

# *Gladue*: Beyond Myth and Towards Implementation in Manitoba\*

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## I. INTRODUCTION

Twenty years have passed since Justices Sinclair and Hamilton concluded the groundbreaking *Report of the Aboriginal Justice Inquiry of Manitoba*,<sup>1</sup> which detailed some of the systemic reasons for the over-incarceration of Aboriginal peoples in Manitoba prisons and jails and put forward a number of recommendations to respond to the crisis. While there has been some limited progress, the fact remains that the incarceration of Aboriginal people in grossly disproportionate numbers has become worse, not better. A recent statistical analysis reveals that Aboriginal persons have consistently comprised 17 to 19% of all adult admissions to Canadian federal penitentiaries for the past decade, even though Indigenous peoples represent only 3% of the Canadian population.<sup>2</sup> The statistics are even more shocking when it comes to admission to provincial jails. In 2007/2008, Indigenous persons comprised 21% of all admissions to provincial

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<sup>1</sup> Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* by Murray Sinclair & Alvin Hamilton (Winnipeg: Aboriginal Justice Inquiry, 1991) ["AJI Report"]. After the AJI Report gathered dust on shelves in the 1990s, Paul Chartrand and Wendy Whitecloud co-chaired the Aboriginal Justice Implementation Commission, which made a number of other concrete recommendations for change in the criminal justice system and other systems (such as, for example, child welfare) which were also aimed at meaningfully addressing the crisis. See *Final Report of the Aboriginal Justice Implementation Commission* by Paul Chartrand & Wendy Whitecloud, Commissioners, (Winnipeg: Government of Manitoba, 2001). Limited progress has been achieved in implementing those changes.

<sup>2</sup> Samuel Perreault, "The Incarceration of Aboriginal People in Adult Correctional Services", (2009) 29:3 *Juristat* at 20.

jail in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories.<sup>3</sup>

One policy change that was introduced in response to this over-representation relates to the sentencing of Aboriginal people convicted of crimes. In 1996, Parliament added a new section to the *Criminal Code*, which reads in part:

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

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(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.<sup>4</sup>

The first Supreme Court of Canada case to consider s 718.2(e) involved Jamie Gladue,<sup>5</sup> a young Indigenous woman who pled guilty to manslaughter in relation to the stabbing death of her common law partner, Reuben Beaver.<sup>6</sup> The Court held this provision was enacted in response to alarming evidence that Indigenous peoples were incarcerated disproportionately to non-Indigenous people in Canada.<sup>7</sup> Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to do what is within their power to reduce the over-incarceration of Indigenous people and to seek reasonable alternatives for Indigenous people who come before them.<sup>8</sup> Justice Cory added:

It 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. Where these sanctions are reasonable in the circumstances, they should be implemented. In all

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<sup>3</sup> *Ibid* at 21.

<sup>4</sup> *Criminal Code of Canada*, RSC 1985, c C-46, s 718.2(e).

<sup>5</sup> *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385.

<sup>6</sup> The Court used this case as a lens to interpret s 718.2(e), provided some guidance on the information that should come before courts sentencing Aboriginal people, and was critical of the lack of engagement with s 718.2(e) and the circumstances of Jamie Gladue as an Aboriginal person at her sentencing hearing. However, her three year sentence was upheld. For further discussion of the circumstance in *Gladue* and a critical analysis of the failure of the courts to consider the intersection of gender and race in sentencing Aboriginal women, see Angela Cameron, "R v Gladue: Sentencing and the Gendered Impacts of Colonialism" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon, Purich Publishing, 2008) at 160 [Cameron, "R v Gladue"].

<sup>7</sup> *R v Gladue*, *supra* note 5 at para 58-65; Justice Cory cited some statistics on over-representation: "By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates...The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions. A similar, albeit less drastic situation prevails in Alberta and British Columbia ..." (at para 58). As noted earlier, the rate of over-representation has increased in the years since *Gladue* was decided.

<sup>8</sup> *Ibid* at para 64.

instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.<sup>9</sup>

A judge must take into account the background and systemic factors that bring Indigenous people into contact with the justice system when determining sentence. Justice Cory described these factors as follows:

The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.<sup>10</sup>

The Court spoke quite openly of systemic racism and the way that it translates into disadvantage at various stages of the criminal justice system. All of this was very promising; yet, the crisis of Aboriginal over-incarceration in Canada has continued unabated in the years since *Gladue* was decided.

There are a number of different explanations that might be offered for why this state of affairs persists. From our vantage point in Manitoba, a province that produced the conditions that led to the AJI report, and that has one of the highest rates of Aboriginal incarceration in Canada, we offer a partial explanation centering on what we see as a number of persistent “*Gladue* myths”<sup>11</sup> that operate to limit the remedial impact of s 718.2(e) and to undermine the promise of *Gladue*. In the sections that follow, we briefly sketch out the situation in Manitoba with respect to *Gladue* implementation, before moving on to outline some *Gladue* myths and the reality or complexity that we see lying beneath them. We will focus on three myths: (1) that *Gladue* does not and should not make a difference in sentencing for serious offences; (2) that prison works (for Aboriginal people); and (3) that Aboriginal over-representation is an intractable problem that is too complex to be dealt with through *Gladue*. We will also offer our thoughts on some of the challenges of pursuing justice for Indigenous peoples in the current context and note some positive developments and ways forward.

## II. *GLADUE* IN MANITOBA

It was in Manitoba that the problems faced by Aboriginal peoples with the criminal justice system were brought to national attention, when the murders of Helen Betty Osborne and JJ Harper provoked a public inquiry.<sup>12</sup> The report of

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<sup>9</sup> *Ibid* at para 74.

<sup>10</sup> *Ibid* at para 67.

<sup>11</sup> One meaning of “myth” as defined in the Oxford Dictionary is “a widely held but false idea or belief.” We use the term myth here to refer to misconceptions or assumptions about s 718.2(e) and about *Gladue* that limit its application and impact.

<sup>12</sup> AJI Report, *supra* note 1, vol I, ch 1.

that inquiry made many recommendations for systemic reform, some of which resemble the principles of the *Gladue* decision, including:

- that incarceration should be avoided for Aboriginal people, except where they pose a danger to the public, or the gravity of the offence leaves no other option, or where the individual has a history of disregarding past court orders;
- that the Manitoba Court of Appeal should encourage more creativity by sentencing judges in searching for non-custodial alternatives for Aboriginal people; and
- that sentencing judges should invite Aboriginal communities to express their viewpoints on an appropriate sentence.<sup>13</sup>

In *Gladue*, the Supreme Court made it clear that s 718.2(e) requires a “different methodology” for assessing a fit sentence for an Aboriginal person.<sup>14</sup> Justice Cory in *Gladue* said that a judge must consider the role of systemic factors in bringing a particular Aboriginal accused before the court.<sup>15</sup> A judge is obligated to obtain that information with the assistance of counsel, or through probation officers with pre-sentence reports, or through other means. A judge must also obtain information on community resources and treatment options that may provide alternatives to incarceration.<sup>16</sup> In *R v Kakekagamick*, the Ontario Court of Appeal noted pointedly that Crown prosecutors and defence counsel alike are under a positive duty to provide information and submissions on *Gladue* factors where appropriate.<sup>17</sup> The presiding judge, even when faced with an inadequate report or inadequate assistance from counsel, is still obliged to try to obtain the information necessary for a meaningful consideration of *Gladue*.<sup>18</sup>

In Manitoba, where a majority of those accused and sentenced are Aboriginal people, *Gladue* has not been implemented in a systemic way.<sup>19</sup> Despite admonitions by the Supreme Court and other appellate courts that judges and lawyers are obliged to facilitate the gathering of information on the circumstances of Aboriginal people and on appropriate and available rehabilitative resources, there is no dedicated program in place in Manitoba to support this endeavour. Currently, probation officers employed by Manitoba Justice to write pre-sentence

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<sup>13</sup> *Ibid* at App I.

<sup>14</sup> *R v Wells*, 2000 SCC 10, [2000] 1 SCR 207 at para 44.

<sup>15</sup> *Gladue*, *supra* note 5 at para 69.

<sup>16</sup> *Ibid* at para 83-84.

<sup>17</sup> *R v Kakekagamick* (2006), 81 OR (3d) 664 at para 53, 211 CCC (3d) 289. With respect to defence counsel's obligations, Legal Aid Ontario has taken steps to develop competence among defence lawyers to represent Aboriginal clients in criminal matters, including through the implementation of “*Gladue* Panel Standards”. See “Fact Sheets” online: Legal Aid Ontario <[http://www.legalaid.on.ca/en/about/fact\\_aboriginalservices.asp](http://www.legalaid.on.ca/en/about/fact_aboriginalservices.asp)>.

<sup>18</sup> *Ibid* at para 46.

