Constitutionalizing Gladue Rights: Critical Perspectives and Prospective Paths Forward

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ABSTRACT

While remedial sentencing practices for Indigenous accused in Canada have often been described in rights-based terms, Canadian jurisprudence has been reluctant to characterize s. 718.2(e) of the *Criminal Code* as an actual "right." At the same time, front-line judges who are witnesses to — and complicit in — the systemic overincarceration of Indigenous people have created something more out of *Gladue* than a *Criminal Code* sentencing guideline. Indeed, they have followed our apex Court's direction that "application of the *Gladue* principles is required in every case involving an Aboriginal offender." Following a few recent expansions of *Gladue* into yet more spheres of the administration of colonial justice, this paper investigates whether there is utility in reconceiving *Gladue* as a *Charter* right. While the substantive and theoretical criticisms of the legal policy mechanism of *Gladue* are valid, binding judicial and administrative decision-makers with a *Charter* responsibility to consider the particular circumstances of Indigenous realities when liberty interests of an accused

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are at stake can serve to strengthen the check on colonial maladministration of justice.

I. INTRODUCTION: *GLADUE*'S "FUTURE TENSE"[1]

Twenty-four years ago, Parliament fundamentally reshaped sentencing in Canada. In s. 718.2(e), Parliament was responding to a slew of reports[2] and commissions[3] that reminded the administrators of the colonial justice system of the horrors of systemic, targeted Indigenous overincarceration.[4] Parliament's response folded an attempt to address this systemic issue into a broader, and more ambitious, reformulation and elucidation of the fundamental principles of sentencing – a novel scheme that would now include explicit consideration for Indigenous accused.[5]

In *R v Gladue*, the Supreme Court was asked to interpret the provision for the first time and, more specifically, whether the provision codified existing common law sentencing principles, or if Parliament intended, and created, something more.[6] Resoundingly, the Court ruled that the provision

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1 "Like verbs, constitutions position us in time; they have a past, present and future tense." John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 at 351.

2 See e.g. House of Commons, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections* (August 1988) (Chair: David Daubney).

3 See e.g. The Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Minister of Supply and Services Canada, February 1987) at 364.

4 We are often cautioned by critics to respect the fact that the full magnitude of horrors has only come to light recently. But the systemic over-incarceration of Indigenous people has long been known, and discussed, by the settler-colonial state. An example of this will be discussed below. See Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (Ottawa: Queen's Printer, 1969) ("An additional striking factor in the situation on the prairies is the extremely high proportion of women incarcerated in provincial jails who are of Indian or Métis origin. These factors, taken together, underline the close relationship between a position of social deprivation and disadvantage and the likelihood of conviction for this type of 'criminal' activity" at 394–395) [*Toward Unity*].

5 Indeed, when Bill C-41 was first introduced, it attracted more controversy for its provisions that sought to extend greater rights to victims of sexual orientation hate crimes. See Tu Thanh Ha, "Bill C-41 Bill much more than same-sex clause", *The Globe and Mail* (19 November 1994) A12.

6 [1999] 1 SCR 688 at para 34, 171 DLR (4th) 385 [*Gladue*].

created a new judicial duty to consider: (1) the unique systemic factors that brought the person before the court and (2) culturally appropriate alternative sentencing procedures and sanctions for the particular Indigenous person and their connection to their Indigenous heritage.[7] From this relatively sparse description, the duty on judges to consider *Gladue* 'factors' and remedial sentences has grown considerably in the two decades since the decision.[8]

Yet, while these practices for Indigenous accused in Canada have often been described in rights-based terms, Canadian jurisprudence has been reluctant to characterize s. 718.2(e) as an actual 'right.' At the same time, front-line judges who are witnesses to — and complicit in — the systemic overincarceration of Indigenous people have created something more out of *Gladue* than a sentencing guideline;[9] indeed, they have followed our apex Court's direction that "application of the *Gladue* principles is required in every case involving an Aboriginal offender."[10]

Following a few recent expansions of *Gladue*[11] into yet more spheres of the administration of colonial justice, this paper investigates whether there is utility in reconceiving *Gladue* as a *Charter* right. While the substantive and

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7 *Ibid* at para 66.

8 Aboriginal Legal Services (ALS) recently argued at the Supreme Court of Canada that *Gladue* considerations should be embedded in the doctrine of collateral attack as it applies to Indigenous offenders in respect of a residency condition in a long-term supervision order. While the argument did not make it into the final case, it is an example of how far *Gladue*, and ALS specifically, have gone to argue the intricacies of the doctrine. See *R v Bird*, 2019 SCC 7 (Factum of the Intervener Aboriginal Legal Services at paras 25–26).

9 Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook*, (Toronto: Emond, 2019).

10 *R v Ipeelee*, 2012 SCC 13 at para 87 [emphasis added] [*Ipeelee*].

11 I italicize *Gladue* (hopefully) consistently throughout this paper even when referring to '*Gladue* principles' and 'factors' because I want to emphasize that they are connected to the legal case *R v Gladue* and not to Jamie Gladue herself. It is, as far as I can tell, unknown what Jamie Tanis Gladue thinks of being the namesake for a whole sub-system of colonial justice. A colleague who mooted at the 2020 Kawaskimhon Law Moot, whose subject was Gladue rights, shared that some teams advocated for the profession to stop referring to them as "Gladue" rights. I wholeheartedly support this submission, and while I do not explicitly advocate for it in this paper, I would quickly change the language of this term to decouple this difficult topic from the name of a woman whose legacy is undoubtedly much more than the criminal case attached to one of the most difficult moments of her life.

theoretical[12] criticisms of the legal policy mechanism of *Gladue* are valid, binding judicial and administrative decision-makers with a *Charter* responsibility to consider the particular circumstances of Indigenous realities when liberty interests of an accused are at stake may serve to strengthen the check on colonial maladministration of justice. This would be especially effective if the conception of a *Gladue Charter* right occurs through a lens that both acknowledges the difficulties of achieving systemic remedies through individualized rights and recognizes the particularly problematic current state of *Gladue* as seen through a critical race theory lens.

Looking to the future of *Gladue* as a *Charter* right requires a few analytical and doctrinal exercises. In this paper, I will attempt to locate an approach to *Charter* expansion that recognizes challenges in addressing systemic policy issues in Canada. Without it, a *Gladue* right might only serve to further enable systemic overincarceration. I will then turn to the substance of my analysis in Part III: investigating whether ss. 7, 12, or 11(e) of the Charter can accommodate *Gladue* rights. In Part IV, I step back to ask more critical questions about a constitutional *Gladue* as a tool for achieving three goals: s. 718.2(e)'s twin purposes of describing Indigenous circumstances and prescribing appropriate sanctions, as well as its underlying, fundamental purpose, the excarceration and decarceration of Indigenous people from the colonial penal system.

II. CREATING NEW *CHARTER* RIGHTS: CRITICAL REFLECTIONS ON THE *CHARTER* AS A TOOL TO COMBAT SYSTEMIC MALADMINISTRATION OF JUSTICE

Discussion of the form and function of *Charter* rights inherently involves discussion of policy. This is not unique to any particular right.[13] But in the judicial development of particular rights, the Court gets it wrong

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12 Carmela Murdocca, "Ethics of Accountability: *Gladue*, Race, and the Limits of Reparative Justice" (2018) 30:3 CJWL 522. Generally regarding rights-based discourses, see Sherene H Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998).

13 Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2016) at 36-5. In this section, I am attempting to establish a framework to evaluate effective prudential arguments for individual *Charter* rights as a solution for systemic maladministration. For more on prudential arguments, see below Part IV.

as often as it gets it right, largely because effective public policy is often not achievable through the pronouncement of individual rights. I want to take this opportunity to reflect in a comparative and purposive way on recent efforts to tackle systemic policy problems through *Charter* rights; specifically, the Court's approach in *Antic*,[14] directed at the systemic obstacles of pre-trial incarceration, and *Jordan*,[15] where the Court has attempted to rein in trial delays in an overextended and underfunded system. Recognizing that it is still quite early to draw firm conclusions, the Court is most effective at checking maladministration — which I define here as systemic, recurring, and pernicious public policy problems involving multiple actors within an institution[16] — where it recognizes the true scope of the problem, identifies the appropriate actors responsible for the problem, and frames the right in terms of clear, enforceable guarantees that do not require strenuous individualized tests for their application.

