Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice

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Over twenty years have passed since Parliament of Canada enacted section 718.2(e) of the Criminal Code, *interpreted by the Supreme Court of Canada in the landmark* R v Gladue *as requiring judges to give special consideration to an Indigenous offender's systemic and background factors in sentencing to reach a proportionate sentence emphasizing restorative justice. Since the Court's judgement in* Gladue *a special kind of pre-sentencing report, known as a* Gladue *report, has emerged to provide a tailored, comprehensive assessment of an Indigenous offender's circumstances to assist sentencing judges in complying with their statutory obligations.*

Reviewing Gladue *and subsequent jurisprudence, as well as numerous reports, the author argues that the statutory requirements in section 718.2(e) are not being applied consistently across Canada, with many Indigenous people not receiving the benefit of a proper consideration into their systemic and background factors, which constitutes a significant access to justice issue. Analyzing the disparate approaches to applying* Gladue *across jurisdictions and in rural and remote communities, the author argues that there should be a statutory requirement for* Gladue *reports to be made available to all Indigenous offenders. The author argues that offering* Gladue *reports to all Indigenous offenders who may be incarcerated would ensure consistency and uniformity in how* Gladue *factors are brought before sentencing judges.* Gladue *reports' distinctive analysis would help ensure that an Indigenous offender's record and life circumstances are not evaluated as risk factors calling for increased prison sentences, as is currently a problem with traditional pre-sentencing reports, undermining the very purpose of section 718.2(e) as identified by the Supreme Court in* Gladue*—the paradox in current* Gladue *implementation practice.*

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Introduction

"[T]here is no greater inequality than the equal treatment of unequals."[1] In Canada, colonial history has resulted in systemic bias and discrimination against Indigenous people. This has fostered the significant disadvantage that this group experiences compared to non-Indigenous people in the criminal justice system, illustrated in the overrepresentation of Indigenous people in penitentiaries and prisons.

To address this overrepresentation, Parliament enacted section 718.2(e) of the *Criminal Code*[2] in 1996, which the Supreme Court of Canada has interpreted as compelling judges to give special consideration to an Indigenous offender's systemic and background factors in sentencing to reach a proportionate sentence emphasizing restorative justice. Over the years, a special kind of pre-sentencing report (*Gladue* report) has emerged to provide a tailored, comprehensive assessment of an Indigenous offender's circumstances to assist sentencing judges in complying with their statutory obligations. This article argues that, in light of statute and jurisprudence, these *Gladue* reports must be made available to all Indigenous offenders who may be incarcerated.

1. *Dennis v United States*, 339 US 162 at 184 (1950). Justice Frankfurter wrote these words in dissent after affirming the principle that the criminal justice system "protects an accused, so far as legal procedure can, from a bias operating against such a group to which he belongs". *Ibid* at 184.

2. RSC 1985, c C-46, 718.2(e).

Though, a *Gladue* report may not be necessary where there is a satisfactory alternative for bringing *Gladue* factors before the court, or where the offender waives his or her right to a *Gladue* report.

The first section analyzes the Supreme Court's interpretation of section 718.2(e) of the *Criminal Code* in detail. The following section demonstrates that *Gladue* reports are truly consistent with the Supreme Court's interpretation, while traditional pre-sentencing reports (PSRs) are often found wanting. The final section discusses the current regional disparity in access to *Gladue* reports, advocating that expanding their use can address access to justice issues and promote restorative justice.

I. A Change in Paradigm

The enactment of section 718.2(e) of the *Criminal Code* marked a fundamental paradigm change in the framework for sentencing Indigenous offenders. Sentencing judges must now consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community . . . for all offenders, *with particular attention to the circumstances of Aboriginal offenders*".[3] The Supreme Court has interpreted this new provision in *R v Gladue*,[4] *R v Wells*,[5] and *R v Ipeelee*[6] as requiring that the holistic and individualized circumstances of Indigenous people be considered in sentencing in order to reach a proportionate sentence emphasizing restorative justice.

A. R v Gladue

In the unanimous *Gladue* decision, the Supreme Court gave its first interpretation of section 718.2(e) of the *Criminal Code*, recognizing the hardships suffered by Indigenous people needed to be considered in their sentencing. Jamie Gladue, the appellant, received a three-year jail sentence after pleading guilty to manslaughter at trial. The Supreme Court deemed the original sentence reasonable and dismissed the appeal, but acknowledged that the lower courts disregarded many relevant factors pertaining to the appellant's Indigenous heritage.[7]

3. *Ibid*, s 718.2(e) [emphasis added].
4. [1999] 1 SCR 688, 171 DLR (4th) 385 [cited to SCR].
5. 2000 SCC 10, [2000] 1 SCR 207.
6. 2012 SCC 13, [2012] 1 SCR 433.
7. *Gladue*, *supra* note 4 at paras 94–96.

Justices Cory and Iacobucci interpreted section 718.2(e) of the *Criminal Code* broadly and expansively, emphasizing that it was drafted in response to Indigenous overrepresentation in prisons.[8] They defined the provision as remedial in nature, seeking to further restorative justice by reducing recourse to imprisonment through a "sensitivity to aboriginal community justice initiatives".[9] In describing the appropriate sentencing methodology, Cory and Iacobucci JJ noted that:

> The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large.[10]

In doing so, the sentencing judge is to take judicial notice of Indigenous peoples' historical and social circumstances and consider sentencing alternatives to imprisonment or a shorter sentence.[11]

The Court held that sentencing judges should consider the "unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts"[12] and conduct an individual assessment of the offender's life circumstances and the broader phenomena at play.[13] The Supreme Court stressed that these systemic or background factors must be carefully considered precisely because they relate to the overrepresentation of Indigenous people in prisons—the very issue section 718.2(e) of the *Criminal Code* seeks to remedy.[14] The Court stated that:

> 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*. These and other factors contribute to a higher incidence of crime and incarceration. . . . "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

8. *Ibid* at para 47.
9. *Ibid* at para 48.
10. *Ibid* at para 81.
11. *Ibid* at paras 79, 83.
12. *Ibid* at para 66.
13. *Ibid* at paras 76–77, 88.
14. *Ibid* at paras 58–65.

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of *systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions*. Moreover, 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.[15]

Although the Supreme Court did not then explicitly mention the incidence of colonialism and residential schools on Indigenous offenders, these factors would have likely been considered as systemic or background factors to be considered as part of the *Gladue* analysis.

The sentencing judge is also to evaluate "[t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection".[16] A proper sentence accounts for the importance many Indigenous communities give to restorative justice and community-based sanctions.[17]

Thus, section 718.2(e) of the *Criminal Code* compels judges to conduct an individualized and holistic analysis of Indigenous offenders' life circumstances in order to reach sentences emphasizing restorative justice on a case-by-case basis.[18] The Supreme Court explained that these special circumstances call for "special attention in pre-sentence reports", while stressing that further information or evidence may be necessary beyond that which PSRs provide.[19]

B. R v Wells

In *Wells*, the Supreme Court took a more reserved tone: it insisted that restorative justice should not trump the sentencing objectives of deterrence and denunciation for serious crimes and discouraged evidential inquiries outside of PSRs.[20] James Wells had appealed his twenty-month prison sentence, claimed that the trial judge did not properly consider his circumstances as an

15. *Ibid* at paras 67–68 [emphasis added].
16. *Ibid* at para 66.
17. See *ibid* at paras 70–71, 74. The Court was clear, however, that the other objectives of sentencing should not be dismissed. See *ibid* at para 79.
18. See *ibid* at paras 81, 83.
19. *Ibid* at paras 83–84.
20. *Supra* note 5.