<sup>19</sup> See generally the presentations by various speakers at the symposium, “Implementing *Gladue*”, *supra* note \*\*.

reports (PSRs) will, on the request of defence counsel, add a “*Gladue* factors” section to a standard PSR. By way of contrast, a number of dedicated Aboriginal Persons Courts in Ontario have programs in place to facilitate the production of *Gladue* reports. One of a number of staff caseworkers from Aboriginal Legal Services of Toronto (ALST) will assist the court at the request of the judge, defence counsel, or the Crown Attorney. The caseworker will investigate the background and life circumstances of the Indigenous person, and then prepare a report detailing that information, and may also provide recommendations for a sentence.<sup>20</sup>

Research conducted at the national level indicates that probation officers preparing PSRs generally spend one to two and one half hours interviewing “collaterals”, including family members.<sup>21</sup> A full *Gladue* report requires a more substantial period of preparation, both because of the greater number of persons to be interviewed, and also the information that has to be obtained. Individual interviews often have to be both in-person and lengthier due to the nature of the information being gathered, but also to establish a meaningful rapport with members of the Aboriginal community. A standard pre-sentence report tends to limit the background information to interviews with the accused’s immediate family, and possibly an employer or a select few other persons close to the accused. A meaningful *Gladue* report requires much more extensive interviewing to understand and locate the accused’s background in the context of systemic factors facing Aboriginal people generally. Persons who should be interviewed will often include not just the immediate family, but the accused’s broader relations, as well as other members of the community. A reason for this is to impress upon the court that what is troubling the accused may in fact be troubling the community at large as well. Interviews with the accused’s relations must also reach back to previous generations so that the accused’s background can be connected to historical phenomena that have acted as oppressive forces on Aboriginal peoples generally, such as residential schools or the “Sixties Scoop”. Elders or other culturally important members of the community may also have to be interviewed to obtain information about what may be troubling the accused, how the community may want to approach the problem, and what options may be available for dealing with the problem.

Research by sociologists Kelly Hannah-Moffat and Paula Maurutto, comparing *Gladue* reports prepared by Aboriginal caseworkers from ALST to PSRs, even those incorporating “*Gladue* factors,” sheds light on the problems with

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<sup>20</sup> “Aboriginal Persons Court (“*Gladue* Court”)” online: Aboriginal Legal Services of Toronto <<http://www.aboriginallegal.ca/gladue.php>>.

<sup>21</sup> Public Safety Canada, *Presentence Reports in Canada 2005-03* by James Bonta et al, (Ottawa: Minister of Public Safety and Emergency Preparedness, 2005) at 22.

the “add *Gladue* and stir” approach utilized in jurisdictions such as Manitoba.<sup>22</sup> The fundamental purpose and governing logic of a PSR is to provide a risk assessment to the court, increasingly incorporating an actuarial criminogenic risk instrument or tool. As Hannah-Moffat and Maurutto point out, there is a fundamental contradiction between the standard PSR focus on risk assessments and the purpose of a *Gladue* report “to provide the court with culturally situated information which places the offender in a broader social-historical group context... and reframe[s] the offender’s risk/need by holistically positioning the individual as part of a broader community and as a product of many experiences.”<sup>23</sup> As such, when “*Gladue* factors” are tacked on to a PSR, the “effect is to situate risk within a broader actuarial framework with no clear direction on how to reconcile the embedded contradictions,” which may have unintended discriminatory consequences by drawing the probation officer’s attention to race and risk factors.<sup>24</sup>

Not only are the approach and methodology for *Gladue* reports different from PSRs, but it is intended that *Gladue* reports will consider options and include recommendations that a standard PSR would not contemplate. For example, if an accused has previously been through probation or a conditional sentence for a similar offence, it would be likely that a PSR would assess the accused as unfit for another supervisory sentence. For a *Gladue* report, an important question to ask is whether the accused has ever had access to rehabilitative services that are grounded in Aboriginal culture and spirituality. Convincing evidence has accumulated demonstrating that Aboriginal people respond better to culturally appropriate rehabilitative services in comparison to mainstream rehabilitative services.<sup>25</sup> One issue that a *Gladue* report must address is whether the accused

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<sup>22</sup> Kelly Hannah-Moffat and Paula Maurutto, “Re-Contextualizing Pre-Sentence Reports: Risk and Race,” (2010) 12 *Punishment and Society* 262.

<sup>23</sup> *Ibid* at 274.

<sup>24</sup> *Ibid* at 275.

<sup>25</sup> Evelyn Zellerer, “Culturally Competent Programs: The First Family Violence Program for Aboriginal Men in Prison” (2003) 83:2 *The Prison Journal* 171; Correctional Service of Canada, *The Relevance of a Cultural Adaptation for Aboriginals of the Reintegration Potential Reassessment Scale (RPRS)* by Raymond Sioui et al (Ottawa: Correctional Service of Canada, 2001); Doug Heckbert & Douglas Turkington, “Turning Points: Factors Related to the Successful Reintegration of Aboriginal Offenders” (2002) 14:3 *Forum on Correctional Research* 55 at 56; Marianne O Nielsen, “Canadian Aboriginal Healing Lodges: A Model for the United States” (2003) 83:1 *The Prison Journal* 67; Correctional Service of Canada, *Exploring the Profiles of Aboriginal Sexual Offenders: Contrasting Aboriginal and Non-Aboriginal Sexual Offenders to Determine Unique Client Characteristics and Potential Implications for Sex Offender Assessment and Treatment Strategies* by Lawrence A Ellerby & Paula MacPherson (Ottawa: Correctional Service of Canada, 2002); Chassidy Pachula et al, “Using Traditional Spirituality to Reduce Domestic Violence Within Aboriginal Communities” (2010) 16:1 *Journal of Alternative and Complementary Medicine* 89.

could benefit from culturally appropriate services where standardized approaches have not worked in the past.

Members of the Manitoba defence bar cite a lack of adequate legal aid funding for the preparation of *Gladue* submissions, as well as the often boilerplate nature of the “*Gladue* assessment” portion of PSRs that are currently available through Probation Services as significant barriers to their ability to make fulsome *Gladue* submissions on behalf of Aboriginal clients.<sup>26</sup> We understand that in a majority of cases the practice in Manitoba of adding a *Gladue* section to a standard PSR involves “cutting and pasting” generic references about Aboriginal people to a collection of general *Gladue* factors, or descriptions of problems in specific Aboriginal communities, from past report precedents and templates. In our view, this does not go far enough in setting out the kind of information that *Gladue* requires, such as the problems that may exist in an accused's community at a given point in time, what role *Gladue* factors have had in bringing the specific Aboriginal accused before the court, specific culturally-based resources that may be available for the accused, and the prospects for the accused of responding to those resources. This kind of information can be obtained by a more fulsome investigation and interviewing process, and then presenting that information in a *Gladue* report.

The lack (or inadequacy) of *Gladue* reports to assist judges in sentencing Aboriginal people in Manitoba has been a source of frustration for some judges. For example, in a 2005 decision, Chief Justice Scott expressed concern that *Gladue* reports had not been submitted in relation to two Aboriginal people (Thomas and Flett) being sentenced for manslaughter.<sup>27</sup> He said:

In such circumstances, it is surprising that what has come to be known as a *Gladue* brief was not proposed. (I add that the time and place to do this is during the hearing before the sentencing judge and not for the first time at the appellate level.) While the sentencing judge was assisted by extensive memoranda composed by the appellant Flett (as well as the victim impact statement from the family of the deceased), and was clearly alive to the situation of the appellants as “aboriginal offenders,” I cannot help but conclude that all would have been better served in this instance had a thorough and comprehensive *Gladue* brief been initiated by counsel and presented to the court. All those who are involved in the process of sentencing aboriginal offenders need to do better to ensure that the Supreme Court’s expectations in *Gladue* are fulfilled.<sup>28</sup>

Two years later, in *R v Irvine*, Judge Lismer expressed frustration as follows:

While invited to address the *Gladue* principle in *R v Gladue*, [1999] 1 SCR 688, the court was not provided with any case specific information either in submission or in the PSR except that the PSR, on page 4, notes that the accused's mother is aboriginal and has ties to

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<sup>26</sup> Personal communication with Darren Sawchuk, President of the Criminal Defence Lawyers Association (Manitoba), 15 August 2011.

<sup>27</sup> *R v Thomas*, [2005] MBCA 61, 195 Man R (2d) 36.

<sup>28</sup> *Ibid* at para 22 (citations omitted).

the Brokenhead First Nations Reserve, although she did not grow up there. The accused also did not grow up on a reserve but according to page 10 of the pre-sentence report, he is interested in connecting with his aboriginal roots. There is no information before the court of any unique or background factors that may have played a part in bringing the accused before the court.<sup>29</sup>

More recently, in a 2010 decision, Justice McKelvey noted that no report was available to provide insight into the role of systemic factors behind a manslaughter case involving an Aboriginal accused.<sup>30</sup> However, she opined that *Gladue* would not likely affect the sentence for a serious offence like manslaughter, which would involve similar sentences for both Aboriginal and non-Aboriginal people alike. In our view, the idea that *Gladue* does not apply or will generally not make a difference in sentencing for serious offences is one of the myths that has contributed to the limited implementation of *Gladue*. We note that concerns about the lack of *Gladue* reports have also been expressed by judges in other jurisdictions,<sup>31</sup> such as the Yukon,<sup>32</sup> where Aboriginal people predominate in the criminal courts.<sup>33</sup>

A sociology master's thesis by Rana McDonald at the University of Manitoba, which included interviews with several defence lawyers in Manitoba, revealed that they cited s 718.2(e) and *Gladue* infrequently for various reasons.<sup>34</sup> Some of those reasons, which we suggest are pervasive "*Gladue* myths," convinced lawyers that *Gladue* should not even enter into consideration as to how to represent their Aboriginal clients. These included:

1) A perception that *Gladue* extended a sentencing discount that was inconsistent with the legal system's emphasis on equality.<sup>35</sup>

<sup>29</sup> *R v Irvine*, [2007] MJ No 102 at para 22 (available on QL) (Prov Ct). Our review of reported Manitoba cases turned up many more which indicated that the accused was an Aboriginal person but where a standard pre-sentencing report was relied on, including *R v Travers* (2001), 16 MVR (4th) 113, 2001 CarswellMan 227 (WL Can) (Prov Ct); *R v LEM*, [2001] MJ No 62, 49 WCB (2d) 233 (Prov Ct); *R v Armstrong* (2004), 189 Man R (2d) 162, 66 WCB (2d) 726 (Prov Ct); *R v Monias* 2004 MBCA 55, 184 Man R (2d) 93; *R v Renschler*, [2005] MJ No 542, 2005 CarswellMan 546 (WL Can) (Prov Ct); *R v Bussidor* (2006), 235 Man R (2d) 177, 2006 CarswellMan 876 (WL Can) (Prov Ct); *R v Hall*, 2007 MBPC 27, 217 Man R (2d) 185; *R v Bird*, 2008 MBCA 41, 225 Man R (2d) 304; *R v Scott*, 2009 MBQB 300, 246 Man R (2d) 297; *R v Audy*, 2010 MBPC 55, [2011] MJ No 13; *R v Guimond*, 2010 MBQB 1, 249 Man R (2d) 75; and *R v WRB*, 2010 MBQB 102, 253 Man R (2d) 207.

<sup>30</sup> *R v McKay* (2010), 2010 MBQB 56, 249 Man R (2d) 287.

<sup>31</sup> For a study of the limited implementation of *Gladue* in Quebec, see Alana Klein, "*Gladue* in Quebec" (2009) 54 Crim LQ 506.

<sup>32</sup> See e.g. *R v Smith*, 2010 YKTC 67 at para 24, 2010 CarswellYukon 72 (WL Can).

<sup>33</sup> See also *R v Egeesiak*, 2010 NUCJ 10, [2010] 3 CNLR 166 (Nu Ct J).

<sup>34</sup> Rana McDonald, *The Discord Between Policy and Practice: Defence Lawyers' use of Section 718.2(e) and Gladue* (Masters in Sociology Thesis, University of Manitoba, 2008) [unpublished], online: <<http://mspace.lib.umanitoba.ca/handle/1993/3084>>.

<sup>35</sup> *Ibid* at 85-92.



2) An uncertainty as to which clients might be Aboriginal aside from those living on First Nations reserves.<sup>36</sup>

3) A preference for a “race-neutral” approach to advocacy.<sup>37</sup>

4) A belief that the *Gladue* factors described mitigating factors for many offenders irrespective of race and were not necessarily unique to Aboriginal offenders.<sup>38</sup>

5) A belief that the seriousness or violent nature of the offence, and/or the presence of significant aggravating factors, especially a prior record for the same kind of offence for which the accused is being sentenced, will denude *Gladue* of any meaningful practical value during a sentencing hearing.<sup>39</sup>

Even when the defence lawyers in McDonald’s study thought that *Gladue* had potential applicability to their clients, they had concerns about practical utility should they attempt to raise *Gladue* in court. These included:

1) Some lawyers were not convinced that *Gladue* could be an effective “bargaining chip” during plea bargaining with the Crown.<sup>40</sup>

2) Some were concerned that seeing through preparation of *Gladue* submissions and information for the Court’s consideration would unduly extend the amount of time their clients spent in remand custody.<sup>41</sup>

3) At the time of the study, some rehabilitative services grounded in Aboriginal cultures were available in Winnipeg. These include, for example, the Metis Justice Strategy, the Interlake Peacemakers Project, and the Onashowewin diversion program in Winnipeg. These programs had limited capacity, however, and this often convinced the defence lawyers that they could not make meaningful submissions for non-custodial sentences.<sup>42</sup>

It appears that there are also economic disincentives to lawyers in Manitoba making fulsome *Gladue* submissions on behalf of their clients, particularly those related to legal aid funding. By way of background, there is considerable empirical evidence suggesting that guilty pleas by accused persons who are factually innocent may be a very serious and pervasive problem.<sup>43</sup> Christopher Sherrin argues that

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<sup>36</sup> *Ibid* at 88-90.

<sup>37</sup> *Ibid* at 90-91.

<sup>38</sup> *Ibid* at 91-94,

<sup>39</sup> *Ibid* at 95-103.

<sup>40</sup> *Ibid* at 105-19.

<sup>41</sup> *Ibid* at 109-114.

<sup>42</sup> *Ibid* at 114-120.

<sup>43</sup> At least 20 instances of wrongful convictions stemming from a guilty plea were documented in Samuel R Gross et al, “Exonerations In The United States 1989 Through 2003” (2005) 95 J Crim L & Criminology 523 at 533-536. Twenty-three percent of accused persons who had plead guilty and were interviewed by Richard V Ericson and Patricia M Baranek maintained their innocence: see Richard V Ericson & Patricia M Baranek, *The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process* (Toronto: University of Toronto Press, 1982) at 158. Other researchers have found significant numbers of people who have pled guilty while

part of this problem is a lack of monetary incentive to go ahead with trials, and this can often lead to defence lawyers pressuring clients to plead guilty irrespective of the actual merits of the prosecution's case.<sup>44</sup> Sherrin thus recommends increasing available legal aid tariffs so that defence lawyers have the incentive to properly assert their clients' innocence, especially when the case merits it.<sup>45</sup> The essence of this argument can be extended to *Gladue*. The legal aid tariffs in Manitoba for cases resolved by guilty pleas are set based on the category of offence. A tariff of \$1,250 is provided for a sentencing hearing for aggravated sexual assault, culpable homicide offences, attempt murder, and organized crime offences. A tariff of \$860 is provided for a broad category of either indictable offences or hybrid offences. A tariff of \$450 is provided for all other offences.<sup>46</sup> It will often be considerably more work for a lawyer to properly make use of *Gladue* in comparison to other cases resolved by guilty plea, as MacDonald's thesis hints. It will often require more research, more preparatory work, advocating for the production of a *Gladue* report, and making more extensive submissions based on the *Gladue* factors and their role in an individual client's case. We are aware that Legal Aid Manitoba is stretched very thin to meet the growing needs for representation in criminal and some civil matters and that inadequate access to justice is a systemic problem across Canada.<sup>47</sup> However, we suggest that adequately funding lawyers to make full answer and defence and to make meaningful submissions on sentencing are matters that have *Charter* and Aboriginal rights dimensions<sup>48</sup> and, as such, should be prioritized in the allocation of funding.

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maintaining their innocence: forty-three percent in John Baldwin & Michael McConville, *Negotiated Justice: Pressures to Plead Guilty* (London: Martin Robertson, 1977) at 62-63; eighteen percent in Anthony Bottoms and John McClean, *Defendants in the Criminal Process* (London: Routledge & Kegan Paul, 1976) at 120; forty-four percent in Susanne Dell, *Silent in Court* (London: G. Bell & Sons, 1971) at 30-31; over fifty-one percent in Abraham S Blumberg, "The Practice of Law as Confidence Game" (1967) 1:2 *Law & Soc'y Rev* 15 at 33-35.

<sup>44</sup> Christopher Sherrin, "Guilty Pleas from the Innocent" (2011) 30 *Windsor Rev Legal Soc Issues* 1 at 19; see also Andrew D Leipold, "How the Pretrial Process Contributes to Wrongful Convictions" (2005) 42 *Am Crim L Rev* 1123 at 1154.

<sup>45</sup> Sherrin, *supra* note 44 at 20.

<sup>46</sup> *Legal Aid Manitoba Act*, CCSM c L105, Part 2.

<sup>47</sup> For example, in a recent address to the Canadian Bar Association, Chief Justice McLachlin stated that "[a]ccess to justice is the greatest challenge facing the Canadian justice system." The Right Honourable Beverley McLachlin, Chief Justice of Canada, Address (Remarks to the Council of the Canadian Bar Association, delivered at the Canadian Legal Conference, Halifax, 13 August 2011), [unpublished].

<sup>48</sup> Larry Chartrand has argued that section 25 of the *Canadian Charter of Rights and Freedoms*, which protects Aboriginal and treaty rights from derogation or abrogation by other *Charter* rights should be interpreted as providing constitutional support for Aboriginal rights to particular consideration on sentencing as provided in the common law and s 718.2(e) of the *Criminal Code*. Larry Chartrand, "Section 25 of the *Charter* and Aboriginal Sentencing," (Aboriginal Criminal Justice Post-Gladue lecture, delivered at the Third National Conference, 30 April 2011) [unpublished].

One would think that in Manitoba of all provinces there would be some impetus towards establishing an enduring program or process with a mandate to enable judges to apply s 718.2(e) and *Gladue*, yet little progress has been made.<sup>49</sup> It seems that the sheer number of Aboriginal people in the system – the profound nature of the overrepresentation itself – causes many to question the value of a *Gladue* program that would, at least to start, not be comprehensive in its coverage.<sup>50</sup> However, we suggest that the magnitude of the problem should be a catalyst for, rather than a barrier to, innovation. The establishment of a *Gladue* program (whether a dedicated court or another model that includes Indigenous staff workers writing *Gladue* reports on an ongoing basis) could go some distance towards addressing defence lawyers' problems with making use of *Gladue*, since it would signal and support the principle that *Gladue* submissions for Aboriginal people are expected, rather than being optional.