In *Jordan*, the Court attempts to locate the true scope of trial delay. Twinning a doctrinal and policy problem, the Court notes that the *Morin* framework is flawed because the "interests in a trial within a reasonable time does not necessarily turn on how much suffering an accused has endured."[17] *Jordan* joins the micro-effects of untimely trials with the macro, and in so doing, acknowledges that the scope of the problem with trial delays goes beyond mere inconvenience. In *Antic*, the Court alludes to the "the stakes" of pre-trial custody and that it "affects the mental, social, and physical life of the accused and his family."[18] But there is no serious engagement with evidence pointing to the realities of pre-trial detention.

The Court in *Jordan* spares no institutional actor responsibility for lengthy trial delays. It explicitly names who causes the culture of complacency: police, Crown counsel, defence counsel, courts, and policymakers all have their role to play.[19] By contrast, *Antic* focuses too

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14 *R v Antic*, 2017 SCC 27 [*Antic*].

15 *R v Jordan*, 2016 SCC 27 [*Jordan*].

16 I use 'maladministration' as a term of art, but I do not want to suggest that the overincarceration of Indigenous people has been somehow accidental or as a result of benign negligence. Explicit colonial policies have targeted and intended to produce overincarceration.

17 *Jordan*, *supra* note 15 at para 34 [emphasis added].

18 *Antic*, *supra* note 14 at para 66. The appellant, Antic, was in pre-trial custody for over one year. Nothing is mentioned about the impact this had on him or on his family.

19 *Jordan*, *supra* note 15 at para 41.

narrowly on bail review justices:[20] by ignoring the possibility that the *Code* itself lacks coherence and merits review, Parliament is let off the hook. And while *Antic* discusses the history and importance of the principle of bail,[21] it entirely sidesteps any meaningful conversation about why the diverse array of actors who are responsible for administering the machinery of the massive bail system so routinely fail to do so in a manner that accords with the basic principles of bail. Too much weight in *Antic* is placed on inducing actors to behave "consistently and fairly" through exhortations to conform to "hallowed principles" rather than through substantive procedural protections.[22]

Constitutional obligations give rise to the Court's desire to see them met.[23] To this end, *Jordan*'s ceilings are by far its most controversial recent scheme. Yet, without clear guarantees, how can the Court send effective signals to downstream Courts about what to prioritize? Finding *Gladue* in the *Charter* would elevate, protect, and secure it.[24] *Jordan* told actors to respond, and they did.[25] Mandatory minimums and preliminary inquiries

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20 The most direct 'naming and shaming' done in *Antic* is directed at "some judges and justices [in Alberta] are improperly imposing cash bail without seeking the consent of the Crown even though doing so is prohibited by the *Code*." *Antic*, *supra* note 14 at para 65.

21 *Ibid* at paras 21–31.

22 *Ibid* at para 66. In *Antic*, no explicit direction is made to Crowns to change their behaviour with respect to bail. The only mention of the Crown in *Antic*'s guidelines comes in the form of a simple restatement of the ladder principle's requirements that the Crown show cause for why an alternative form of release is required (*ibid* at para 67).

23 As the Court said in *R v Morin*: "The Court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice." See *R v Morin*, [1992] 1 SCR 771 at 795, 53 OAC 241.

24 Hogg, *supra* note 13 at 36-7.

25 Albeit largely through the hiring of additional Crowns, judges, and general investments into the criminal justice system. See the list of investments described in Maxime Charron-Tousignant, "Unreasonable Delays in Criminal Trials: The Impact of the Jordan Decision" (11 December 2017), online: *Hill Notes* <hillnotes.ca/2017/12/11/unreasonable-delays-in-criminal-trials-the-impact-of-the-jordan-decision> [perma.cc/4LS8-G7GB]. There have been other questionably relevant reforms that have been attempted under the rubric of complying with *Jordan*, including the potentially unconstitutional

have also been identified as areas for reform, however ill-advised the latter may be.[26] By contrast, the Court's strong words in *Antic* have not led to significant policy movement whatsoever.[27] The proper definition of *Charter* rights and remedies is essential to create rights capable of being instrumentalized beyond the hyper-personalized cases of well-resourced accused. Whatever message is being sent must be cognizable to other institutional actors.

Jordan is not without its critics. Much can be learned from these criticisms. Most relevant to *Gladue* is the notion that *Jordan* erred in its setting of descriptive, rather than prescriptive, ceilings.[28] By doing so, the Court not only set the 11(b) bar too high but ensured that it would likely not be lowered in the near future. By choosing a standard that reflected the average delay in the 'real world,' the Court ensured that that world would never be required to significantly change. In setting Constitutional parameters for *Gladue*, it would be a significant mistake to imagine only within the scope of what currently exists. For this reason, I will argue in Part IV of this paper that, for a *Charter* right to be effective, it should be more ambitious and prescriptive, guided by a purposive interpretation of what *Gladue* was intended to accomplish: decarceration.

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amendments proposed in the recently passed Bill C-75. See Jillian Williamson, "Breaking Bail" (2019) 24:1 Can Crim L Rev 131 at 139.

26 See Doug Beazley, "Will the Jordan ruling speed up reform of our justice system?" (22 June 2017), online: *CBA/ABC National* <nationalmagazine.ca/articles/law/in-depth/2017/will-the-jordan-ruling-speed-up-reform-of-our-just> [perma.cc/876V-LP2X].

27 In fact, quite the opposite, as Canada's largest jurisdiction has since substantially decreased funding for legal aid for bail hearings. See Mike Crawley, "Legal aid cuts will clog Ontario's already crowded courts, lawyers warn", *CBC News* (12 June 2019), online: <cbc.ca/news/canada/toronto/legal-aid-ontario-cuts-bail-clinic-1.5172329> [perma.cc/67PM-XQYG]. The judiciary itself has taken up repeating to bail justices the importance of *Antic*. See e.g. *R v Tunney*, 2018 ONSC 961. See also Thomas Surmanski, "How *Antic* Changed Everything for Bail in Canada: The Case of *R. v. Tunney*" (13 February 2018), online (blog): *Robichaud Law* <robichaudlaw.ca/antic-tunney-di-luca-bail-decision> [perma.cc/BC8C-AZL3].

28 See Keara Lundrigan "*R v Jordan*: A Ticking Time Bomb" (2018) 41:4 Man LJ 113 at 122.

III: ENTRENCHING *GLADUE*: POSSIBILITIES AND PITFALLS IN SECTIONS 7, 11(E), AND 12 OF THE *CHARTER*

As Borrows argues, Canada's highest Court adopts an anomalously originalist approach to interpreting the rights of "Aboriginal" people.[29] Manikis writes compellingly on conceiving *Gladue* as a principle of fundamental justice (PFJ).[30] I was inspired by and draw on her work and attempt to continue to expand it by surveying a few different avenues for how *Gladue* could be constitutionalized. In doing so, I advance mostly doctrinal, prudential, and structural arguments for *Gladue* as a constitutional feature, over historical and textual arguments, though there is space for these as well.[31] Ultimately, this theoretical exercise is itself not the reason for incorporating *Gladue* into the *Charter*, but rather its potential utility. Consequently, in each section, I briefly touch on the potential usefulness of novel rights for Indigenous claimants.

This analysis omits many other potential constitutional dimensions of s. 718.2(e), but I would like to highlight two immediately promising ones that exceeded the scope of this analysis. First, the s. 15 dimension of *Gladue* recently used by the Ontario Court of Appeal to invalidate Harper-era legislative provisions barring conditional sentences in *R v Sharma*[32] is worthy of its own direct engagement. Secondly, *R v Morris*[33] is currently under reserve following arguments at the Ontario Court of Appeal. To what extent the issues raised in this paper map onto Black offenders is too complex of a question to address here, though to paraphrase an argument from the Black

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29 J Borrows, *supra* note 1 at 358. Borrows is referring specifically to the jurisprudence regarding s. 35 of the Constitution, but I think this argument is relevant to the interaction between Aboriginal people and the *Charter* more broadly, as I will explain.

30 Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors" (2016) 21 Can Crim L Rev 173.

31 I draw, as does Borrows, on the theoretical argumentative distinctions described by Bobbitt: historical, textual, structural, doctrinal, prudential, and ethical. See Philip Bobbitt, "Methods of Constitutional Argument" (1989) 23:3 UBC L Rev 449. Prudential refers to modes of constitutional argumentation that rely on practical costs and benefits: effectively, policy reasons. Bobbitt attributes their introduction into American legal jurisprudence to Louis Brandeis (*ibid* at 454).

32 2020 ONCA 478, rev'ing 2018 ONSC 1141 [*Sharma*].

33 2018 ONSC 5186 [*Morris*].

