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Learning from Missibizi: Recognizing Ojibwe Mineral Sovereignty and Decolonizing Ontario's Mining Law Regime

Grace Shin*

This paper provides an overview of the historic mineral interest held by the Ojibwe people living on Treaty 3 territory and critiques the way in which the treaty-making process as well as the Ontario mining regime has completely disregarded Indigenous mineral sovereignty. By connecting the principles of free, prior and informed consent encapsulated in the United Nations Declaration on the Rights of Indigenous Peoples and the customary notion of permanent sovereignty over natural resources with the underlying Indigenous interest in minerals, I propose that a system of legal pluralism could exist in Canada, one which respects the mineral sovereignty of Ojibwe First Nations.

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INTRODUCTION

> Before setting out, they loaded themselves with a good many of these stones, large and small, and even with some slabs of Copper; but they had not gone far from the shore when a powerful voice made itself heard to their ears, calling in great wrath: "Who are those robbers carrying off from me my children's cradles and playthings?"
>
> - Claude Dablon, "Vol 54", *Jesuit Relations and Allied Documents*[1]

Minerals have been—and continue to be—inextricable from society. Rare metals remain the epitome of luxury and power, while metals such as iron or copper play an indispensable role in the advancement of technologies. Yet minerals, like all natural resources, are finite, and the unfettered extraction of minerals driven by capitalism has led to the desecration of once rich lands and healthy ecosystems. Most directly impacted by these mining activities are Indigenous communities whose lands, abundant with mineral riches, have historically been exploited without seeking their consent resulting in the destruction of their livelihoods. However, a narrative that paints Indigenous peoples as mere casualties of settler-colonial forces has the potential to erase their demonstrated interest in and sovereignty over minerals and the recognized value that flows from them. This depiction of Indigenous peoples lacks insight into the complex relationships Indigenous peoples have with the land and the legal order they have practiced since time immemorial to manage such resources.[2]

The quote at the beginning of this paper is an excerpt from an Ojibwe story that illustrates the ways in which humans ought not to withdraw minerals, and the potential repercussions if such laws are not followed. The story surrounds four men who anger Missibizi—a panther-like creature that resides in Lake Superior and guards the copper found within it and on its islands —after taking an excessive amount of copper from an island that they were stranded on. The men die one by one because of their greed and the Ojibwe take their deaths as a lesson to not extract copper from the lake and the island.[3]

As a non-Indigenous settler, I cannot properly decipher the true significance of this story, especially because I am relying on an account of it written by a non-Indigenous missionary.[4] Having said that, I cautiously draw out three lessons settlers can take from the story. These lessons will subsequently frame this paper. The first lesson is that Indigenous peoples knew the value of their minerals and where they could be found. Despite this awareness, Indigenous peoples chose not to recklessly remove these minerals, as prescribed by Indigenous legal orders. This is the foundation upon which I ground my argument that Indigenous mineral sovereignty exists and continues to exist. Second, the story informs settlers how not to engage with minerals and by extension, Missibizi. Analogizing Missibizi as Ojibwe people, I take this lesson to describe the myriad of ways settlers ought not to engage with mineral management and Indigenous peoples.

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[1] Journal entry of Claude Dablon (1610-1791), reprinted in Reuben Gold Thwaites, ed, *The Jesuit Relations and Allied Documents* (Cleveland: Burrows Brothers Company, 1899), online: <http://moses.creighton.edu/kripke/jesuitrelations/relations_54.html>.

[2] Val Napoleon, "Thinking About Indigenous Legal Orders" in *Dialogues on Human Rights and Legal Pluralism* (Dordrecht: Springer, 2013) 229 at 245.

[3] "Great Lynx, the Thunder and the Mortals" (24 February 2019), online (blog): *Mii Dash Geget* <https://miidashgeget.wordpress.com/2019/02/24/great-lynx-the-thunder-and-the-mortals/#6four>.

[4] Dablon, *supra* note 1.

Lastly, the story reminds settlers that to live harmoniously, we must respect the obligations we have to Missibizi. Thus, in the context of this paper, I interpret this to mean that settlers have an obligation to respect Indigenous mineral sovereignty.

The focus of this paper is to explore the significance of these lessons as it applies to the current mining regime in northwestern Ontario, specifically in Treaty 3 territory. Indigenous stories are closely tied to the land they are told on and as such, it is only appropriate that the lessons drawn from the story, which originates from the Lake Superior region, apply to the area it is intended to cover. To further narrow the scope of the paper, I chose not to discuss the sovereignty implications for the Indigenous parties to the Robinson-Superior treaties and the Métis parties to Treaty 3.[5]

Before I delve into the way this paper is structured, I want to make clear that as a non-Indigenous settler woman who has benefitted from the very systems I intend to critique, I am complicit in the continuation of the existing colonial system and its perpetuation of neoliberalist ideologies. I have experienced immense privilege growing up in Toronto, where I have learned and benefitted from Indigenous knowledge systems through my schooling.[6] I am incredibly grateful to the Indigenous knowledge bearers for sharing this knowledge. It is my obligation as a treaty person to ensure that my contribution to the field of Aboriginal law does not exploit Indigenous knowledge and throughout this paper, I try to make note of my limitations in interpreting and relying on Indigenous legal theories.