With this context in mind, we will now focus on just three of the myths that we see underlying reservations about *Gladue* and in the case law more generally. These are myths that can come into play even when *Gladue* information is made available for a court's consideration. These are: (1) that *Gladue* does not and should not make a difference in sentencing for serious offences; (2) that prison works (for Aboriginal people); and (3) that Aboriginal over-representation is an intractable problem that is too complex to be dealt with through *Gladue*.<sup>51</sup> We will briefly discuss each in turn.

### III. MYTH #1: *GLADUE* DOES NOT AND SHOULD NOT MAKE A DIFFERENCE IN SENTENCING FOR SERIOUS OFFENCES

There are at least two ways that this myth manifests: one is the idea that principles of sentencing (denunciation, retribution, protection of society) take precedence in cases of violence and therefore *Gladue* and its principles do not have any "work" to do, even where the Indigenous person before the court is considered a low risk to reoffend. A related myth is that applying *Gladue* means

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<sup>49</sup> We note, however, that following the "Implementing *Gladue*" symposium held at the Faculty of Law, University of Manitoba in March 2011, *supra* note \*\*, members of the defence bar, Crown, and Provincial Court bench have shown interest in a Robson Hall initiative to develop materials such as a "*Gladue* Handbook" for judges, lawyers, community advocates, and policy makers.

<sup>50</sup> For example, Chief Judge Ken Champagne of the Provincial Court of Manitoba expressed concern at the "Implementing *Gladue*" symposium that a *Gladue* court (perhaps located in Winnipeg) would not assist Aboriginal people who are sentenced in northern communities.

<sup>51</sup> It is beyond the scope of this paper to address other myths such as, for example, the pervasive idea that s 718.2(e) provides an unfair sentencing "discount" to Aboriginal people. On this latter subject, see the articles published in the Colloquy on "Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders" (2002) 65 Sask L Rev 1.

that violence – including violence against Aboriginal women and children – is not taken seriously. We will examine both aspects in turn.

### A. Offence Bifurcation and Sentencing Principles

With respect to the first, sections 718 and 718.1 of the *Criminal Code* provide:

718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and others from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to the victim or the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of the harms done to victims and the community;

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.<sup>52</sup>

These provisions describe key objectives of Canadian sentencing law. Objectives that we might associate with Aboriginal justice and restorative justice, such as rehabilitation and reparation to victims and community, are present as part of the general sentencing framework. There are, however, other objectives such as denunciation, deterrence, and separation from society that can often work at cross-purposes with the goals of restorative justice. Section 718.1 in particular has been described by the Supreme Court as consistent with a retributive approach to punishment,<sup>53</sup> in that the severity of the sentence should correlate to the perceived seriousness and moral blameworthiness of the offence.

What is noticeable upon a review of reported cases in Manitoba, as in other jurisdictions,<sup>54</sup> is that some offences are categorically deemed so serious, or aggravating factors seen to cast the offences in such a negative light, as to render *Gladue* inapplicable. For example, in *R v Wilson*, the Aboriginal accused was sentenced to 20 months for dangerous driving.<sup>55</sup> The accused's past criminal record included a long series of traffic offences, including several speeding tickets, and a past dangerous driving charge. Judge Chartier found that this past record was not only a significant aggravating factor, but also indicated that the accused simply had no sense of self-control while behind the wheel. In the court's view, *Gladue* factors had no role in this lack of self-control, and thus the judge felt that

<sup>52</sup> *Supra* note 4 at ss 718 and 718.1.

<sup>53</sup> *R v M* (CA), [1996] 1 SCR 500, [1996] SCJ No 28.

<sup>54</sup> Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 *Crim LQ* 470.

<sup>55</sup> *R v Wilson*, [2001] MJ No 179, 49 WCB (2d) 492 (Man Prov Ct) Chartier J.

incarceration was necessary even when members of the accused's community had proposed a plan of culturally appropriate rehabilitation.

In *R v SES*, the Aboriginal accused was sentenced to 9 years for manslaughter. *Gladue* factors were present both in the accused's life, and in her Aboriginal community of Lake Delmare in Saskatchewan. Judge Gregoire found that the presence of significant aggravating factors, such as the accused bragging about the act afterwards, the brutality of the beating death, and her attempt to conceal evidence of the crime after the fact, spoke heavily in favour of a federal term.<sup>56</sup>

In *R v Hayden*, Judge Pullan found that the accused participated in a home invasion and subsequent manslaughter where the victim was mistakenly believed to have abused the accused's daughter. The court cited numerous aggravating factors and took the view that both an Aboriginal and a non-Aboriginal offender should receive the same sentence in such circumstances, irrespective of *Gladue*.<sup>57</sup>

In *R v Fontaine*, a public fraud case, the loss of \$2 million, the flagrant nature of the fraud, and the subsequent efforts to cover it up, meant that a four year term was considered appropriate for Aboriginal and non-Aboriginal offenders alike notwithstanding *Gladue*.<sup>58</sup> In *R v Beaulieu*, Judge Harvie noted from the pre-sentence report that the accused had a tragic upbringing that included routine physical and sexual abuse as a child, and this background presented a significant set of mitigating factors. Judge Harvie decided, however, that these were overborne by aggravating factors such as the brutal nature of the gang-related attack. The accused received 12 years for manslaughter.<sup>59</sup>

Risk assessment also plays a significant role in whether or not to apply *Gladue*, in ways that may be unsatisfactory from contemporary Aboriginal approaches to justice, and in a manner that often prioritizes the seriousness of the offence. As Hannah-Moffatt and Marrutto have demonstrated,<sup>60</sup> the whole enterprise of evaluating risk for Aboriginal people is in need of serious examination and research. The actuarial risk emphasis of standard PSRs is of limited value when assessing the totality of the circumstances and needs of Aboriginal people:

Within PSRs, individual risk/criminogenic categories are typically decontextualized, hierarchically ordered and reconstituted as criminogenic needs associated with recidivism.

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<sup>56</sup> *R v SES*, [2000] MJ No 225 (available on QL) (Prov Ct); See also *R v Sinclair*, 2009 MBCA 71, 240 Man R (2d) 135 (CA).

<sup>57</sup> *R v Hayden*, [2001] MJ No 343, 50 WCB (2d) 215.

<sup>58</sup> *R v Fontaine*, 2009 MBQB 165, 241 Man R (2d) 215.

<sup>59</sup> *R v Beaulieu*, 2007 MBPC 9, 213 Man R (2d) 239. However, in *R v Desjarlais*, where Judge Lismer deemed that a serious assault, death threats, and an attempt to intimidate the victim ruled out the possibility of a non-custodial sentence, consideration of *Gladue* did merit a reduction of the sentence from 25 months to 13 months: *R v Desjarlais*, 2009 MBPC 45, 256 Man R (2d) 1.

<sup>60</sup> Hannah-Moffat and Maurutto, *supra* note 22.

... The result is a narrowly defined set of categories that are not self-identified by the offender or clinically determined by a treatment professional, but are based on statistical correlations derived from aggregate data from a large population sample of mostly white adult male offenders.<sup>61</sup>

Risk assessments used in the correctional context have been found to be invalid and discriminatory in their over-classification of Aboriginal women as maximum security.<sup>62</sup> Accordingly, until such time as a risk assessment model that appropriately addresses the situation of Aboriginal people is developed, standard risk assessments made in relation to Aboriginal people should be viewed with a degree of scepticism by judges and lawyers applying *Gladue* on sentencing. At a minimum, consideration should be given the potential for Aboriginal people to respond to culturally appropriate programs and services, and the availability of those programs and services, in mitigating risk to the community, or voiding that risk altogether.

With this in mind, there are some encouraging decisions in Manitoba, where *Gladue* principles have been applied to counter common assumptions about risk. For example, in *R v Renschler*, both the Crown in submissions and the probation officer in a pre-sentence report, asserted that the accused was a high risk to re-offend. Judge Smith was nonetheless willing to allow the accused to serve a conditional sentence for theft during a home invasion because the accused, on her own efforts, participated in both educational and healing programs at the Aboriginal Centre in Winnipeg. Judge Smith in fact expressed concern that allotting a federal penitentiary term could prove counter-productive to the accused's rehabilitative efforts.<sup>63</sup>

On the other hand, aggravating factors can themselves lead judges to order a term of imprisonment, irrespective of the evidence relating to risk of re-offending in those cases where *Gladue* applies. In *R v Armstrong*, Judge Preston noted that the accused had made progress with his drug addiction and had intended to avail himself of cultural healing resources that were available in Edmonton. He wanted to avoid becoming more entrenched in a gangland culture that would be expected with a federal penitentiary term. Judge Preston nonetheless found that the aggravating factors, basically a violent home invasion that left the victim severely traumatized, meant that both general and specific deterrence were to be the paramount considerations in sentence. Armstrong was sentenced to a five year term.<sup>64</sup> A similar rationale was applied to an Aboriginal accused guilty of manslaughter, whereby general deterrence for a violent offence demanded a three

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<sup>61</sup> *Ibid* at 278.