Legal Action Centre and the Canadian Association of Black Lawyers, [34] the question is not if anti-Black racism will be considered during sentence hearings, but how. Many of the considerations I address here about the purpose, effects, and nature of *Gladue* as a legal and policy tool are relevant to that ongoing conversation.[35]

A. Section 7

This paper takes up Manikis' argument that the *Gladue* principle meets the three-step test laid out by the Supreme Court for recognizing a PFJ:[36] it is a well-established binding legal principle that applies across the whole criminal justice system;[37] it has enjoyed repeated affirmations from the Supreme Court that it is a principle fundamental to achieving fairness in the criminal justice process;[38] and its contemporary application is proof that it has sufficient precision to yield a manageable standard.[39] I would like to expand on Manikis' doctrinal arguments that *Gladue* could function as a stand-alone PFJ, and grapple with some potential problems.

1. The Doctrinal Argument for Gladue as a Stand-Alone Principle of Fundamental Justice

Any discussion of iterating PFJs starts with *Re BC Motor Vehicle Act*, [40] where the Court described them as being found in "basic tenets of our legal system."[41] Yet, Justice Lamer provided no discrete legal test for uncovering

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34 *R v Morris*, 2021 ONCA (Factum of the Interveners BLAC and the CABL at para 4), online: *BLAC* <www.blacklegalactioncentre.ca/wp-content/uploads/2021/03/C65766.FOI-BLACCABL.pdf> [perma.cc/DF7E-NA8S].

35 The inevitable appellate direction from the Supreme Court on these two decisions is sure to develop the law as it relates to *Gladue*, as well. As Maria C. Dugas writes, there is nothing inherent to s. 718.2(e) that makes it inapplicable to the unique historical experience of Black Canadians: Marie C Dugas, "Committing to Justice: The Case for Impact of Race and Culture Assessments in Sentencing African Canadian Offenders" (2020) 43:1 Dal LJ 103 at 148.

36 Manikis, *supra* note 30.

37 *Ibid* at 183.

38 *Ibid*.

39 *Ibid*.

40 [1985] 2 SCR 486, 24 DLR (4th) 536 [*Re BC Motor Vehicle Act*].

41 *Ibid* at 503. Alluding to concerns that would be developed by subsequent jurisprudence, discussed below, Lamer J held that they go beyond mere "general public policy" but are "in the inherent domain of the judiciary as guardian of the justice system" (*ibid*).

PFJs. After years of turbulence,[42] the Court finally prescribed the test in *Malmo-Levine*.[43] That case and subsequent jurisprudence provide semi-useful signposts to determine what criteria the Court is looking for when applying the three-step test that helps to inform our analysis here.

At the first step, the Court is alive to one primary concern: avoiding stepping too lightly into policy debates. Legal principles must be distinguished from "generalizations about what our society considers to be ethical or moral."[44] Any argument for a novel *Gladue* PFJ should strike the right balance between recognizing a greater scope for a *Gladue* constitutional remedy, but not so great a scope as to open the floodgates to requiring the Court to intervene on behalf of *Gladue* considerations in every government decision-making process as it relates to Indigenous peoples.[45]

In *Malmo-Levine*, the Court rejected the harm principle as a novel PFJ. Suggesting it did not meet the second step of the test, the majority pointed to criminal laws that might run afoul of the "harm principle" and why they were still justified.[46]

Malleability is a concern at the third step as well. In rejecting the harm principle as a manageable standard, the Court pointed to the wide diversity of submissions from both sides of the case as to what constitutes "harms."[47]

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42 Hogg points to the years before *R v Malmo-Levine* and particularly the five distinct definitions of PFJ offered in *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425, 67 DLR (4th) 161. Hogg, *supra* note 13 at 47-23–47-28.

43 A PFJ is a "[1] legal principle about which there is [2] significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and [3] it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person." *R v Malmo-Levine*, 2003 SCC 74 at para 113 [*Malmo-Levine*].

44 *Rodriguez v British Columbia*, [1993] 3 SCR 519 at 591, 107 DLR (4th) 342 [*Rodriguez*].

45 This would likely raise concerns about s. 7 getting too mired in "policy adjudication." *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 9 [*Canadian Foundation*].

46 *Malmo-Levine*, *supra* note 43 at para 118. The Court also rejected the argument that the decriminalization by Parliament of suicide could be described as supporting a consensus "by Parliament or by Canadians in general" (*ibid* at para 123). The majority was quoting Justice Sopinka in *Rodriguez*. In another case that failed at step 2 of the test, while found to be "widely supported in legislation and social policy," the best interests of the child were not a "foundational requirement for the dispensation of justice." *Canadian Foundation*, *supra* note 45 at para 10.

47 "In the present appeal, for example, the respondents put forward a list of 'harms' which they attribute to marihuana use. The appellants put forward a list of 'harms' which they

In *Canadian Foundation*, the best interests of the child (BIOC) was also found to fail the third step of the test due to its application being "highly contextual and subject to dispute" among "reasonable people [who] may well disagree about the result that its application will yield… particularly in areas of the law where it is one consideration among many, such as the criminal justice system."[48]

In pointing to concerns over malleability and subordination,[49] the Court is really concerned about the scope and content of any rights created out of a novel PFJ. If established, how would the Court apply it? In order to better meet the test for a novel PFJ, the argument for a *Charter Gladue* right must contend with this specific difficulty. As will be discussed below, the Court's sentencing jurisprudence recognizes the importance of *Gladue* alongside other sentencing principles. It is frequently subordinated at the expense of other principles and applied incredibly inconsistently among sentencing judges.[50] The Ontario Court of Appeal recently grappled with this idea and developed its own – slightly clearer – test for how *Gladue* applies at sentencing,[51] but this uncertainty will undoubtedly be a concern in establishing a stand-alone PFJ.

The answer to these concerns about *Gladue* also lies in the Court's own flexible understanding of the test for novel PFJs. In deciding the principle of a constitutional entitlement to a presumption of diminished moral culpability for young offenders at sentencing had sufficient precision, the

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attribute to marihuana prohibition. Neither side gives much credence to the 'harms' listed by the other. Each claims the 'net' result to be in its favour." *Malmo-Levine*, *supra* note 43 at para 128.

48 *Canadian Foundation*, *supra* note 45 at para 11.

49 The Court's reasoning suggested that the BIOC being "subordinated to other concerns in appropriate contexts" was crucial in a failure at step 2 of the test. *Ibid at* para 10.

50 See Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548.

51 "The correct approach may be articulated as follows. For an offender's Aboriginal background to influence his or her ultimate sentence, the systemic and background factors affecting Aboriginal people in Canadian society must have impacted the offender's life in a way that (1) bears on moral blameworthiness, or (2) indicates which types of sentencing objectives should be prioritized in the offender's case." *R v FHL*, 2018 ONCA 83 at para 40 [*FHL*]. The Court, after finding the trial judge had misapplied the factors, ultimately upheld the original sentence. This frequent failure of *Gladue* to achieve substantive differences in sentencing outcomes is a worthy subject of further analysis that unfortunately is outside the scope of this paper.

Court pointed to "decades" of administration and application to proceedings against young people.[52] Past practice — with no mention of whether, and to what extent, the principle had been subject to any controversy — was found to be sufficient. Undermining the majority's precise point about manageability were the dissenting reasons of Justice Rothstein, supported by as large of a minority as there can be in a Supreme Court decision. Justice Rothstein agreed that there was a principle of fundamental justice but disagreed about how it applied to the facts at bar, particularly what guarantees flowed from the principle.[53]

More recently, *Ewert* not only confirmed the test in *Malmo-Levine*,[54] but also presents a case in point for why a novel PFJ is required to combat systemic overincarceration. Mr. Ewert, a Métis federal prisoner, launched a s. 7 claim challenging the arbitrariness of the Correctional Service of Canada's (CSC) risk assessment tools as they were never properly tested to ensure they did not disproportionately label Indigenous offenders higher risk.[55] While the majority at the Supreme Court rejected his s. 7 claim, they ultimately agreed that CSC had done something wrong and provided Mr. Ewert with a declaration that the CSC had violated an obligation under its own statute to take "all reasonable steps to ensure that any information about an offender… is as accurate… and complete as possible."[56] The Court infused the obligation with principles from *Gladue* to reach its conclusion that CSC owed a duty to Mr. Ewert, but in their reasons for providing declaratory relief, they made it clear that should Mr. Ewert wish to instrumentalize his 20-year legal battle to Canada's apex Court, he would have to return to the legal starting line: using his declaratory relief to launch a judicial review of the initial decision. [57]

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52 *R v DB*, 2008 SCC 25 at para 69 [*DB*].