Indigenous person, and asked for a conditional sentence instead.[21] Both the Court of Appeal for Alberta and the Supreme Court upheld the original sentence.[22]

The Supreme Court's decision in *Wells* did not recognize the need for a systematic, independent assessment of the offender, but rather affirmed that PSRs are an appropriate means to bring *Gladue* information before the sentencing judge. According to the Supreme Court, judges are not a "board of inquiry", and while they must take judicial notice of systemic factors affecting Indigenous people, background research outside PSRs should be limited.[23] This view appears to rest on the premise that PSRs provide an adequate assessment of Indigenous offenders' circumstances, which the next section demonstrates is often not the case.

In addition, while the Supreme Court confirmed that section 718.2(e) of the *Criminal Code* aims to discourage imprisonment by favouring restorative justice,[24] it insisted that the Court in *Gladue* did not intend to prefer restorative justice over denunciation and deterrence, suggesting these may weigh heavily where serious or violent offences are concerned.[25] This line of argument, however, seems inconsistent with the Supreme Court's rationale in *Gladue*. Although serious and violent crimes must certainly be deterred and denounced, offenders committing such crimes arguably need restorative justice the most, especially where their circumstances as Indigenous people contributed to their violent behaviour.

C. R v Ipeelee

In *Ipeelee*, the Supreme Court confirmed its adherence to *Gladue* and its guiding principles, holding that trial judges must consider Indigenous offenders' systemic and background factors, notwithstanding the gravity of the offence, in order to ensure proportionality in sentencing.[26] The appellants were Indigenous long-term offenders who had breached their long-term supervision orders.[27] Manasie Ipeelee received a three-year prison sen-

21. *Ibid* at para 1.
22. *Ibid*, aff'g 1998 ABCA 109, 125 CCC (3d) 129.
23. *Ibid* at paras 53, 55.
24. *Ibid* at para 4.
25. *Ibid* at paras 25, 39–40, 44. Though Indigenous offenders must be sentenced according to a distinct methodology, the resulting sentence may be similar to that of a non-Indigenous offender. See *ibid* at paras 42, 44.
26. *Ipeelee*, *supra* note 6 at paras 84–86.
27. *Ibid* at paras 13, 27.

tence at trial,[28] which was upheld by the Court of Appeal for British Columbia.[29] The Supreme Court allowed Manasie Ipeelee's appeal and reduced his sentence to one year in prison, finding that the lower courts had erred in overemphasizing protection of the public as a sentencing objective and failed to consider the offender's Indigenous circumstances.[30] Frank Ralph Ladue also received a three-year prison sentence at trial.[31] However, the Court of Appeal allowed his appeal, finding that the trial judge did not give sufficient consideration to the offender's Indigenous circumstances, and reduced his sentence to one year in prison.[32] The Supreme Court dismissed the Crown's appeal.[33]

In its decision, the Court reaffirmed the systemic and background factors already listed in *Gladue* and emphasized that the *Gladue* analysis seeks to acknowledge the important meaning of colonialism and residential schools in sentencing Indigenous offenders. Writing for the majority, Lebel J stated that:

> [C]ourts must take judicial notice of such matters as the *history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples*. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel.[34]

Justice Lebel stressed that sentencing judges must apply *Gladue* principles even when confronted with serious offences.[35] Failing this, proportionality in sentencing would be undermined, and the remedial power in section 718.2(e) of the *Criminal Code* would be ineffectual.[36] The Court thus avoided deciding between *Gladue*'s emphasis on restorative justice and *Wells*' focus on denunciation and deterrence. Rather, the Court rested its argument on the constitutional principle of fundamental justice, which requires that a sentence be proportionate to the gravity of the offence and the offender's moral culpability.[37] This principle takes on its full meaning in the *Gladue*

28. *Ibid* at para 14.
29. *Ibid* at para 16.
30. *Ibid* at paras 88–90, 93, rev'g 2009 ONCA 892, 99 OR (3d) 419.
31. *Ipeelee*, *supra* note 6 at para 28.
32. *Ibid* at para 31.
33. *Ibid* at para 98, aff'g *R v Ladue*, 2011 BCCA 101, 302 BCAC 93.
34. *Ipeelee*, *supra* note 6 at para 60 [emphasis added; emphasis in original removed].
35. *Ibid* at para 84.
36. *Ibid* at para 86.
37. *Ibid* at paras 36–37.

analysis, as many Indigenous offenders' "constrained" socio-economic circumstances "may diminish their moral culpability".[38]

Moreover, *Ipeelee* expressly referred to *Gladue* reports as a tool to assist the sentencing judge in conducting a *Gladue* analysis for each Indigenous offender. Since proportionality in sentencing calls for a "highly individualized process",[39] counsel's duty is to provide the trial judge with such individualized information on an Indigenous offender:

> [C]ase-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report *tailored to the specific circumstances of Aboriginal offenders*. Bringing such information to the attention of the judge in a *comprehensive* and timely manner is helpful to all parties at a sentencing hearing . . . as it is *indispensable to a judge in fulfilling his duties under s. 718.2(e) of the* Criminal Code.[40]

Such language suggests that section 718.2(e) of the *Criminal Code* demands that *Gladue* reports be made available to all Indigenous offenders, as these offer the comprehensive, tailored, case-specific information on Indigenous offenders, which is indispensable for a judge to properly comply with his or her statutory obligations. Regrettably, the Court left this matter ambiguous by not explicitly stating that section 718.2(e) of the *Criminal Code* requires that all Indigenous offenders benefit from a *Gladue* report in appropriate cases and if they so elect. Nevertheless, *Gladue* reports' holistic and individualized approach is meant to embody the analysis required by this provision to reach a just and proportionate sentence for an Indigenous offender.

II. *Gladue* Reports are an Appropriate Response to Section 718.2(e) of the *Criminal Code*

This section discusses typical differences between PSRs and *Gladue* reports, which are separate reports presented in addition to the PSR. It argues the latter are generally consistent with section 718.2(e) of the *Criminal Code* and the Supreme Court's jurisprudence, while traditional PSRs often prove unsatisfactory in this regard. Finally, this section provides a brief overview of situations in which a *Gladue* report may not be required, as well as satisfactory alternatives to *Gladue* reports.

38. *Ibid* at para 73, 81–82 (LeBel J specified, however, that no causal link between the Indigenous offender's systemic and background factors and the offence need be established).

39. *Ibid* at para 38.

40. *Ibid* at para 60 [emphasis added].

