The Sentencing of Indigenous People in Canada: Where We Are Two Decades After Gladue

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The overincarceration of Indigenous peoples is a national crisis. While representing only 4% of the country's population, Indigenous people disproportionately constitute over 30% of the federal inmate population. Sentencing is often perceived as a point in the criminal justice system where this problem could be addressed, and a number of measures have been implemented in the past 25 years to do so. Notably, section 718.2(e) of the Criminal Code, and the Supreme Court decisions in R v Gladue and R v Ipeelee, have affirmed the legal duty of trial judges to sentence all Indigenous offenders using a different methodology that takes into account their unique background circumstances ("Gladue" factors) and all alternatives to incarceration that may be more appropriate. It is hypothesized that these sentencing guidelines are not working, as Indigenous incarceration rates are continuing to increase. In this report, I analyzed all decisions involving Indigenous offenders at the provincial appeal court level from 2019 and 2020 in order to understand how well judges are considering and applying Gladue principles of sentencing, and how well appeal courts are enforcing these principles. I found that an overwhelming majority (67.9%) of trial judges failed to account for Gladue factors in sentencing. I also found a large inconsistency in appeal courts penalizing these trial–level departures from Gladue, with less than half (47.4%) of courts overturning a decision in which Gladue was not applied. This pervasive failure supports concerns that progress is not being made in courts to address overincarceration, and it presents the need for future research that closely examines why judges are not following Gladue and what reforms are required for meaningful change.

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INTRODUCTION

For decades, Indigenous peoples have been significantly overrepresented in the criminal justice system – not only as victims, but also as offenders. In Canada, the rate of incarceration of Indigenous people is disproportionately high: "Indigenous people represent only 4% of the country's population, yet over 30% of the incarcerated population in the federal system."[1] Multiple national–level inquiries have identified Indigenous overrepresentation as a crisis in Canada and have emphasized the urgent need for change. For instance, in 2015, the final report of the Truth and Reconciliation Commission stated that this issue reflects "a systemic bias in the Canadian justice system," and through Call to Action #30 called on governments to commit to eliminating the overrepresentation of Indigenous people in custody over the next decade.[2] In 2019, the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls identified overincarceration as a vehicle of colonial violence that contributes to the deaths of Indigenous women and girls, noting that the incarceration rate of Indigenous women in particular has increased by 90% in the last decade.[3]

Sentencing is often perceived as a point in the criminal justice system where, potentially, the problem of Indigenous overrepresentation could be effectively addressed.[4] Although a number of specialized Indigenous sentencing courts have been established in the past few decades to deal with the issue through a more community–centered process, the majority of Indigenous cases are still being heard in mainstream courts. Therefore, it is important to critically examine these systems to analyze the ways in which they account for, and help to address, the unique background circumstances of Indigenous offenders. The relationship between Indigeneity and sentencing has been well explored in academic research, and it is identified as an area that holds significant potential in helping to produce meaningful criminal justice reform. As Kent Roach and Jonathan Rudin write, "Sentencing reform cannot cure the multiple causes of over–incarceration, but judges make the ultimate decision whether aboriginal offenders go to jail."[5]

REVIEW OF LITERATURE

A. Reasons for Overincarceration

In its 1996 report, the Royal Commission on Aboriginal Peoples (RCAP) identified the current overincarceration crisis as rooted in a history and ongoing legacy of colonialism. This theory, identified by subsequent scholars as the strongest explanation for overrepresentation, draws attention to the colonial government's goal of disappearance through forced assimilation, and the

[1] Chris Cunneen, "Aboriginal Deaths in Custody: A Continuing Systematic Abuse" (2006) 33:4 Soc Just 37.
[2] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (December 2015), online (pdf): *National Centre for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Executive_Summary_English_Web.pdf> at 170, 172.
[3] National Inquiry into Missing and Murdered Indigenous Women and Girls, "Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls" (June 2019), online (pdf): *National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> at 113, 53.
[4] Samantha Jeffries and Philip Stenning, "Sentencing, Aboriginal Offenders: Law, Policy, and Practice in Three Countries" (2014) 56:4 Can J Corr 447.
[5] Kent Roach and Jonathan Rudin, "*Gladue*: The judicial and political reception of a promising decision" (2000) 42:3 Can J Crim 355 at 358.

systemic and institutional racism that prevails in the criminal justice system today. These legacies of colonialism are, as Elena Marchetti explains, laws and policies that are either intentionally racist and discriminatory or that "fail to consider the harmful effects of a particular decision or process for Indigenous people coming into contact with the criminal justice system."[6] Jillian Rogin explains that courts tend to discuss background circumstances of Indigenous offenders *outside* of the context of colonialism. Rogin cites *R v Pierce*, which considered the substance abuse, trauma and mental health factors of the accused individual, yet made no stated connection between these factors and any systemic issue, "as if these factors are part of Aboriginal heritage or culture divorced from the context of colonialism."[7]

Marchetti writes that the policies integral to the process of colonization "succeeded in attacking the core of Indigenous societies by disempowering and marginalising their very existence."[8] In doing so, colonialism resulted in a loss of land and culture, the desecration of Indigenous sites, the breakdown of relational systems, and an unwillingness of colonial authorities to acknowledge the jurisdiction of Indigenous laws. These underlying factors have contributed to systemic socioeconomic issues, as well as a legal system that does not respect, let alone account for, Indigenous laws and culture. As discussed by many scholars, it is these interrelated factors that form the backdrop of heightened criminal behaviour and criminalization. Thomas Clark argues that legacies of colonialism have manifested in systemic and direct discrimination against Indigenous people, as well as poor socioeconomic conditions.[9] Various authors have discussed the effect of residential schools on survivors and generations that have followed, and the social dysfunction caused by colonial policies such as residential schools and foster care.[10] Similarly, other authors have emphasized the overlapping effects of systemic bias: "penal policies have been closely tied to imperialist and colonialist strategies which legitimated, and eventually normalised, discriminatory penal practices toward Indigenous groups."[11]

The result of these underlying factors is that, under the same statistical circumstances, Indigenous defendants are more likely to be incarcerated than non–Indigenous defendants.[12] Indigenous defendants are more likely to be "arrested, charged rather than cautioned, remanded in custody rather than bailed."[13] Moreover, as Clark writes, Indigenous defendants are also "more adversely affected" by incarceration because imprisonment is often culturally inappropriate for Indigenous offenders and facilitates further discrimination.[14]

B. Judicial Attempts to Address the Problem

[6] Elena Marchetti, "Delivering Justice in Indigenous Sentencing Courts: What This Means for Judicial Officers, Elders, Community Representatives, and Indigenous Court Workers" (2014) 36:4 Denv J Intl L & Pol'y 341 at 342.
[7] Jillian Rogin, "*Gladue* and Bail: The Pre–Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can J Corr 313 at 338–339.
[8] Marchetti, *supra* note 6 at 343.
[9] Thomas Clark, "Sentencing Indigenous Offenders" (2014) 20 Auckland UL Rev 245 at 247.
[10] Brian R Pfefferle, "*Gladue* Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over–Incarceration" (2008) 32:2 Man LJ 113 at 115–116.
[11] Sarah Xin Yi Chua and Tony Foley, "Implementing Restorative Justice to Address Indigenous Youth Recidivism and over–Incarceration in the Act: Navigating Law Reform Dynamics" (2014/2015) 18:1 Austl Indigenous LJ 138 at 139.
[12] Jeffries and Stenning, *supra* note 4 at 469.
[13] Elena Marchetti and Janet Ransley, "Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?" (2014) 37:1 UNSWLJ 1 at 4.
[14] Clark, *supra* note 9 at 247.

i. Section 718.2(e) of the *Criminal Code* and *R v Gladue*

Courts and governments in Canada have come under increasing pressure to reduce the number and proportion of Indigenous inmates in the prison system. Consequently, in Canada, "political legislative events over the past 20 years have theoretically increased the potential for Indigenous status to reduce sentencing severity."[15] There was a positive turning point for Canadian law in 1996, due to amendments made to s 718: the sentencing provisions of the *Criminal Code*.[16] Bill C–41 added to the *Code* s 718.2(e), the first sentencing provision specific to Indigenous individuals in the criminal justice system. This new section instructed judges to take into consideration all alternatives to imprisonment for all offenders by paying particular attention to the circumstances of Indigenous offenders.[17] Scholars have emphasized that the introduction of s 718.2(e) not only codified a certain principle of sentencing, but, more importantly, it directed sentencing judges to undertake the process of sentencing Indigenous offenders using a different methodology, "in order to endeavour to achieve a truly fit and proper sentence in the particular case."[18] The introduction of this section signalled an initial recognition of the ways in which sentencing plays an important role in overincarceration.