<sup>62</sup> Cheryl Marie Webster and Anthony N Doob, "Classification without Validity or Equity: An Empirical Examination of the Custody Rating Scale for Federally Sentenced Women Offenders in Canada" (2004) 46:4 Canadian Journal of Criminology and Criminal Justice 395.

<sup>63</sup> *R v Renschler*, *supra* note 29; see also *R v Abraham*, 2008 MBPC 10, 226 Man R (2d) 5 discussed *infra* text accompanying note 106.

<sup>64</sup> *R v Armstrong*, *supra* note 29; see also *R v Pakoo*, 2004 MBCA 157, 198 CCC (3d) 122.

year term despite the fact that the accused was deemed a low risk to re-offend.<sup>65</sup> In *R v Monias*, the trial judge sentenced the accused to 18 months for acting as a drug courier, despite the fact that the pre-sentence report found that she was a low risk to re-offend and recommended a conditional sentence. The Court of Appeal dismissed the appeal of sentence because by the time the appeal could be considered, the accused had served so much time already that the point had become moot.<sup>66</sup>

In our view, to continue to prioritize deterrence and retribution even for Aboriginal people considered to be low-risk to reoffend goes against the spirit, if not the letter, of the words, “reasonable in all the circumstances,” that appear in s 718.2(e). Routine reliance on standard sentencing principles works at cross-purposes with the remedial purpose envisioned by *Gladue* by denying its application in those instances where it has the potential to make a positive impact.

Much has been made of the statement by Justice Cory in *Gladue* that “[c]learly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant.”<sup>67</sup> Kent Roach has noted that appellate courts in a variety of jurisdictions have prioritized the seriousness of the offence, thereby denuding *Gladue* of much of its potential promise. He states it this way:

Many of the Court of Appeal decisions revolve around an attempt to resolve the ambiguity in *Gladue* and *Wells* about the relevant importance of offender and offence characteristics in serious cases involving violence and death. This focus on what to do with serious cases may to some extent be a product of the data set of appeal cases. Both the Crown and the accused are probably more likely to appeal in serious cases. Nevertheless, the focus on the serious case has the effect of deflecting attention away from the primary concerns expressed in *Gladue* about the overuse of prison. In this way, the transformative potential of *Gladue* may have been blunted by the focus on the most serious cases, in appellate cases at least.<sup>68</sup>

A dividing line between less serious and more serious offences seemed to get reinforced in *R v Wells*,<sup>69</sup> a follow up judgment to *Gladue* by the Supreme Court of Canada. In *Wells*, the Court held that a community based sentence will not be appropriate if an offence requires two or more years of imprisonment. The presence of mitigating factors can reduce an otherwise appropriate term of imprisonment to less than 2 years, and thereby make an Indigenous person eligible for community based sentences.<sup>70</sup> On the other hand, if a judge decides

<sup>65</sup> *R v MacDougall*, 2009 MBQB 299, 247 Man R (2d) 147.

<sup>66</sup> *R v Monias*, 2004 MBCA 55, 184 Man R (2d) 93.

<sup>67</sup> *Gladue*, *supra* note 5 at para 78.

<sup>68</sup> Kent Roach, *supra* note 53 at 503-504.

<sup>69</sup> *Supra* note 14.

<sup>70</sup> Of course, recent amendments to the *Criminal Code* have made conditional sentences unavailable in number of cases, notably where the accused is being sentenced for a “serious personal injury offence” that carries a maximum ten year sentence: *Criminal Code*, *supra* note 4, s 742.1.

that an Indigenous person is a danger to the public, that person will not be eligible for community based sentences.<sup>71</sup> The Court in *Wells* did note, however, that: “[t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application.”<sup>72</sup>

Some appellate courts have recently begun to address this persistent myth and have made it clear that the nature or characterization of the offence should not be used to discount the impact of *Gladue* in cases involving Aboriginal accused. In *R v Jacko*,<sup>73</sup> a recent decision in which three young Aboriginal men from the Wikwemikong First Nation on Manitoulin Island were sentenced for a variety of offences related to a violent home invasion, the Ontario Court of Appeal said:

To begin with an acknowledgement of the obvious, the offences the appellants committed were serious. ... But denunciation and deterrence are not the only sentencing objectives at work here.

Restorative justice sentencing objectives are of crucial importance in the circumstances. They include assistance in rehabilitation, providing reparations for harm done to the victims and to the community, promoting a sense of responsibility in offenders and an acknowledgement by offenders about the harm their conduct has done to the victims and to their community.

In cases such as these, we must do more than simply acknowledge restorative justice sentencing objectives and note approvingly the rehabilitative efforts of those convicted. They must have some tangible impact on the length, nature and venue of the sentence imposed.<sup>74</sup>

In a similar vein, albeit in different circumstances in *R v Ladue*,<sup>75</sup> a recent decision of the British Columbia Court of Appeal, a majority of the court noted:

While all of the principles and purposes of sentencing must be weighed and considered ... when sentencing an Aboriginal offender, consideration must be given to the principles of rehabilitation, restorative justice and promoting a sense of responsibility in the community. These are the principles that many commissions and reports acknowledge are more culturally ingrained for the Aboriginal person than deterrence, denunciation and separation. ...

In my view, what is critical, fifteen years after the proclamation of Bill C-41, is the fact that the overrepresentation of Aboriginal people in prison is increasing. The decision in *Napiesis* emphasizes the importance of sentencing judges taking the time to apply the principles as they relate to Aboriginal offenders. ...

The sentencing judge overemphasized the principle of separating the offender and gave insufficient weight to the principle of rehabilitation. ...

<sup>71</sup> *R v Wells*, *supra* note 14 at para 27-28, 44-50.

<sup>72</sup> *Ibid* at para 50.

<sup>73</sup> *R v Jacko*, 2010 ONCA 452, 101 OR (3d) 1.

<sup>74</sup> *Ibid* at paras 84-87 [emphasis added].

<sup>75</sup> *R v Ladue*, 2011 BCCA 101, 511 WAC 93, leave to appeal to the SCC granted: [2011] SCCA No 209.



While the trial judge acknowledged his Aboriginal heritage, she did not give it any tangible consideration when sentencing Mr. Ladue. If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed.<sup>76</sup>

Mr. Ladue was a Dene man from the Kaska Nation in Ross River, Yukon, who was being sentenced for breach of a long-term supervision order (he was found intoxicated while at a community correctional centre). The original offences for which he received the long-term supervision order were violent in nature. The sentencing judge had emphasized protection of society through isolation as paramount and had not given significant weight to *Gladue* principles. In overturning a three year sentence and substituting one year for the breach, Bennett JA made it clear that *Gladue* must not be discounted due to the nature of the offence or even where the individual has been declared a long-term offender:

In my respectful view, the direction to exercise restraint with particular attention to Aboriginal offenders is still to be applied even in the circumstances of a long-term offender. Much will depend on the circumstances, but the direction is not to be disregarded or downplayed simply because the accused is a long-term offender. Indeed, given the focus on rehabilitation and the reintegration of the offender in the community, as noted in L.M., as well as protection of the public, the principles of restraint and restorative justice may play a significant role in sentencing such offenders, depending on the circumstances.<sup>77</sup>

The key point emphasized by both the British Columbia and Ontario Courts of Appeal in these decisions is that counsel and judges must give serious consideration to *Gladue* and its application in cases involving serious offences. We are not arguing that the sentences meted out in the Manitoba cases mentioned in this section are necessarily too high or inappropriate; we recognize the discretionary nature of sentencing (as well as constraints posed by legislation or appellate review) and the multiplicity of factors that should be considered. However, we are suggesting that *Gladue* and its principles may be given short-shrift in cases involving serious crimes such as offences of violence. It is worth remembering that Jamie Gladue herself was sentenced in relation to a manslaughter charge.

## B. Violence against Women and Children

A more challenging aspect of the myth that *Gladue* does not apply to serious offences is the assertion that to give meaningful effect to *Gladue* (which may lead a

<sup>76</sup> *Ibid* at paras 51-64 [citations omitted].

<sup>77</sup> *Ibid* at para 74. It was noted in *Ladue* that the Ontario Court of Appeal took a different view in *R v Ipeelee*, 2009 ONCA 892, 99 OR (3d) 419, leave to appeal to SCC granted, [2010] SCCA No 129. In quite similar circumstances involving an Inuk man who breached an alcohol abstention provision of a LTSO, the Ont CA held that denunciation, deterrence, and protection of the public took priority over *Gladue* and restorative justice principles. The *Ladue* and *Ipeelee* were heard together by the SCC in Fall 2011.

judge to order a reduced jail term or a community-based sentence) means that violence, particularly violence against Aboriginal women and children, is minimized and not taken seriously.<sup>78</sup> There can be no doubt that violence has reached tragic and crisis proportions in some communities and that state responses, including those in the criminal justice system but extending to child welfare agencies, education and other social services, have been woefully inadequate in preventing and responding to that violence.<sup>79</sup> To the extent that appeals to restorative justice and leniency for Aboriginal men who have assaulted women and children in their communities and families have been put forward in ways that have not provided protection and recognition of the harm done to these victims, and have reinforced racist stereotypes about Aboriginal people, Aboriginal women's groups have rightly raised concerns about the messages sent, as noted by Sherene Razack:

Pauktuutit, the Inuit Women's Association of Canada, as [Teresa] Nahanee reports, launched a constitutional challenge of sentencing decisions on the basis that lenient sentencing of Inuit males in sexual assault cases interferes with the right to security of the person and the right of equal protection and benefit of the law of Inuit women. Nahanee emphasizes Pauktuutit's position that "sexual exploitation of the young must stop because it is not 'culturally' acceptable, and it is not part of Inuit sexual mores and practices." Cultural defence in this context, both Nahanee and Pauktuutit stress, minimizes the impact of sexual assault on Inuit girls and women, a minimizing made possible by the view that Inuit women are sexually promiscuous.<sup>80</sup>

It is true that restorative justice theory<sup>81</sup> expresses a fundamental optimism that there is potential for many people who would otherwise be incarcerated to change their behaviour and do their part to further community safety.<sup>82</sup> However,

<sup>78</sup> We do not mean to minimize the reality of violence experienced by Aboriginal men, which is also higher than the rate for non-Aboriginal men as a group; but rather, we focus on the particular social problems of intimate violence (which is a gendered phenomenon) and abuse of children. For recent statistics on violence experienced by Aboriginal people in Canada, see Jodi-Anne Brzozowski, Andrea Taylor-Butts, & Sara Johnson, "Victimization and Offending Among the Aboriginal Population in Canada" (2006) 26:3 *Juristat* 1.

