor access to legal aid,[12] and further opined that there is "failure to treat the native with dignity that perhaps more than any other single thing has given some support to the suggestion of discrimination".[13]

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5 *Criminal Code*, RSC 1985, c C-46, s 718.2(e).
6 Ralston, *supra* note 3 at 18.
7 *Ibid* at 19.
8 Justice William G Morrow, *Inquiry re Administration of Justice in the Hay River Area of the Northwest Territories Report* (Ottawa: Government of Canada, 1968), online (pdf): *Government of Canada* <publications.gc.ca> [perma.cc/BD92-G7LM].
9 *Ibid* at 3.
10 *Ibid* at 1.
11 *Ibid* at 25.
12 *Ibid* at 80.
13 *Ibid* at 96.

The Justice Reform Committee, appointed in 1987 in British Columbia, was "mandated to address citizens' attitudes and offer policy advice in various areas of the provincial justice system"[14] across a broad section of legal areas, rather than just criminal law. Following a review of the Committee's Report and a consultation with Indigenous stakeholders,[15] the province developed five themes for its response, including that "a holistic approach to justice, integrating justice with broader social reconstruction initiatives, should be developed in Indigenous communities".[16]

Describing local-level response to these action items, the 1990 Report describes legal workers arriving in the remote community of Alert Bay one day before court, allowing for greater access to services.[17] This echoes Justice Morrow's observation that further access to members of the "legal fraternity" in Hay River was necessary to alleviate the phenomenon of civil causes of action being "lost by delay."[18] Together, Justice Morrow's statement and Alert Bay's program demonstrate that geographic remoteness, which affects Indigenous communities disproportionately,[19] operates as an impediment to access to justice worthy of redress.

Speaking to a broader disjunction between Euro-Canadian and Indigenous "concepts of law, justice and society"[20] the Osnaburgh Windigo Tribal Council Justice Review Committee made the following remarks in 1990:

> While this Report addresses the justice system, it is but the flashpoint where the two cultures come into poignant conflict. The Euro-Canadian justice system espouses alien values and imposes irrelevant structures on First Nations communities. The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness.[21]

The Committee's Report was made in response to an incident in which an Indigenous individual from the Osnaburgh Band had been arrested following his public intoxication and was rendered a quadriplegic sometime between his arrest and release.[22] The arresting officer was acquitted in Provincial Court of aggravated assault in connection with the incident.[23] Like many others, the *Osnaburgh Report* focuses on criminal law; however, it does describe

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14 Ralston, *supra* note 3 at 25.

15 *Ibid* at 26.

16 British Columbia, Ministries of Solicitor General, Ministry of Attorney General & Ministry of Native Affairs, *Native Justice Consultations: Progress Report and Action Plan* (Victoria: Ministries of Solicitor General, Attorney General and Native Affairs, 1990) at 8.

17 *Ibid* at 9.

18 Morrow, *supra* note 8 at 80.

19 See generally: Moazzami Economic Consultants Inc, *Remoteness Indicators and First Nation Education Funding* (Ottawa: Assembly of First Nations), online (pdf): Assembly of First Nations <afn.ca> [perma.cc/78YV-S8KG]

20 Ontario, *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee - Tay Bway Win: Truth, Justice and First Nations* (Toronto: The Osnaburgh/Windigo Tribal Council Justice Review Committee, 1990) at 5.

21 *Ibid*.

22 *Ibid* at 1.

23 *Ibid*.

functional dissimilarities between Indigenous (Anishinaabe) and Euro-Canadian society that apply throughout the Canadian legal system.

> Addressing the barriers that language creates, the Report makes the following observation:
>
> Euro-Canadian society has largely dealt with the fact that Ojibway is the language of the First Nations in this part of Northern Ontario by simply ignoring Ojibway and rendering none of the justice-related documentation in syllabics. Similar problems exist in the First Nations communities on the west coast of James Bay by ignoring the Cree language that predominates there.
>
> […]
>
> First Nations individuals, when dealing with the justice system, from the police through the courts to the correctional process, may encounter difficulty both conceptually and linguistically with the use of the English language.
>
> […]
>
> There can be fundamental problems in comprehension and understanding, especially of technical legal terms.[24]

The *Osnaburgh Report* describes the difficulty Band residents on reserve face attending court, when the only options are off reserve some 35 kilometres away.[25] This isolation from the court system was difficult to reconcile because the Osnaburgh community was reluctant to construct courts on reserve, given that the courts dispense a form of justice alien to their community and which they perceived as "irrelevant" to their needs, while the judges were reluctant to hold court in buildings seen as insufficiently appointed for the purpose.[26]

In 1973, a Board of Review was commissioned in Alberta, chaired by Justice Kirby, to review the operation of the Provincial Courts.[27] Included in the terms of reference were questions related to making the court system more responsive to the needs of the Indigenous community, including:

- Making court more accessible to geographically remote communities;
- Whether procedural changes should be made in the administration of the courts;
- Whether issuing custodial sentences for individuals who have defaulted on fines charged for provincial offences should be continued, and to what extent;
- Whether fines against individuals convicted of traffic offences should continue; and

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24 *Ibid* at 28–29.

25 *Ibid* at 55.

26 *Ibid*.

27 Justice WJC Kirby, *Native People in the Administration of Justice in the Provincial Courts of Alberta - Term of Reference of Report No. 4* (Alberta Board of Review - Provincial Courts, 1978), online (pdf): <www.ojp.gov> [perma.cc/QF2M-GMGC].

- Whether infractions of municipal by-laws as offences in Provincial Courts, and the attending fines collected, should be effected in Small Claims Court or other courts of civil jurisdiction.[28]

Like the previous reports cited, Justice Kirby's 1978 Report noted that a majority of Status and non-Status Indians, as well as Métis, lived in rural areas[29] and that there were higher rates of alcohol abuse among Indigenous individuals (both First Nations and Métis alike).[30] The Report also noted higher rates of incarceration resulting from the failure to pay fines among Status Indians as compared to non-Indigenous, non-Status, and Métis.[31]

To address these issues, the Report suggested the appointment of Indigenous Justices of the Peace, who would have limited jurisdiction over criminal and provincial offences, as well as juvenile delinquencies, and would preside over proceedings conducted on reserve.[32]

The Report identified social and economic problems leading to conflict between Indigenous communities and the judicial system, including alcohol abuse, unemployment, poverty, availability of welfare subsidies, lack of recreation facilities and education (especially the residual and ongoing traumas of residential schools).[33]

It also recommended cultural competency training for officials of the Court, including judges, lawyers and administrators, noting that "it is only from such exposure that these people can come to realize that the Indian is not a brown white man. He is different and these differences must come to be understood before the law will be relevant to him".[34]

A more recent commission of inquiry was initiated in British Columbia to investigate "the relationship between the native people of the Cariboo-Chilcotin and the justice system of this province"[35] in response to "disturbing allegations made against the police, lawyers, judges and other functionaries of the justice system".[36] The Report, released in 1993, made several observations about the difficult reconciliation of Indigenous and settler cultures, including that the "family-centered cultural values" of Indigenous Nations were "irreconcilable with the values of a free-enterprise, individual-oriented, self-acquisitive society".[37] Despite the fact that most complaints giving rise to the inquiry were made against police,[38] the Report acknowledged difficulties experienced by Indigenous people within the Euro-Canadian court system generally. It recognized that "standards of proof and examination and cross-examination

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28 *Ibid* at iv.
29 *Ibid* at 6.
30 *Ibid* at 7.
31 *Ibid* at 9.
32 *Ibid* at 31–32.
33 *Ibid* at 10–12.
34 *Ibid* at 30.
35 British Columbia, *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria: Cariboo-Chilcotin Justice Inquiry, 1993) at 4, online (pdf): <www.llbc.leg.bc.ca> [perma.cc/FML9-3G6W].
36 *Ibid* at 5.
37 *Ibid* at 10.
38 *Ibid*.

of witnesses are foreign to them",[39] echoing the findings made by the Osnaburgh Windigo Tribal Council Justice Review Committee, quoted above.[40]

Perhaps most starkly, the Report drew a connection between the *Indian Act*'s[41] paternalizing narrative that "native people are incapable of managing their own lives, that they cannot make their way in non-native society and that they are inferior to non-natives".[42] It went on to detail how this attitude towards Indigenous people has become ingrained in non-Indigenous society, advanced by the government of Canada through the Department of Indian Affairs,[43] as it was called then, and from which the "dependence, the poverty, the self-destruction to which the natives were reduced"[44] operated as a self-fulfilling prophecy.