53 Justice Rothstein, joined in dissent by Justices Bastarache, Deschamps, and Charron. *Ibid* at para 106.

54 *Ewert v Canada*, 2018 SCC 30 at para 76 [*Ewert*].

55 Mr. Ewert, a Métis man, has spent over 30 years in custody. He challenged five CSC tools and submitted, admittedly weak, expert evidence which the trial judge nevertheless accepted as fact that (1) the tools had been used to affect key aspects of Ewert's incarceration, (2) that the CSC had known about concerns about the validity of the tools with respect to Indigenous offenders since 2000, and (3) that the tools could not be "in and of themselves" relied upon for classifying Indigenous offenders. *Ibid* at paras 14–18.

56 *Corrections and Conditional Release Act*, SC 1992, c 20, s 24(1) [*CCRA*].

57 "[A] declaration… does not invalidate any particular decision made by the CSC, including any decision made in reliance on the impugned assessment tools. Should Mr.

In an article on the proposed unconstitutionality of CSC's offender classification scale, Leitch argues that the application of s. 81 of the *CCRA* — a remedial provision that allows Indigenous prisoners to serve their sentences in the community or at healing lodges — is arbitrary and overbroad and violates s. 7.[58] While the evidence marshalled by Leitch is compelling, much like in *Ewert*, I have concerns that the Court could: a) set the evidence threshold high for findings of arbitrariness, especially in the carceral context and b) side-step arbitrariness claims by pointing to law, or legislation working through Parliament, to provide statutory (and ultimately ineffective) relief. In fact, with the recently passed amendments to the *CCRA*, the government has done just that: anticipating challenges to their risk assessment schemes and requiring that any *Gladue*-type considerations only be considered in risk assessment where they reduce the level of risk.[59] A constitutionalized *Gladue*, by contrast, might provide swift and substantive remedies to claimants seeking to infuse *Gladue* considerations across a broad array of specific administrative contexts, rather than launching an extensive and evidence-based arbitrariness claim. The Supreme Court may currently be more amenable to using s. 7 of the *Charter* to guarantee instrumental rationality,[60] but fashioning a substantive *Gladue* PFJ may provide a more elastic and useful paradigm for Indigenous litigants.

There remains an important doctrinal obstacle to address for a novel *Gladue* PFJ. Manikis' original argument sought to respond to *R v Anderson*, where the Supreme Court explicitly rejected a proposed PFJ "that Crown prosecutors must consider the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options."[61] The Court found that it failed to meet the second requirement, consensus, because it was contrary to "long-standing and deeply rooted" prosecutorial

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Ewert wish to challenge the validity of any such decision, he must do so through an application for judicial review of the relevant decision." *Ewert*, *supra* note 54 at para 88.

58 D'Arcy Leitch, "The Constitutionality of Classification: Indigenous Overrepresentation and Security Policy in Canadian Federal Penitentiaries" (2018) 41:2 Dal LJ 411.

59 See *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27, cl 2.

60 See Andrew Menchynski & Jill R Presser, "A Withering Instrumentality: The Negative Implications of R. v. Safarzadeh-Markali and other Recent Section 7 Jurisprudence" (2017) 81 SCLR (2d) 75.

61 2014 SCC 41 at para 29 [*Anderson*].

independence.[62] Manikis addresses the Court head-on, and argues that *Gladue* considerations are in fact deeply compatible with the constitutional role and duties of prosecutors.[63] But even where *Anderson* may have wrongly decided the law on this point, it is also distinguishable as the Court was quite specific in the language of the PFJ it rejected: that prosecutors be bound by *Gladue* factors, not judges. And while Manikis may also believe that the social consensus argument is unlikely to bind a future Court, in my view what the Court is really talking about when it invokes conflicting legal principles at the second stage of the test is concerned about how a substantive legal principle would operate in the real world.[64] The procedural considerations I discuss in Part IV are crucial in both alleviating judicial concerns of how *Gladue* could operate, while also challenging the Court to meet the enormity of the crisis its rhetoric acknowledges exists with appropriate *status quo*-altering tools.

B. Disproportionality: The Consequences of Ignoring *Gladue* Can be Cruel and Unusual and Violate the Principles of Fundamental Justice

Gross disproportionality is one of three "failures of instrumental rationality" that have repeatedly been recognized by the Supreme Court as constituting principles of fundamental justice and grounding successful constitutional invalidation of the impugned legislation.[65] Gross disproportionality equally grounds a claim that a given punishment is unconstitutional under s. 12 of the *Charter*. Their overlap has been resolved through the Court's preferred application of s. 12 at criminal sentencing and s. 7 to when laws pursuing legitimate state interest are grossly disproportionate to <u>that</u> state interest.[66]

The basic problem of an s. 12 and s. 7 disproportionality *Gladue* right comes from the Court's repeated assertions that proportionality in

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62 *Ibid* at para 30.

63 Manikis, *supra* note 30 at 184–86.

64 Justice Moldaver J. wrote in *Anderson* that Mr. Anderson's submissions, if accepted, would "enormously expand the scope of judicial review of discretionary decisions made by prosecutors" and would "hobbl[e] Crown prosecutors in the performance of their work." *Anderson*, *supra* note 61 at para 31.

65 Hogg, *supra* note 13 at 47–59.

66 *R v Safarzadeh-Markhali*, 2016 SCC 14 at para 72 [*Safarzadeh-Markhali*].

sentencing is not a constitutional obligation, but merely a fundamental legislative one. The Court in *Safarzadeh-Markhali* writes:

> The principles and purposes for determining a fit sentence, enumerated in s. 718 of the Criminal Code and provisions that follow—including the fundamental principle of proportionality in s. 718.1—do not have constitutional status. Parliament is entitled to modify and abrogate them as it sees fit, subject only to s. 12 of the Charter.[67]

This passage underlies the crucial importance of a *Gladue* dimension to s. 12: without it, Parliament could do away with the entire requirement, and all of the other requirements that flow from it, with simple legislative amendment.[68] Making a compelling case that the failure to consider *Gladue* factors at sentencing can result in grossly disproportionate punishments is therefore crucially important to safeguarding 20 years of *Gladue* jurisprudence. A constitutionalized *Gladue* right in s. 12 is also desirable because of its reach: beyond fines and imprisonment, many types of carceral and non-carceral forms of punishment become reviewable through a *Gladue* lens.[69]

So, would failure to consider *Gladue* factors ground an s. 12 claim? Given that *Gladue* would likely be invoked in the context of something considered as "punishment" (meeting the first step of the s. 12 test), the bulk of any doctrinal analysis will have to take place in the second step: proving that failing to consider *Gladue* creates punishment that is "cruel and

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67 *Ibid* at para 71. The Court explicitly rejected Lebel Js comments from *Ipeelee*, writing: "To say that proportionality is a fundamental principle of sentencing is not to say that proportionality in the sentencing process is a principle of fundamental justice for the purpose of determining whether a deprivation of liberty violates s. 7 of the Charter, notwithstanding the *obiter* comment of LeBel J. in *Ipeelee*" (*ibid*). The Court repeated this point in *Anderson*, *supra* note 61.

68 Parliament has indeed already amended these provisions, though with little yet discernible effect. See *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, SC 2015, c 13.

69 A non-exhaustive list from *Charterpedia* shows the reach of s. 12: imprisonment, monetary fine, victim surcharge, non-punitive detention, prisoner transfer and solitary confinement, other conditions of prison detention, prohibition and forfeiture of firearms, and the taking of DNA samples. See Department of Justice, "Charterpedia: Section 12 – Cruel and unusual treatment or punishment", online: *Department of Justice* <justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html > [perma.cc/P3ST-BTKE].

unusual."[70] The most recent jurisprudence on s. 12 lays out the test: more than excessive, but a high bar rarely surpassed.[71]

In *Boudreault*, the Court, when applying this test to the mandatory victim surcharge, ruled that a sentence that "elevates… one objective above all other sentencing principles" cannot save a sentence from evading s.12 scrutiny.[72] Specifically, the mandatory surcharge undermined s.718.2(e). The Court made the rather strong statement that:

> [A]ny criminal sanction that falls disproportionately on the marginalized and vulnerable will likely fall disproportionately on Indigenous peoples… Just as Indigenous peoples remain overrepresented in Canada's prisons, so may we expect them to be overrepresented at committal hearings for defaulting on a surcharge order.[73]

Effectively invoking a presumption of the criminal justice system's uneven impact on Indigenous people, *Boudreault* might set the stage for a finding that disproportionate impact, without any mitigating attempts, might ground a s. 12 claim. There are innumerable examples of the devastating impacts on sentencing not considering *Gladue*.[74] It may also be an indicator of how the Court primarily conceives of *Gladue* as a tool of equity in sentencing, bolstering a s. 15 conception of *Gladue*.[75]

Boudreault also solidifies the notion that the principles of sentencing, to operate constitutionally, cannot operate to the exclusion of all principles over the application of one. This cuts both ways for making the argument for a constitutional aspect of *Gladue*. It both entrenches the importance of the principles working in harmony, while simultaneously discouraging the elevation of s. 718.2(e) above the others.[76]

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70 The preliminary test for s. 12 is to ensure that the state action at issue constitutes "punishment." See *R v Boudreault*, 2018 SCC 58 at paras 37–44 [*Boudreault*].