In the first part of the paper, I attempt to describe Indigenous interests in minerals and illustrate how Indigenous communities governed these minerals for millennia, based on stories and principles found within Ojibwe legal orders which relate to natural resource management, specifically copper. I argue that unbeknownst to early settlers, Ojibwe peoples engaged with copper in a responsible and reciprocal manner for millennia, establishing a unique system of mineral governance that continues to exist today. I tie this to existing works by Indigenous scholars on Indigenous legal orders to argue that this system of mineral governance was in fact an assertion of jurisdiction and sovereignty.

The next section demonstrates how the Ojibwe asserted mineral sovereignty during treaty negotiations and how the Crown repeatedly undermined this sovereignty by breaking treaty promises. I first set out the historical background to the creation of Treaty 3, including the motivations held by both parties in deciding to negotiate the treaty, and recount the promises made by the Crown in light of these motivations. I then turn to the Crown's subsequent violation of those promises, enacted through the imposed delineation of reserves, exclusion of Indigenous voices in the drafting of land agreements between the federal and provincial governments, and the intentional undercutting of Indigenous mineral rights to minerals found on reserve. I argue that in its founding years, Canada intentionally minimized Indigenous mineral rights to derive profit from their land through these actions, which were in line with their attempt to implement the colonial agenda.

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[5] For congruency's sake, the use of the terms "Indigenous" and "First Nations" refers to the Ojibwe signatories to Treaty 3, unless specified otherwise. Further, the choice to delineate does not mean that mineral sovereignty should not extend to them; the argument can be made, but the historical and societal evidence backing this argument would be different from what is discussed in this paper.

[6] Toronto is located on the traditional territory of the Mississaugas of the Credit, the Anishinaabeg, the Chippewa, the Haudenosaunee, and the Wendat peoples. It is governed by the Dish With One Spoon Wampum Belt Covenant, and home to many urban Indigenous individuals. The factual elements of the land acknowledgement is derived from: City of Toronto, "The Land Acknowledgement", online (pdf): <www.toronto.ca/wp-content/uploads/2019/06/90c6-2019-Land-Acknowledgment-Guidance.pdf>.

In the third section, I discuss briefly how the current mining regime in Ontario continues to perpetuate colonization in two ways. First, the *Mining Act* ("the *Act*"), the main legislation that governs mining in Ontario, fails to incorporate Indigenous notions of sovereignty as it permits exploration by settlers onto treaty territory without Indigenous consent. Second, the *Act* has failed to, and continues to fail to, establish an adequate consultation procedure with Indigenous communities in the mine development process.[7] In light of the shortcomings of the *Act* and their consequences, I argue that reconciliation cannot occur without the recognition of Ojibwe mineral sovereignty.

In the final section, I introduce two arguments as to why Ojibwe mineral sovereignty ought to be recognized. The first is that the historical evidence shows Ojibwe mineral sovereignty has existed and continues to exist, through the existence of Ojibwe sovereignty in general. Second, Canada is obliged under international law to recognize Indigenous sovereignty through their treaty relations, the international law principle of permanent sovereignty of natural resources ("PSNR") as well as the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[8]

Throughout the paper, I draw connections between mining and colonization, and they serve as the basis for true decolonization of Ontario's mining regime, meaning full incorporation of Indigenous mineral sovereignty. Instead of viewing decolonization as a metaphor, I call on settlers to reckon with the oppressive nature of the existing mining regime on Indigenous minerals and the land in which they are contained, and to renounce the Crown's right to mineral resources for true decolonization.[9]

1. Indigenous Mineral Management

According to archaeologists and historians, Indigenous mineral extraction and use in present-day Ontario can be traced back millennia.[10] Although Indigenous peoples made use of gold, silver, coal, oil and other minerals, copper was a particularly significant mineral for the Ojibwe, ascribed with religious and ceremonial significance.[11] Early non-Indigenous explorers captured Ojibwe people's relationship with copper as a "veneration, as if the [minerals] were the presents of gods who dwell under the waters; they collect their smallest fragments which they carefully preserve."[12] While small pieces of copper were used as providing power and medicine, removing large pieces of copper was considered offensive to the Great Spirit and could lead to bad fortunes.[13]