However, s 718.2(e) itself did not provide clear direction to sentencing judges as to how, or to what extent, judges should address the unique backgrounds and circumstances of Indigenous offenders. The application of s 718.2(e) has been clarified in subsequent years through landmark Supreme Court decisions. The first case to consider this section was *R v Gladue.*[19] In the case, an Indigenous woman named Jamie Gladue was convicted of manslaughter and sentenced to three years of imprisonment. The Supreme Court monumentally held that s 718.2(e) was more than simply a re–affirmation of existing sentencing principles, and outlined the different methodology that judges were expected to apply in sentencing Indigenous offenders.[20] The Court concluded that, in sentencing an Indigenous offender, judges must consider:

> (a) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
> (b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[21]

The first consideration is related to the "moral culpability" of the offender, while the second consideration focuses on the effectiveness of available sanctions.[22] To conduct this analysis, the

[15] Samantha Jeffries and Christine Bond, "The Impact of Indigenous Status on Adult Sentencing: A Review of the Statistical Research Literature from the United States, Canada, and Australia" (2012) 10:3 J Ethnicity & Crim Just 223 at 226.
[16] *Criminal Code*, RSC 1985, c C-46, s 718.2(e).
[17] Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" (2005) Ipperwash Inquiry 1 at 42.
[18] Philip Stenning and Julian V Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2002) 54 Sask L Rev 137 at 153.
[19] *R v Gladue*, 1999 SCC 13.
[20] Wayne K Gorman, "The Sentencing of Indigenous Offenders in Canada" (2018) 54:2 Sup Ct Rev 52 at 53.
[21] *Gladue*, *supra* note 19 at para 93.
[22] Charlotte Baigent, "Why *Gladue* Needs an Intersectional Lens: The Silencing of Sex in Indigenous Women's Sentencing Decisions" (2020) 32:1 CJWL 1 at 10.

sentencing judge must attempt to acquire all information regarding the circumstances of the offender as an Indigenous person. *Gladue* was the Supreme Court's acknowledgement of systemic discrimination as a cause of overincarceration, and an attempt to import the concept of "restorative justice" into the sentencing process.[23]

A special type of pre-sentencing report was introduced to facilitate this different approach to sentencing Indigenous individuals: the *Gladue* report. These reports were implemented as a tool to assist the sentencing judge in conducting a *'Gladue* analysis' for each Indigenous offender. Kelly Hannah–Moffat and Paula Maurutto write that, unlike pre–sentencing reports, "*Gladue* reports offer an alternative way of assessing risk that is attentive to racism and racializing processes."[24] Alexandra Hebert elaborates on the features and purpose of *Gladue* reports, writing that these 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."[25] *Gladue* reports link the impact of background circumstances with the offender's criminal behaviour, emphasizing the importance of these interrelationships. The reports are prepared by either Indigenous caseworkers or trained court workers, who gather extensive information about the offender from interviews with family, friends, community members and Elders in a collaborative process that involves the accused themselves.[26]

The Court in *Gladue* noted, however, that the unique methodology put forth did not translate to an automatic reduction of a sentence simply because the offender was Indigenous. Further, it was implied that the impact and importance of *Gladue* would become reduced for more serious offences or when the defendant had a longer criminal history.[27] The Court's decision was reinforced in subsequent cases, such as *R v Wells* and *R v Proulx*,[28] in which the given courts decided that due to the severity of the respective offences, "the goals of denunciation and deterrence are accorded increasing significance";[29] these goals being "best served by a custodial sentence."[30] The clear implication of these decisions was that the differences between Indigenous and non–Indigenous cases would diminish as an offence increased in seriousness, and disappear entirely for the most serious offences.[31]

ii. *R v Ipeelee*[32]

In the years following the landmark legislative changes and Supreme Court decisions, nothing seemed to have changed in how Indigenous offenders were being sentenced. In their 2008 study, Andrew Welsh and James Ogloff sampled 691 sentencing decisions made prior to and following the implementation of s 718.2(e). They found that Indigenous offenders were over three

[23] Andrew Welsh and James RP Ogloff, "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50:4 Can J Corr 491 at 496.
[24] Kelly Hannah–Moffat and Paula Maurutto, "Re–Contextualizing Pre–Sentence Reports" (2010) 12:3 Punishment & Society 262 at 280.
[25] Alexandra Hebert, "Change in Paradigm or Change in Practice? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 157.
[26] *Ibid* at 158.
[27] *Gladue*, *supra* note 19 at para 93.
[28] *R v Wells*, 2000 SCC 10; *R v Proulx*, 200 SCC 5.
[29] Gorman, *supra* note 20 at 53.
[30] Welsh and Ogloff, *supra* note 23 at 496.
[31] Stenning and Roberts, *supra* note 18 at 163.
[32] *R v Ipeelee*, 2012 SCC 13.

times more likely to be imprisoned after the introduction of the new section.[33] Similarly, Charlotte Baigent reported that Indigenous people represented 17% of admissions to prisons in 1998–99, rising to 19–21% in 2006–07 and 27–28% in 2016–17.[34] Recently, Roach reported that in 2017-2018, Indigenous people represented 28% of admissions to federal prisons and 30% of admissions to provincial prisons: "What was a crisis in 1999," he wrote, "has gotten much worse and sadly appears today as business as usual."[35]

Various scholars had predicted these negligible impacts of the *Gladue* sentencing reform. In 2001, for instance, Renée Pelletier criticized the Supreme Court for its failure to adequately address the impacts of colonialism, emphasizing that the situation would only worsen with a continued reliance on "legally relevant factors" such as the accused's prior criminal record.[36] Pelletier also identified more practical problems to be faced with *Gladue* – notably, that defense counsel are inadequately trained to deal with Indigenous issues and to inquire into the circumstances of an Indigenous offender.[37] Further, Roach and Rudin have commented on the unavailability of treatment and alternative programs, and how this may be a factor that perpetuates a continued reliance by judges on custodial sentences.[38] In recent years, concerns about the inefficacy of these sentencing provisions have prevailed. In 2005, Justice LaForme, as he then was, stated that "some could legitimately argue that [Indigenous sentencing] is getting worse."[39] It is clear that recent jurisprudence dealing with Indigenous offenders has demonstrated confusion and frustration on the parts of judges in applying *Gladue* and s 718.2(e).

Over a decade after the *Gladue* decision, the Supreme Court addressed this confusion and frustration in *R v Ipeelee*. In *Ipeelee*, the Court acknowledged that previous sentencing directions have "not had a discernible impact on the overrepresentation of Aboriginal people in the criminal justice system."[40] The Court attributed this failure to a "fundamental misunderstanding and misapplication of both s 718.2(e) and this Court's decision in *Gladue.*"[41] The Supreme Court identified one of the main issues in the post–*Gladue* jurisprudence as the irregular and uncertain application of *Gladue* principles to serious and violent offences in particular, with passage 13 in paragraph 93 of the *Gladue* decision receiving disproportionate attention. In passage 13, the Supreme Court had stated that, "generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal."[42]

The Court in *Ipeelee* referenced numerous cases where courts "erroneously interpreted" passage 13 of paragraph 93 to be an indication that the *Gladue* principles do not apply to serious offences.[43] The Court sought to clarify that "Aboriginal circumstances are to be given full

[33] Welsh and Ogloff, *supra* note 23 at 506.
[34] Baigent, *supra* note 22 at 2.
[35] Kent Roach, "Plan B for Implementing Gladue: The Need to Apply Background Factors to the Punitive Sentencing Purposes" (2020) 67:4 Crim LQ 375.
[36] Renée Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over Representation in Canadian Prisons" (2001) 38:2 Osgoode Hall LJ 469 at 475.
[37] *Ibid* at 481.
[38] Roach and Rudin, *supra* note 5 at 361.
[39] Pfefferle, *supra* note 10 at 117.
[40] *Ipeelee*, *supra* note 32 at para 63.
[41] *Ibid*.
[42] *Gladue*, *supra* note 19 at para 93.
[43] *Ibid* at para 84.

consideration, irrespective of the seriousness of the offence."[44] The judges pointed out that the *Criminal Code* does not make a distinction between serious and non–serious crimes. They also mentioned the ease with which sentencing judges could deem any number of offences to be 'serious,' therefore, "allowing an exception for serious offences would inevitably lead to inconsistency in the Indigenous sentencing jurisprudence."[45] Justice LeBel, writing for the majority in *Ipeelee*, stressed that failing to apply *Gladue* principles to serious offences would undermine proportionality in sentencing and render the remedial power of s 718.2(e) ineffectual.[46] Proportionality is a fundamental principle of sentencing, which requires that the sentence be proportionate not only to the gravity of the offence, but, more importantly, to the offender's moral culpability – which would be diminished by an Indigenous offender's background circumstances.[47] The takeaway from *Ipeelee* is therefore that in order to address the issue of Indigenous overrepresentation, sentencing courts *must* take into account the unique systemic and background factors that have played a role in bringing Indigenous offenders before the court, in every single case.[48] The *Ipeelee* case was heralded as a "sentencing innovation" – aiming to bring greater national uniformity to sentencing practices, and paving the way for internormativity in the types of procedures and sanctions that judges use to consider Indigenous heritage.[49]

C. Impact on Incarceration Rates

Research shows that despite important judgements and legislative changes, the Indigenous overrepresentation crisis has only been exacerbated in the past few decades.[50] According to recent imprisonment data, although overall incarceration rates are decreasing, these rates are dropping faster for non–Indigenous people, with the percentage of Indigenous people being imprisoned actually increasing. In 2020, the Correctional Investigator of Canada, Dr. Ivan Zinger, released a report on the rates of Indigenous people in custody. He announced that since April 2010, the Indigenous inmate population has increased by 43.4% (or 1,265), whereas over the same periods, the non–Indigenous incarcerated population has declined by 13.7% (or 1,549). In a news release, Zinger added:

> Four years ago, my Office reported that persons of Indigenous ancestry had reached 25% of the total inmate population. At that time, my Office indicated that efforts to curb over–representation were not working. Today, sadly, I am reporting that the proportion of Indigenous people behind bars has now surpassed 30%.[51]

[44] Thalia Anthony et al, "Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice" (2015) 39:1 Melbourne UL Rev 47 at 56.
[45] Clark, *supra* note 9 at 255.
[46] Hebert, *supra* note 25 at 155.
[47] *Ibid* at 156.
[48] Clark, *supra* note 9 at 245.
[49] Marie–Andrée Denis–Boileau and Marie–Eve Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548 at 562.
[50] Julian V Roberts and Andrew A Reid, "Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story" (2017) 59:3 Can J Corr 313 at 314.
[51] Office of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30% – Correctional Investigator Issues Statement and Challenge" (January 2020), online: *Government of Canada* <www.oci–bec.gc.ca/cnt/comm/press/press20200121–eng.aspx>.

Zinger further stated that, on this trajectory, Indigenous people are projected to comprise 33% of the total federal inmate population within the next three years.

Unsurprisingly, many scholars are skeptical about the efficacy of judicial measures implemented to reduce incarceration rates for Indigenous offenders. Although progress has been made at the legislative level, many legal scholars still hold that no meaningful change is actually being made at the sentencing level and that colonial courts continue to uphold the oppression and criminalization of Indigenous people in Canada. The increasing overrepresentation of Indigenous offenders presents the crucial need to examine what is occurring in the courts, to better understand the areas that require further attention.