<sup>79</sup> *Ibid*; Amnesty International, "Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada" (3 October 2004), online: Amnesty International <<http://www.amnesty.ca/stolensisters/amr2000304.pdf>>.

<sup>80</sup> Sherene Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 71.

<sup>81</sup> Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm" (1996) 60:1 *Sask L Rev* 153; Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (Philadelphia: Jessica Kingsley Publishers, 2009).

<sup>82</sup> See for example Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' Empty Promises" (2002) 65:1 *Sask L Rev* 1; Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books Canada Ltd, 1996); Philip Lane et al, "Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities" in Wanda D McCaslin, ed, *Justice as Healing: Indigenous Ways* (St Paul, Minnesota: Living Justice Press, 2005) 369.

critics have argued that placing optimistic hope in restorative justice can prove unjustified in practice, especially when it routinely and uncritically pursues non-carceral alternatives as a standardized objective.<sup>83</sup> Several scholars have questioned the wisdom of applying restorative justice to certain offences that by their very nature involve a power imbalance between the offender and the victim, such as sexual offences<sup>84</sup> and offences of intimate violence.<sup>85</sup>

The Royal Commission on Aboriginal Peoples also commented on the messages sent by a failure to address intimate violence in Aboriginal communities:

If family violence is addressed without proper concern for the needs of the victims, two dangerous messages are sent. The first is that these offences are not serious. This message puts all who are vulnerable at risk. The second and more immediate message is that the offender has not really done anything wrong. This message gives the offender licence to continue his actions and puts victims in immediate danger.<sup>86</sup>

Not surprisingly, concerns of this kind also emerge in judicial decisions such as the Manitoba case of *R v CDB* in which Judge Tarwid concluded that *Gladue* factors had no application in a case involving sexual abuse by the accused of his own daughter.<sup>87</sup> In sentencing the man to four years, the judge's comments were infused with a retributivist approach and a focus on parity in sentencing:

And again, in terms of this being a *Gladue* hearing, is an aboriginal child worth less than a non-aboriginal child? Should an aboriginal offender receive a lesser sentence than a non-aboriginal offender for violating the sacred trust of parenthood by sexually assaulting his own daughter? I do not believe that, that is what the case of *R v Gladue* stands for.<sup>88</sup>

In a similar vein, Judge Barrett had this to say in the British Columbia case of *R v J (H)*:

There have been instances when Canadian judges were persuaded to bend the rules too far in favour of offenders from Native communities or disadvantaged backgrounds. When that

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<sup>83</sup> Angela Cameron, "Sentencing Circles and Intimate Violence: A Feminist Perspective" (2006) 18:2 CJWL479 [Cameron, "Sentencing Circles"]; Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004); Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19:1 CJWL 1; Donna Coker, "Enhancing Autonomy for Battered Women" (1999) 47:1 UCLA L Rev 1 [Coker, "Enhancing Autonomy"].

<sup>84</sup> Annie Cossins, "Restorative Justice and Child Sex Offences" (2008) 48:3 Brit J Crim 359; Shirley Julich, "Views of Justice Among Survivors of Historical Child Sexual Abuse" (2006) 10:1 Theoretical Criminology 125; Christopher P Roseman, Martin Ritchie & John M Laux, "A Restorative Justice Approach to Empathy Development in Sex Offenders: An Exploratory Study" (2009) 29:2 Journal of Addictions & Offender Counselling 96; Acorn, *supra* note 82.

<sup>85</sup> Andrew Fulkerson, "The Use of Victim Impact Panels in Domestic Violence Cases: A Restorative Justice Approach" (2001) 4:3/4 Contemporary Justice Review 355; Cameron, "Sentencing Circles", *supra* note 82; Coker, "Enhancing Autonomy", *supra* note 82.

<sup>86</sup> Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Services Canada, 1996) at 269.

<sup>87</sup> *R v CDB*, 57 WCB (2d) 335, [2003] MJ No 78 (available on QL) (Man Prov Ct).

<sup>88</sup> *Ibid* at para 317.

happens a form of injustice results; specific victims and members of the public generally are given cause to believe that the justice system has failed to protect them.<sup>89</sup>

While we share the concern that violence against Aboriginal women and children must be taken seriously and that ending the violence and providing tangible safety and security for Aboriginal community members should be a top priority for governments, we do not see the meaningful implementation of *Gladue* and restorative justice principles as necessarily inconsistent with those concerns and goals. The challenge is that the demands from survivors of intimate violence, including particularly the calls by Aboriginal women, for the violence against them to be taken seriously have been often misunderstood as calls for retributivist, punitive approaches, rather than as calls to stop the violence. Too often, the resources necessary to provide the safety, economic independence, and ongoing support required to really make a difference simply do not flow to the people who need them.<sup>90</sup>

In addition, demands that violence against women and children be taken seriously, including those by feminist anti-violence groups, have coincided with retributivist law and order policy agendas that have been focused on mandatory minimum sentences<sup>91</sup> and increased use of incarceration.<sup>92</sup> The punitive approaches implemented in recent years fly in the face of the evidence that prison largely does not deliver on its promises of public safety and rehabilitation. They also ignore the complexity of communities, victims' needs and the victim-offender continuum. Cases involving Aboriginal women as accused put this reality into stark relief.<sup>93</sup> Aboriginal women are the fastest growing prison population in

<sup>89</sup> *R v J (H)*, Court file no 1095FC, Reasons for Sentence, 17 January 1990 (BC Prov Ct) 1.

<sup>90</sup> Angela Cameron, *Restorative Justice: A Literature Review*, (Vancouver: The British Columbia Institute Against Family Violence, 2005) at 53 [Cameron, *Restorative Justice*].

<sup>91</sup> For example, mandatory minimum sentences for offences committed with a firearm were added to the Code in 2008. See also Bill C-10: *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, 1<sup>st</sup> Sess, 41<sup>st</sup> Parl, 2011 (Senate first reading 16 December 2011) ["Omnibus Crime Bill"]. Among other measures, the Omnibus Crime Bill increases the number of mandatory minimum sentences and further limits the availability of conditional sentences. However, it is worth noting that there has been no legislative effort to bring in mandatory minimum sentences for sexual assault: Elizabeth Sheehy, "The Discriminatory Effects of Bill C-15's Mandatory Minimum Sentences" (2010) 70 CR (6th) 302. The median sentence for that crime is 360 days.

<sup>92</sup> See e.g. Lauren Snider, "Feminism, Punishment and the Potential for Empowerment," in Mariana Valverde, Linda MacLeod & Kirsten Johnson, *Wife Assault and the Canadian Criminal Justice System*, Toronto: Centre of Criminology 236; and Dianne L Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall LJ 151.

<sup>93</sup> Gillian Balfour, "Falling Between the Cracks of Retributive and Restorative Justice: The Victimization and Punishment of Aboriginal Women" (2008) 3:2 Feminist Criminology 101; Cameron, "R v Gladue", *supra* note 6.

Canada, including for serious offences receiving federal time,<sup>94</sup> and this same group of women are also overwhelmingly survivors of trauma and abuse.<sup>95</sup>

When we listen to survivors of intimate violence, particularly women, we find that they want an end to the violence, and accountability on the part of the community and the state, as well as on the part of the individual accused.<sup>96</sup> What little empirical research there is demonstrates that the best results in addressing intimate violence have come where resources and control of coordinated community justice responses are in the hands of sovereign Indigenous nations and where Indigenous women are involved in crafting the programs.<sup>97</sup> Effectively applying *Gladue* in cases involving violence against Indigenous women and children is ultimately dependent on the infusion of adequate resources and supports to communities.<sup>98</sup> There is no question that these cases represent significant challenges; however, it is also clear that the status quo is not working to provide the security and protection from violence that survivors and communities are entitled to expect.<sup>99</sup>

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<sup>94</sup> There was a 131% increase in the number of Aboriginal women serving federal sentences of imprisonment from 1998-2008. Office of the Correctional Investigator, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections* by Michelle M Mann (Ottawa: Office of the Correctional Investigator, 2009) ["Mann Report"].