These reports, spanning decades and from jurisdictions across the country, demonstrate systemic barriers to the integration of Indigenous communities into the Canadian legal system. Not only do they reflect legislative and executive attempts at understanding the issues facing Indigenous individuals that might cause or contribute to the overrepresentation of Indigenous offenders in the prison system, but equally, they highlight challenges applicable to the legal system generally.

## B. Pre-*Gladue* Jurisprudence

Recognition of the conditions of poverty, geographic isolation, and fundamental cultural disjunction resulted in efforts to make the court system more responsive to Indigenous needs by increasing court sittings, introducing Indigenous case workers, and improving access to Legal Aid. These remedial efforts have been supplemented by attempts to integrate Indigenous legal orders within the Canadian civil and common law systems, as well as early cases taking judicial notice of the existence of racial inequality plaguing Indigenous communities in particular ways.

Only a few days after the Dominion of Canada was created through the passage of the *British North America Act,*[45] the case of *Connolly v Woolrich*[46] [*Connolly*] was decided. The case partially related to the validity of a marriage between William Connolly and Susanne Pas-de-nom, a Cree woman. It was contended that William Connolly had been married to Ms. Pas-de-nom under the Cree tradition, at the time he purported to have married Julia Woolrich under the Roman Catholic tradition. Mr. William's son through Ms. Pas-de-nom brought the action for a share of the estate, which he contended had lawfully passed to her.[47] The judge was tasked with finding whether Mr. William's marriage to Ms. Pas-de-nom was valid to the point of displacing the validity of his subsequent marriage to Ms. Woolrich.

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39 *Ibid* at 13.
40 Ontario, *supra* note 20 at 30.
41 *Indian Act*, RSC 1985, c I-5.
42 British Columbia, *supra* note 35 at 11.
43 *Ibid*.
44 *Ibid*.
45 *British North America Act, 1867*, (UK) 30 & 31 Vict, c 3.
46 *Connolly v Woolrich*, [1867] 1 CNLC 70 (Que Sup Ct), [1867] QJ No 1 (QL) [*Connolly*].
47 *Ibid* at paras 1–2.

The Court recognized that "Indian custom" is a foreign law of marriage, but it was available to the British parliament to abrogate the "Indian laws", and since it had not, the Court would not, in its place.[48] It has been written that Justice Monk's decision "went well beyond the law of marriage. He was prepared to recognize Indigenous systems of law and governance generally".[49]

Lest Justice Monk be taken for a particularly enlightened juridical mind, repeated references to Indigenous Peoples as "savages"[50] or "children of the forest"[51] cast his judgment as dimly hopeful, if hopeful at all, as an early exemplar of reconciliation. [52] Nevertheless, it has been cited in a relatively recent British Columbia case that affirms Canadian courts have occasionally recognized and enforced Indigenous laws, and by implication, the legal orders giving rise to them.[53]

As is discussed in Part II of this paper, the alienation of Indigenous Peoples from the Canadian legal system is one social ill that animates the application of *Gladue* principles.[54] Recognition of Indigenous legal systems, and the possibility for their broad integration within Canadian common and civil law, hinted at in judgments like *Connolly*, is a forward-looking means of reducing this alienation. It is suggestive of judicial recognition of three legal traditions: the common law, civil law, and Indigenous legal traditions in various forms.[55]

Notwithstanding a few bright stars; however, the constellation of Canadian jurisprudence suggests that Canada's legal system must still do more to address the harms done by the superimposition of Euro-Canadian law onto Indigenous legal traditions, a superimposition which, in many respects, forms the basis for the poverty, substance abuse and lateral violence seen so pervasively within Indigenous communities.[56]

The seminal judgment *R v Van der Peet*[57] observed that Indigenous societies and Canadian society are "vastly dissimilar",[58] and recognized the need to account for specific differences between different Indigenous cultures and Canadian culture in order to understand the nature of the rights being claimed.[59] The accommodative approach championed by *Gladue* is analogous, in that it too accounts for dissimilarities in ways that directly target the over-incarceration of Indigenous offenders.[60]

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48 *Ibid* at para 144.

49 Mark Walters, "The Judicial Recognition of Indigenous Legal Traditions: Connolly v Woolrich at 150" (2017) 22:3 Review of Constitutional Studies 347 at 352.

50 *Connolly*, *supra* note 46 at paras 78, 116, 159, 174.

51 *Ibid* at para 162.

52 Mark Walters, *supra* note 49 at 349.

53 *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 97, 189 DLR (4th) 333.

54 *Gladue SCC, supra* note 1 at para 65.

55 Mark Walters, *supra* note 49 at 355.

56 Sidney L Harring, *White Man's Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press and the Osgoode Society for Canadian Legal History, 1998) at 278.

57 *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 (SCC).

58 *Ibid* at para 42.

59 *Ibid* at para 69.

60 *Gladue SCC, supra* note 1 at para 65.

Other judgments have addressed cultural dissimilarity, including language barriers and spiritual differences, while applying common or civil law. In *R v Machekequonabe*, an appeal from a manslaughter conviction, defence counsel argued that the accused, an Indigenous man, had not intended to shoot a person but instead a Wendigo, an evil spirit disguised as a human.[61] While the appeal was ultimately unsuccessful, the jury did accept that the accused had believed the victim to be a Wendigo and that the Wendigo could be killed by a bullet shot from a rifle, as he had done.[62]

In *R v Louie*[63] the admissibility of an Indigenous woman's dying words were being considered as an exception to the rule against hearsay evidence. In assessing whether the victim had a fear of impending death the judge made a cross-cultural note of the vernacular he felt was often employed by Indigenous individuals, stating "Indians use the term 'think' generally as a statement of fact", in response to the victim's statement "I think I be dying".[64] This decision, like the *Machekequonabe* decision, is a prototypical example of the common law seeking to understand Indigenous perspectives.

Other judgments have recognized the inequity of applying Canadian law in untailored ways to Indigenous offenders. In *R v Itsi*,[65] Justice Sissons of the Northwest Territories Territorial Court upheld an order by a Justice of the Peace disregarding the minimum fine for supplying liquor to a minor. The Justice of the Peace's reasons, which Justice Sissons generally accepted, found Mr. Itsi had not supplied teenage girls with liquor for immoral reasons, which the Justice of the Peace found to be a condition precedent for applying the fine (a condition precedent Justice Sissons rejected),[66] and that the minimum fine would, on account of the accused being Indigenous, have caused the offender and his family "hardships not warranted by the nature of the charge".[67]

The reasons of Justice Sissons recognize the predatory behaviour of white men in the area, and the related vulnerability of Indigenous girls. It was partially on this basis Justice Sissons justified differential sentencing for Mr. Itsi:

> … I agree with the Justice of the Peace that the giving of liquor by a white man to a native girl is ordinarily a prelude to anticipated sexual intercourse.
>
> […]
>
> [T]he first thing some of the visiting boys from Ottawa do when they reach the northern settlements is to put in their pocket a bottle of liquor and inquire where the native girls are. This is notorious. There are other whites in the same category. Included are young researchers or budding anthropologists or sociologists, working on

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61 *R v Machekequonabe*, [1897] OJ No 98 at para 5, 28 OR 309.
62 *Ibid* at para 8.
63 *R v Louie*, [1903] BCJ No 30, CanLII 83 (BCSC).
64 *Ibid* at para 3.
65 *R v Itsi*, 6 CNLC 394 (NWT Terr Ct).
66 *Ibid* at 401.
67 *Ibid* at 396.