D. The Current Gap

In Canada, there is a significant body of literature on Indigenous disadvantage and on how Canadian courts consider Indigenous status in determining fit sentences. However, a clear gap exists in the research: most of the studies were written before the 2012 *Ipeelee* decision, in which the Supreme Court clarified its decision in *Gladue* and asserted that Indigeneity must be considered in every single case involving an Indigenous offender. At the time of the decision, the *Ipeelee* case was celebrated for demonstrating a judicial resistance to incarceration and excessive sentences for Indigenous individuals.[52] In 2012, Rudin published an article on *Ipeelee*, discussing what the decision meant for the future of sentencing. Rudin emphasized the importance of the Supreme Court's clarifications that a *Gladue* analysis was required in all cases involving Indigenous offenders, and that direct connections between background circumstances and the offence were not necessary.[53] Rudin saw these conclusions as having significant potential for a fundamental shift in sentencing practices. The Court in *Ipeelee*, in its clarification of some of the confusion that arose following *Gladue*, and in its repudiation of those academics and judges who have sought to minimize or trivialize that decision, has made clear that addressing Indigenous over–representation is the responsibility of all those in the justice system.[54]

Given that over ten years have passed since this decision, it is important to evaluate the extent to which *Ipeelee* has actually contributed to any definitive change in sentencing and incarceration in the past few years, especially since recent incarceration data suggests otherwise. Since the post–*Ipeelee* judicial shift occurred relatively recently, the current academic literature predominantly focuses on a pre–*Ipeelee* jurisprudential regime, which is a clear limitation to current understandings of the Indigenous overincarceration issue. This evidentiary gap reveals the need to measure sentencing practices in a recent, post–*Ipeelee*, comparator group.

METHODOLOGY

In order to conduct this analysis, I studied all cases at the provincial appeal court level from 2019 and 2020 that involved Indigenous offenders. I conducted this research through CanLII and collected 28 cases in total.

A. Rationale

[52] Denis–Boileau and Sylvestre, *supra* note 49 at 562.
[53] Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*" (2012) 57 SCLR 375 at 376.
[54] *Ibid* at 381.

Section 718.2(e) in the *Criminal Code* directs judges to give particular attention to the circumstances of Indigenous offenders and consider all available sanctions other than imprisonment. Judges are directed to report their reasoning, and the factors that influenced their sentencing decision, in their written statements.[55] Therefore, I thought that it would be most useful to look at these written sentencing decisions themselves in order to determine how s 718.2(e) is being applied and what factors are influencing judges' decisions regarding the use of *Gladue* principles. Studying this case law provides important context for a judge's sentencing decision—allowing us to see how certain factors were considered and weighed in arriving at that sentence. As such, this methodology offers the opportunity to critically examine both the sentencing process and the outcome.

The benefits of this approach have been promoted by scholars in the field. Roach and Rudin argue that looking at sentencing decisions is often the best way to study disparities between Indigenous and non–Indigenous offenders – in particular, looking at sentencing decisions is more illustrative than a purely quantitative analysis that solely considers sentence lengths for various groups of offenders. "The reason for the apparent disparity [between Indigenous and non–Indigenous offenders]," Roach and Rudin write, "will not be found anywhere other than the reasons for sentencing given by the judge."[56] Conducting this study at the appellate court level is especially beneficial. A number of scholars have chosen to study the impact of sentencing provisions at the appellate level because "it is the job of appellate courts to bring some consistency to trial courts in sentencing."[57] Given that appeal courts are expected to provide guidance to trial judges in how to approach the sentencing provision, studying appellate court case law can therefore be an effective way to understand how *Gladue* is being interpreted and enforced. Roach used an appellate court analysis in his study of *Gladue* treatment, and wrote that "The courts of appeal for each province send important signals about the meaning of *Gladue*."[58]

I collected my data from CanLII, a database that provides a comprehensive selection of Canadian case law. I chose to examine cases from 2019 and 2020 because they were the two most recent completed years at the time of this research.

B. Data Collection and Analysis

To collect my cases, I searched for "Indigenous offender" on CanLII and limited my search results to appeal court cases between 2019–01–01 and 2020–12–31. I pulled 28 cases in total. To conduct my research, I read through each case and recorded any information related to the provision of a *Gladue* report, the consultation of this report and of all relevant *Gladue* factors as per s 718.2(e), how a consideration of these factors impacted the sentence, and the quantum of the final sentence itself. In doing so, I sought to determine how each sentencing judge accounted for the offender's Indigenous status in constructing a fit sentence, and if the sentence differed in any meaningful way to accommodate the offender's unique needs and circumstances. Once my research was collected, I separated the cases into three main groups: cases in which *Gladue* was not considered, cases in which *Gladue* was considered but not applied, and cases in which *Gladue*

[55] Dawn Anderson, "After *Gladue*: Are Judges Sentencing Aboriginal Offenders Differently?" (2003) 1:1 National Library Canada 1 at 80.
[56] Roach and Rudin, *supra* note 5 at 372.
[57] Isabel Grant, "The Role of Section 718.2(a)(ii) in Sentencing for Male Intimate Partner Violence against Women" (2018) 96:1 Can Bar Rev 158 at 161.
[58] Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 Crim LQ 470 at 472.

was both considered and applied. Each case was examined for the appeal courts' analysis of the initial trial court's treatment of *Gladue*. To that end, cases fell into one of two categories: those in which the appeal court found that the trial judge had meaningfully erred ('Disagree'), or those in which the appeal court agreed with the trial judge's treatment of *Gladue* factors ('Agree').

In analyzing the data, both a quantitative and a qualitative approach were employed. First, I looked at the data quantitatively to determine the number of sentencing judges who were considering *Gladue* and the number of judges who were applying *Gladue* in their sentencing decision. I also examined the number of appeal courts that agreed and disagreed with the initial trial judge's reasoning. These results were then analyzed qualitatively, in order to better understand the reasoning of the trial judges and appeal courts.

My methodology accounted for both the process of sentencing – namely, when, how, and to what extent *Gladue* was applied, and also the outcome of the sentencing – if and how the sentence was adapted due to the offender's Indigenous status.

C. Limitations

There are a few limitations to this study. First, the cases available in this data set may not represent *all* appellate court decisions involving Indigenous offenders during the specified time period. In order to be included in the CanLII database, the sentencing decision must be a written one, as opposed to a decision given orally. Not only would oral decisions have been omitted, but it is possible that some written ones were as well, especially given that the cases included in online legal databases are a result of "decisions made by various people at the provincial level."[59] For these reasons, the cases included in this study are not *all* of the relevant sentencing decisions, but rather all of the available decisions.

Further, regarding the reasoning provided in the sentencing decisions themselves, there is the possibility that some judges may not be explicitly documenting all of the factors that influenced their decision. In that case, it is difficult to come to conclusions regarding what the judge did or did not consider during sentencing. For the purposes of my study, however, I will assume that since judges are required to document all factors that they considered in arriving at their sentence – especially given the possibility of appeal courts needing to evaluate their reasoning if the decision gets appealed – then if something is not mentioned it was likely not considered or did not have any significant bearing in the decision–making.

Finally, there is the limitation of a selection bias, as the cases I included in my research are only those that were contested, therefore one might expect a greater proportion of cases in which the trial judge did not do an adequate *Gladue* analysis. However, my sample included a number of cases (7 in total) that had been appealed by the Crown, with the complaint that *Gladue* factors had been "overemphasized." Therefore, while the cases may be disproportionately negative in terms of *Gladue* treatment, this limitation is slightly mitigated by the number of those that were Crown–appealed.

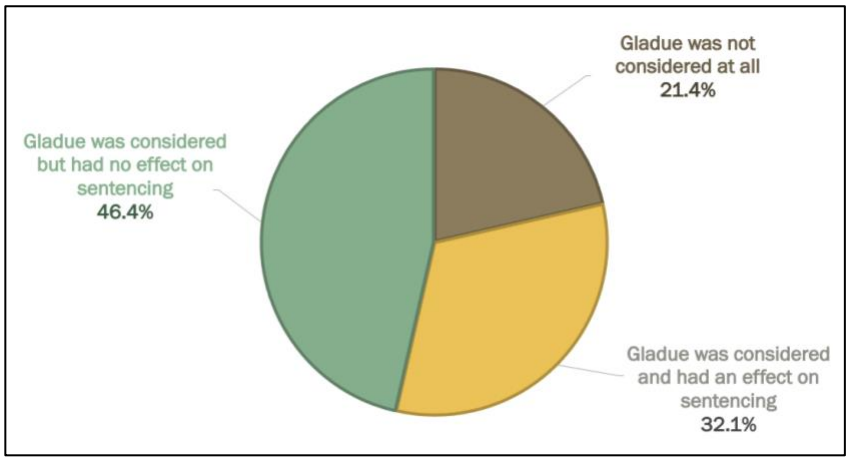
RESULTS

A. Quantitative Results

See Table 1–1 in Appendix for general results.

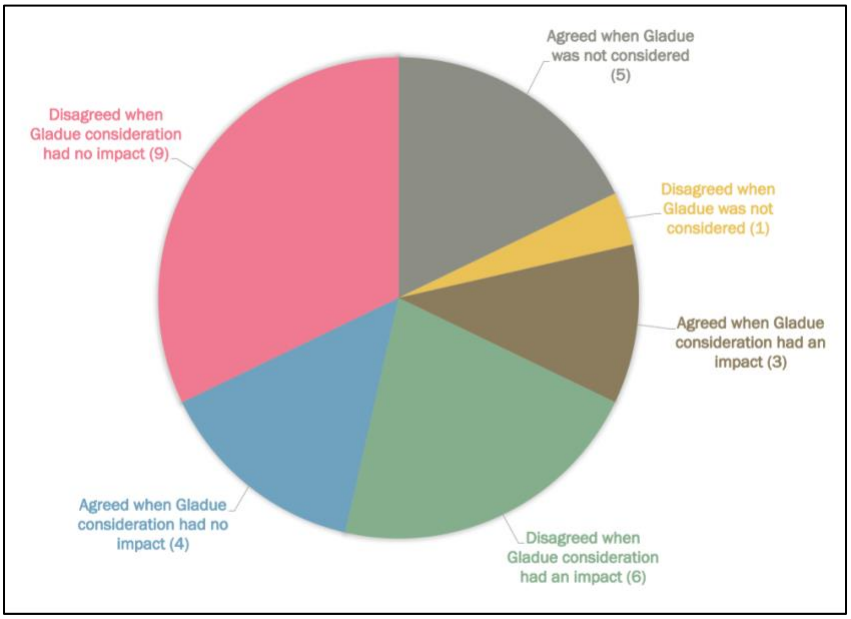
[59] Anderson, *supra* note 55 at 88.