71 The Court writes: "As this Court has stated many times, demonstrating a breach of section 12 of the Charter is 'a high bar'… The impugned punishment must be more than merely disproportionate or excessive. Rather, '[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society'… It is only on 'rare and unique occasions' that a sentence will infringe s. 12, as the test is '"very properly stringent and demanding."'" *Ibid* at para 45.

72 *Ibid* at para 81.

73 *Ibid* at para 83.

74 See Denis-Boileau & Sylvestre, *supra* note 50 for examples.

75 See discussion in *Sharma*, *supra* note 32.

76 *Gladue*, unlike the mandatory victim surcharge, actually enhances and supports the application of other sentencing principles. "Systemic and background factors, however, do not operate as an excuse or justification for an offence: *Ipeelee*, at para 83. They are

C. Section 11(e): The Right to Reasonable Bail Includes Consideration of *Gladue*

Gladue rights in the bail process have largely failed Indigenous accused.[77] I will advance a model for including *Gladue* principles in the right to reasonable bail, as defined in *Antic*. I will then briefly make the case for why *Gladue* content in the right to reasonable bail is a desirable remedy for Indigenous accused.

1. The Doctrinal Test for the Right to Reasonable Bail

In interpreting the s. 11(e) guarantee of the "right… not to be denied reasonable bail without just cause"[78] the Court has described two discrete aspects of s. 11(e): the right to not be denied "reasonable bail" and the right not be denied bail "without 'just cause.'"[79] Requiring bail to be reasonable means that the "quantum of any monetary component and other… restrictions" must be reasonable.[80] While the types of legal bail are circumscribed by the *Code*, it is ultimately the judicial decisionmaker who orders specific terms of release.[81] These terms, if unreasonable, can be unconstitutional. Requiring bail not be denied without just cause creates a "constitutional standard that must be met for the denial of bail to be valid,"[82] namely that it is (1) narrow, and (2) "necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system."[83]

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only relevant to assessing the "degree of responsibility of the offender", and to considering whether non-retributive sentencing objectives should be prioritized. Accordingly, *Gladue* and *Ipeelee* do not detract from the "fundamental principle" that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." *R v FHL*, *supra* note 51 at para 47.

77 Jillian Rogin, "Gladue and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325 at 343, n 83.

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

79 *Antic*, *supra* note 14 at para 36.

80 *Ibid* at para 41.

81 *Ibid* at para 42.

82 *Ibid* at para 40.

83 *R v Pearson*, [1992] 3 SCR 665 at 693, 144 NR 243 [*Pearson*].

Some form of *Gladue* at bail is essential. The vast majority of accused persons plead guilty through plea bargains,[84] often to avoid remand.

Indigenous peoples represent 21% of those in remand custody, despite only representing 3% of the general population.[85] And yet, the caselaw on *Gladue* and bail is a mess, or as Rogin describes: "sporadic, contradictory, and… misguided."[86] *Gladue* factors are largely ignored at bail, and where they are considered, they are used to place an inappropriate emphasis on rehabilitation and restorative justice, over constitutionally guaranteed principles.[87] In an attempt to ensure bail provisions are applied "consistently and fairly," *Antic* provides further "principles and guidelines" that are to be adhered to that include stand-alone principles such as the interwovenness of s. 11(e) and the right to the presumption of innocence and that terms of release on bail "must not be imposed to change an accused person's behaviour or to punish an accused."[88] An entrenched *Gladue* analysis in s. 11(e) might help mitigate against harmful applications of the principle at the bail stage.

Gladue can inform both aspects of the s. 11(e) right. If restrictions in bail release orders are to be reasonable, they must be informed by *Gladue* factors to avoid *Charter* scrutiny. Interpreting the right to reasonable bail within the context of Gladue as a constitutional facet of s. 11(e) would better mitigate against interpretations of *Gladue* at bail that conflict with the presumption of innocence that "cloaks" all accused until the end of their trial.[89] This is especially relevant to the Constitutional right to reasonable bail, as it is so intimately intertwined with the other Constitutional legal rights, particularly the presumption of innocence, protection against

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84 Between 2008–2009, 59% of accused appearing before Canadian adult courts pleaded guilty. See Marie Manikis & Peter Grbac, "Bargaining for Justice: The Road towards Prosecutorial Accountability in the Plea Bargaining Process" (2017) 40:3 Man LJ 85 at 86–87. Plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system." See Robert E Scott & William J Stuntz quoted in Palma Paciocco, "Seeking Justice by Plea: The Prosecutor's Ethical Obligations during Plea Bargaining" (2017) 63:1 McGill LJ 45 at 47.

85 Rogin, *supra* note 77 at 326.

86 *Ibid* at 327. For a comprehensive list (up to 2017) of *Gladue* cases at Bail, see *ibid* at 332, nn 26–27.

87 *Ibid* at 334. Another approach may be to argue that *Gladue* consideration is required through the lens of prosecutorial ethics in the plea bargaining process. See Paciocco, *supra* note 84 at 64.

88 *Antic*, *supra* note 14 at paras 66–67.

89 Rogin, *supra* note 77 at 329.

unreasonable and invalid detention (*habeas corpus*), and the other two legal rights that form the subject of this paper.[90]

Further, *Gladue* could ensure that bail is not denied in a manner that upsets the second aspect of s. 11(e): that it is for a purpose extraneous to the bail system. The purposes of the bail system have been rather widely interpreted by the Court to include the cessation of further behaviour and the risk of abscondment.[91] *Gladue* can be used to shed light on both of these facets of the s. 11(e) analysis.

Suffusing s. 11(e) of the *Charter* with *Gladue* principles might have the corollary impact that *Gladue* considerations can be better considered at the charge bargaining and plea negotiation stages of the criminal justice process. A recent study on joint recommendations strongly indicated that *Gladue* rights are frequently waived in an attempt to accelerate the plea process.[92]

D. *Gladue*'s Doctrinal Hurdles

Simply arguing that *Gladue* meets these doctrinal tests will not be enough. While a fragmented approach may have the potential to stall reform, all of these constitutional dimensions of *Gladue* can and should complement and reinforce each other, like in other areas of the *Charter*.[93] There will be other intra-constitutional hurdles as well. The carving out of a constitutional right that attracts resource investment must also consider the way that s. 1 is interpreted, particularly in light of recent jurisprudence.[94] But our Constitution's text has other elements that encourage a *Charter* with *Gladue* components: primarily the relationship between s. 35, s. 25, and the legal rights in the *Charter*. These topics go beyond the scope of this analysis,

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90 *Ibid*.

91 See *Pearson*, *supra* note 83.

92 See David Ireland, "Bargaining for Expedience: The Overuse of Joint Recommendations on Sentence" (2015) 38:1 Man LJ 273 at 317.

93 In the right to be tried within a reasonable time, for example, the Court has acknowledged that pre-trial and appellate delay are not themselves included in the s. 11(b) right, but excessive delay at those stages is protected by a supplementary s. 7 protection. Hogg, *supra* note 13 at 47-29–47-30.

94 The Assembly of Manitoba Chiefs filed an intervener factum in a case before the Supreme Court, *Conseil scolaire francophone de la Colombie-Britannique, Fédération des parents francophones de Colombie-Britannique, et al v Her Majesty the Queen in Right of the Province of British Columbia, et al*, 2020 SCC 13 [*Conseil scolaire*]. In it, they write about the case's potential to dilute the s. 1 analysis. See Factum of the Intervener Assembly of Manitoba Chiefs at para 39.

but they vitiate in favour of Indigenous-specific *Charter* rights. Beyond constitutional barriers to *Gladue*, there are theoretical and practical problems with the administration of *Gladue* that require consideration alongside the development of a *Charter* right. Effectively, if there is a *Charter* right to *Gladue*, what should it protect? This is where the policy analysis performed in Part II can inform the doctrinal exercise in Part III to ensure that any remedies flowing from a *Charter Gladue* do as little further harm as possible. It is very possible that the magnitude of the crisis exceeds meaningful judicial law reform, but, in my view, this area of the law has for too long lacked appropriate purposive intention.