> their master's or doctorate's theses, who apparently have been told that the best way, and the most enjoyable way, to study Indians or Eskimos is under a maiden's blanket.[68]

Justice Sissons also accounts for Mr. Itsi's race in sentencing:

> It is a principle of imposing punishment that there should be consideration of all the circumstances. I took into consideration of the circumstances whether the accused was an Indian or an Eskimo or was a white man.[69]

Justice Sissons reasons demonstrate that Indigenous race is not just a superficial difference. It is a difference that justifies nuanced applications of the law because of Indigenous Peoples' unique circumstances (in this case vulnerability to sexual predation and poverty) that are the unfortunate ancillaries to the experience of Indigenous people in Canada.

In *R v Quilt,*[70] the British Columbia Court of Appeal was tasked with determining whether a prison sentence for arson and criminal negligence causing death should be reviewed. The Court rejected the defence counsel's argument that "the fact that these young men reside in a primitive area, are from a primitive culture, and that at the time of the offence they were both under the influence of alcohol"[71] constituted mitigation worthy of a lower sentence. Chief Justice Nemetz's decision chides defence counsel's language:

> I do not accept for one moment that arson is a part of our Native Indian culture in this or any other Indian band. The fact that theirs is a "primitive" culture (I would call it a different culture) does not mean that its moral precepts are lower than in our so-called advanced culture.[72]

Chief Justice Nemetz's approach acknowledges the limits of cultural context as a mitigating factor. While circumstances particular to Indigenous individuals are worthy of consideration by the courts, the Court's decision in *Quilt* is a reminder that they cannot serve as a panacea which completely displaces the principles of just sentencing.

The early commissions of inquiry provided the "theoretical and empirical"[73] support for a more tailored approach to the treatment of Indigenous people in the justice system, which was implemented to varying degrees by judicial decisions like those canvassed above. A significant advance on the road to functional equality for Indigenous people came when the Supreme Court of Canada released *R v Williams*, recognizing the need for judicial notice of systemic racial bias and discrimination.[74]

The issue before the Court was whether the accused, an Indigenous man, had the right to question potential jurors, pursuant to section 638 of the *Criminal Code,* to determine

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68 *Ibid* at 402.
69 *Ibid* at 401.
70 *R v Quilt*, 1984 Carswell BC 859, CanLII 483 (BCCA).
71 *Ibid* at para 7.
72 *Ibid* at para 13.
73 Ralston, *supra* note 3 at 64.
74 *R v Williams,* 1998 CanLII 782 (SCC), [1998] 1 SCR 1128 [*Williams*].

"whether they possess prejudice against aboriginals which might impair their impartiality".[75] In support of that challenge Mr. Williams had filed an affidavit stating, in part, "[I] hope that the 12 people that try me are not Indian haters".[76]

The motion judge made the following observation:

> Natives historically have been and continue to be the object of bias and prejudice which, in some respects, has become more overt and widespread in recent years as the result of tensions created by developments in such areas as land claims and fishing rights.[77]

Despite the recognition of widespread racial bias, the motion judge declined to allow the motion on the basis that jurors "can be expected to put aside their biases and because the jury system provides effective safeguards against such biases".[78] The motion judge's finding there is a presumption of juror impartiality was upheld at the British Columbia Court of Appeal, which held "there are no studies […] in the evidence which conclude that persons in a jury setting may be inclined to find that an aboriginal person is more likely to have committed a crime than a non-aboriginal person".[79]

The Supreme Court recognized that the Canadian approach to challenging jurors on the basis of partiality begins with a presumption that jurors are indifferent or impartial, though the Crown or the accused may raise concerns which displace that presumption.[80] Alternatively, a judge may take judicial notice of bias, where the basis of the concern is "widely known and accepted".[81] Specific to this case was the question of whether the evidence of "widespread bias against aboriginal people in the community" raised a "realistic potential of partiality".[82]

The Supreme Court went on to reject the assumption, held by the motion judge and upheld on appeal, that jurors will set aside their biases in order to properly fulfill their duties, stating such an assumption "is to underestimate the insidious nature of racial prejudice and the stereotyping that underlies it",[83] and that judicial safeguards or instructions are insufficient to "eliminate biases that may be deeply ingrained in the subconscious psyches of jurors".[84] The Court was quick to caution that not every potential juror with racial bias would automatically be rejected, instead a judge must determine whether the potential juror's prejudice would affect their partiality and whether or not they are capable of setting aside that prejudice.[85]

The Court also rejected the view that a general bias, that is one directed at a racial group generally, rather than particularized in some way, cannot be equated with partiality.

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75 *Ibid* at para 1.
76 *Ibid* at para 3.
77 *Ibid* at para 4.
78 *Ibid* at para 5.
79 *R v Williams*, 1996 CanLII 3687 (BC CA) at 229–30, [1996] BCJ No 926 (QL) [*Williams* CA].
80 *Williams*, *supra* note 74 at para 13.
81 *Ibid*.
82 *Ibid* at para 14.
83 *Ibid* at para 21.
84 *Ibid* at para 22.
85 *Ibid* at para 23.

The Court recognized that racist stereotypes "may affect how jurors assess the credibility of the accused",[86] a concern equally applicable to civil jury trials in which credibility of parties is likewise assessed.

The Court cited several reports, including the *Report on the Cariboo-Chilcotin Justice Inquiry*, in finding that evidence of widespread racism has translated into systemic discrimination in the criminal justice system, and that these racial tensions had been inflamed due to Indigenous groups asserting land claims and fishing rights.[87]

The Court in *Williams* was tasked with interpreting a specific provision of the *Criminal Code*, and it is understandable that for that reason the Court's decision hems closely to criminal law. Nevertheless, the finding that judges may take judicial notice of widespread racial animus, including animus that is endemic to a particular community,[88] has broad applicability outside criminal law. Consider, for example, the hypothetical "reasonable person"[89] of tort law, who likewise exists in criminal law, and who acts as a standard against which objectively reasonable conduct is measured. This reasonable person is deemed to be a member of the local community, aware of the racial politics and biases present within it.[90] Applied in this context, *Williams* demonstrates, helped in part by the studies and jurisprudence canvassed here, that systemic bias is a persistent feature of Canadian society, which judges must respond to and account for.

## C. Conclusion of Part I

The cases and materials reviewed here describe a decades-long process of attempts to recognize and accommodate Indigenous difference in the justice system. The early commissions of inquiry detail the root causes of the overrepresentation of Indigenous individuals in the criminal justice system. The jurisprudence that developed alongside those commissions of inquiry have first sought to identify the uniqueness of the Indigenous experience in Canada, accommodate it through inter-cultural understanding, and finally take judicial notice of the existence and effects of endemic and institutionalized racism.