Figure 1–1: Trial Court Results



Source: Author Analysis

Figure 1–2: Appeal Court Results



Source: Author Analysis

At the trial court level, out of the 28 cases, trial judges chose not to reference *Gladue* considerations in 6 of the cases. In the remaining 22 cases, trial judges did consider *Gladue* factors, most often provided through a *Gladue* report. In terms of whether or not the consideration had a measurable impact in arriving at a fit sentence, in only 9 of the cases did *Gladue* factors help the trial judge reach a sentence that was more appropriate for the given Indigenous individual. For the other 13 cases, the judge decided that the *Gladue* factors were either not relevant in customizing the sentence, or that other factors were more important to take into account. In total, therefore, there were 19 cases (or, 67.9%) in which *Gladue* was either not considered or not applied in sentencing. While the specific crime committed by each defendant was not the focus of this study, it is important to note that none of the cases in this data set deal with murder, and are mostly related

to assault, firearms, drug trafficking and robbery. Therefore, the concern that courts may be constrained in their sentencing due to laws that mandate certain minimum imprisonment terms is not relevant here, as mandatory minimums were present in only 5 of the cases (1 for sexual assault and 4 for firearm offences). For the purposes of this study, I do not focus on the circumstances of each offence. Given that the law requires *Gladue* considerations to be applied in *all* cases involving an Indigenous offender, regardless of the specific offence, I am concerned with how courts are following this direction. My findings that the majority of courts are not adhering to *Gladue* raises the need to do a qualitative assessment of the reasons why trial judges are not following *Gladue*, and what appeal courts are saying about the way that *Gladue* is being interpreted and treated in sentencing.

B. Qualitative Results

i. Trial Court Decisions

Cases in which *Gladue* was not considered (See Table 2–1 in Appendix)

Out of the six trial judges who chose not to reference *Gladue* despite the offender's Indigenous status, two of the judges – in *Gracie* and *Vicaire* – gave no reason for this decision. In the other four cases, the trial judges' justifications for their neglect of Indigenous–related circumstances are varied. In *Kritik,* the judge dismissed the *Gladue* report on the basis that the author was "not an expert" and the report contained "nothing specific to address a sexual offender."[60] In *Parr,* the trial judge reached a sentence based on his own prior legal experience and without any reference to case law or counsel requests, ultimately finding "no true mitigating factors" in the defendant's case.[61] In *McNeil,* the defendant had declined to participate in a *Gladue* report, and one was not prepared (this individual had been diagnosed with a mental illness around the time that they had declined the report, and experts testified that the decision to decline the report was not fully informed). Finally, in *Brown*, the trial judge received a *Gladue* report, however Crown prosecutors disputed that the defendant was actually Indigenous, citing an instance in which the defendant's alleged Indigenous parent had said, while drunk, "you're not my son so fuck off."[62] The judge in *Brown* noted the defendant's "minimal connection" to his "alleged" Indigenous roots, and concluded anyway that the issue of Indigeneity is "somewhat moot because of the seriousness of the offence that he committed."[63]

Cases in which *Gladue* was considered but not applied (See Table 2–2 in Appendix)

While the remaining 22 trial judges in this study accounted for *Gladue* factors in their decisions, 13 of these judges ultimately decided that the *Gladue* factors would not have an effect on their sentence. In 5 of these cases – *Piche, Pete, Sheck, McKay,* and *Hartling* – the trial judge did not reference *Gladue* in the sentence analysis. Although *Gladue* considerations had been put before the court, these judges did not make any reference to the factors in arriving at a decision, and there is no indication of the final sentence being reduced or modified in any way. The remaining 8 judges addressed *Gladue* considerations but decided that it was more important to privilege other factors. In justifying this departure, these judges either referenced other more

[60] *Kritik c R*, 2019 QCCA 1336 at para 15.
[61] *R v Parr*, 2020 NUCA 2 at para 95.
[62] *R v Brown*, 2020 ONCA 657 at para 20.
[63] *Ibid* at para 32.

important sentencing principles, or certain aggravating factors such as the seriousness of the offence.

In *McWatters*, the trial judge decided that *Gladue* mitigating factors were overwhelmed by the "many aggravating factors" in the case.[64] The judges in *EO, Awasis* and *Reddick* referenced the need to prioritize other principles of sentencing such as protection of the public, and denunciation and deterrence. In *Hansen* and *Altiman*, the judges highlighted the seriousness of the offence and specifically referenced section 13 in paragraph 93 of *Gladue* (as discussed earlier, this is the passage which has since been deemed invalid in *Ipeelee*). Finally, in two of the cases – *JP* and *Sharma* – judges attributed their lack of *Gladue* application to issues with insufficient evidence. The judge in *JP* had been expecting the *Gladue* report to specifically describe how the systemic and background factors bear on the defendant's moral culpability, and the judge in *Sharma* required "statistical evidence" that incarceration would disproportionately impact Indigenous offenders.[65]

Cases in which *Gladue* was considered and applied (See Table 2–3 in Appendix)

In 9 cases, the judge took into account the relevant *Gladue* considerations and decided on a lesser sentence than what would usually be given under the circumstances. Although the specific justifications for these reduced sentences varied, there were certain themes that were consistent across the cases. A few sentencing judges cited the need to include a condition in the sentence that offers the opportunity for the offender to be integrated back into their community. This was the case in *Charlie* and in *LSN* – in the latter, the judge believed that an Aboriginal restorative justice program would better serve the objective of rehabilitating the offender and integrating them back into the community. Further, four sentencing judges were tasked with considering *Gladue* in the context of offences that carried mandatory minimum sentences. In these cases – *Itturiligaq, Ookowt, Hills* and *Hilbach* – the judges weighed the relevant sentencing principles and found that the mandatory minimum sentence was not appropriate. These judges decided that given the mitigating factors related to systemic and background circumstances, the offenders were lower on the scale of moral blameworthiness. Specifically, the judges in *Itturiligaq* and *Hills* found that the mandatory minimum violated the individual's *Charter* rights, while the judges in *Ookowt* and *Hilbach* simply found that the mandatory minimum was too severe. Similarly, the judges in the remaining three cases also held that reduced sentences would be more appropriate due to the directions outlined in s 718.2(e) and the relevant *Gladue* factors.

ii. Appeal Court Decisions

Appeal court decisions can be organized into two categories: those that affirmed the trial judge's treatment of *Gladue* and those that departed from it. This distinction can be made within each of the three types of trial judge decisions previously outlined.

Cases in which *Gladue* was not considered (See Table 3–1 in Appendix)

As previously described, there were 6 cases in which the trial judge chose to not at all consider *Gladue* factors in arriving at their sentence. At the appeal court level, tribunals took issue with this lack of *Gladue* consideration in only one of the cases. However, in most of the other cases tribunals still identified the departure from *Gladue* as an error of law or an error of principle.

[64] *R v McWatters*, 2019 ONCA 46 at para 6.
[65] *R v Sharma*, 2020 ONCA 478 at para 95.

The one case in which the appeal court disagreed with the trial judge's sentence was *Kritik*; where the appeal court found that the error of law made by the trial judge in not assessing the *Gladue* report was an error that warranted a new hearing. In the five other cases, however, the appeal courts found that the judge's departure from *Gladue* did *not* justify a new hearing or sentence. Appeal courts in *Gracie* and *Vicaire* identified the departure from *Gladue* as an "error of law," but not an error that had any meaningful impact on the sentencing outcome. In *McNeil* and *Brown*, appeal courts found that the trial judges had made errors of principle by not admitting the *Gladue* report evidence and not determining whether or not the offender was Indigenous, respectively. However, in both of these cases, the appeal court concluded that the given sentence was not unreasonable due to the serious nature of the offence. Finally, in *Brown*, the appeal court did not even identify the lack of *Gladue* consideration as an error made by the trial judge.

Cases in which *Gladue* was considered but not applied (See Table 3–2 in Appendix)

Of the 13 cases in which *Gladue* factors were considered but not applied by the trial judge, the majority of appeal courts disagreed with the trial judge's treatment of *Gladue* and either ordered a re–trial or reduced the sentence as requested by the appellant. In 8 of these 13 cases, the appeal court found that the inadequate *Gladue* application constituted a material error that conflicted with the guidance outlined in *Ipeelee*. Many courts noted that a failure to meaningfully consider how *Gladue* factors bear on the offender's moral blameworthiness rendered the sentence unfit.

Some specific justifications given by the sentencing judges that were identified as errors on appeal were: the arbitrary distinction made between serious and non–serious offences in *Hansen*; the presumption that an Indigenous community would sentence the offender similarly in *Altiman*; the requirement of a direct cause–and–effect correlation between *Gladue* factors and the crime in *JP;* and the requirement of evidence demonstrating that incarceration disproportionally impacts Indigenous offenders in *Sharma*. In *Piche*, *Pete*, *Sheck*, and *McKay*, the appeal court broadly found that the trial judge had erred by failing to include *Gladue* factors in their sentencing reasoning, and the court allowed the appeal.