IV: APPLYING LESSONS LEARNED TO *GLADUE*: WHAT DOES AN EFFECTIVE *CHARTER* REMEDY LOOK LIKE?

We must be ambitious about the scope of *Gladue* and its potential remedies, given the crushing scale of the permanent crisis of Indigenous overincarceration. The efficacy of *Gladue* should not rely upon sympathetic judges and under-funded (or not funded at all) provincial government programs. Creating an effective remedy will necessarily involve sketching out a greater scope for what a "right" to *Gladue* actually means.

Gladue is a "complex set of legal and bureaucratic interpretations, arrangements, and discourses"[95] described by Murdocca as "racial governance."[96] A *Charter* definition and judicially prescribed requirements have the potential to harmonize and improve the scattered approach of all the myriad policy actors that make up its diffuse implementation. But it also has the capacity to create deep harm. As Sylvia McAdam reminds us, the "typologies of genocide have been described as the bureaucratic apparatus of the systems."[97] In an effort to mitigate the potential for a constitutional *Gladue* to replicate the harmful ways *Gladue* has already been instrumentalized, I advocate for an expansive, purposive model of *Gladue*. It should focus on three basic components: (1) the *Gladue* report, whose purpose is to make Indigenous personal realities cognizable to the common law; (2) *Gladue* remedies, that are intended to make justice more effective

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95 Murdocca, *supra* note 12 at 524.

96 *Ibid* at 525.

97 Sylvia McAdam (Saysewahum), *Nationhood Interrupted: Revitalizing nêhiyaw Legal Systems* (Saskatoon, SK: Purich Publishing, 2015) at 82.

for Indigenous accused through the recognition of Indigenous legal mechanisms; and (3) an ethic of decarceration – the ultimate goal of *Gladue*.

A. *Gladue* as Report: "it hurts to be a story."[98]

There is an inherent power imbalance in storytelling, between the teller and the listener;[99] between its subject and its author. Indigenous accused who recount versions of their life story to a *Gladue* writer, who then have their submissions summarized by a defence counsel, cross-examined by a Crown, and ultimately heard by a statistically white judge, are stories inevitably constructed before the court asymmetrically. We must critically examine the interpretive structures of the formalized storytelling of marginalized groups to understand their power and their potential to compound oppression.[100] As Murdocca argues, even the most compelling *Gladue* sentencing decisions are dependent on "genealogies of colonial racism"[101] that nest in the way *Gladue* reports are funded and written — particularly when they subjectivize the Indigenous accused they are intended to help. Creating clear, enforceable procedural protections for how *Gladue* reports are written and funded is one way a *Charter* right to *Gladue* could ameliorate the present situation.

Given how essential the report is to appropriate judicial consideration of *Gladue* factors, one would anticipate it would form the basis of much judicial consideration. It has not. *Gladue* reports have been largely ignored by the judiciary.[102] Guidance, where it exists, on the form and function of *Gladue* reports comes from organizations that write them,[103] which run the

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98 "Gay Incantations" in Billy-Ray Belcourt, *This Wound is a World* (Calgary, AB: Frontenac House, 2017) at 11.

99 Razack, *supra* note 12 at 36.

100 *Ibid* at 37.

101 Murdocca, *supra* note 12 at 527.

102 This is, in part, due to their continued rarity. Denis-Boileau and Sylvestre's analysis of nearly 635 sentencing decisions revealed that a substantial majority made no reference to a *Gladue* report. See Denis-Boileau & Sylvestre, *supra* note 50 at 587.

103 See Legal Services Society BC, *Gladue Report Guide* (1 March 2018), online (pdf): *Legal Aid BC* <lss.bc.ca/publications/pub/gladue-report-guide> [perma.cc/37QB-4HF3]. These guides can be extremely useful for report writers in jurisdictions that are underfunded, but they can also contribute to the pan-indigenization of *Gladue* reports. The forthrightness with which Legal Aid BC defines *Gladue* rights and the ease of access of their materials was one of the impetuses for writing this paper. For their

gamut from Legal Aid BC, to Aboriginal Legal Services, to the Alberta Government. Judicial guarantees for such reports could be structured into two types: form or content.

Form guarantees could look like this: *Gladue* reports should, where possible, be written by report writers that share the same community as the person who is the subject of the report. During my summer spent interning at Grand Council Treaty #3 (GCT#3),[104] it became evident that the specificity of the organization's focus on Anishinaabe culture in Treaty #3 territory informed every facet of its work. As explained to me by Beverly Williamson, GCT#3's Lead Gladue Writer, Anishinaabe stories do not have headings, so why should *Gladue* reports? For lawyers and judges, it may seem like an infuriating distraction, but as a storytelling tool, it is essential.[105] Storytelling in law can only be useful for the upending of ordinary oppression where it "is an interrogation of how courts come to convert information into fact, how judges, juries and lawyers come to 'objectively' know the truth: 'Those whose stories are believed have the power to create fact.'"[106]

A content guarantee could look like this: *Gladue* reports should also endeavour to locate more than the person's Indigeneity in their scope. Critical race theory asks us to always question when a part of a person is being represented as a whole. *Gladue* reports that only represent the Indigenous subject and not their gender expression or sexual orientation, for example, risk merely constructing another "autonomous liberal self…

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conceptualization of *Gladue* rights, see Legal Services Society BC, "Gladue principles", online: *Aboriginal Legal Aid in BC* <aboriginal.legalaid.bc.ca/courts-criminal-cases/gladue-rights> [perma.cc/W2LJ-94LT].

104 Grand Council Treaty #3 is the traditional government of the Anishinaabe Nation in Treaty #3. Its mandate is to protect, preserve and enhance Treaty and Aboriginal Rights. I am enormously grateful for the patience and grace of its staff, especially those in the Justice Department, or Kaakewaaseya. See Grand Council Treaty #3, online: <gct3.ca> [perma.cc/PJA6-G8NS].

105 As Maurutto and Hannah-Moffat argue, contextualized Indigenous knowledges in courts allow legal professionals to raise novel arguments and have the potential to truly reconstitute and alter outcomes for Indigenous accused. See Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451.

106 Razack, *supra* note 12 at 37.

another abstraction."[107] Put in terms of this *Charter* exercise: any recognition of *Gladue* as a *Charter* right should update the list provided in *Gladue* and *Ipeelee* to reflect that the social factors of colonization occurred along broader lines than just Indigeneity.[108]

As Woolley writes of the "seek justice ethic," the simple exhortation that is supposed to define the complex ambit of a Crown prosecutor's duties, attempting to incorporate "undefined moral concepts into legal duties" fails both in providing guidance and unwittingly contributes to undesirable prosecutorial behaviour.[109] We are far better served when scoping duties to identify the norms and functions of the desirable behaviour and create obligations that flow from those functions — essentially a purposive approach.[110] More than a simple requirement to produce a *Gladue* report, a *Charter* right to *Gladue* should more rigorously define form and content guarantees to ensure the efficacy of such a report in achieving its ultimate goal: revealing the circumstances of the accused. Effective reports should not depend upon the pen of a fortunately well-trained writer[111] or the ear of a particularly sympathetic judge.

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107 *Ibid* at 41, 55. As Razack argues, adopting the responsibility to "trace the other in self" must become central to the legal practice in the courtroom, through "maintaining a … vigilance about how we know what we know."

108 "To be queer and native and alive is to repeatedly bear witness to worlds being destroyed, over and over again." Billy Ray-Belcourt quoted in Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis: University of Minnesota Press, 2017) at 119. The quote precedes Simpson's chapter on "Indigenous Queer Normativity" that discusses the specific ways colonization disrupted queer narratives (*ibid* at 119–44).

109 Alice Woolley, "Reconceiving the Standard Conception of the Prosecutor's Role" (2017) 95:3 Can Bar Rev 795 at 833.

110 *Ibid*.