The Canadian justice system has long recognized that Indigenous Peoples have access to both civil and criminal courts, but access to the court system has not always gone unimpeded or unchallenged, and the "simple statement of juridical equality" has not reflected "the reality of native legal status".[91] It is telling that most of the early cases dealing with Indigenous people in Canada do so through criminal law.[92] The decisions surveyed here provide some reason for optimism that Canada is capable of meaningful reconciliation with Indigenous groups, and *Gladue* and *Ipeelee* provide principles necessary for that reconciliation. That optimism may be muted; however, because the Crown is often in opposition to Indigenous interests

86 *Ibid* at para 28.
87 *Ibid* at para 58.
88 *Ibid* at para 54.
89 *Vaughn v Menlove*, (1837) 132 ER 490 (UK).
90 *R v S (RD),* 1997 CanLII 324 (SCC) at para 47 [1997], 3 SCR 484 (S(RD)).
91 Harring, *supra* note 56 at 91.
92 *Ibid* at 92.

where it is a party to litigation at the Supreme Court outside criminal contexts.[93] For this reason, strong judicial safeguards, including the broadest tenets of *Gladue*, are necessary to mitigate against a system that has been, since its beginning, prejudicial to Indigenous Peoples.

## II. *GLADUE* PRINCIPLES

Many of the commissions of inquiry and jurisprudence surveyed in Part I of this paper, in addition to several others,[94] informed the enactment of Bill C-41,[95] which, in 1995, introduced new sentencing provisions to the *Criminal Code*. These provisions include section 718.2(e), which directs judges to consider all available sanctions apart from imprisonment, with "particular attention to the circumstances of Aboriginal offenders". The Supreme Court of Canada interpreted the provision for the first time in *Gladue.*

The Supreme Court's interpretation of section 718.2(e) in *Gladue* provided the Court an opportunity to affirm the judicial notice of systemic bias made in *Williams*, tethering the over-incarceration of Indigenous individuals to systemic factors. The Court observed general Indigenous "alienation from the criminal justice system",[96] echoing earlier findings like Justice Morrow's, that Indigenous people often lack understanding of court processes and experience language barriers, which lead to higher rates of guilty pleas and custodial orders.[97]

The Court revisited *Gladue* roughly 13 years later in *Ipeelee*, affirming its framework for the application of section 718.2(e), but also the broad principles of Indigenous alienation from the justice system and judicial notice of the effects of systemic discrimination. These broad principles are the focus of Part II of this paper.

### A. *R v Gladue*

Ms. Gladue is a Cree woman born in Alberta, who pled guilty to manslaughter in the death by stabbing of her common-law husband. At her sentencing hearing, the judge considered several mitigating factors, including her age, lack of criminal record, and that she was a young mother.[98] The trial judge did not think there were any special circumstances emanating from Ms. Gladue being Indigenous, since both she and the deceased had lived off-reserve and therefore not "within the aboriginal community as such", and therefore, in his view, section 718.2(e) of the *Criminal Code* did not apply.[99] The sentencing judge determined the appropriate sentence was three years' imprisonment and a ten-year weapons prohibition.[100]

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93 Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press: The University of British Columbia, 2011) at 170.

94 Department of Justice Government of Canada, "The Genesis and Content of the Current Statement - A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code", (5 August 2016), online (pdf): <justice.canada.ca> [perma.cc/N9AV-L6KH].

95 *An Act to Amend the Criminal Code (Sentencing)*, 1995 SC c 22.

96 *Gladue SCC, supra* note 1 at para 65.

97 Morrow, *supra* note 8 at 25.

98 *Gladue SCC, supra* note 1 at para 15.

99 *Ibid* at para 18.

100 *Ibid*.

The British Columbia Court of Appeal overturned the judge's ruling that section 718.2(e) did not apply because Ms. Gladue lived off-reserve.[101] However, noting the "viciousness and persistence" of her attack,[102] the court denied Ms. Gladue's appeal.[103]

Dissenting, Justice Rowles noted that an Indigenous offender's heritage "may be more complex" when they do not live on reserve, but that heritage is still relevant to the sentencing process.[104] Coming to this conclusion, she excerpted from the *Report of the Aboriginal Justice Inquiry of Manitoba*, which reads in part:

> … [T]he influence of Aboriginal cultures is present, although difficult to detect. As we have noted earlier, it is important to distinguish between a person's lifestyle, which for some individuals may appear to be one of complete integration into the mainstream, and his or her culture, which is reflective of the values in which a person was raised and which continues to shape that person's behaviour. Thus, it is important for the courts to satisfy themselves as to the true influence of Aboriginal culture. The acceptance of outward appearances is not sufficient. In fact, where the influence of Aboriginal culture is difficult to detect, this itself may be a factor that the courts should take into consideration.[105]

Justice Rowles' reasons also recognize systemic discrimination, which gives rise to the over-incarceration of Indigenous people:

> Socioeconomic factors such as employment status, level of education, family situation, etc., appear on the surface as neutral criteria. They are considered as such by the legal system. Yet they can conceal an extremely strong bias in the sentencing process. Convicted persons with steady employment and stability in their lives, or at least prospects of the same, are much less likely to be sent to jail for offences that are borderline imprisonment offences. The unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail. This is systemic discrimination.[106]

Justice Rowles also recognized a need for implementing criminal justice in ways that align with Indigenous concepts of restorative justice:

> The conception of justice as restorative of the community may be relevant to the degree to which 'justice' may be seen to be done by aboriginal people. Particularly in isolated aboriginal communities, the need for rehabilitation, reintegration and reconciliation may be essential to the community's cohesion.[107]

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101 *R v Gladue*, 1997 CanLII 3015 (BC CA) at para 88, [1997] BCJ No 233 (QL) [*Gladue* CA].
102 *Ibid* at para 89.
103 *Ibid* at para 92.
104 *Ibid* at para 63.
105 *Ibid* at 408.
106 *Gladue CA*, *supra* note 101 at para 55.
107 *Ibid* at para 60.

The Supreme Court found that section 718(2)(e) was not simply "a codification of existing sentencing principles",[108] but rather a direction to sentencing judges "to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case".[109] It was recognized that the circumstances of Indigenous offenders are unique, and that uniqueness may, occasionally, make imprisonment "a less appropriate or less useful sanction".[110]

The Court made notice that Indigenous people are victims of "systemic and direct discrimination",[111] characterizing the high incidents of poverty, unemployment, poor education, substance abuse and "community fragmentation" within Indigenous communities as the frequent result of "years of dislocation and economic development".[112]

In acknowledging these systemic and direct discriminatory effects on Indigenous people, the Court also recognized the inefficacy of incarceration, in part because it would affect Indigenous individuals more adversely, but also because it was less likely to be rehabilitative, since incarceration is "culturally inappropriate" and penal institutions tend to be environments rife with anti-Indigenous discrimination.[113] The Court noted that community-based sanctions "coincide with the aboriginal concept of sentencing",[114] while still appreciating that Indigenous groups are varied, and their approaches to sentencing likewise vary.[115] The Court also cautioned against "reverse discrimination", in that an Indigenous offender's sentence should not automatically be lower by virtue of the fact they are Indigenous.[116] The Court held that the direction provided by section 718(2)(e) should be applied to Indigenous individuals, regardless of where they reside and irrespective of whether they are registered or non-registered "Indians", Métis or Inuit.[117]

*Gladue* is fundamentally a decision about sentencing in the criminal context, under a framework provided by section 718.2(e) of the *Criminal Code*. However, the Court's recognition of the "greater problem of aboriginal alienation from the criminal justice system",[118] and the systemic causes of that alienation, are applicable in many areas outside criminal sentencing. The attempts to integrate Indigenous conceptions of law and justice into the dominant Canadian legal order harken back to similar early attempts, like that in *Connolly. R v Ipeelee [Ipeelee],* surveyed below, affirms the framework and principles set out in *Gladue* while broadening the scope of matters to which they apply.