In the other five cases in which *Gladue* factors did not impact the sentence, appeal courts ultimately decided that they agreed with the sentence and how the trial judge had considered the *Gladue* factors. In *EO*, the court found that the trial judge had not erred by giving the sentencing circle recommendations minimal weight, as the circle was an "unsatisfactory process."[66] The court in *EO* also stated that it is not their role to "second–guess a sentencing judge."[67] Similarly, the appeal courts in *McWatters*, *Awasis*, *Hartling* and *Reddick* found that the trial judge had in fact adequately applied *Gladue* and the relevant sentencing principles. In *Awasis*, the court added that although there were certain concerning factors related to the offender's appearance before the court, "the judge was unable to remedy this complex problem through the sentencing process."[68]

Cases in which *Gladue* was considered and applied (See Table 3–3 in Appendix)

Finally, in the 9 cases where *Gladue* was both considered and applied by the sentencing judge, the majority of appeal courts found that *Gladue* factors were 'overemphasized' and thus resulted in an unfit sentence. While the courts in *Smarch*, *Quash*, and *Charlie* agreed with the trial judge for how it accounted for the offender's background circumstances and their diminished

[66] *R v EO*, 2019 YKCA 9 at para 64.
[67] *Ibid* at para 73.
[68] *R v Awasis*, 2020 BCCA 23 at para 132.

moral blameworthiness, courts in the remaining 6 cases found that more severe sentences were required. Specific justifications for these conclusions varied. Appeal courts found that, in *Itturiligaq* and *Ookowt*, *Gladue* factors did not significantly diminish moral blameworthiness; in *Ookowt*, *Hilbach* and *LP*, sufficient weight was not placed on the principles of denunciation and deterrence; in *Hills*, the trial judge did not demonstrate how the mandatory minimum sentence would be unfit for the defendant; and in *LP*, the victimization of Indigenous females was not adequately considered. In *LSN*, the appeal court merely stated that a more severe sentence would still be appropriate with respect to *Gladue* considerations. Notably, each of the decisions in which the trial judge had found the mandatory minimum sentence to be unfit – *Itturiligaq*, *Ookowt*, *Hills* and *Hilbach* – were ultimately overturned on appeal. In *Ookowt*, the appeal court justified its decision by stating that the people in the offender's home community, "like people everywhere else in Canada, are entitled to be protected by the law and are entitled to be safe in their homes and communities."[69]

DISCUSSION

A. Overall Findings

Incarceration rates for Indigenous people are rising in Canada. As a result, it has been hypothesized that the sentencing directions recently implemented to curb Indigenous overrepresentation are not working. In reviewing the recent appeal court case law involving Indigenous offenders, it becomes clear that these predictions are correct, as trial judges are overwhelmingly failing to meaningfully account for *Gladue* factors in constructing an appropriate sentence for Indigenous individuals, and appeal courts are failing to enforce a clear standard in their decisions.

At the trial court level, we can see in Figure 1–2 that the majority of trial judges chose not to apply *Gladue* factors in their sentences. *Gladue* only had an effect on sentencing in 32.1% of the cases, with 67.9% of judges deciding that *Gladue* factors were not important. This hesitancy to give full effect to *Gladue* exists at the appeal court level as well, and out of the 67.9% of cases in which trial judges departed from *Gladue*, appeal courts only overturned the decisions in less than half (47.4%) of the cases. We can see in Figure 1–3 that while the largest number of appeal courts departed from the trial judgement when the *Gladue* consideration had no impact on the sentence, there was much more inconsistency when it came to decisions in which *Gladue* was not considered at all or where *Gladue* had an impact. The majority of appeal courts found that a trial judge had not meaningfully erred when they did not consider *Gladue* at all. Further, the majority of appeal courts found that a judge *had* erred when they did apply *Gladue* in their sentence.

Given that s 718.2(e), *Gladue* and *Ipeelee* all mandate that the unique background circumstances of Indigenous offenders, as well as the availability of all alternative sentences, be considered in every single case, the fact that an overwhelming majority of judges are not following these directions is cause for concern. The lack of a clear standard in applying the law at both the trial and appeal court levels supports the ongoing criticism that overincarceration is not being effectively addressed in the courts. Roberts and Reid said it is a "paradox" that a deterioration of the overincarceration problem occurred during a period in which several remedial initiatives had been launched and a number of important judgements had been handed down by the Supreme

[69] *R v Ookowt*, 2020 NUCA 5 at para 71.

Court of Canada.[70] To understand why the paradox persists in the Canadian criminal justice system, it is helpful to pay attention to the reasons why judges are choosing to depart from *Gladue* principles in sentencing.

In investigating the reasoning and justifications provided for a lack of deference to *Gladue* principles, I noticed three recurring issues at both the trial and appeal court levels – as discussed below.

B. Common Issues

1. Factors related to the seriousness of the offence and other aggravating factors are often prioritized

The level of seriousness of the offence was an important consideration in many of the cases, but in *Brown, Hansen, Altiman, McWatters* and *Awasis* it was explicitly cited by the trial judge as the primary justification for a departure from *Gladue.* In *Brown*, the trial judge declared that the offender's Indigenous status was a "moot" point because of the "seriousness of the offence that he committed."[71] In *Awasis*, the judge implied seriousness by stating, "despite the influence of *Gladue* factors, the need to protect the public had to be paramount."[72] The judges in *Hansen* and *Altiman* both referenced paragraph 93, section 13, of the original *Gladue* decision to say that serious offences warrant a similar sentence for an Indigenous offender as would be given to a non–Indigenous offender. The judge in *Altiman* remarked that given the crime and its consequences, "there was never an alternative to jail," and that it is reasonable to assume that the offender's community would sentence the individual in the same way.[73]

The issue of sentencing Indigenous individuals convicted of serious offences has been identified in the literature as one of the primary conceptual hurdles in the exercise of the *Gladue* sentencing provisions.[74] This is a problem that dates back to early interpretations of the *Gladue* decision itself. In the years following *Gladue,* courts were determining culpability by privileging factors related to the seriousness of the crime rather than those relating to Indigenous circumstance, largely because of undue attention being paid to paragraph 93, section 13, of *Gladue*. In *Ipeelee,* the Supreme Court clarified that the arbitrary distinction between 'serious' and 'non–serious' offences should be irrelevant to the application of *Gladue* factors. The Court wrote that, statutorily, there is no such thing as a 'serious' offence: "The *Code* does not make a distinction between serious and non–serious crimes. There is also no legal test for determining what should be considered 'serious.'"[75] David Milward and Debra Parkes, discussing the myth that *Gladue* does not apply to serious offences, wrote that "the remedial purpose of *Gladue* is effectively rendered hollow by minimizing its reach and denying its applicability to a majority of Aboriginal people who are facing sentences of incarceration, the very people who have the greatest need for *Gladue*'s promise."[76]

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[70] Roberts and Reid, *supra* note 50 at 333.
[71] *Brown*, *supra* note 62 at para 32.
[72] *Awasis*, *supra* note 68 at para 129.
[73] *R v Altiman*, 2019 ONCA 511 at para 36.
[74] David Milward and Debra Parkes, "Gladue: Beyond Myth and towards Implementation in Manitoba" (2011) 35:1 Man LJ 84.
[75] *Ipeelee*, *supra* note 32 at para 86.
[76] Milward and Parkes, *supra* note 74 at 105.

The results of this study show that judges continue to make the mistake of rendering *Gladue* factors invalid in the case of 'serious' offences. Furthermore, appeal courts are not diligently enforcing the Court's clarification made in *Ipeelee*. While appeal courts did find that the trial judges in *Hansen* and *Altiman* had erred in referencing paragraph 93 of *Gladue*, four other appeal courts – in *Brown, McNeil, EO* and *McWatters* – used the seriousness of the offence as a justification for departing from *Gladue*. *McNeil* and *Brown*, for example, are two cases in which the trial judge did not consult any *Gladue* considerations. In both cases, the appeal courts upheld that a *Gladue* analysis should have been conducted, but due to the serious nature of the offence, the sentence was still fit. In 2009, Roach said that appellate courts have paid disproportionate attention to the 'serious offence' section in the *Gladue* decision: "Indeed, the appellate decisions in general tend to focus more on the seriousness of the offence than the circumstances of the offender."[77] Although most appeal courts in this study did not prioritize aggravating factors such as the seriousness of the offence, it is notable that even with the *Ipeelee* clarification, seriousness of offence is still being used as a justification in a number of cases.

2. Other principles of sentencing, such as denunciation and deterrence, are often prioritized

Similar to how an offence's seriousness is frequently considered as more important than background circumstances, certain sentencing principles are also being prioritized. Namely, the principles of denunciation and deterrence are often heralded by trial and appeal courts as paramount sentencing objectives, at the expense of *Gladue* and principles of rehabilitation and restorative justice. At the trial level, judges in *EO*, *Altiman*, *JP* and *Reddick* weighed the relevant *Gladue* factors and concluded that the principles of denunciation and deterrence would be better served by not applying *Gladue* considerations. The justifications for these decisions are generally consistent, but two decisions stand out. The judge in *EO* found that even with *Gladue* factors, the defendant's moral culpability was high, and a conditional sentence would thus be incompatible with the "fundamental principles of sentencing" of denunciation and deterrence.[78] In *JP*, the trial judge stated the following:

> In fashioning an appropriate sentence, I am not persuaded that the systemic and background factors, presented in the *Gladue* analysis, reduce the emphasis that must be placed on… the objectives of denunciation and deterrence. More particularly, I am satisfied that this is not a case for a disposition other than a penitentiary sentence.[79]

As such, judges in cases like *JP* assert that the sentencing goals of denunciation and deterrence are incompatible with *Gladue* principles, and that the background circumstances of Indigenous offenders do not justify a departure from what are pervasively viewed as the 'fundamental principles of sentencing.'

The appeal court in *JP* decided that the trial judge was wrong to conclude that the systemic and background factors did not contribute significantly to the offender's appearance before the courts. The appeal court further asserted that there was in fact a clear connection between JP's circumstances and the facts of the case, and that a reduced moral culpability was warranted. The

[77] Roach, *supra* note 58 at 473.
[78] *EO*, *supra* note 66 at para 30.
[79] *R v JP*, 2020 SKCA 52 at para 37.

appeal court allowed the appeal in this case; however, in the other three cases, appeal courts upheld the trial judge's decision to prioritize denunciation and deterrence. In other cases, appeal courts even overturned trial court decisions that gave meaningful effect to *Gladue*, specifically citing insufficient emphasis placed on denunciation and deterrence. In *Ookowt, Hilbach* and *LP*, appeal courts were all faced with decisions in which trial courts had chosen to depart from a mandatory minimum sentence due to importance placed on *Gladue* principles. Appeal courts overturned each of these decisions, referencing the trial judge's mistake of "overemphasizing *Gladue/Ipeelee* factors."[80] The appeal court in *Ookowt* found that the sentencing judge had failed to state why a lower sentence would meet the need for denunciation and deterrence and how it would be responsive to needs of Indigenous people and their communities, implying that the offender's community would also prioritize being free from gun violence – an argument similar to that used by the trial judge in *Altiman*. There is limited literature specifically focusing on conflicting sentencing principles in the context of a meaningful realization of *Gladue*, but the pervasive prioritization of denunciation and deterrence suggests a need for further research in this area.