A. Gladue *Reports are Consistent with the Analysis Required in* Gladue

A *Gladue* report's purpose is to help the judge tailor a sentence for an Indigenous offender, while mindful of the unique context in which the offender committed the crime[41] and while also addressing what "continue[s] to bring the offender before the court".[42] *Gladue* reports were developed specifically to remedy PSRs' lacunae[43] in conducting this analysis, and do so more satisfactorily.[44]

A *Gladue* report generally provides more extensive information on the systemic and background factors bringing the Indigenous offender before the court than a PSR.[45] *Gladue* reports address both the Indigenous offender's macro-circumstances, such as colonial history and enduring discrimination, as well as the offender's micro-circumstances, such as community, family and addiction.[46] While PSRs often document such factors less extensively, *Gladue* reports discuss their impact on the Indigenous offender's criminal behaviour and link them to the crime.[47] The *Gladue* analysis recognizes that these interrelationships are crucial. At sentencing, the assessment of an Indigenous offender's moral blameworthiness cannot be conducted in a vacuum, but must be informed by the potential repercussions of colonialism, residential schools, systemic discrimination and socio-economic vulnerability on the Indigenous offender's crime to reach a just and proportionate sentence. Correspondingly, *Gladue* reports outline sentencing alternatives and emphasize healing and restorative justice[48] to help the judge craft a

41. See Jay Istvanffy, *Gladue Primer*, reprinted ed (Legal Services Society, BC, 2012) at 7; Kelly Hannah-Moffat & Paula Maurutto, "Re-contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12:3 Punishment & Society 262 at 274, 278–79 [Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs"].

42. See Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 278–79.

43. See *ibid* at 265.

44. See *Gladue*, *supra* note 4 at paras 66, 76–77, 88; *Ipeelee*, *supra* note 6 at para 59.

45. See Debra Parkes et al, *Gladue Handbook: A Resource for Justice System Participants in Manitoba* (University of Manitoba Faculty of Law, 2012) at 31; Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (Legal Services Society, British Columbia, 2013) at 35 [LSSBC]. The report concluded that: "Gladue reports are longer and more thorough than PSRs . . . specifically with respect to the Gladue factors." *Ibid* at 2.

46. See Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 276–77; Istvanffy, *supra* note 41 at 7.

47. See Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 274, 276.

48. See *ibid* at 278; Istvanffy, *supra* note 41 at 7.

"meaningful" and "culturally appropriate" sentence for the Indigenous offender and his or her community,[49] in accordance with *Gladue*.[50]

This distinctive methodology is faithful to the Supreme Court's jurisprudence in its sensitivity to Indigenous realities.[51] *Gladue* reports are often written by either Indigenous caseworkers or trained court workers[52] and include extensive information gathered from interviews with the offender's family, friends, and sometimes community members and elders on "what may be troubling the accused, how the community may want to approach the problem, and what options may be available".[53] Moreover, as Indigenous caseworker Chad Kicknosway points out, this methodology often has a therapeutic effect on Indigenous offenders, allowing them an "opportunity to explain who they are" and engage in self-reflection.[54] Enabling Indigenous offenders to contribute to their own sentencing process is a commendable first step in addressing Indigenous people's "estrangement . . . from the Canadian criminal justice system"[55] and the divergence in Indigenous and non-Indigenous conceptions of justice.[56]

While *Gladue* reports have emerged as a powerful means of bringing case-specific information on an Indigenous offender before sentencing judges, it should be understood that they are not monolithic or uniform. Consequently, their quality, depth and detail can vary between provinces and regions. For instance, in one case the *Gladue* report presented was limited to statements from the offender, as collateral contacts could not be reached.[57] Judges have sometimes expressed dissatisfaction with *Gladue* reports that were lacking in quality and objectivity,[58] or were a "cut-and-paste

49. See Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", supra note 41 at 279; Chad Kicknosway, "Gladue Reports: Not Just a Sentencing Report" (March 13, 2015), *Legal Aid Ontario* (blog), online: <blog.legalaid.on.ca/2015/03/13/gladue-reports-not-just-a-sentencing-report>.

50. *Gladue*, *supra* note 4 at paras 70–71, 74.

51. See e.g. *ibid* at para 33; *Wells*, *supra* note 5 at para 44; *Ipeelee*, *supra* note 6 at para 72.

52. See Istvanffy, *supra* note 41 at 7; Kicknosway, *supra* note 49; David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2012) 35:1 Man LJ 84 at 88; Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 276.

53. Milward & Parkes, *supra* note 52 at 88. See also Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 276.

54. *Supra* note 49.

55. *Gladue*, *supra* note 4 at para 61.

56. See *ibid* at para 62, citing Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canadian Communications Group, 1996) at 309.

57. See *R v Vollrath*, 2016 ABPC 258 at paras 14, 21, 23, 2016 CarswellAlta 2187 (WL Can).

58. See e.g. *R v Florence*, 2015 BCCA 414 at paras 13–15, 21–25, 648 WAC 194; *R v Lawson*, 2012 BCCA 508 at paras 10, 21, 34, 565 WAC 123.

that [bore] no resemblance to what is required or requested for the purposes of the sentencing".[59] Nevertheless, it does not follow that because they may vary in quality, *Gladue* reports are an inadequate medium for informing sentencing judges of and Indigenous offender's systemic and background factors. Rather, this reality should incentivize governments to increase funding for creating or improving *Gladue* report programs and training to *Gladue* report writers.

B. Pre-Sentencing Reports Routinely Fall Short of the Analysis Required in Gladue

In contrast, the traditional PSR's purpose is to prevent recidivism by conducting a risk assessment of the offender, focusing on criminal behaviour and risk factors.[60] Such an approach contradicts the analysis mandated by the Supreme Court in *Gladue* to understand an Indigenous offender's unique circumstances and impose a "culturally-appropriate" sentence.[61]

As professors Hannah-Moffatt and Maurutto explained in their seminal article, and reiterated in a more recent piece on the subject, most provincial jurisdictions' PSRs follow an "actuarial"-like risk assessment model, identifying "'criminogenic' factors which are 'treatable' and statistically correlated with recidivism".[62] As a result, the offender's profile is broken down into a series of risk factors to be "isolated, targeted and treated" in the PSR's sentence recom-

59. *R v Taylor*, 2016 BCSC 1326 at para 48, 2016 CarswellBC 1997 (WL Can).

60. See *Criminal Code*, *supra* note 2, s 721(1). Section 721(1) states that:

> [W]here an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.

Ibid. See also Public Safety Canada, "Presentence Reports: Research Summary", vol 10 no 5 (September 2005), online: <www.publicsafety.gc.ca/cnt/rsrcs/pblctns/prsntc-rprt/index-en.aspx>; Milward & Parkes, *supra* note 52 at 89; Istvanffy, *supra* note 41 at 7.

61. Parkes et al, *supra* note 45 at 15.

62. Paula Maurutto & Kelly Hannah-Moffatt, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451 [Maurutto & Hannah-Moffatt, "Aboriginal Knowledges"]; Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 268–69 (such factors generally include criminal history, education and employment, family circumstances, leisure and recreation, pro-criminal attitude, substance abuse, anti-social behaviour and acquaintances).

mendations.[63] Within this framework, *Gladue* factors and their relation to the offender's crime are merely secondary as PSRs often only focus on the Indigenous offender's behaviour isolated from its historical and socio-economic context.[64] Since the offender's circumstances as an Indigenous person are analyzed alongside risk factors, they can become interpreted with the "unintended discriminatory effect" that "Aboriginal offenders continue to be characterized as high risk and high need".[65] In other words, Indigenous people may often be perceived as presenting a higher risk precisely because of their circumstances as Indigenous people. Thus, not only is a PSR's risk assessment analysis incompatible with the holistic, contextualized approach mandated in *Gladue*, but it potentially undermines section 718.2(e) of the *Criminal Code*'s objective to reduce incarceration and promote restorative justice in sentencing Indigenous offenders.