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108 *Gladue SCC, supra* note 1 at para 31.
109 *Ibid* at para 33.
110 *Ibid* at para 37.
111 *Ibid* at para 68.
112 *Ibid* at para 67.
113 *Ibid* at para 68.
114 *Ibid* at para 74.
115 *Ibid* at para 73.
116 *Ibid* at para 88.
117 *Ibid* at para 90.
118 *Ibid* at para 65.

### B. *R v Ipeelee*

The Supreme Court's decision in *R v Ipeelee* involved the appeals of two separate, though similar, cases involving Indigenous long-term offenders subject to long-term supervision orders ("LTSO"). Mr. Ipeelee had suffered from alcohol dependency and had a history of committing violent offences when intoxicated. His criminal history stretched back decades. His first involvement with the criminal justice system occurred when he was just 12 years old, and his convictions ranged from property offences to violent assaults, including a sexual assault.[119]

Mr. Ladue also had alcohol dependency issues. He had been removed from his family when he was young to attend residential school, where he alleged he had suffered from "physical, sexual, emotional and spiritual abuse".[120] Like Mr. Ipeelee, Mr. Ladue's criminal offences date from when he was a juvenile, and include property-related offences as well as violent offences, such as robbery and sexual assault. Both men were subject to LTSOs, which contained conditions that they abstain from alcohol and other intoxicants. Both men violated those conditions and were sentenced to incarceration as a result.[121]

The issue before the Court was whether section 718(2)(e) of the *Criminal Code* should apply to breaches of LTSOs, providing an opportunity to "revisit and reaffirm" the Supreme Court's judgment in *Gladue*.[122] The need for this revisitation had much to do with inconsistent and incorrect lower court judgments since *Gladue* was released, errors which "significantly curtailed the scope and potential remedial impact of the provision".[123]

The Court noted some decisions in which *Gladue* was incorrectly applied and identified two primary issues with the post-*Gladue* jurisprudence. First, the Court noted cases in which it was determined "an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge",[124] citing *R v Poucette*[125] as a representative example. The Court noted the *Poucette* decision did not adequately identify the "devastating intergenerational effects of the collective experiences of Aboriginal peoples", while at the same time imposing an evidentiary burden not intended by *Gladue*.[126]

The second issue, which the Court identified as potentially the "most significant issue in the post-*Gladue* jurisprudence", was the interpretation that *Gladue* principles do not apply to serious offences.[127] The Court clarified that a sentencing judge owes a statutory duty, in all cases, to apply section 718.2(e), and that a failure to do so will result in a reviewable error justifying appellate intervention.[128]

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119 *Ipeelee*, *supra* note 2 at paras 2–13.
120 *Ibid* at para 19.
121 *Ibid* at paras 19–27.
122 *Ibid* at para 1.
123 *Ibid* at para 80.
124 *Ibid* at para 81.
125 *R v Poucette*, 1999 ABCA 305, [1999] AJ No 1226 (QL).
126 *Ipeelee*, *supra* note 2 at para 82.
127 *Ibid* at para 84.
128 *Ibid* at para 87.

The *Ipeelee* decision does more than simply clarify *Gladue* principles as they relate to section 718.2(e). At its broadest, *Ipeelee* is a decision that follows *Gladue* in its judicial notice of systemic discrimination and the effects of inter-generational trauma.

In its discussion on systemic discrimination, the Court began by quoting former Minister of Justice Allan Rock, who cited the overrepresentation of Indigenous people within Canadian prison populations as part of the social context that animated the introduction of sentencing principles provisions to the *Criminal Code*, including section 718.2(e).[129] Mr. Rock's contention was supported by government figures showing Indigenous people accounted for 10 percent of the federal prison population while forming only 2 percent of the national population, and starker statistics in prairie provinces, where Indigenous people were 32 percent of inmates compared to 5 percent of the general population.[130]

The Court reiterated that section 718.2(e) is remedial, and "designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing".[131] In giving effect to this remedial purpose, judges must take judicial notice of the "broad systemic and background factors affecting Aboriginal people generally", though cautioned that case-specific information will need to come from counsel.[132]

The Court requires judges to take judicial notice of such matters as "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples".[133]

The Court affirmed Justice Cory and Justice Iacobucci JJ's description in *Gladue* of the root causes of Indigenous criminality, wherein they stated:

> It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system. The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.[134]

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129 *Ibid* at para 56.
130 *Ibid* at para 57.
131 *Ibid* at para 59.
132 *Ibid*.
133 *Ibid* at para 60.
134 *Gladue SCC, supra* note 1 at para 65.

Despite contrary efforts since *Gladue*, the Court observed the problem of Indigenous over-incarceration has not only persisted, but worsened. The Court noted that between 1996 to 2001, Indigenous admissions into custody "increased by 3 percent while non-Aboriginal admissions declined by 22 percent",[135] and that section 718.2(e) of the *Criminal Code* "has not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system".[136]

### C. Conclusion of Part II

While the Court in *Ipeelee* recognized that the applicability of *Gladue* principles is not meant to operate as a "panacea",[137] and despite both decisions relating to a statute that is relatively narrow in its application, the Court has, in both decisions, enunciated valuable principles relating to the judicial notice of both the presence and effects of systemic discrimination. This systemic discrimination, connected to a centuries-long process of imposing alien laws and dislocating Indigenous communities, operates in many instances as a root cause of Indigenous offending. Systemic discrimination is also largely responsible for the alienation of Indigenous Peoples from the criminal justice system.

These broad principles are applicable in most instances where Indigenous people are before the courts, and particularly so when the Indigenous individual has a liberty interest at stake. Part III of this paper explores situations in which these broader *Gladue* principles have been found applicable, outside the strict confines of criminal sentencing.

## III. *GLADUE,* BEYOND CRIMINAL SENTENCING

*Gladue* principles have been explicitly applied outside the narrow context of criminal sentencing in a handful of decisions, including the following notable cases:[138]

- Review Board disposition of an Indigenous person found not criminally responsible; [139]
- Parole eligibility in the context of a life sentence;[140]
- Civil contempt of Court proceedings for engaging in peaceful protest;[141]
- Modification of orders made pursuant to section 161 of the *Criminal Code*, prohibiting an offender from attending a community centre where there were culturally appropriate rehabilitation programs;[142]

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135 *Ipeelee*, *supra* note 2 at para 62.

136 *Ibid* at para 63.

137 *Ibid*.

138 Research and Statistics Division, *Spotlight on Gladue: Challenges, Experiences and Possibilities in Canada's Criminal Justice System* (Government of Canada: Department of Justice, 2017) at 20, online (pdf): <www.justice.gc.ca> [perma.cc/S6XU-6N8D].

139 *R v Sim*, 2005 CanLII 37586 (ONCA), 78 OR (3d) 183.

140 *R v Jenson*, 2005 CanLII 7649 (ONCA), [2005] OJ No 1052 (QL).

141 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, [2008] OJ No 2651 (QL) [Frontenac].

142 *R v Sutherland*, 2009 BCCA 534.

- Extradition proceedings, evaluating whether *Gladue* factors are relevant to determining if extradition would be contrary to section 7 of the *Charter*;[143] and
- Determining whether the state made efforts to ensure representative inclusion of Indigenous people in jury selection;[144]

Two of these decisions, *Frontenac* and *R v Kokopenace* [*Kokopenace*] deal with matters wholly applicable outside criminal law.