3. Many judges are not referencing *Gladue* at all, often due to issues with the *Gladue* report

Finally, perhaps the most glaring issue in the case law was a repeated failure to even consider or mention *Gladue* factors, whether as evidence or as relevant factors in the sentence analysis. There are six cases in which *Gladue* factors were not put before the judge despite the offender's Indigenous status, and there were five cases in which there was no reference to *Gladue* made in the sentencing analysis despite the factors having been presented to the court. In the appeal courts, this failure to discuss the relevant *Gladue* factors and principles is being addressed very inconsistently. For instance, appeal courts only disagreed with the sentence and ordered a retrial in *one* of the cases in which *Gladue* was not considered at all. This inconsistency is concerning, and necessitates a focus on how *Gladue* information is being provided to the courts in the first place.

Notably, a number of cases were characterized by issues with funding, preparing, or consulting the *Gladue* report. In *McNeil* and *Vicaire*, *Gladue* reports were not prepared; in *Hartling*, there was no funding for the *Gladue* report, the defendant had to pay for it privately, and it was barely mentioned in sentencing; in *Kritik*, the trial judge dismissed the *Gladue* report because the author was "not an expert" and the report contained "nothing specific" to address the given offence;[81] and in *JP* and *Sharma*, the trial judges found that there was insufficient evidence provided in the *Gladue* report to justify a lesser sentence. In the appeal courts, these *Gladue* report–related errors were not addressed in any uniform way. While the courts either ordered a new trial or imposed a reduced sentence in *JP*, *Sharma* and *Kritik*, they found that the sentences imposed at trial were fit in *McNeil, Vicaire* and *Hartling*. Specifically, in *McNeil*, the appeal court declared that the case was not one in which restorative justice principles were the most important; in *Vicaire*, the appeal court stated that the *Gladue* report would not have changed the sentence outcome anyway, so the failure to order the report, "resulted in no substantial wrong or miscarriage of justice;"[82] and in *Hartling*, the appeal court decided that due consideration had been given to *Gladue* factors. Furthermore, the appeal court in *Gracie*, a case in which the trial judge did not consult the prepared *Gladue* report, found that despite their error, "there is no reasonable

[80] *R v Hilbach*, 2020 ABCA 332 at para 49.
[81] *Kritik*, *supra* note 60 at para 15.
[82] *Vicaire v R*, 2020 NBCA 77 at para 47.

possibility that the verdict would have been any different," because, "the record does not suggest that the appellant's Indigenous background might have had a significant impact on the terms of his sentence."[83] Elspeth Kaiser–Derrick found in her review of trial court cases that the provision of *Gladue* reports was "jurisdictionally uneven and precariously funded."[84] She pointed out that issues with *Gladue* reports contributed to an overall inadequacy, and sometimes unavailability, of information related to the systemic or background factors of Indigenous individuals being sentenced. The results of this study support Kaiser–Derrick's concerns. *Gladue* reports continue to be unevenly ordered and consulted in the courts, which contributes to judges' decisions to neglect *Gladue* factors.

Therefore, while issues with the *Gladue* report were explicitly cited in the aforementioned cases, it is likely that problems related to information provided in the reports were a contributing factor in many other courts' decisions to depart from *Gladue* sentencing principles. *Gladue* reports are expected to provide detailed information about the offender's circumstances, as well as link the impact of these factors to their criminal behaviour.[85] The fact that so many judges and appeal courts in this study did not see a clear connection between background factors and offending suggests that *Gladue* reports are either not as informative as they should be, or not being given enough importance. As summarized by Kaiser–Derrick, "the form, content, and sometimes existence of *Gladue*–related information at the disposal of sentencing judges vary widely."[86] In multiple cases, as was seen in this study, a lack of information or proper understanding of *Gladue* information means that judicial notice is left to supplant instead of supplement what should be provided by *Gladue* reports. It is because of this gap that judges often signal the need of additional information even where comprehensive reports are provided. These problems should be kept in mind, but should be considered alongside a broader focus on instructing judges regarding how to properly seek and interpret the information being put before them in the *Gladue* reports.

Across each of the three issues detailed above is the systemic problem that judges are not being given the instruction they need to meaningfully apply *Gladue* information in sentencing. This is a problem that exists at the appeal court level as well. Judges in appeal courts are educated in the same way as trial judges, and thus have the same biases and understandings when it comes to considering Indigeneity in sentencing. The lack of training and support related to Indigenous sentencing principles is evident in the numerous cases in which a judge or court made the decision, for whatever reason, not to follow the directions to sentence an Indigenous offender differently. This plays out with, for example, the appeal court in *Awasis* concluding that "the judge was unable to remedy this complex problem through the sentencing process."[87] It also plays out in numerous judges finding that there is insufficient evidence that an Indigenous offender's moral culpability is reduced, or that an incarceration term would be demonstrably unfit. The fact that Indigenous peoples, as a result of legacies of colonialism, genocide and assimilation, are disproportionately incarcerated, has been proven time and time again. As Elizabeth Adjin–Tettey writes, the overrepresentation of Indigenous people in the criminal justice system is a reflection of the "persistence of the colonial relationship between Aboriginal peoples and the Canadian state" as

[83] *R v Gracie*, 2019 ONCA 658 at para 46.
[84] Elspeth Kaiser–Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women* (Winnipeg: University of Manitoba Press, 2019) at 132.
[85] Hebert, *supra* note 25 at 157.
[86] Kaiser–Derrick, *supra* note 84 at 139.
[87] *Awasis*, *supra* note 72 at para 132.

well as of their continuing socio–economic marginality.[88] Speaking about the courts' failure to apply *Gladue* principles, Mi'kmaq lawyer and activist Pamela Palmater said, "this is so far beyond the law, it is unconstitutional, and it violates the *Charter*."[89] She pointed out that the Supreme Court has called on judges to find alternatives to prison for people with *Gladue* factors. "And instead," Palmater explained, "despite being a cure for discrimination, [the courts] actually use [*Gladue*] to further discriminate against Indigenous people."[90] The results of this study support Palmater's assertion that court systems are upholding discriminatory practices that continue to criminalize Indigenous offenders. By continuing to send offenders to prison even when moral blameworthiness should be reduced, and all alternatives to incarceration should be explored, courts are signalling that the ongoing oppression and disempowerment of Indigenous peoples by the criminal justice system in Canada is not a crisis that warrants drastic judicial action.

C. Areas for Future Research

There are a number of areas beyond the scope of this paper that would be important to target for future research on the lack of *Gladue* application in courts. Notably, it would be informative to focus on variations in sentencing across the provinces or variations related to the different types of offences. Further, there is also a need to look into certain statutory considerations that conflict with *Gladue*, such as mandatory minimum sentences. While only five of the cases in the current study involved mandatory minimums, and in each of these cases the trial judges deemed the mandatory minimum unconstitutional in light of *Gladue* factors, it has been posited that mandatory minimum sentencing legislation may be blunting the impact of s 718.2(e) and are "making it harder to reduce levels of Aboriginal over–representation."[91] The availability and accessibility of alternatives to incarceration is another important area for future research, as it would help to explain why judges continue to impose prison sentences despite being directed to choose other options. The "conditional sentence" option – a community–based form of custody – is a relevant, but often overlooked, alternative to incarceration that has received little attention in the academic research.[92] Finally, in terms of appeal court–specific analyses, there seems to be a hesitancy in a number of appeal courts to question the trial judge's weighing of the relevant *Gladue* factors. In *EO*, for example, the appeal court expressed an unwillingness to oppose the trial judge's decision to dismiss the sentencing circle's recommendations and the relevant *Gladue* factors, stating:

> The role of this Court is not to second–guess a sentencing judge who has examined the facts carefully, in this case heard the evidence at trial, participated in a circle sentencing, carefully considered the case law, the circumstances of the offence and the offender, the *Gladue* factors, and the principles of sentencing set out in the *Criminal Code*.[93]

[88] Elizabeth Adjin–Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19 CJWL 179 at 188.
[89] "Indigenous Over–Incarceration" (24 January 2018), online: *The Agenda with Steve Paikin* <www.tvo.org/video/indigenous–over–incarceration>.
[90] *Ibid*.
[91] Jonathan Rudin, "Aboriginal Over–representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:22 SCLR 687 at 710.
[92] Roberts and Reid, *supra* note 50 at 315.
[93] *EO*, *supra* note 66 at para 73.

Appeal courts' hesitancy to challenge the *Gladue* analysis conducted at trial perpetuates the cycle of criminalization that limits Indigenous offenders' opportunities to receive non–custodial sentences. These limitations faced at the appellate level when courts attempt to change a trial judge's sentence have been mentioned by scholars such as Roach, but further study is warranted.[94] Hopefully, more research into these various constraints to *Gladue* sentencing provisions will provide a clearer picture of why exactly the disparity persists in Canadian courts.

CONCLUSION

In the years following *Gladue*, many scholars declared that the criminal justice system had "failed Indigenous people."[95] Although over two decades have passed, and the 'sentencing innovation' of the *Ipeelee* decision has since been introduced, the results of this study suggest that courts in Canada are still failing to acknowledge and address the disproportionate representation of Indigenous people in prisons. It is clear that the sentencing guidelines created in *Gladue* and reaffirmed in *Ipeelee* are not having any meaningful effect: Out of the 28 cases in this data set, a reduced sentence was only imposed at trial and maintained on appeal in three (or, 10.7%) of the cases. The fact that across Canada, a clear *minority* of cases implemented *Gladue* principles in the sentence is a major cause for concern.