Furthermore, PSRs are often qualitatively and quantitatively lacking. Indigenous offenders frequently perceive the probation officers who write PSRs as "part of a system that has historically marginalized them".[66] Consequently, they may feel uncomfortable sharing personal details about their lives and only provide basic information.[67] Interviews conducted for PSR purposes are much more limited—generally extending only to the offender's immediate family and surroundings.[68] PSRs often address *Gladue* considerations in only a few paragraphs limited to the offender's history and generic information on his or her community,[69] rarely elaborating on the community's unique history and culture.[70] Although *Gladue* and *Ipeelee* insist on identifying sentencing alternatives available in the Indigenous offender's particular community, PSRs may not conduct these inquiries in rural and remote communities, and may sometimes even advocate for imprisonment.[71]

63. See Hannah-Moffatt & Maurutto, "Re-contextualizing PSRs", *supra* note 41 at 272, 276.

64. See *ibid.*

65. *Ibid* at 275. See e.g. *R v Knott*, 2012 MBQB 105, 278 Man R (2d) 82.

66. See LSSBC, *supra* note 45 at 38. The report found that "many clients view probation officers as part of a system that has historically marginalized them" which as a result, "makes [them] inherently distrustful of the process". The report further found that: "For this reason, clients indicate that they do not open up to probation officers; rather, they give them minimal information." *Ibid.* See also Kicknosway, *supra* note 49.

67. See LSSBC, *supra* note 45 at 38; Kicknosway, *supra* note 49.

68. See Milward & Parkes, *supra* note 52 at 88.

69. See LSSBC, *supra* note 45 at 36.

70. See Department of Justice Canada, Gladue *Practices in the Provinces and Territories*, by Sébastian April & Mylène Magrinelli Orsi, Catalogue No J2-378/2013E, (Ottawa: Department of Justice Canada, 2013) at 10.

71. See LSSBC, *supra* note 45 at 39–40.

Available data indicates that sometimes little time is invested in writing PSRs.[72] Many adopt an "add *Gladue* and stir approach", sometimes "cutting and pasting" general information from previous reports.[73]

While such egregious practices are certainly not universal,[74] PSRs are nonetheless an inadequate medium to conduct the *Gladue* analysis as their purpose and methods are incompatible with the holistic individual analysis of an Indigenous offender's circumstances and how these circumstances contribute to the offence. In addition, the variation in the depth and quality of how PSRs address an Indigenous offender's unique circumstances casts doubt on their ability to always provide the sentencing judge with an accurate picture of the Indigenous offender's moral blameworthiness and, consequently, threaten his or her chance of receiving a just and proportionate sentence.

C. Alternatives to Gladue *Reports*

While this article advocates making *Gladue* reports available at sentencing to all Indigenous offenders who may be imprisoned, it does recognize that this proposition must be nuanced.

It must first be emphasized that Indigenous offenders may decline to have a *Gladue* report prepared for them. In *R v Gilliland*, for instance, the offender waived his right to a *Gladue* report and made his own submissions to the sentencing judge regarding his life circumstances.[75] In such situations, it should be ensured that the Indigenous offender's waiver of a *Gladue* report is informed.

Gladue reports may also not be appropriate in all cases. For instance, an extensive inquiry into an Indigenous offender's past may be undesirable for those that have suffered severe emotional, physical or sexual trauma. Such

72. Public Safety and Emergency Preparedness Canada, *Presentence Reports in Canada 2005-03*, by James Bonta et al, Catalogue No PS3-1/2005-4, (Ottawa: Minister of Public Safety and Emergency Preparedness, 2005) at 21. The report analyzed time sheets for five sites and noted that: "On average, a probation officer spent 14.1 hours preparing a PSR. However, there was significant variation in the time spent on a PSR across the sites . . . The Edmonton site spent the least time on the preparation of the PSR (6.1 hours) and Whitehorse spent the most time (17.1 hours)". *Ibid.*

73. Milward & Parkes, *supra* note 52 at 89–90. See also Department of Justice Canada, *supra* note 70 (*Gladue* factors are included as a "rubber stamp [and PSRs] frequently reference resources being available in the community that are not actually available" at 12).

74. LSSBC, *supra* note 45 at 40.

75. 2014 BCCA 399 at para 16, 622 WAC 224. While the appellant waived the preparation of an individualized *Gladue* report before the sentencing judge, the Court of Appeal for British Columbia found that the sentencing judge was still required to consider "the systemic factors affecting Aboriginal persons generally". *Ibid* at paras 15–16.

was the case in *R v Pelletier*,[76] which presents a positive application of *Gladue* despite the absence of a *Gladue* report. In this case, Nakatsuru J had sufficient information about the offender's past and life circumstances to administer a just and proportionate sentence, and wrote a sensitive and poignant explanation of how she considered the Indigenous offender's circumstances in sentencing.[77]

Likewise, one may question the propriety of a formal *Gladue* report in certain cases. In the sentencing of an Indigenous offender who is not facing incarceration, a *Gladue* report may not always be necessary, and the incorporation of *Gladue* factors in the PSR may prove a more proportionate alternative and a wiser use of resources.

Further, judges have often admitted *viva voce* evidence from Indigenous offenders or counsel to complement PSRs.[78] In "*Gladue* courts", *Gladue* reports are one of many means through which case-specific information on an Indigenous offender is brought to the sentencing judge. These courts have emerged in Toronto and:

> [A]pply Canadian law in cases involving Aboriginal offenders, but . . . are distinctive in their approach to sentencing. These courts adjudicate bail, conduct trials, and sentence offenders, but they do so by integrating specialized Aboriginal knowledge to produce alternative understandings of an Aboriginal accused so that bail orders and sentences conform to the intent of the *R. v. Gladue* decision.[79]

In these courts, *Gladue* reports are one of many services offered to Indigenous offenders to ensure their sentencing conforms with *Gladue*.[80]

This article proposes that, despite these realities and the limits of *Gladue* reports, they are nevertheless a useful and appropriate instrument for providing *Gladue* information to sentencing judges in cases where incarceration of an Indigenous offender is an option. As most Indigenous offenders in Canada do not have access to *Gladue* courts, providing a *Gladue* report in addition to a PSR at sentencing would help ensure that Indigenous offenders throughout the country benefit from their *Gladue* rights, and do so more consistently.

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76. 2016 ONCJ 628, 2016 CarswellOnt 16617 (WL Can).

77. *Ibid.*

78. See e.g. *R v Kovich*, 2014 MBPC 15, 314 Man R (2d) 45, aff'd 2016 MBCA 19, 664 WAC 101; *R v Long*, 2014 ONSC 38, 2014 CarswellOnt 900 (WL Can); *R v Jacko*, 2010 ONCA 452, 101 OR (3d) 1.

79. Maurutto & Hannah-Moffat, "Aboriginal Knowledges", *supra* note 62 at 452.

80. *Ibid* at 460.