*Frontenac* deals with the application of *Gladue* principles in a sentencing appeal for civil contempt. *Kokopenace*, while a criminal law decision, deals with the adequate representation of Indigenous people on a jury, where the accused is Indigenous. As jury trials are a feature of civil litigation, particularly in British Columbia and Ontario,[145] the Supreme Court's decision should apply outside criminal law wherever civil juries are empaneled.

It should be observed that the Supreme Court in *Kokopenace* overturned the Ontario Court of Appeal's decision that the generation of jury rolls were to be guided by the honour of the Crown and *Gladue* principles.[146] As such, *Kokopenace* stands as a counterexample to the argument that Indigenous alienation from the justice system is sufficient justification for the extension of *Gladue* principles outside the context of criminal sentencing. These two decisions are analyzed in more detail below.

Beyond these two important appellate decisions, the judicial notice of systemic discrimination mandated by *Gladue* should limit the effects of inherent biases in the evaluation of Indigenous witness credibility. This applies where lawyers and judges are influenced to improve their intercultural competency, in line with the Truth and Reconciliation Commission's Calls to Action numbers 27 and 28,[147] as well as recognizing the roles systemic discrimination and Indigenous alienation from the criminal justice system have played when civil trials present Indigenous witnesses with criminal records.

## A. Civil Contempt of Court: *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*

*Frontenac* involved an appeal by two Indigenous individuals, Mr. Robert Lovelace and Chief Paula Sherman, as well as Ardoch Algonquin First Nation ("AAFN")[148] against their sentences

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143 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

144 *R v Kokopenace*, 2013 ONCA 273; rev'd *R v Kokopenace*, 2015 SCC 28 [*Kokopenace CA*].

145 W A Bogart, "'Guardian of Civil Rights...Medieval Relic': The Civil Jury in Canada" (1999) 62:2 Law and Contemporary Problems 305 at para 307.

146 *R v Kokopenace*, 2015 SCC 28 (CanLII), [2015] 2 SCR 398 at para 97 [*Kokopenace SCC*].

147 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2012).

148 An anonymous report has suggested that AAFN is not an authentic First Nation, and that Mr. Lovelace is not Indigenous. These allegations had not emerged at the time of the motion or its appeal and are currently unproven. See: Amanda Pfeffer and Michelle Allan, "Award-winning Queen's prof questioned over Indigenous identity claim", CBC News (23 June 2021), online: CBC News <www.cbc.ca> [perma.cc/7YTF-9EPM].

for civil contempt. Two court orders allowed the respondent, Frontenac Ventures Corporation, to conduct exploratory drilling on lands the Ardoch Algonquin First Nation ("AAFN") asserted were within their traditional territory. The appellants had engaged in a peaceful protest and blockade, which prevented Frontenac from drilling on the land. The appellants were subsequently held in contempt of the court orders, admitted their contempt, but then argued their conduct "flowed from their adherence to Algonquin law".[149] The individuals, Mr. Lovelace and Paula Sherman, were sentenced to six months' imprisonment, in addition to substantial fines, which were also levied against AAFN for its contempt.

The Indigenous appellants were esteemed members of their communities. Mr. Lovelace is a former chief of AAFN and was at the time of the appeal a spokesman and chief negotiator for the Nation, as well as a university lecturer.[150] Chief Paula Sherman was, at the time of the appeal, co-chief of AAFN, a Professor of Native Studies, and had received a Ph.D. after overcoming a "lifetime of poverty".[151]

Justice Macpherson, writing for a unanimous Court, made several statements in *obiter dicta* regarding the purpose of injunctions and the rule of law. He wrote that granting an injunction requires a "comprehensive and nuanced description of the rule of law", demanding a "careful and sensitive balancing of many important interests",[152] which in this case were the rights of AAFN, Frontenac's private interest in exploration, and the respect for Crown property rights.[153] These interests were to be balanced through "consultation, negotiation, accommodation, and ultimately, reconciliation of aboriginal rights and other important, but at times, conflicting interests".[154] He opined that an injunction should not be granted unless the court had made "every effort to encourage" this process, "even if the affected aboriginal communities choose not to fully participate in the injunction proceedings" (emphasis added).[155] He concluded this point by acknowledging the applicants had not appealed the injunctions, but felt it important to "give judicial guidance on the role to be played by the nuanced rule of law […] when courts are asked to grant injunctions, the violation of which will result in aboriginal protestors facing civil or criminal contempt proceedings."[156]

Justice Macpherson's remarks in *obiter* regarding the choice of Indigenous groups not to fully participate in proceedings are faintly reminiscent of the Supreme Court's remarks in *Gladue* regarding Indigenous alienation in the criminal justice system. It is not difficult to imagine that Indigenous groups and individuals might refuse to participate in contempt proceedings, believing the Euro-Canadian justice system, in all its forms, is a super-imposition that is irrelevant to Indigenous legal systems.

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149 *Frontenac*, *supra* note 142 at paras 1–4.
150 *Ibid* at para 10.
151 *Ibid* at para 11.
152 *Ibid* at para 43.
153 *Ibid* at para 44.
154 *Ibid* at para 45.
155 *Ibid* at para 46.
156 *Ibid* at para 47.

This view was expressed in many of the commissions of inquiry canvassed above and was argued explicitly by Mr. Lovelace in the motion proceedings, where he articulated his view that Algonquin law was supreme.[157]

Addressing the core issue on appeal, the Court noted that the motion judge's reasons for sentencing focused exclusively on punishment and deterrence, ignoring the principles of reformation and rehabilitation.[158] The motion judge had also failed to refer to mitigating factors present, including that both individual contemnors were first offenders, were leaders in their communities, candidly conceded their contempt and had engaged in non-violent, non-destructive protest.[159]

The Court determined *Gladue* principles "are applicable when fashioning a sentence for civil or criminal contempt on the part of aboriginal contemnors". The respondent's arguments that *Gladue* principles should not be extended beyond the criminal context was rejected. The Court noted first that *Gladue* principles had already been applied outside of criminal sentencing,[160] and that *Gladue* was a case that "in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations".[161] On this point, the Court listed three factors emanating from *Gladue* and of particular relevance to this case:

> I note three factors in particular that were highlighted in *Gladue*: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.[162]

The Court then applied each of the three factors to the circumstances at issue:

> First, while the appellants did not contest the injunctions and admitted that they were in breach of the orders, the enforcement of the injunctions by imprisonment could not help but emphasize the estrangement of this community and aboriginal peoples generally from the justice system. The use of incarceration as the first response to breach of the injunction dramatically marginalizes the significance of aboriginal law and aboriginal rights. Second, imposing a lengthy term of imprisonment on a first offender fails to recognize the impact of years of dislocation. The fact that persons of the stature of Mr. Lovelace and Chief Sherman saw no meaningful avenues of redress within the justice system and felt driven to take these drastic measures demonstrates the impact of years of dislocation and the other problems discussed in *Gladue*, at paras. 67-69. Finally, imprisonment, far from being a meaningful sanction for the community, had the effect of pitting the community against the justice system.

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157 *Ibid* at para 40.
158 *Ibid* at para 50.
159 *Ibid* at paras 51–52.
160 *Ibid* at para 56.
161 *Ibid* at para 57.
162 *Ibid*.