<sup>95</sup> Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003) ch 1; See also Canadian Association of Elizabeth Fry Societies/Native Women's Association of Canada, "Women and the Canadian Legal System: Examination Situations of Hyper-Responsibility" in Patricia A Monture & Patricia D McGuire, eds, *First Voices: an Aboriginal Women's Reader* (Toronto: Inanna, 2009) at 385.

<sup>96</sup> Cameron, *Restorative Justice*, *supra* note 89 at 18-21, 54-56; Donna Coker has argued that restorative justice processes may be beneficial to some women who are survivors of violence, but only if they meet five criteria: (1) prioritize victim safety over batterer rehabilitation; (2) offer material as well as social supports for victims; (3) work as part of a coordinated community response; (4) engage normative judgments that oppose gendered domination as well as violence; and (5) do not make forgiveness a goal of the process: Donna Coker, "Restorative Justice, Navajo Peacemaking and Domestic Violence" (2006) 10:1 *Theoretical Criminology* 67 [Coker, "Restorative Justice"].

<sup>97</sup> Cameron, *Restorative Justice*, *supra* note 89; Coker, "Restorative Justice", *supra* note 95; Andrea Smith, "Not an Indian Tradition: The Sexual Colonization of Native Peoples" (2003) 18:2 *Hypatia* 70.

<sup>98</sup> Family group conferences, which involve family members meeting in a safe place to put in place a plan to stop violence, which is then supported by state and community based resources for each member of the family, have been used successfully in cases involving intimate violence in a number of jurisdictions: see e.g. Joan Pennell and Stephanie Francis, "Safety Conferencing: Toward a Coordinated and Inclusive Response to Safeguard Women and Children" (2005) 11:5 *Violence Against Women* 666.

<sup>99</sup> Rupert Ross, "Traumatization in Remote First Nations: an Expression of Concern" (2006), a consultation memo written for the Community and Correctional Services, Yukon [unpublished] (containing the reflections of a Crown attorney about the counter-productive nature of existing criminal justice approaches to address the intergenerational trauma experienced in many First Nations) [Ross, "Traumatization"].

The myth of “too serious for *Gladue* to apply”, in its various manifestations, has significantly restricted the reach of *Gladue*. The remedial purpose of *Gladue* is effectively rendered hollow by minimizing its reach, and denying its applicability to a majority of Aboriginal people who are facing sentences of incarceration, the very people who have the greatest need for *Gladue*’s promise. Which leads to the next myth, namely that “prison works”.

#### IV. MYTH #2: PRISON WORKS (FOR ABORIGINAL PEOPLE)

There is a significant body of research built up over decades which demonstrates that prison does not effectively deliver on many of its promises such as public safety, rehabilitation, and deterrence.<sup>100</sup> The 1996 amendments to the *Criminal Code* – of which s 718.2(e) is just one part – were built in part on that foundation of research and an understanding among policy makers that our society’s reliance on prison is often counter-productive.<sup>101</sup> But even more profoundly, prison does not work for Aboriginal people. The Court in *Gladue* was blunt:

As has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.<sup>102</sup>

Sentencing judges are often under the impression that Aboriginal people will have access to culturally appropriate and much needed programs, therapies and resources for healing if they are sentenced to federal time.<sup>103</sup> For example, in *R v CPW* Judge Tarwid sentenced a young Aboriginal woman to a federal term on the assumption that she would have access to an Aboriginal healing lodge in the federal system.<sup>104</sup> However, the Office of the Correctional Investigator has shed light on the degree to which these programs are often simply unavailable.<sup>105</sup>

<sup>100</sup> See e.g. Anthony N Doob & Cheryl Webster, “Sentence Severity and Crime: Accepting the Null Hypothesis” in Michael Tonry, ed, *Crime and Justice: A Review of Research*, vol 30 (Chicago: University of Chicago Press, 2003) at 143 (extensively reviewing numerous studies which collectively indicate that severity/length of sentence generally does not deter people from committing crimes).

<sup>101</sup> See generally David Daubney & Gordon Parry, “An Overview of Bill C-41 (The Sentencing Reform Act)” in Julian V Roberts & David P Cole, eds, *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31.

<sup>102</sup> *Supra* note 5 at para 68.

<sup>103</sup> It is generally well understood that few resources or programs exist in provincial correctional systems.

<sup>104</sup> *R v CPW* (2002), 172 Man R (2d) 259, 2002 CarswellMan 584 (WL Can) (Prov Ct).

<sup>105</sup> *Protecting Their Rights*, *supra* note 94; Mann Report, *supra* note 93.

Particularly with respect to Aboriginal women, access to the one healing lodge is simply illusory for most women.<sup>106</sup>

In fact, prison is actually a “risk” factor for many Aboriginal people that increases their likelihood of further engagement with the criminal justice system. In a small number of cases, such as *R v Abraham*, this reality seems to be appreciated:

In response to a question from the court as to what rehabilitation would be required to mitigate against the likelihood that Mr. Abraham would acquiesce in resorting to violence the next time he was subjected to similar pressure, counsel suggested that psychological counselling and participation in activities that could increase his sense of self-worth would be most appropriate. In this regard I note as well, in passing, that given Mr. Abraham's susceptibility to pressure and shaming, the likelihood of prison being a maelstrom of completely negative experiences that would entrench him in the criminal world, is high.<sup>107</sup>

Not only can the proliferation of Aboriginal “gangs” be linked to growth and recruitment in Canadian prisons or by gang members returning to communities,<sup>108</sup> but there is substantial evidence of systemic discrimination in corrections at both the federal<sup>109</sup> and provincial levels,<sup>110</sup> as acknowledged by the Supreme Court in *Gladue*. Once sentenced, Aboriginal people tend to serve more of their sentence in prison (i.e. be paroled later or be detained to their statutory release date or to warrant expiry) and be assigned higher security classifications than their non-Aboriginal counterparts.<sup>111</sup> Until we can debunk the myth that our current reliance on imprisonment is working, we will not get very far in addressing Aboriginal over-incarceration. Yet, rather than address the mounting evidence that imprisonment is costly and ineffective in human and fiscal terms, Parliament has been busy passing laws that will pack our jails even further,<sup>112</sup> and will require us to divert billions of dollars to build more prisons. The Manitoba government has been one of the most vocal provinces in calling for this increased use of imprisonment.<sup>113</sup>

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<sup>106</sup> Patricia A Monture, “Women and Risk: Aboriginal Women, Colonialism and Correctional Practice,” in Monture & McGuire, *supra* note 94.

<sup>107</sup> *R v Abraham*, *supra* note 62.

<sup>108</sup> Jana Grekul & Patti Laboucane-Benson, “Aboriginal Gangs and their (Dis)placement: Contextualizing Recruitment, Membership & Status” (2008) 50:1 Can J Crim 59; Mark Totten, “Aboriginal Youth & Violent Gang Involvement in Canada: Quality Prevention Strategies” (2009) 3 IPC Review 135.

<sup>109</sup> Mann Report, *supra* note 93.

<sup>110</sup> AJI Report, *supra* note 1.

<sup>111</sup> Mann Report, *supra* note 93 at 15-22.

<sup>112</sup> See e.g. Bill C-25: *An Act to Amend the Criminal Code (Limiting Credit for Time Spent in Pre-Sentence Custody)*, 2nd Sess, 40th Parl, 2009 (Royal Assent 22 October 2009) and the Omnibus Crime Bill, *supra* note 90.

<sup>113</sup> See e.g. “Swan seeks Criminal Code changes,” *Winnipeg Sun* (2 March 2011). For an analysis of the Manitoba NDP government’s approach to crime, see Andrew Woolford & Jasmine Thomas,

The reality is that even for less serious offences, including those involving the administration of justice or property crime, *Gladue* is not factoring into the many decisions where it could have the most impact.<sup>114</sup> Underlying the many cases where *Gladue* has arguably not made a difference is a lack of resources – to prepare *Gladue* reports, to investigate options for the accused, and to make appropriate submissions to the court, as well as resources in the community to actually provide relevant programs and supports to the accused and to victims. The race to incarcerate flies in the face of reason and limits the availability of alternatives to incarceration – both in terms of new statutory limits on discretion in sentencing and in terms of the diversion of scarce resources that could otherwise be directed to community-based programs that can actually work, which leads to the next myth.

### V. MYTH #3: ABORIGINAL OVER-REPRESENTATION IS AN INTRACTABLE PROBLEM THAT IS TOO COMPLEX TO BE DEALT WITH THROUGH *GLADUE*

There are a number of components to this myth. One is the idea that sentencing is too late in the game to effect change. However, the courts and policy makers in various jurisdictions have, in fact, applied *Gladue* principles to other stages in the criminal justice system – notably bail<sup>115</sup> (where Aboriginal people are more likely than non-Aboriginal accused to be denied bail<sup>116</sup>), but also corrections<sup>117</sup> and other proceedings where an Aboriginal person's liberty is at stake, such as Mental Health Review Board decisions for individuals found not criminally responsible on account of mental disorder<sup>118</sup> and parole ineligibility decisions.<sup>119</sup> The Ontario courts have taken the lead in this regard and others

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"Exceptionalism and Deputization under Today's NDP: Neo-liberalism, the Third Way, and Crime Control in Manitoba," (2011) 26:1 CJSLS 113.