Further cause for concern is presented by recent jurisprudence from the Supreme Court, which goes as far as undermining the guidance set out in *Gladue* and *Ipeelee*. In the 2022 decision of *R v Sharma* (an appeal to the Supreme Court of one of the cases analyzed in this study), a majority of the Court upheld a ban on conditional sentences for certain classes of serious offences and found that the Indigenous defendant had not demonstrated that such a ban would contribute to a disproportionate impact on Indigenous offenders relative to non–Indigenous offenders.[96] Given the various factors discussed in this paper – incarceration rates increasing faster for Indigenous than non–Indigenous offenders, the legacies of colonization that lead to increased criminalization, and the greater adversity experienced by Indigenous peoples in the justice system – it is difficult to see how restricting an important alternative to incarceration would not have an obviously disproportionate impact on Indigenous offenders. Regardless of whether or not courts accept this fact, the instruction they have been given is clear and should be easy to apply: use a different sentencing methodology *in every case*, even for 'serious' offences.

A fundamental principle of the *Criminal Code* is that incarceration is a *last resort* for anyone who is coming before the courts, and especially for Indigenous peoples. There is already the legal framework in place that specifically allows judges to depart from prison terms for Indigenous offenders. However, it is clear that certain systemic issues need to first be addressed in order for the full meaning of this framework to be realized in the courts. Training judges, changing attitudes, funding alternatives to incarceration, and involving Indigenous peoples and communities more in the sentencing process are all steps that need to be taken before *Gladue* principles will have any measurable impact on imprisonment rates. Sentencing innovations by themselves will not remove important causes of Indigenous contact with the criminal justice system – causes such as poverty, substance abuse, lack of education, and lack of employment opportunities. Moreover, as affirmed in *Gladue*, the unbalanced ratio of imprisonment for Indigenous offenders also arises from "bias against Aboriginal people and from an unfortunate institutional approach that is more

[94] Roach, *supra* note 58.
[95] Rudin, *supra* note 91 at 712.
[96] *R v Sharma*, 2022 SCC 39 at para 76.

inclined to… impose more and longer prison terms for Aboriginal offenders."[97] Therefore, sentencing judges have the most direct power over whether an Indigenous offender will go to jail, or whether other more appropriate sentencing options will be exercised.

Of course, it would be most impactful to put justice in the hands of Indigenous peoples themselves. Indigenous peoples have long been asking for more self–determination in the criminal justice process, something which the RCAP has highlighted the need for as well. Indigenous peoples have strong legal traditions that date back to pre–contact, but the erasure of Indigenous peoples' right to self–govern was central to the colonial project. In this sense, colonialism is not a historical event; as long as Indigenous people are unable to practice their own restorative and rehabilitative justice systems, they will continue to be disproportionately targeted by a system that was built to marginalize them. When Indigenous communities have more control over the punishment of their own people, it opens the possibility of meaningful progress through community–based restorative justice systems, and alternatives to incarceration such as "culturally specific prisons, rehabilitation methods, and probation that is tailored to meet the needs of the Aboriginal offender and that is capable of addressing the intergenerational impact colonisation has had on that offender."[98] For now, while these options remain rare and underused, it is crucial to focus on how to change engrained practices and biases in the courts. It is time for the colonial court system to recognize its complicity in furthering the cycle of oppression and institutionalization of Indigenous people, and take meaningful steps to reduce overincarceration. This change is long overdue.

[97] *Gladue*, *supra* note 19 at para 65.
[98] Carolyn Holdom, "Sentencing Aboriginal Offenders: Recognising Disadvantage and the Intergenerational Impacts of Colonisation" (2015) 15:2 QUT L Rev 50 at 69.

APPENDIX

Table 1–1: General Results

Case	Did the trial judge consider/apply *Gladue* factors?	If not, did the appeal court found that they erred in not doing so?	If they did consider *Gladue*, did it have an effect on sentencing?	If it did have an effect on sentencing, did the appeal court agree with how it affected the sentence imposed?	If it did not have an effect, did the appeal court agree?
R v McWatters	Yes		No		Yes
R v Smarch	Yes		Yes	Yes	
R v Quash	Yes		Yes	Yes	
R v E.O.	Yes		No		No
R v Hansen	Yes		No		No
R v Piche	Yes		No		No
R v Altiman	Yes		No		No
R v Pete	Yes		No		No
Kritik c R	No	Yes			
R v Gracie	No	No			
Sheck v Canada (Minister of Justice)	Yes		No		No
R v McKay	Yes		No		No
R v Awasis	Yes		No		Yes
R v Charlie	Yes		Yes	Yes	
R v Hartling	Yes		No		No
R v Parr	No	No			
R v L.S.N.	Yes		Yes	No	
R v J.P.	Yes		No		No
R v Itturiligaq	Yes		Yes	No	
R v Ookowt	Yes		Yes	No	
R v Hills	Yes		Yes	No	
R v Sharma	Yes		No		No
R v Hilbach	Yes		Yes		No
R v McNeil	No	No			
R c L.P.	Yes		Yes	No	
R v Brown	No	No			
R v Reddick	Yes		No		Yes
Vicaire v R	No	No			

Source: Author Analysis

Table 2–1: Cases in which *Gladue* was not considered

Case	Reason for *Gladue* not considered
Kritik c R	Although a Gladue report was prepared per the defendant's request, the judge dismissed the Gladue report and in his judgement made no mention of the offender's Indigenous background, saying that the author of the Gladue report was not an expert and the report contained "nothing specific to address a sexual offender."

R v Gracie	Although a *Gladue* report was filed, the sentencing judge's reasons do not reference the *Gladue* report or any principles relevant to the offender's Indigeneity.
R v Parr	There was no *Gladue* report ordered or considered, and the trial judge determined a sentenced based on his own prior legal experience without any reference to case law or counsel requests. In his analysis, he found "no true mitigating factors."
R v McNeil	The defendant had declined to participate in a *Gladue* report, and one was not prepared. The defendant had been diagnosed with a mental illness around the same time that they had declined the report.
R v Brown	Although the trial judge received a *Gladue* report, it was disputed that the defendant was Inuit (due to the defendant's alleged father once saying, "you're not my son so fuck off"). The judge concluded that since there was, "minimal connection between Mr. Brown and his alleged aboriginal roots… it must be said that these issues are somewhat moot because of the seriousness of the offence that he committed."
Vicaire v R	Despite the fact that the trial judge identified the defendant as Indigenous, Vicaire's Indigenous ancestry "received only a passing reference in his Pre–Sentence Report." No *Gladue* report was ordered and thus no consideration of Vicaire's Indigeneity was made in determining the sentence.

Source: Author Analysis

Table 2–2: Cases in which *Gladue* was considered but not applied

Case	Reason for *Gladue* not applied
R v McWatters	There is no clear specification provided about how *Gladue* factors were considered or applied. In its decision, the trial judge decided that these mitigating factors were overwhelmed by the "many aggravating factors" in the case—the most notable of which was the appellant's long criminal record.
R v E.O.	In addition to the *Gladue* report filed, there was a circle–sentencing process in which the participants expressed their desire for a non–custodial sentence. However, the trial judge ultimately decided that a conditional sentence order would not be appropriate because it was "inconsistent with the fundamental principles of sentencing," in particular denunciation and deterrence. The judge therefore imposed the mandatory minimum sentence for the offence.
R v Hansen	The trial judge decided that *Gladue* factors would not apply in this case due to the offence seriousness. He cited paragraph 93 of *R v Gladue* that said, "the more violent and serious the offence committed, the greater the likelihood that terms of incarceration would be the same or similar for both Aboriginal and non–Aboriginal offenders."
R v Piche	Although part of the trial took place in the defendant's home community, in the trial judge's final reasons he did not mention anything about *Gladue* factors.
R v Altiman	In its final decisions, the judge emphasized the principle in the *Gladue* case that the more serious the crime, the more likely that terms of imprisonment will be the same for Indigenous and non–Indigenous offenders. The judge thus imposed a much harsher sentence than is usually imposed for similar crimes. He stated, "There was never an alternative to jail, even with the *Gladue* principles in play, given the enormity of the crime here and its consequences." He also declared that even the defendant's community would sentence the same way, therefore the sentence is just.
R v Pete	The trial judge decided to sentence the defendant to a custodial sentence that is well above the lower end of the range for a first–time offender, without giving any weight to the relevant *Gladue* factors.
R v Sheck	The Minister did not take into account the defendant's Indigenous heritage in 3 specific ways that were relevant to the question of how an extradition sentence would impact the given Indigenous individual.
R v McKay	Although the sentencing judge found that the appellant's background factors had a bearing on his moral culpability, it is not clear how the judge applied these factors in arriving at an appropriate sentence, as the sentence was maximally harsh for the circumstances of the crime.
R v Awasis	The trial judge concluded that, "despite the influence of *Gladue* factors, the need to protect the public may be paramount in certain cases" due to the high likelihood of re–offending.
R v Hartling	Initially, there were many issues in getting the *Gladue* report due to lack of funding, and ultimately the defendant had to pay for the report himself. In the trial judge's reasoning, there is no information about how *Gladue* impacted the sentence or existence of a reduced or different sentence based on mitigating factors.
R v J.P.	In its decision, the trial judge said that "I am not persuaded that the systemic and background factors, presented in the *Gladue* analysis, reduce the emphasis that must be placed on the sentencing objective of public protection, and, perhaps to a lesser extent, on the objectives of denunciation and deterrence. More particularly, I am satisfied that this is not a case for a disposition other than a penitentiary sentence."
R v Sharma	The sentencing judge did not consider community–based sanctions, or the importance of these alternatives. The judge required that there be statistical evidence to establish that removing the conditional sentence option would disproportionately impact Indigenous offenders.

R v Reddick	The sentencing judge expressed that deterrence and denunciation were more important than rehabilitation in this case.