III. A Change in Paradox

As explained above, the Supreme Court established in *Gladue* and *Ipeelee* a robust set of principles for sentencing Indigenous offenders pursuant to section 718.2(e) of the *Criminal Code*, directing sentencing judges to consider systemic and background factors which may decrease the offender's blameworthiness and consider sentencing alternatives to long imprisonment. In fact, the Supreme Court stressed that "[i]n some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender",[81] although it rejected the view that this entails an "automatic reduction" of an Indigenous offender's sentence.[82] This section argues that *Gladue* reports are meant to embody and assist the holistic and individualized analysis called for in *Gladue*, while PSRs can often prove unsatisfactory in this regard.

Indigenous offenders now experience a range of treatment in the sentencing process, which impacts the extent to which they benefit from their *Gladue* rights. While some receive the assistance of a full *Gladue* report, most can only obtain a traditional PSR that simply includes *Gladue* components. Therefore, they do not receive what they are entitled to under *Gladue* and section 718.2(e) of the *Criminal Code*. This disparity is the result of two factors: there is no positive right to a *Gladue* report in most jurisdictions, and access to *Gladue* services varies greatly across regions. The next section will discuss the sources of this disparity and argue that making *Gladue* reports available for every Indigenous offender is a desirable and appropriate response.

A. Diverging Provincial Approaches to Gladue *Reports and PSRs*

Most provincial jurisdictions do not consider *Gladue* reports mandatory in sentencing Indigenous offenders, nor do they deem the absence of a *Gladue* report as a ground for appeal. In Alberta, courts have required that a full *Gladue* report be available at sentencing of an Indigenous offender, while British Columbia, Prince Edward Island and some other provinces have deemed PSRs with *Gladue* components to be sufficient. The following sections set out the details of the judicial approaches undertaken in these jurisdictions.

81. *Gladue*, *supra* note 4 at para 79.
82. *Ibid* at para 88.

(i) Alberta: Mandatory *Gladue* Reports

Alberta is currently the only jurisdiction that has interpreted *Ipeelee* as mandating that a *Gladue* report be made available for Indigenous offenders at sentencing. In *R v Mattson*[83] and *R v Napesis*,[84] Gary Mattson and Daniel Napesis appealed their respective sentences claiming that the trial judge did not sufficiently consider their circumstances as Indigenous people.[85] At sentencing, neither accused had a *Gladue* report, and Daniel John Napesis did not even have a PSR.[86]

In *Mattson*, the Court of Appeal for Alberta declared that it was "clear from the decision in *Ipeelee* that when sentencing an Aboriginal it is *required that a* Gladue *report be prepared*".[87] Paradoxically, the Court refused to "elevate form over substance" and dismissed the appeal.[88] The Court stressed, however, that *Gladue* reports will be mandatory in all future such cases.[89] Similarly, in *Napesis*, the Court confirmed that a sentencing judge's *Gladue* analysis "must be informed by a *Gladue* report".[90] As in *Mattson*, the irony here is unmistakable: the Court found that the trial judge erred in sentencing Mr. Napesis without a *Gladue* report, yet resentenced him without a *Gladue* report, instead referring to a PSR with *Gladue* factors.[91]

Mandating that *Gladue* reports be available at sentencing to Indigenous offenders who may be incarcerated aligns with the Supreme Court's perspective in *Ipeelee* and moves one step closer to enabling all Indigenous offenders to fully and somewhat uniformly benefit from *Gladue* principles. Yet, the rule in *Mattson* and *Napesis* is compromised if an Indigenous offender cannot successfully appeal a sentence given in the absence of a *Gladue* report where he or she wanted one.[92]

83. 2014 ABCA 178, 612 WAC 164.

84. 2014 ABCA 308, 620 WAC 380.

85. *Mattson*, *supra* note 83 at para 28; *Napesis*, *supra* note 84 at para 7 (both cases were appealed on multiple grounds).

86. *Mattson*, *supra* note 83 at para 37; *Napesis*, *supra* note 84 at para 7.

87. *Supra* note 83 at para 50 [emphasis added].

88. *Ibid* (in reaching this finding, the Court examined a post-sentence *Gladue* report, and found the original sentence appropriate despite the lack of a pre-sentence *Gladue* report).

89. *Ibid.*

90. *Supra* note 84 at para 8.

91. *Ibid* at para 9. The Court found that the appellant's circumstances did not play a significant part in his criminal behaviour. This was not a technical error, as the Court clearly distinguishes between *Gladue* reports and PSRs with *Gladue* factors. *Ibid* at paras 7, 13.

92. The British Columbia Provincial Court pointed out this contradiction. See *R v McCook*, 2015 BCPC 1 at paras 69–74, [2015] 2 CNLR 320.

Since *Mattson* and *Napesis* were rendered in 2014, they have been cited and applied by courts in Alberta.[93] In one isolated case, a judge chose not to order a *Gladue* report, claiming that the requirement for a *Gladue* report in *Mattson* was *obiter*.[94] As of the date of publication, there appears to be no study analyzing the implementation of *Mattson* and *Napesis* or determining whether *Gladue* reports are now being effectively provided every time an Indigenous offender is sentenced. This could be an area for potential future research.

(ii) Prince Edward Island, British Columbia and Others: A PSR with *Gladue* Elements is Sufficient

In contrast, other provinces have deemed PSRs with *Gladue* components to be satisfactory. The Courts of Appeal for British Columbia,[95] Manitoba,[96] Ontario,[97] Saskatchewan[98] and the Territorial Court of Yukon[99] have supported this view favouring substance over form.[100] While Prince Edward Island has set a high standard for PSRs to be deemed satisfactory, the British Columbia Court of Appeal has been most affirmative in defending PSRs with minor *Gladue* components. This section addresses and discusses their respective reasoning.

Although the Prince Edward Court of Appeal did not make formal *Gladue* reports mandatory when sentencing an Indigenous offender, it strongly expressed that the lack of a report which extensively examines *Gladue* factors is a reviewable error where the offender has requested that these factors be considered.[101] In *R v Legere*, an Indigenous offender had been sentenced to

93. See e.g. *R v Laboucane*, 2016 ABCA 176, 337 CCC (3d) 445; *R v Lepretre*, 2016 ABPC 187, 2016 CarswellAlta 1464 (WL Can) (the offender waived his right to a *Gladue* report); *R v McMaster*, 2017 ABPC 49, 2017 CarswellAlta 453 (WL Can) (the offender waived his right to a *Gladue* report).

94. *R v Aulotte*, 2015 ABPC 37 at para 7, 2015 CarswellAlta 1135 (WL Can).

95. See e.g. *Lawson*, *supra* note 58.

96. See e.g. *R v Harry*, 2013 MBCA 108 at paras 20, 77–81, 309 CCC (3d) 76; *R v Huska*, 2014 MBCA 114 at paras 5, 15, 630 WAC 36.

97. See e.g. *R v Kakekagamick* (2006), 81 OR (3d) 664 at para 52, 211 CCC (3d) 289 (though this decision was given before *Ipeelee*, *Kakekamick*'s rationale was followed by lower courts post-*Ipeelee*); *R v Doxtator*, 2013 ONCJ 79 at para 37, 2013 CarswellOnt 2158 (WL Can); *R v Raymond*, 2014 ONCS 6845 at para 108, 2014 CarswellOnt 17173 (WL Can).