111 It should be noted, and persistently repeated, that there are functionally no *Gladue* reports written in Manitoba and Saskatchewan. See Keith Fraser, "Gladue reports play key role in sentencing Aboriginal offenders, but program off to slow start", *Vancouver Sun* (9 September 2018), online: <vancouversun.com/news/local-news/gladue-reports-play-key-role-in-sentencing-aboriginal-offenders-but-program-off-to-slow-start> [perma.cc/59W5-BF3K].

B. *Gladue* as a Remedial Sentence: "building a politics of refusal that is generative"[112]

Something about *Gladue* reports makes judges wax poetic. At their core, applying the *Gladue* principles makes judicial actors grapple with complex questions of inter-cultural understandings of justice, something featured in many justice's decisions.[113] While this analytical exercise is crucial, it is entirely unhinged from Indigenous academic scholarship on multi-juridical relationships. The Supreme Court itself was guilty of this in *Gladue*.[114] Despite meriting inclusion in the Supreme Court's description of the British Columbia Court of Appeal (BCCA) decision, little was discussed in the decision about the fact that Jamie Gladue maintained contact with Mr. Beaver's mother, also Cree, who was, in fact, helping Jamie with her status applications at the time of the release of the BCCA decision and had already secured status for one of her and Mr. Beaver's daughters.[115] The decision to include some information about the extent of the reconciliation between Ms. Gladue and the mother of Reuben Beaver indicates that the judges at the Court of Appeal and the Supreme Court had some visceral understanding that that information was relevant to a determination of appropriate justice in the circumstances. But they displayed appalling ignorance at not placing that information within its appropriate context-relevant Cree laws.

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112 Simpson, *supra* note 108 at 177.

113 See e.g. Gibson J in *R v Suggashie*, 2017 ONCJ 67. Describing the effect of s. 718.2(e) as creating a "contact zone within which the legal systems can intersect with a view to achieving greater internormativity" see Denis-Boileau & Sylvestre, *supra* note 50 at 554–55.

114 Drawing on Sheehy's work on wrongful conviction, Roach argues that Ms. Gladue should be considered among the many wrongfully convicted Indigenous women in Canada. Kent Roach, "The Wrongful Conviction of Indigenous People in Australia and Canada" (2015) 17:2 Flinders LJ 203 at 218–20. The Court of Appeal refused to admit fresh evidence that Ms. Gladue may have had a valid self-defence claim despite pleading guilty to manslaughter at trial and the trial judge's finding that Ms. Gladue was not a "battered woman." In addition to being errors of law, they can also be considered through the lens of failure of *Gladue* consideration, errors that are still made today.

115 *Gladue*, *supra* note 6. In the Court of Appeal decision, we learn that this information comes from deposition testimony from Ms. Gladue that her connection to Mr. Beaver's mother, Mary Yellowknee, stems in part from securing Cree status for herself and her children. The record in the case indicates she was seeking status with the Atikameg First Nation, located just two hours from where Reuben Beaver is reported to have been born. *R v Gladue*, [1999] 2 CNLR 231 at para 79, 119 CCC (3d) 481 [*Gladue* CA].

Sentencing decisions can be read as "repositor[ies] of ethical responses to histories of colonial racism in the criminal justice process."[116] They are individual judges wrestling with the realities of hundreds of years of colonial justice with the consequences elaborately laid in front of them. The result is, confusingly, often the reverse of its intent. As Patricia Monture-Angus describes her experience as an Indigenous female legal scholar: "[a]nd when I speak and the brutality of my experience hurts you, you hide behind the hurt. You point the finger at me and you claim that I hurt you."[117] It is important to recognize that it is not only judges that are being told to engage with Indigenous legal orders: in plea negotiations and remand proceedings – truly the bulk of the criminal justice system – Crown prosecutors and defence lawyers are working to identify and refer Indigenous accused to community-based remedial mechanisms.

Divorcing constitutionalizing *Gladue* from any substantive reconsideration of the relationship between colonial and Indigenous law is an error of first principles. As many commissions[118] and scholars have concluded, Indigenous overincarceration and colonial hostility to valid, existing, and workable Indigenous legal mechanisms are fundamentally interconnected. Murdocca tells us that looking for justice in unjust reparative justice processes is to recognize the inherent limits of the colonial criminal justice system in providing justice for Indigenous people. She calls on us to specifically attend to the way Indigenous experience is relayed and instrumentalized through the *Gladue* process.[119]

Humility is a core component of inter-legal discourse.[120] *Gladue* relies on the recognition of remedial processes, but it does not create them.[121] In

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116 Murdocca, *supra* note 12 at 526.

117 Razack, *supra* note 12 at 40, citing Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 35.

118 See Royal Commission on Aboriginal Peoples (RCAP), Aboriginal Justice Inquiry of Manitoba.

119 Murdocca, *supra* note 12 at 539.

120 See Lindsay Borrows, "Dabaadendiziwin: Practices of Humility in a Multi-Juridical Legal Landscape" (2016) 33:1 Windsor YB Access Just 149.

121 "If we began this exercise by imagining that the Canadian state and its courts engage in braiding laws the way we might imagine a single person braids a rope out of materials on hand, we would then have to begin with the notion the state has control over Indigenous law. To think of the state as having control over Indigenous law is, however, to think of Indigenous law as being bits and pieces, constituting no more than articulated rules and principles. This effectively removes Indigenous law from the

light of this analytic lens, any instrumentalization of *Gladue* through the *Charter* has to grapple with this concern. More than simply asking can the *Charter* receive *Gladue* rights, it should ground itself in whether and how the reception of *Gladue* rights into the *Charter* can be conceived *ab initio* in a way that respects the way Indigenous legal orders presently imprint on the doctrine and ensure that it recognizes and reflects back fundamental principles of Indigenous self-determination. For example, diversion programs that require volunteer community service hours — even where they take place in an Indigenous community — are not true Indigenous legal orders. The difference, as Hewitt points out, is that "[r]estorative justice is a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice."[122]

C. *Gladue* as Effective Decarceration and Excarceration: Abolitionist-Informed Perspectives

Fundamentally, *Gladue* rights are intended to be remedial: they exist to combat overincarceration. To deny this purposive approach to *Gladue* is to unnecessarily limit the true scope of the problem of contemporary maladministration of the criminal justice system with respect to Indigenous peoples. An abolitionist informed perspective calls on us to critically examine all reforms through Mathiesen's positive or negative typology: positive reforms by their effect improve the carceral system, whereas negative reforms "abolish or remove parts of the system on which it is dependent."[123]

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landscape. There can only be such a thing as Indigenous law if there are Indigenous legal and political authorities, those entities that determine the nature and functioning of legal orders under contemplation. To cut away the possibility these legal and political authorities exist and exercise their authority through their laws and policies is to move directly into a world where the colonial project has been completed." Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws, Special Report* (Waterloo, ON: Centre for International Governance Innovation, 2017) 48 at 49, online (pdf): *Centre for International Governance Innovation* <cigionline.org/sites/default/files/documents/UNDRIP%n20Implementation%20Special%20Report%20WEB.pdf> [perma.cc/2V65-NUE3].

122 Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67 UNBLJ 313 at 317.

123 Liat Ben-Moshe, "The Tension Between Abolition and Reform" in Mechthild E Nagel & Anthony J Nocella II, eds, *The End of Prisons: Reflections from the Decarceration*

Why is an abolitionist perspective important? Take, for example, decarceration strategies at the pre-trial stage. Some strategies are more effective than others because they involve an explicit motivation of limiting the reach of the carceral state. *Gladue* factors, properly identified, can be inappropriately instrumentalized at bail with a "rehabilitative" focus and have harmful effects, up to and including incarceration. A typical 'positive' example is a bail justice, attempting to rehabilitate someone's substance abuse disorder, revealed through a *Gladue* report, binding them with an order to enter into treatment, or not drink, leading to a subsequent breach of these conditions and re-incarceration.[124]

More productive abolitionist reforms should be open to excarceration as well as decarceration. Excarceration strategies might include holding police accountable to using their discretionary powers to arrest in non-discriminatory ways[125] or applying *Gladue* considerations to police during their interactions with Indigenous people during interrogations.[126] Better *Gladue* reports are themselves a form of excarceration. But equal attention should be paid to investing in remedial sentencing programs. Without adequate resources for community programs, no amount of excellent *Gladue* reports could rectify overincarceration.[127] With a *Charter* right comes

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Movement (Amsterdam: Brill, 2013) 83 at 87, citing Thomas Mathiesen, *The Politics of Abolition* (New York: Halsted Press, 1974).

124 For a detailed study of how punitive processes actually operate in the bail context through unjust bail conditions, see Marie Manikis & Jess De Santi, "Punishing While Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences" (2019) 60:3 C de D 873.