Source: Author Analysis

Table 2–3: Cases in which *Gladue* was considered and applied

Case	Trial judge's reasoning/decision
R v Smarch	Although the trial judge held that *Gladue* factors would not affect the decision as to whether or not the defendant was a "dangerous offender," the judge did consider *Gladue* factors in determining the sentence and decided on a lesser sentence than would usually be given in this case.
R v Quash	The judge imposed a lower sentence of imprisonment: 10 months instead of 4–5 years, as asked by the Crown.
R v Charlie	The judge focused on the principle of proportionality and sought a sentence that included a custodial term but also allowed opportunity for support and integration in the defendant's home community.
R v L.S.N.	The judge acknowledged that the respondent's disadvantaged upbringing was a major contributing factor to the commission of the offence, and that "both the respondent and the community would be better off [in an Aboriginal restorative justice program] than if a sentence of imprisonment was imposed."
R v Itturiligaq	The court that heard the case was a "*Gladue* Court," in which the judges have a moral as well as constitutional duty to apply *Gladue* principles meaningfully. The judge found that the mandatory minimum punishment violated the defendant's *Charter* rights and the principles of section 718.2(e).
R v Ookowt	The judge found that the defendant was lower on the scale of moral blameworthiness than in other similar cases due to the *Gladue* factors, and thus the mandatory minimum sentence did not apply.
R v Hills	The judge argued that given the mitigating factors identified in the *Gladue* report, the mandatory minimum sentence for this case violated the defendant's *Charter* rights.
R v Hilbach	Given the *Gladue* factors, the judge found that a penitentiary sentence would be too severe, and a reduced sentence would be more appropriate than the mandatory minimum in this case.
R c L.P.	The judge considered the impact of imprisonment on the defendant and his family, and decided on a lesser sentence.

Source: Author Analysis

Table 3–1: Appeal court treatment of cases in which *Gladue* was not considered

Case	Category	Appeal court reasoning
Kritik c R	Disagree	The appeal court found that the trial judge had made an error of law by not properly assessing the *Gladue* report and considering possibilities of rehabilitation. The appeal court allowed the appeal and ordered a new hearing.
R v Gracie	Agree	The appeal court decided that although the trial judge's error to apply *Gladue* principles constitutes an error of law, "there is no reasonable possibility that the verdict would have been any different," so they dismissed the appeal.
R v Parr	Agree	Although the appeal court identified multiple errors in principle that led to an unfit sentence, the lack of *Gladue* consideration was not one of these issues. The appeal court slightly decreased the sentence, but they did not cite the departure from *Gladue* as a reason for this reduced sentence.
R v McNeil	Agree	The appeal court found that the *Gladue* report should have been admitted because it has a bearing on the defendant's moral culpability. However, they concluded that the sentence was still fit because this case was, "not one where restorative justice principles are most important."
R v Brown	Agree	The appeal court took issue with the trial judge's statement that the defendant's Indigenous status was a "moot" point because of the seriousness of the offence. The court upheld that the trial judge made an *Ipeelee* error (not applying *Gladue* because of seriousness) and should have determined whether or not the defendant was Indigenous, because it does matter in every single case. However, the court concluded that the sentence was not unreasonable given the nature of the offence and the fact that the appellant's connection to his Indigenous heritage was remote.
Vicaire v R	Agree	The appeal court found that the failure to order a *Gladue* report was an error of law that pointed to a chronic problem in the province: a lack of standard for preparing *Gladue* reports. However, they concluded that "a fulsome *Gladue* report would not have changed the outcome of Vicaire's designation and sentence." Ultimately, therefore, the trial judge's error does not require overturning the decision because "the error of law has resulted in no substantial wrong or miscarriage of justice."

Source: Author Analysis

Table 3–2: Appeal court treatment of cases in which *Gladue* was considered but not applied

Case	Category	Appeal court reasoning
R v McWatters	Agree	Appeal court stated that they, "consider the quantum of the sentence to be fit," and did not raise any issues about the departure from *Gladue*.
R v E.O.	Agree	Although the appeal court found that the trial judge gave the sentencing circle's recommendation little to no weight, with no explanation about why they did so, the appeal court said that since the sentencing circle was an "unsatisfactory process" with no participation from the victim, it was "not an error for the judge to give the sentencing circle's recommendation the minimal weight he did." Ultimately, the appeal court agreed that a conditional sentencing order is not fit because of the more important objectives of denunciation and deterrence given the seriousness of this offence. The appeal court stated that the role of the Court is not to "second–guess a sentencing judge who has examined the facts of the case carefully."
R v Hansen	Disagree	The appeal court pointed out the trial judge's claim about seriousness of offence as erroneous, citing *R v Ipeelee* and the need to apply *Gladue* principles in every case with no distinction drawn between non–serious and serious offences when it comes to applying the restorative principles of sentencing. They allowed the appeal and reduced the sentence.
R v Piche	Disagree	The appeal court pointed out that the trial judge heard from community workers and relatives about Piche but did not refer to this evidence in writing their reasons. This, along with other factors, contributed to the appeal court's decision to order a new hearing.
R v Altiman	Disagree	The appeal court said that the sentencing judge conducted a "defective *Gladue* analysis" by failing to consider how the *Gladue* factors affected the defendant's moral blameworthiness and by making assumptions about the preferred approach of Indigenous communities to sentencing that were not grounded in evidence. The court referenced *Ipeelee*, which included the guidance to judges to abandon the presumption that all Indigenous offenders and communities share the same values when it comes to sentencing. The appeal court also pointed out that the trial judge, while referencing paragraph 93 of *Gladue*, failed to mention the clarification subsequently issued in *Ipeelee* about a judge's duty to apply *Gladue* in *every* case. They decided to allow the appeal and reduce the sentence.
R v Pete	Disagree	The appeal court found that the trial judge made a material error in sentencing, and also that the principle of rehabilitation should have been given more weight in the sentencing analysis. Allowed the appeal and reduced the sentence.
R v Sheck	Disagree	Appeal court found that the Minister had failed to properly take into account the defendant's Indigenous heritage for this extradition case. They allowed the appeal for judicial review for the Minister to reconsider their decision.
R v McKay	Disagree	The appeal court found that the trial judge's failure to apply *Gladue* in the sentence constitutes an error in principle, and they allowed the appeal and reduced the sentence.
R v Awasis	Agree	The appeal court stated, "while the judge in this case ought to have articulated more precisely how she considered the appellant's *Gladue* factors, when her reasons are read as a whole and in conjunction with the evidence, I cannot conclude that she did not adequately consider them." And that, "while the appellant's lack of motivation and capacity undoubtedly stem largely from his tragic background, the judge was unable to remedy this complex problem through the sentencing process."
R v Hartling	Agree	The appeal court found that the trial judge's consideration of *Gladue* was adequate and they "provided due consideration to the relevant aggravating and mitigating factors, including the *Gladue* report."
R v J.P.	Disagree	The appeal court found that while the judge considered *Gladue*, it failed to properly account for it in the sentencing decision. The appeal court referenced *Ipeelee*, which said that there is no requirement of a direct cause–and–effect correlation between background factors and the crime. The appeal court also noted that although cause and effect are not required, "the facts of this case come as close as most any situation could." Appeal court held that the defendant should have a reduced moral culpability in this case, and that the judge erred in principle by taking *Gladue* factors "off the table." Decided to substantially reduce the sentence.
R v Sharma	Disagree	The appeal court found that the trial judge misunderstood the purpose of *Gladue* by denying that it would be beneficial to address the problem of overrepresentation through alternative sentences. The trial judge also made an error of law by requiring evidence about disproportionate impacts of incarceration on Indigenous offenders. The appeal court held that a conditional sentence served in the community would be more appropriate to achieve the sentencing objectives of 718.2(e) and substituted the sentence accordingly.
R v Reddick	Agree	Appeal court agreed with how the sentencing judge applied *Gladue* and relevant principles.

Source: Author Analysis

Table 3–3: Appeal court treatment of cases in which *Gladue* was considered and applied

Case	Category	Appeal court reasoning
R v Smarch	Agree	While the appeal court allowed the defendant to appeal their dangerous offender designation, they did not raise any concerns with the sentence imposed by the trial judge.
R v Quash	Agree	The appeal court found that the sentence was crafted with appropriate regard to the circumstances of the offence and the prospects for rehabilitation
R v Charlie	Agree	The appeal court held that the sentencing judge made the right decision in considering the defendant's diminished moral blameworthiness, saying that this sentence gives "meaningful effect to fundamental principle of proportionality, as well as the remedial direction provided in *R v Gladue* and *R v Ipeelee*."
R v L.S.N.	Disagree	The appeal court believed that a substantial sentence of imprisonment was required, and that a higher sentence would still be appropriate with respect to *Gladue* considerations. They allowed the Crown's appeal and imposed a higher sentence.
R v Itturiligaq	Disagree	The appeal court concluded: "While the history of colonialism and its intergenerational effects must be acknowledged, in our view the *Gladue* factors in this case do not operate to significantly diminish the high level of moral culpability underlying this offence." They allowed the Crown's appeal and imposed an increased sentence.
R v Ookowt	Disagree	The appeal court found that the sentencing judge had failed to state why a lower sentence would meet the need for denunciation and deterrence. Appeal court also found that the defendant did not have a disadvantaged upbringing and that there are no background factors that "greatly diminish Mr. Ookowt's moral blameworthiness." Therefore, they allowed the Crown's appeal and increased the sentence.
R v Hills	Disagree	The appeal court stated that the trial judge did not demonstrate how the mandatory minimum sentence would constitute "cruel and unusual punishment," therefore there was no clear reason to reduce the sentence. They allowed the Crown's appeal and increased the sentence.
R v Hilbach	Disagree	The appeal court acknowledged the importance of *Gladue* but found that the trial judge erred by, "overemphasizing *Gladue*/*Ipeelee* factors," and by failing to place sufficient weight on aggravating factors and the principles of deterrence and denunciation. They concluded that a more severe sentence would be more fit in this case.
R c L.P.	Disagree	The appeal court found that the trial judge neglected to consider the victimization of Indigenous females, and the respondent's alcoholism and risk of recidivism as aggravating factors. They stated that the principles of denunciation, deterrence and victim protection were more important in this case, and increased the sentence.

Source: Author Analysis