98. See e.g. *R v Peekeekoot*, 2014 SKCA 97 at para 118, 621 WAC 22; *R v Chanalquay*, 2015 SKCA 141 at para 43, 658 WAC 110.

99. See e.g. *R v Atkinson*, 2012 YKTC 62 at para 15, 2012 CarswellYukon 97 (WL Can); *R v Quock*, 2015 YKTC 32 at para 109.

100. At the time of writing, no relevant decisions were recorded from New Brunswick, Newfoundland, Nova Scotia, the Northwest Territories, Nunavut and Quebec.

101. *R v Legere*, 2016 PECA 7 at paras 21, 24, 376 Nfld & PEIR 81.

eight months incarceration for a drug offence. He appealed this verdict on the grounds that the judge sentenced him without a *Gladue* report, even though a PSR had been prepared for him.[102] He sought to introduce a new, proper *Gladue* report into evidence on appeal.[103]

The Court did admit the new *Gladue* report into evidence and found the PSR insufficient in light of the sentencing principles set out by the Supreme Court. The Court held that while the PSR gave a "snap shot" of the appellant's Indigenous status and life circumstances, it did not "deal with the unique systemic or background factors that played a role in bringing this offender before the courts nor did it make reference to particular programming which may be appropriate to this Aboriginal offender".[104] Conversely, the *Gladue* report presented on appeal offered a satisfactory *Gladue* analysis.[105]

Justice Mitchell emphasized that "[t]here is no 'magic' in the word 'Gladue'", and that what matters is that the sentencing report which is presented to the judge corresponds to the analysis of systemic and background factors prescribed in *Gladue*.[106] Although it did not dismiss traditional PSRs entirely, the Prince Edward Court of Appeal did set a high threshold with regards to the *Gladue* information that must be provided to a judge for the sentencing of an Indigenous offender. It stressed that sentencing reports for an Indigenous offender must "be balanced and objective . . . [and] must not advocate a particular viewpoint".[107] On the facts of *Legere*, even a PSR with *Gladue* elements was not deemed satisfactory.

The Court of Appeal for British Columbia has taken a more restrictive approach. In *Lawson*[108] the Court of Appeal reviewed *Ipeelee* and declared that while the "type of information" contained in *Gladue* reports is indispensable, a formal *Gladue* report is not.[109] In *Lawson*, the appellant had benefitted from both a PSR and a *Gladue* report, but claimed that the sentencing judge did not accord sufficient weight to the latter.[110] Though it found that

102. *Ibid* at paras 1, 20.
103. *Ibid* at paras 2, 8–10.
104. *Ibid* at paras 20–21.
105. *Ibid* at para 22.
106. *Ibid* at paras 13–14.
107. *Ibid* at para 14.
108. *Supra* note 58.
109. *Ibid* at para 26.
110. *Ibid* at paras 3, 20.

the *Gladue* report was more exhaustive than the PSR, the Court concluded that other available sources provided relevant information and dismissed the appeal.[111] In its view, PSRs were an adequate means to provide the judge with factors to consider in sentencing an Indigenous offender: "it does not matter what label is put on the report. . . . *Gladue* information may be brought before the court in various ways by a variety of people".[112] The Court has upheld this interpretation in later judgements,[113] even after having considered the Prince Edward Island Court of Appeal's stance in *Legere*.[114] However, substance and form are often synonymous and *Gladue* reports are generally a much more adequate medium than PSRs to inquire into an Indigenous offender's circumstances.[115] Justice Cozens of the Yukon Territorial Court expressed it well:

> The importance of *Gladue* Reports to the sentencing of Aboriginal offenders cannot be overstated. While there are other means by which *Gladue*-type information can be provided to the Court, these means are often not as efficient in providing the relevant information. *In order for the sentencing of Aboriginal offenders to be done in compliance with s. 718 - 718.2 and the judgment of the Supreme Court of Canada in* Gladue *and* Ipeelee, Gladue *information and considerations must be before the sentencing judge. Properly prepared* Gladue *Reports are the most effective means by which this can be done, and an important factor in allowing the sentencing judge to impose a fit sentence.*[116]

Likewise, in a case where different memoranda on the Indigenous offender's background had been presented, Richard J. Scott CJ, as he then was, of the Manitoba Court of Appeal deemed that "all would have been better served" by a comprehensive *Gladue* report, suggesting they ensure "the Supreme Court's expectations in *Gladue* are fulfilled".[117] It follows that Indigenous offenders who only have a PSR are, broadly speaking, disadvantaged. The different formats in which *Gladue* information may be presented to the sentencing judge threaten consistency and uniformity in the quality and extent of the *Gladue* analysis provided to Indigenous offenders. Most importantly, varying levels of inquiry into their circumstances and moral culpability may influence the extent to which Indigenous offenders benefit from proportionality in sentencing.

111. *Ibid* at paras 36–37, 71.
112. *Ibid* at para 38.
113. See e.g. *Gilliland*, *supra* note 75 at paras 8, 15; *Florence*, *supra* note 58 at para 21.
114. See *R v Alec*, 2016 BCCA 347, 2016 CarswellBC 2183 (WL Can).
115. For further comparisons between PSRs and *Gladue* reports, see Hannah-Moffat & Maurutto, "Re-Contextualizing PSRs", *supra* note 41.
116. *Quock*, *supra* note 99 at para 109 [emphasis added].
117. *R v Flett (D) et al*, 2005 MBCA 61 at para 22, 351 WAC 36.

B. Disparity in Access to Gladue *Reports*

This article has previously discussed the reality that *Gladue* reports can vary in quality and scope across regions. Across Canada, access to *Gladue* reports is regionally disparate and limited.[118] This results in disadvantages in sentencing based on geographic location. According to a Department of Justice report published in 2013, PSRs remain the norm for presenting *Gladue* information to sentencing judges, and *Gladue* training for judges is only available in half of the jurisdictions in the country.[119] While Indigenous people in certain regions may obtain a fully funded *Gladue* report, most may only receive a traditional PSR with a *Gladue* component. Such disparity is especially worrying considering that PSRs generally do not adequately fulfill *Gladue* and *Ipeelee*'s requirements.

Many provincial and territorial jurisdictions do not offer subsidized *Gladue* report programs and rely chiefly on PSRs or non-funded *Gladue* reports.[120] In Newfoundland and Labrador, traditional PSRs are the norm, and in Nunavut, a court even refused a request for the inclusion of *Gladue* factors in PSRs.[121] In the Yukon, *Gladue* reports have been written by individuals with little training on an infrequent basis, which is a deplorable situation that has triggered advocacy for a formal *Gladue* report program in the territory.[122]

At the time of the writing of the *Yukon Gladue Research & Resource Identification Project* by the Council of Yukon First Nations in 2015, only seven out of thirteen jurisdictions had established funded *Gladue* report programs,[123] and they often could not meet demand.[124] In fact, even in jurisdictions with established programs, *Gladue* reports are not made available to all Indigenous offenders due to a lack of resources and awareness. Many programs

118. See Nate Jackson, "Aboriginal Youth Overrepresentation in Canadian Correctional Services: Judicial and Non-Judicial Actors and Influence" (2015) 52:4 Alta L Rev 927 ("While the use of '*Gladue* Reports' . . . is prevalent in larger jurisdictions, access is limited throughout the country" at 933, n 35).