<sup>114</sup> See e.g. *R v Hall*, *supra* note 29; *R v CF*, 2005 MBQB 227, 197 Man R (2d) 183. As Kent Roach has noted, the cases that get reported and appealed tend to be those involving serious charges, so the public record does not fully reflect the extent to which *Gladue* is not being applied.

<sup>115</sup> See e.g. *R v Robinson*, 2009 ONCA 205, 95 OR (3d) 309; and *R v Neshawabin*, 2008 CanLII 73617, 2008 CarswellOnt 8598 (WL Can) (ON SC).

<sup>116</sup> *Gladue*, *supra* note 5 at para 65; AJI Report, *supra* note 1.

<sup>117</sup> For example, the Correctional Service of Canada has directed that all CSC staff should consider all decisions affecting Aboriginal persons in custody in accordance with "Gladue principles"; Correctional Service of Canada, Commissioner's Directive 702 – *Aboriginal Offenders* (Ottawa: Correctional Service of Canada, 2008).

<sup>118</sup> *R v Sim* (2005), 78 OR (3d) 183, 201 CCC (3d) 482 (ON CA).

<sup>119</sup> *R v Jensen*, 74 OR (3d) 561, 195 CCC (3d) 14 (ON CA).



have been slower or more resistant to extending *Gladue* principles in this way,<sup>120</sup> even though in Manitoba, for example, the AJI Report long ago made such recommendations. A more fundamental component of this myth is the idea that Aboriginal over-representation is not a criminal justice problem at all; it is a complex social problem, and that pouring money into various aspects of the criminal justice system will not achieve results. Of course, on one level it is true that colonization, residential schools, and a host of other policies have left Aboriginal people and communities traumatized and poor. There are no “easy fixes” but the criminal justice system is clearly implicated in perpetuating these problems.<sup>121</sup>

Furthermore, the idea that there are not resources to spend or that resources directed – particularly at community-based alternatives to incarceration – would not be well-spent just flies in the face of facts and reason. Our governments are spending billions of dollars on imprisonment<sup>122</sup> but comparatively miniscule amounts on community alternatives<sup>123</sup> and capacity building in Aboriginal communities to address these challenging issues. Legal Aid is already stretched thin to try to meet the basic demands for representation in criminal (and some civil) matters. Lawyers who may try to argue for a more culturally appropriate, community based sentence for their client are often faced with a lack of available options in the community.<sup>124</sup> The Community Holistic Circle Healing Program of the Hollow Water First Nation, for example, is a model developed by one Aboriginal community that has achieved some success.<sup>125</sup> But there is such an unmet demand for such programs – and would be more if the criminal justice system was not so oriented towards punishment and imprisonment.

In a recent decision, Judge Sandhu summarized the reality in Manitoba:

Unfortunately, the *Gladue* process outcomes in Manitoba are rendered generally weak and ineffective due to a lack of resourcing to put *Gladue* principles into action in a manner

<sup>120</sup> Roach, *supra* note 53. Roach notes that, for example, the Saskatchewan Court of Appeal has been receptive to a number of Crown appeals in *Gladue* cases, thereby limiting the scope of that decision in Saskatchewan.

<sup>121</sup> AJI, *supra* note 1; Ross, “Traumatization”, *supra* note 98.

<sup>122</sup> See e.g. The Correctional Service of Canada, 2011-2012 *Report on Plans and Priorities* (Ottawa, Ont: Correctional Service of Canada, 2011), along with other federal, provincial and territorial documents detailing justice spending in Canada, collected online: Tracking the Politics of Crime and Punishment <<http://tcp-canada.blogspot.com/>>

<sup>123</sup> See e.g. Tim Quigley, “Pessimistic Reflections on Aboriginal Sentencing in Canada” (2009) CR (6<sup>th</sup>) 135 (where the author notes that the number of sentencing circles convened in Saskatchewan declined from 39 in 1997 to just one in 2007).

<sup>124</sup> McDonald, *supra* note 34 at 114-120; Sawchuk, *supra* note 26.

<sup>125</sup> The Hollow Water program was initiated by community members in one Manitoba First Nation to deal with widespread intergenerational sexual abuse in the community. An evaluation study found that the program contributed to reduced recidivism for such offences. See J Couture *et al*, *A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process* (Ottawa, Ont: Ministry of the Solicitor General, 2001).

than inspires confidence, both by the court and the public... that will permit the court to confidently send an offender back into the community, confident in the knowledge that community resources would be, if not immediately, shortly and generously made available to the accused, under supervision.... Without that confidence, the application of *Gladue* principles is little utilized by the courts in Manitoba and is little respected by the public. The root of the problem of such a lack of confidence in *Gladue* principles and its application is a matter of resources.<sup>126</sup>

Clearly without an infusion of resources to provide meaningful alternatives to incarceration and to build capacity in Aboriginal communities (for safe and affordable housing, programs and services to address violence, education and vocational training, etc.), s 718.2(e) is a hollow promise. However, the case law and McDonald's interviews with defence lawyers provide a window on some of the more challenging reasons why it is difficult to make change within the criminal justice system.

## VI. CONCLUDING THOUGHTS: CHALLENGES AND WAYS FORWARD

The *Gladue* decision places an imperative on the legal system, as does the social problem of Aboriginal over-incarceration, which is especially acute in Manitoba. However, progress is elusive and barriers are many. Some of these barriers may stem from limitations within *Gladue* itself. Many decisions post-*Gladue* have used Justice Cory's comment regarding when deterrence and incarceration should remain the primary consideration to sustain bifurcation between less serious and more serious offences. *Wells* takes it even further by imposing explicit limitations on when non-custodial sentences are available for consideration under *Gladue*. Nonetheless, some decisions in Manitoba have worsened the situation by crystallizing offence bifurcation, and giving short shrift to *Gladue*, even where the accused was identified as low-risk. Other factors contributing to the limited impact *Gladue* has had in Manitoba, include the absence of a program to facilitate *Gladue* reporting in Manitoba and a lack of adequate resources flowing to community-based alternatives to incarceration. With a few exceptions, when *Gladue* is applied in Manitoba, it has tended to be where the standard justice system would be willing to use probation or a conditional sentence anyway.<sup>127</sup>

<sup>126</sup> *R v Mason* (21 March 2011) (Man Prov Ct) at 6-7. Sandhu J rejected a joint submission for a conditional sentence in a case of break and enter and theft from an adult video store which was committed while the accused was severely intoxicated. The court gave effect to *Gladue* principles and ordered a conditional discharge, citing the significance of avoiding a criminal record for this Aboriginal man who had made significant strides in addressing issues in his life.

<sup>127</sup> A notable exception is *R v Audy*, 2010 MBPC 55 (CanLII) where Judge Slough sentenced an Aboriginal woman to a fine and probation in a case of impaired driving causing bodily harm, an offence for which a conditional sentence is no longer available.

It may seem contradictory for us to promote greater implementation of *Gladue* in Manitoba, and yet lament its shortcomings. Firstly, implementing a *Gladue* program in Manitoba, even taking into considerations some of the limitations latent in *Gladue* itself, can still result in taking some positive strides forward. Appellate courts have produced some very sound decisions that stress that courts must still seriously consider applying *Gladue* even for more serious offences that would demand deterrence and incarceration under standard sentencing principles. We are hopeful that more Manitoba judges will follow this promising development, and give it much needed momentum in the Manitoba justice system. Resources to Indigenous communities – both on reserve and in urban areas – to provide effective community-based programs and services are also needed to provide meaningful alternatives to incarceration.

Secondly, our hope is that setting up a *Gladue* program in Manitoba can be a pathway to more fundamental change.<sup>128</sup> If a *Gladue* program gets off to a good start in Manitoba and achieves early successes, such as reduced recidivism rates, it can become an established feature of the legal system in Manitoba. Once established, it can then it can provide a foundation to enlarge the scope of Indigenous justice programs.<sup>129</sup> Beyond that, who knows? In the future, an established *Gladue* program in Manitoba can provide a foundation for a transition to Aboriginal self-determination over justice, where Aboriginal communities ultimately decide for themselves how they will address crime and disorder. In the meantime, the damage done to Aboriginal people, their families, and their communities through the counterproductive overuse of incarceration cannot be denied. Given recent and ongoing legislative initiatives to increase the use of incarceration, the brunt of which will be born disproportionately by Aboriginal people, there is an increasing practical imperative to do more on this front. Decisions such as *Mason*, as well as the interest shown by members of the Manitoba legal community in the recent *Gladue* symposium and follow-up meetings, demonstrate that there are individuals interested in bringing about systemic change in the criminal justice system. It is time to move from myth to implementation of the basic principles articulated in *Gladue*.

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<sup>128</sup> See also Mark Carter, "Of Fairness and Faulkner" (2002) 65 Sask L Rev 63 (on s 718.2(e) and *Gladue* as an important first step in addressing the extraordinary circumstances of Aboriginal over-incarceration).

<sup>129</sup> Key areas and possibilities for reform have been documented in the AJI Report, *supra* note 1; See also Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System*, (2007) research paper commissioned by the Ipperwash Inquiry, online: <[http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy\\_part/research/index.html](http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/index.html)>. Recommendations to address Aboriginal over-representation in the Ontario criminal justice system include, for example, development of a concrete plan by the province to expand the range of Aboriginal justice programs; examination of Crown policies of general application for their impact on Aboriginal people; and funding of Aboriginal-specific bail programs.