125 Ss. 495, 498 and 599 of the *Criminal Code* confer discretionary power on police to not arrest and release accused persons with conditions, which should be used more frequently. Rogin, *supra* note 77 at 343, n 83.

126 Kerry G Watkins, "The Vulnerability of Aboriginal Suspects When Questioned by Police: Mitigating Risk and Maximizing the Reliability of Statement Evidence" (2016) 63:4 Crim LQ 474 at 477.

127 See Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 173, online (pdf): *National Centre for Truth and Reconciliation* <ehprnh2mwo3.exactdn.com/wpcontent/uploads/2021/01/Executive_Summary_English_Web.pdf> [perma.cc/GJJ2-5ZSP]. The TRC's 31st recommendation calls for "sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending" (*ibid*).

the potential for compelling significant government resources for both.[128] Additionally, applying this lens to the constitutional exercise herein, approaches that include a *habeas corpus* remedy and immediate decarceration might be preferred over others.

V. CONCLUSION: *GLADUE*'S FUTURE PERFECT

I must finish by acknowledging that I am a white settler law student, and this is a speculative constitutional exercise. This analysis springs from a summer spent working in the *Gladue* space with incredible Indigenous front-line workers. Bobbitt describes ethical modes of argument in the constitutional arena as the most "ineluctable element" in jurisprudence. They are arguments that appeal to our ethos: "not necessarily what we are, but perhaps what we think we are,... what we would like to be, or in some cases what we know we are and what we are no longer willing to abide."[129]

In January 1966 in Kenora, Ontario — where I worked in the summer of 2019 — 266 of the 281 women in detention in the local jail were Indigenous.[130] Today, the exact same proportion of prisoners at that same

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128 Funding *Gladue*'s can and should be the number one priority. Where *Gladue*'s are not properly funded, it falls on probation officers and other government entities to provide *Gladue* considerations to the courts—a function they are institutionally incapable of performing. See Kyle Edwards, "Why Gladue has not lived up to its promise for Indigenous justice", *Maclean's* (18 October 2017), online: <macleans.ca/news/canada/why-gladue-has-not-lived-up-to-its-promise-for-indigenous-justice> [perma.cc/3DNF-VYAJ].

129 Bobbitt, *supra* note 31 at 455. Bobbitt points to a particularly consequential submission made in *Brown v Board of Education* that ended up in the final Supreme Court decision. The famous "doll" study asked African American children to identify which dolls they preferred amongst an array of racially diverse dolls: most picked the white dolls, and assigned positive characteristics to them. The study was used by the Court to concretize the negative consequences that segregation had on young children. For their part, Drs. Kenneth and Mami Clark, the African American psychologists who designed and conducted the cited research, were dismayed that the Supreme Court had missed two of their other findings: that racism was a uniquely American institution, and the effect segregation had on inhibiting the development of white children. See "The Significance of the 'The Doll Test'" (4 March 2019), online: *NAACP Legal Defence and Education Fund* <naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/significance-doll-test> [perma.cc/3D2T-M8NF].

130 See *Toward Unity*, *supra* note 4 at 403, 404. The Committee's report calls "for special programs in these institutions designed to meet the particular needs of these Indian or Métis women. The importance of involving the general community in corrections has

jail are Indigenous, as are 40% of federally incarcerated women.[131] We have known, and continue to know, that the situation is an intolerable crisis. Front-line workers deserve sharper tools at their disposal for checking the voracious Canadian colonial carceral state.

The notion of *Charter* rights that belong specifically to one part of Canadian society no doubt will raise the ire of those whose ire is ordinarily raised by such a prospect. Other parts of the Constitution have partial answers to these concerns: s. 35 jurisprudence explains why Aboriginal peoples have a distinct relationship to the Constitution compared to other rights holders, and s. 15 jurisprudence demonstrates the Canadian desire to achieve substantive, over formal, equality.[132] That being said, there is no reason why the expression of s. 718.2(e), as it applies with "particular

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been stressed throughout this report. The need to involve members of the Indian and Métis communities in programs designed to help these Indian and Métis women offenders seems particularly acute." Logan Turner, "As Ontario eyes correctional expansions in the north, skepticism, alternatives to incarceration emerge", *CBC News* (17 October 2020), online: <cbc.ca/news/canada/thunder-bay/jail-expansions-nwo-alternatives-1.5764182>.

131 *Sharma*, *supra* note 32 (Factum of the Intervener LEAF and the David Asper Centre for Constitutional Rights at para 8), online (pdf): <aspercentre.ca/wp-content/uploads/2019/07/R-v-Sharma-Court-File-No-C66390-Factum-of-the-Interveners-LEAF-and-the-Asper-Centre-01328633x7A7FA.pdf> [perma.cc/KD5Q-ME8L].

132 Rudin, in a 2008 paper, was cautious about the interaction between s. 15 and *Gladue*. His criticisms of a s. 15 *Gladue* are relevant here, though there is not sufficient space to address them: "The problem, of course, is that a successful challenge would require that the courts compel governments to direct resources to address this issue. As recent s. 15 jurisprudence has shown, courts are increasingly reluctant to embark on such a road. Making matters more difficult is that empirical evidence does not yet exist to show precisely what governments should do to address the problem. While the lack of definitive solutions is not a bar to innovation, indeed it should spur on new approaches, the fact that there are no easy-to-describe, inexpensive, off-the-shelf responses to the problem would likely inhibit courts from moving to require government action in this area." Jonathan Rudin, "Aboriginal Over-representation and R v Gladue: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR (2d) 687 at 713.

attention" to Indigenous people,[133] cannot find formulation in Constitutional principles for other rights holders.[134]

Gladue has had dubious reception in the Canadian public and the legal system.[135] There are many hurdles to establishing new *Charter* rights, especially so in the Indigenous context. But, as someone who has already had the privilege of working in Indigenous spaces early in my legal career, I feel a responsibility to do more than be a "comfortable carrier of no."[136] The inevitability of continuing Indigenous overincarceration by the Canadian settler carceral state is comorbid with legal and constitutional *status quo*. By entrenching *Gladue* principles in the *Charter*, perhaps more cognizable tools will allow all decision-makers to do better on the front lines of the crisis, securing Indigenous accused "the full benefit of the *Charter*'s protection."[137]

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133 I note a small difference in translation between the French and English versions of s. 718.2(e). In English, the provision reads: "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." In French, it reads: "l'examen, plus particulièrement en ce qui concerne les délinquants autochtones, de toutes les sanctions substitutives qui sont raisonnables dans les circonstances et qui tiennent compte du tort causé aux victimes ou à la collectivité." See *Code criminal*, LRC 1985, c C-46, art 718.2(e). In my view, in the English version the "particular attention" applies to the circumstances of Indigenous offenders, whereas in the French version the "plus particulièrement" modifies the consideration of alternative sanctions where Indigenous offenders are concerned.

134 Specifically, the line of cases that hold that the provision requires the consideration of the circumstances of Black accused and their distinct history of systemic overincarceration. See *R v Jackson*, 2018 ONSC 2527 and *R v Morris*, *supra* note 33, where Justice Nakatsuru applied *Gladue*-like considerations to the Black Canadian experience.

135 The *Gladue* case's reception in the national news media was swiftly racist. One reporter was quick to point to an over-dramatized recounting of the facts and a summary of the case completely denuded of Canada's role in the overincarceration of Indigenous people. See Kirk Makin, "Top court appalled as natives fill Canada's jails", *The Globe and Mail* (24 April 1999) A1.

136 L Borrows, *supra* note 120 at 159, quoting lawyer Leslie Pinder, who participated in the *Delgamuukw* trial. "What knowledge can be found to sustain us when we have destroyed the stories. Lawyers assemble the evidence with words cut from the environment; they hold up as evidence, hacked up pieces of meaning. Lawyers don't have to take responsibility to construct a world. We charge ourselves only to destroy. We say no. We are the civilized, well-heeled, comfortable carriers of no."

137 *R v Big Drug Mart Ltd*, [1985] 1 SCR 295 at 344, 18 DLR (4th) 321 (Justice Dickson). Chief Justice Lamer quotes this passage in *Re BC Motor Vehicle Act* which he describes

And perhaps, someday, it will be said that *Gladue*'s branch, like any other part of the *Charter*'s living tree, will have borne just fruit.

as being "[t]he task of the Court" when approaching s. 7, while trying to avoid adjudicating on the merits of public policy. *Re BC Motor Vehicle Act*, *supra* note 40 at 499.