119. See Department of Justice Canada, *supra* note 70 at 22–23.

120. See Council of Yukon First Nations, *Yukon Gladue: Research & Resource Identification Project* (Whitehorse: Council of Yukon First Nations, 2015) at 10–21; Don Clairmont, "The Development of an Aboriginal Criminal Justice System: The Case of Elsipogtog" (2013) 64:1 UNBLJ 160 at 164.

121. See Department of Justice Canada, *supra* note 70 at 9, 11.

122. For a review of access to *Gladue* report practices in Yukon, as well as in other jurisdictions generally, see Council of Yukon First Nations, *supra* note 120 at 4–11.

123. *Ibid* at 10–11 (those jurisdictions with established, funded *Gladue* report programs are Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Prince Edward Island, Saskatchewan).

124. *Ibid* at 4, 7–8, 48.

cannot provide a *Gladue* report in every appropriate case, and prioritize certain Indigenous people such as women and young people.[125] Moreover, some judges ignore *Gladue* reports' availability or believe that PSRs adequately provide *Gladue* information for sentencing.[126] In Manitoba, shrinking funding for the *Gladue* report program has resulted in an average of only ten *Gladue* reports produced each year. In most cases, *Gladue* components are simply added to traditional PSRs.[127] As a result, sentencing judges may not have sufficient information to fulfill their obligations pursuant to section 718.2(e) of the *Criminal Code*.[128]

Sentencing judges have openly denounced this disparity in access to *Gladue* reports. In British Columbia, Brecknell J criticized the Legal Services Society for acting as a "gatekeeper", "fiscally constrained in how it decides whether a report of the importance of a *Gladue* report is prepared", which, he argued, severely undermined the court's work.[129] In Ontario, Pomerance J in *R v Corbiere* opposed having to transfer the accused to Sarnia for him to benefit from *Gladue* programs and ordered funding for a *Gladue* report in Windsor.[130] Justice Pomerance expressed concern that the offender "did not have access to *Gladue*-related services in Windsor that would have been available to him in other city centres".[131] She deemed this contrary to section 718.2(e) of the *Criminal Code* and the proper administration of justice, as "availability of a *Gladue* report should not depend . . . on where an offender is situated".[132] In *R v Knockwood*, the Indigenous offender had requested a *Gladue* report in Quebec and was denied it on grounds that such reports were not available in that province.[133] Instead, *Gladue* elements were added to the PSR, which was found to be "entirely inadequate" and written completely in French, a language Ms. Knockwood did not speak.[134] In a very strongly worded judgement, Hill J criticized the State's

125. See Council of Yukon First Nations, *supra* note 120 at 10, 15–16. Alberta and Nova Scotia indicated that the program never had to refuse a request. *Ibid* at 18–19. However, this is not a guarantee that all Indigenous offenders have a *Gladue* report, as some judges or counsel may not demand one.

126. Department of Justice Canada, *supra* note 70 at 10.

127. See Council of Yukon First Nations, *supra* note 120 at 10 (only ten *Gladue* reports are produced yearly through the funded program); Milward & Parkes, *supra* note 52 at 87–88, 94; Parkes et al, *supra* note 45 at 15 (the authors make a strong argument for increasing *Gladue* reporting in Manitoba).

128. See Parkes et al, *supra* note 45 at 13–14; Milward & Parkes, *supra* note 52 at 90.

129. *McCook*, *supra* note 92 at paras 76–78.

130. 2012 ONSC 2405 at para 8, 2012 CarswellOnt 5931 (WL Can).

131. *Ibid* at para 14.

132. *Ibid* at para 9.

133. 2012 ONSC 2238 at paras 6–8, 286 CCC (3d) 36.

134. *Ibid* at paras 11–14.

lethargy in ensuring that Indigenous offenders benefit from their *Gladue* rights: "The outrageousness of this story is self-evident. A shameful wrong. Contempt for the rights of Aboriginal Canadians. A denial of equality."[135] All Indigenous Canadians should receive equal treatment: "While regional disparities may well exist in terms of sentencing ranges in various parts of the country, the application of the *Gladue* principles and section 718.2(e) of the *Code* are matters of federal law applicable in all regions of Canada."[136]

All in all, access to full *Gladue* reports is limited and not uniform across Canadian regions and jurisdictions and judges often do not have enough resources to fulfill their statutory obligations in sentencing Indigenous offenders.[137] The fact that vastly different services and programs are offered across the country points to a serious unfairness and disparity among Indigenous offenders: those in metropolitan areas may often benefit from a fully funded *Gladue* report, or even *Gladue* courts in certain cases, while others may only have an incomplete or unsatisfactory *Gladue* report and most are limited to PSRs which are routinely found wanting.

Conclusion: Resolving Disparities in Access to Justice

Disparity in access to a *Gladue* report and the quality of such a report among Indigenous offenders raises serious access to justice issues. In light of the information presented above, this section argues that *Gladue* reports can achieve *Gladue*'s and *Ipeelee*'s objectives in practice, that the many Indigenous offenders who may only obtain a PSR are therefore prejudiced, and that making *Gladue* reports available to Indigenous offenders who may be incarcerated is necessary to remedy this injustice.

First, *Gladue* reports can achieve the objectives of section 718.2(e) of the *Criminal Code* both practically and conceptually. In *Gladue* and *Ipeelee*, the Supreme Court explained that this section is remedial and aims at decreasing recourse to prison sentences for Indigenous people through a novel sentencing methodology emphasizing restorative justice and proportionality, while recognizing the enduring effects of systemic and background factors rooted in colonial history, discrimination and socio-economic vulnerability on an Indigenous offender's culpability.

135. *Ibid* at para 71.
136. *Ibid* at para 56.
137. See Council of Yukon First Nations, *supra* note 120 at 6.

Available data indicates that *Gladue* reports help meet both these principles concretely. The British Columbia Legal Services Society's evaluation of its *Gladue* report pilot project reveals that Indigenous clients with a *Gladue* report received significantly fewer and shorter jail sentences.[138] This supports the view that where judges have access to a *Gladue* report, they receive much more extensive information on the systemic and life circumstances bringing an Indigenous offender before them. Consequently, they can more accurately assess the offender's degree of moral blameworthiness and impart a correspondingly proportionate sentence. This in turn may lead to reduced jail sentences, as in LeBel J's own words, Indigenous people's "constrained circumstances may diminish their moral culpability".[139] In addition, a similar comparison in the Council of Yukon First Nations' report on *Gladue* practices indicates Indigenous offenders with a *Gladue* report have low rates of recidivism, which is "encouraging" considering the territory's struggle with recidivism.[140] Though this tendency may not be conclusive, it points to *Gladue* reports' influence in promoting restorative justice through proposals for sentencing alternatives that are mindful of the Indigenous offender's circumstances, needs and community. These comparative appraisals in British Columbia and the Yukon suggest that the Supreme Court's sentencing methodology for Indigenous people, when informed with a *Gladue* report, can indeed successfully reduce imprisonment.