> That the court found it necessary to imprison the leaders of the AAFN simply serves to emphasize the gulf between the dominant culture's sense of justice and this First Nation's sense of justice.[163]

After describing which *Gladue* principles were applicable in the civil contempt context (Indigenous alienation, dislocation, and the meaningfulness of imprisonment to Indigenous communities), Justice Macpherson turned to an analysis of the unique systemic or background factors that "played a part in bringing AAFN and two of its leaders before the courts to be sentenced for contempt".[164] The Court identified the following background factors:

- An existing land-claim negotiation between Algonquin Nation and Ontario, triggering a duty to consult and accommodate where the proposed activity could impact the claimed rights or title; and
- The fact that Ontario's *Mining Act* is a "remarkably sweeping" law that does not require the consideration of aboriginal land claims or interests.[165]

In the Court's view, the permissive wording of the *Mining Act* was at odds with a "respectable interpretation" of section 35 of the *Charter* and recent Supreme Court jurisprudence.[166] This interpretation, coupled with the "appellants' character, circumstances, [and] conduct", should have operated as "significant mitigation when sentences were imposed on them".[167] The Court ultimately allowed the appeal, set aside the custodial sentences, and disallowed the fines.[168]

## B. Indigenous Alienation from the Justice System and Jury Selection: *R v Kokopenace*

The Supreme Court's decision in *R v Kokopenace* rejected the extension of *Gladue* principles to the generation of jury rolls and serves as an example of the Supreme Court's reluctance to apply *Gladue* principles beyond the sentencing stage.[169]

Justice LaForme JA's reasons in the Ontario Court of Appeal decision emphasized the shortcomings of *Gladue*'s application, noting, as the Court had in *Ipeelee*, that despite the promise of *Gladue*, the problem of Indigenous over-incarceration had worsened.[170] He then cited *Frontenac*, among others, for the proposition that *Gladue* principles "properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system",[171] before determining that the process by which Ontario generates the jury roll should be

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163 *Ibid* at para 58.
164 *Ibid* at para 60.
165 *Frontenac*, *supra* note 142 at paras 60–61.
166 *Ibid* at para 62.
167 *Ibid*.
168 *Ibid* at para 66.
169 Alexandra Hebert, "Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice" 43:1 Queen's LJ 149 at 173.
170 *Kokopenace CA*, *supra* note 145 at para 141.
171 *Ibid* at para 142.

"viewed in the light of this same context".[172] Justice LaForme held the deficiencies of Ontario's efforts to ensure adequate inclusion of on-reserve residents on its jury rolls was a violation of the accused's section 11(d) and (f) *Charter* rights, and ordered a new trial and the introduction of fresh evidence.[173]

Overturning this ruling, Justice Moldaver, writing for the Supreme Court majority, disavowed the Court of Appeal's application of *Gladue* principles to this context:

> By relying on the honour of the Crown and *Gladue* principles, the majority transformed the accused's s. 11 *Charter* rights into a vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system. In doing so, it raised the bar Ontario was obliged to meet to satisfy its representativeness obligation.[174]

Justice Moldaver's reasons have been criticized as offering virtually no explanation as to why *Gladue* principles should not apply to this situation,[175] and characterized as a "minimalist and fixed interpretation of rights".[176] The Court's reasons have also ignored the insidious nature of disaffection with Euro-Canadian legal systems that might lead to Indigenous residents being unwilling to participate in jury questionnaires. The harms of Indigenous alienation and dislocation identified by the majority in *Frontenac* are fundamentally present in this context, and were observed to be so by LaForme JA, who characterized the interests at stake as belonging not only to the accused, but to the Indigenous on-reserve residents, who were not provided a "fair opportunity to have their distinctive perspectives included in the jury roll".[177]

The Supreme Court's reasons may limit the application of *Gladue* if interpreted from the perspective of the accused, whose *Charter* rights under section 11 are engaged only when subject to criminal and penal proceedings. If considered from the juror's perspective; however, no recourse is necessary to section 11 of the *Charter*, and the idea that *Gladue* principles should apply to the process by which jury rolls are formed may be grounded in the right to equality under law, protected by section 15 of the *Charter*. *Gladue* principles are, at their core, about functional equality (i.e., equitable treatment of Indigenous individuals within the justice system), and so the tension the Court found to exist between *Gladue* principles and section 11 *Charter* rights should not exist between *Gladue* principles and those rights found in section 15. In other words, no transformation should be necessary to make section 15 a "vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system".[178] This goal is implicit in the provision, and entirely aligned with the purpose of *Gladue*.

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172 *Ibid* at para 146.

173 *Ibid* at para 224.

174 *Kokopenace SCC*, *supra* note 147 at para 101.

175 Andrew Flavelle-Martin, "Gladue at Twenty: Gladue Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 at 40.

176 *Ibid* at 41.

177 *Kokopenace CA*, *supra* note 145 at para 205.

178 *Kokopenace*, *supra* note 147 at para 101.

Indeed, this issue was argued before the Court of Appeal in *Kokopenace.* The appellant had attempted to invoke public interest standing to argue the Indigenous on-reserve residents' section 15 *Charter* rights had been infringed, but was denied standing.[179] The Supreme Court likewise declined to determine whether the Indigenous on-reserve residents' section 15 rights had been infringed, leaving the possibility open for future challenges.[180]

Justice Cromwell J's dissenting opinion in the Supreme Court appeal offers hope, and perhaps some insight into how such a future challenge may be assessed. His reasons link the low rates of Indigenous participation in the jury questionnaire to alienation from the criminal justice system, making explicit reference to *Gladue* principles in the process:

> […] Again, my colleague believes that the state is not required to address systemic problems contributing to the estrangement of Aboriginal peoples from the criminal justice system in order to achieve its representativeness obligation. These views, as I see it, overlook the state's responsibility for these factors and thus its responsibility to make reasonable efforts to address them. Having played a substantial role in creating these problems, the state should have some obligation to address them in the context of complying with an accused's constitutional right to a representative jury roll.
>
> We must first be clear what the phrase "systemic problems" in this context refers to. It is a euphemism for, among other things, racial discrimination and Aboriginal alienation from the justice system. In *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688, and *Williams*, this Court recognized the problem of systemic bias and discrimination against Aboriginal people in the criminal justice system.[181]

Given the same process is generally applicable to the formation of jury rolls in either the criminal or civil contexts,[182] a future constitutional challenge to the inadequate inclusion of Indigenous individuals in jury pools, grounded in the *Gladue* principle of Indigenous alienation and dislocation, would have clear impacts on civil proceedings.

## C. Witness Credibility

Assessments of witness credibility are an essential part of the adversarial process inherent to common law. However, despite the purported utility of witness examinations, credibility assessment remains an imperfect process that is more "an art than a science" and is dependent on "intangibles such as demeanour and the manner of testifying" to be achieved.[183]

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179 *Kokopenace SCC, supra* note 147 at para 101.

180 *Kokopenace SCC, supra* note 147 at para 128.

181 *Ibid* at paras 281–282.

182 See *Jury Act*, RSBC 1996, c 242, s. 14 (British Columbia); *Jury Act*, RSA 2000, c J-3, s. 2 (Alberta); *The Jury Act, 1998*, SS 1998, c J-4.2, s. 2 (Saskatchewan); *The Jury Act*, CCSM c J30, s. 1 (Manitoba); *Juries Act*, RSO 1990, c J.3, s.2 (Ontario); *Jury Act*, RSNB 2016, c 103, s. 21 (New Brunswick); *Juries Act*, SNS 1998, c 16, s. 15 (Nova Scotia); *Jury Act*, RSPEI 1988, c J-5.1, s.2(1) (Prince Edward Island); *Jury Act, 1991*, SNL 1991, c 16, s. 31.1 (Newfoundland and Labrador); *Jury Act*, RSY 2002, c 129, s. 2 (Yukon); *Jury Act*, RSNWT 1988, c J-2, s. 2(1) (Northwest Territories); SNu 2002, c 14, s. 2(1) (Nunavut).