Second, given this evidence that Indigenous offenders with a *Gladue* report have a significant advantage in sentencing, the great disparity in access to such reports across Canada creates an access to justice problem. Many Indigenous offenders still cannot enjoy the full extent of their sentencing rights pursuant section 718.2(e) of the *Criminal Code*, and the extent to which an Indigenous offender can benefit from a full *Gladue* analysis depends primarily on whether

138. LSSBC, *supra* note 45 at 21–22. The evaluation obtained results from a "comparison of case outcomes for 42 clients with a *Gladue* report to a matched sample of 42 non-*Gladue* Aboriginal clients". The non-*Gladue* report group received thirty-two jail sentences, and the *Gladue* report comparison group received twenty-three jail sentences. The median sentence length was eighteen days for *Gladue* clients and forty-five days for non-*Gladue* clients. All in all, *Gladue* clients received approximately thirty percent fewer, and fifty percent shorter, jail sentences. *Ibid* at 22.

139. *Ipeelee*, *supra* note 6 at para 73.

140. Council of Yukon First Nations, *supra* note 120 at 8. In the cases under study, *Gladue* report clients had a twenty-six percent recidivism rate. The report is nonetheless cautious and takes no definite position as to whether *Gladue* reports have definitely "contributed to a reduction in recidivism". *Ibid*.

Gladue report funding is available in his or her location.[141] This disparity in how *Gladue* is implemented among Indigenous offenders is paradoxical, considering that section 718.2(e) of the *Criminal Code* aims to address the disadvantage of Indigenous offenders versus non-Indigenous offenders.[142]

Third, making *Gladue* reports available in appropriate cases can solve this access to justice problem. Considering the significant disparity in how provincial courts have interpreted *Gladue*, Parliament should consider amending the *Criminal Code* to ensure that all Indigenous offenders equally benefit from their *Gladue* rights across Canada. Particularly, the *Criminal Code* should require that *Gladue* reports be offered at sentencing to Indigenous offenders who may be incarcerated in addition to a PSR. Correspondingly, the *Criminal Code* should stipulate that the lack of a *Gladue* report in these circumstances is a ground for appeal. In turn, at the political level, such amendments would incentivize the federal and provincial governments to increase funding in *Gladue* programs to ensure their compliance with statutory obligations.

Those who oppose making *Gladue* reports mandatorily available—including the British Columbia Court of Appeal in *Lawson*—have argued, in contrast, that substance should stand over form and a sentencing decision may be fully justifiable notwithstanding the lack of a *Gladue* report. While this line of reasoning is appealing, it disregards LeBel J's statement in *Ipeelee* that "bringing [*Gladue*] information to the attention of the judge in a *comprehensive* and timely *manner* is . . . *indispensable to a judge in fulfilling his duties* under s. 718.2(e) of the *Criminal Code*".[143] In fact, substance often follows form: *Gladue* reports are significantly more detailed and thorough than PSRs. While it is true that PSRs could be improved, offering *Gladue* reports to all Indigenous offenders who may be incarcerated would ensure consistency and uniformity in how *Gladue* factors are brought before sentencing judges. *Gladue* reports' distinctive analysis would help ensure that an Indigenous offender's record and life circumstances are not evaluated as risk factors calling for increased prison sentences, but rather with the perspective of reaching a proportionate sentence emphasizing restorative justice.

The tremendous human and financial resources involved may also be raised in objection to guaranteeing the availability of a *Gladue* report to all Indigenous offenders who may be incarcerated. While these reports are indeed

141. See Part 3(b), *above*, for a detailed analysis of regional disparities in access to *Gladue* reports. The Supreme Court has held in the context of *Gladue* reports that "proportionality in sentencing could aptly be described as a principle of fundamental justice under s. 7 of the Charter". *Ipeelee*, *supra* note 6 at para 36.

142. See *Gladue*, *supra* note 4 at paras 33, 37, 44.

143. *Supra* note 6 at para 60 [emphasis added].

very costly,[144] more imperative considerations support their becoming universal. Above all, Indigenous offenders are entitled to receive a just and proportionate sentence regardless of where they may live, and no expense should be spared to ensure the remedial power in section 718.2(e) of the *Criminal Code* is effective. In any case, increasing the number of *Gladue* reports provided may prove to be cost-effective, since these emphasize alternatives to imprisonment and data suggests that they may contribute to fewer and shorter jail sentences.[145] If such a correlation exists, financial costs beyond those involved in producing a *Gladue* report could be spared as a result of decreased Indigenous presence in penitentiaries.

Gladue reports should be offered and made available to all Indigenous offenders who may be imprisoned in Canada. Such a measure would be a meaningful first step towards ensuring that Indigenous offenders uniformly benefit from section 718.2(e) of the *Criminal Code* stressing principles of restorative justice and proportionality in sentencing.

Finally, it must be emphasized that the Canadian criminal justice system's failure towards Indigenous people, acknowledged in *Gladue*, is far-reaching. Making *Gladue* reports available to Indigenous offenders who may be incarcerated, though essential for access to justice, cannot achieve substantive equality for Indigenous people alone. The Supreme Court has been reluctant to apply *Gladue* principles beyond the sentencing stage. In recent rulings, it has denied that an offender's Indigenous status must be considered by the Crown in exercising its prosecutorial discretion to seek a mandatory minimum sentence,[146] and by the province in compiling a representative jury roll.[147] However, it is noteworthy that many lower court decisions have successfully expanded the consideration of *Gladue* factors in new spheres of the criminal justice system. Courts have considered *Gladue* factors in the context of extradition proceedings,[148] dangerous offender designations,[149] bail hearings,[150] parole

144. The cost of a *Gladue* report is currently, on average, $2,500 in Ontario, $2,337 in British Columbia (during the pilot phase), $2,000 in Nova Scotia, $1,200 in Alberta, $3,600 in Saskatchewan (plus disbursements), and $2,000 to $2,500 in Prince Edward Island. See Council of Yukon First Nation, *supra* note 120 at 12, 15, 17–19, 21.

145. See LSSBC, *supra* note 45 at 21–23.

146. See *R v Anderson*, 2014 SCC 41 at para 1, [2014] 2 SCR 167.

147. See *R v Kokopenace*, 2015 SCC 28 at para 98, [2015] 2 SCR 398 (Cromwell J offers a strong dissent on this point).

148. See e.g. *United States v Leonard*, 2012 ONCA 622, 112 OR (3d) 496.

149. See e.g. *R v Moise*, 2015 SKCA 39, 632 WAC 190.

150. See e.g. *R v Robinson*, 2009 ONCA 205, 95 OR (3d) 309.

hearings,[151] Ontario Review Board hearings[152] and administrative appeals from solitary confinement.[153] These cases illustrate that, to achieve restorative justice for Indigenous people in the Canadian criminal justice system, the principles in *Gladue* should be applied broadly and expansively, recognizing that all stages in the criminal process are interrelated, and that an Indigenous offender's *Gladue* report is intended to follow him or her through the criminal justice system and that its guiding principles have utility beyond sentencing.

151. See e.g. *Twins v Canada (AG)*, 2016 FC 537, [2016] 3 CNLR 342.

152. See e.g. *R v Sim* (2005), 78 OR (3d) 183, 201 CCC (3d) 482 (CA).

153. See e.g. *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440, 41 Alta LR (6th) 29.