183 *S (RD), supra* note 90 at para 128.

The Supreme Court's laudable pronouncement that "[a]t the commencement of their testimony all witnesses should be treated equally without regard to their race, religion, nationality, gender, occupation or other characteristics"[184] poses significant challenges when triers of fact are encouraged to ignore cultural differences which may subconsciously influence them to misapprehend the demeanour of witnesses. This in turn may result in determinations regarding credibility that may impact both civil and criminal proceedings a great deal. This effect may be more pronounced when triers of fact are juries, as observed in *Williams*, and especially so where Indigenous jurors are under-included, as in *Kokopenace*.

Lawyers are not immune, as they may craft cross-examination questions calculated to impeach a witness they deem uncredible and invite triers of fact to reduce the weight given to certain witnesses' testimonies.[185] It is likely for this reason the Truth and Reconciliation Commission has proposed Calls to Action numbers 27 and 28, imploring lawyers, judges and law students to achieve intercultural competence and receive anti-racism training.

Consider the following remarks made in the *Osnaburgh Report*, discussed in Part I of this paper:

> In addition to the problems with language, there are cultural differences that are often misunderstood. First Nations individuals do not fare well in the Euro-Canadian trial format with its emphasis on confrontation. The avoidance of eye contact is cultural behaviour that is often misunderstood.
>
> […]
>
> [T]he Euro-Canadian adversarial system, with its desire to seek the truth through searing cross-examination and confrontation, is completely alien to a culture where the hallmark of conflict-resolution was an informal customary process reinforced by a belief in spiritual sanctions.[186]

The reality of fundamental cultural differences, observed in *Van der Peet* and by the writers of the *Osnaburgh Report,* create discordant expressions of language that undermine the efficiencies of demeanour evidence. And yet "the frailty of using demeanour as indicative of credibility […] is certainly at odds with *dicta* from most trial judges who in their reasons frequently use the same as indicating their acceptance or rejection of the testimony of witnesses".[187]

In *R v (S (RD))*, the Supreme Court of Canada dealt with the reasonable apprehension of bias when assessing witness credibility and when the trier(s) of fact are aware of systemic racism in the local community and include that knowledge in their decision making. In delivering her reasons,

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184 *Ibid* at para 131.

185 RJ Currie, "The Contextualised Court: Litigating Culture in Canada" 9:2 International Journal or Evidence and Proof 73 at 82.

186 Ontario, *supra* note 20 at 30.

187 Ronald Delisle & Don Stuart, *Evidence: Principles and Problems*, 6th ed (Toronto: Thomson Carswell, 2001) at 456.

the Youth Court judge had made comments about police in the area being known to mislead the court and had in the past overreacted with non-white groups, which would indicate a questionable state of mind.[188]

Justice L'Heureux-Dubé and Chief McLachlin JJ wrote for a divided Court, though were in the majority on the issues of bias, impartiality, and the relevance of social context. They remarked that the hypothetical "reasonable person," whose apprehension of bias is to be avoided, expects that "triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place."[189] Rather than being neutral, they wrote, judges must strive to be impartial, assisted by their diverse experiences "so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence".[190]

As the racial dynamics of the community were central to the case before her, the trial judge's incorporation of those dynamics were, in Justice L'Heureux-Dubé and Chief Justice McLachlin JJ's view, "simply engaging in the process of contextualized judging which, in our view, was entirely proper and conducive to a fair and just resolution to the case".[191] As the Court was deeply divided on this issue, it is difficult to extract a definitive principle from their reasons, though at least one does emerge:

> Simply to proceed from the starting point that everyone is 'equal' and 'neutral' until the facts prove otherwise (which is what the dissent suggests) is, in effect, a formal equality analysis—it renders one oblivious to the social forces which got the witness onto the stand in the first place.[192]

The Supreme Court's judgement in *R v S(RD)*, and Professor Currie's analysis, quoted above, both pre-date *Gladue* and *Ipeelee*. Their references to "social forces" and stereotypes are reminiscent of *Gladue*'s references to facially neutral factors which are, in reality, products of systemic discrimination.[193]

Professor Currie's apposite acknowledgment of these social forces that convey individuals into court systems they would otherwise not appear echoes Justice Cory and Justice Iacobucci JJ's depiction of systemic discrimination as the root cause of Indigenous offending in *Gladue*.[194] Against this backdrop, consider that section 12 of the *Canada Evidence Act,*[195] which is mirrored by several analogous provincial statutes,[196] permits questioning witnesses as to

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188 *S (RD)*, *supra* note 90 at para 5.
189 *Ibid* at para 39.
190 *Ibid* at para 29.
191 *Ibid* at para 59.
192 Currie, *supra* note 187 at para 88.
193 *Gladue CA*, *supra* note 101 at para 55.
194 *Gladue SCC, supra* note 1 at para 65.
195 *Canada Evidence Act*, RSC 1985, c C-5.
196 See e.g. *Evidence Act* (BC), RSBC 1996, c 124, s. 15.

whether they have been convicted of an offence. The purpose of the federal legislation was interpreted by the Supreme Court in *R v Corbett*:

> What lies behind s. 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness [...] There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.[197]

It is now known, through *Gladue* (and the commissions of inquiry and jurisprudence that preceded it), that systemic discrimination and Indigenous alienation from the criminal justice system operate as root causes of Indigenous offending and conviction – with many Indigenous accused pleading guilty despite being factually innocent, only to hasten the process.[198] To then hold those convictions as suggestive of lower credibility is an abandonment of *Gladue* principles. Instead, triers of fact should heed Justice L'Heureux-Dubé and Chief Justice McLachlin JJ's direction to avoid inappropriate stereotypes by deploying the judicial notice of systemic discrimination required by *Gladue* as social fact evidence that forms a necessary part of the calculus in assessing credibility of Indigenous witnesses.

## CONCLUSION

As the Court stated in *Ipeelee, Gladue* principles are not a panacea.[199] They cannot apply as a miraculous salve for centuries of colonial government policy. However, the broadest principles are flexible enough to be adapted to many contexts outside criminal law. They have been applied when Indigenous individuals have a liberty interest at stake, whether personal – as in the prospect of incarceration for civil contempt of Court, or professional – as Professor Andrew Flavelle-Martin has written about regarding the professional discipline of Indigenous lawyers.[200]

The alienation of Indigenous Peoples from the criminal justice system has impacts even within the civil justice system, as when criminal convictions are used to undermine credibility of Indigenous witnesses, and translates to the justice system at large when Indigenous residents are under-represented in the jury selection process.

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197 *R v Corbett,* 1988 CanLII 80 (SCC) at para 22, [1988] 1 SCR 670.

198 Angela Bressan & Kyle Coady, *Guilty Pleas Among Indigenous People in Canada* (Department of Justice Canada, 2017), online (pdf): <justice.gc.ca> [perma.cc/2BTP-GDLV].

199 *Ipeelee*, *supra* note 2 at para 63.

200 Flavelle-Martin, *supra* note 177.

The possibilities identified in this paper for the application of *Gladue* principles in the civil context are narrow case studies. They recognize the broad but not unlimited potential of *Gladue* principles and are far enough outside the dominant criminal law purposes of *Gladue* as to highlight the principles' malleability.

Extending *Gladue* principles outside criminal law would do service to a justice system that is grappling with how to best give expression to meaningful reconciliation. The responsibility to reconcile Indigenous and colonial justice systems lies with the colonial justice system, and not the Indigenous individuals who attempt to use it. For reconciliation to be effective, the Canadian justice system must accommodate Indigenous Peoples in *every* context.