Although the spiritual significance of copper is uncontested, to assume that the Ojibwe only left copper in the ground would be wrong. In the nineteenth century, settler anthropologists "discovered" human-made pits and trenches along the coasts of Lake Superior, but they dismissed

[7] *Mining Act*, RSO 1990, c M 14.
[8] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61th Sess, 107th Plen Mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007).
[9] Eve Tuck and K Wayne Yang, "Decolonization is Not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 7.
[10] Rhonda Mae Telford, *"The Sound of the Rustling of the Gold is Under my Feet Where I Stand; We have a Rich Country": A History of Aboriginal Mineral Resources in Ontario,* (PhD Thesis, University of Toronto, 1996) [unpublished] at 24.
[11] *Ibid.* See also, Bernard C Peters, "Wa-bish-kee-pe-nas and the Chippewa Reverence for Copper" (Fall 1989) 15:2 Michigan Historical Review 47 at 48.
[12] *Ibid* at 49 citing Pierre de Charlevoix, *Journal of a Voyage to North America* (London: 1761), 2.
[13] *Ibid* at 50–51.

these findings and did not attribute them as evidence of contemporary Indigenous mining technologies.[14] Yet seeing that copper was in demand for the creation of plates and kettles, which were used in healing and funeral ceremonies, and copper sheets were created to record history and sacred events, Indigenous peoples presumably mined such materials.[15] The mineral was widely traded throughout North America, alongside other minerals used for tools, such as quartzite, nephrite, and obsidian.[16]

Due to the sacred nature of copper, many copper deposits and mines and sites were considered "sacred places on the earth" and the locations remained undisclosed to settlers. These locations also remained hidden because they doubled as healing sites for Anishinaabeg elders and if approached brashly, could lead to dangerous outcomes.[17] Subsequently, Indigenous miners had to engage in ritual fasting and purification before entering a mine, and they had to demonstrate gratitude and reciprocity to the spirits guarding the mines—known as *Memengweshiwuk*—to seek permission to take the minerals.[18]

All this is to say that mineral extraction in Ojibwe culture was strictly governed by legal orders, which involved ceremonies grounded in reciprocity, gratitude, and respect for the land and the spiritual goods it provided. Sākihitowin Awāsis, a Mischif Anishinaabe scholar, expands on the notion of principle-guided natural resource extraction in Indigenous communities and how, contrary to capitalist extractivism, Anishinaabe harvesting protocols require individuals to be guided by egalitarian thinking.[19] According to Awāsis, Anishinaabe harvesting protocols are based on natural law and centered around four themes: rights to land-based practices and life; responsibility to previous and future generations; relationality with the land and those harvesting together; and reciprocity with the land.[20] Ojibwe mining practices embodied these themes, reflected in the intentional and respectful ways of entering mines, disclosing mine locations, and removing minerals. It would not be an overstatement then to promote the Ojibwe mining practices as Indigenous legal orders.

2. Mineral Rights and Treaty Making

Much of the argument that Indigenous peoples have no right to mineral extraction stems from the fact that mineral rights were not included or mentioned in the text of the treaty. This argument, however, paints an incomplete picture. As highlighted above, early Europeans dismissed pre-existing Ojibwe interest in minerals and their knowledge of them. By extension, treaty negotiators and drafters largely ignored the existence of surrounding mineral rights during treaty negotiations. Yet access to minerals were likely discussed leading up to the signing of treaties as settler mining activity increased and conflicts arose between Indigenous and non-Indigenous miners. In the case of Treaty 3, the promise that Indigenous peoples would have mineral rights in treaty territory is

[14] Telford, *supra* note 10 at 30–32.
[15] *Ibid* at 37–39.
[16] Andrew Miller and Evelyn Siegfried, "Traditional Knowledge of Minerals in Canada" (2017) 37:2 The Canadian Journal of Native Studies 35 at 45.
[17] *Ibid* at 42; Telford, *supra* note 10 at 39.
[18] *Ibid* at 42–43.
[19] Sākihitowin Awāsis, "Gwaabaw: Applying Anishinaabe harvesting protocols to energy governance" (2021) 65:1 The Canadian Geographer 8 at 14.
[20] *Ibid* at 15.

made evident in the commissioner and translator's notes.[21] By reviewing the context in which treaty negotiations took place, it becomes clear that Indigenous communities have long held interest in minerals, expressed such interest, and continue to hold such interests regardless of what is stated in the text of the treaty.

a. Leading Up to the Treaties

Settlers were aware of the presence of minerals in present-day Ontario beginning in the sixteenth century. Historian Rhonda Mae Telford notes that when Jacques Cartier met with Chief Donnacona in 1534 and 1535, he revealed that copper deposits could be found in Lake Superior.[22] She also suggests Samuel de Champlain associated himself with the Algonquian military cause in the early seventeenth century so that he could continue reaping the benefits of copper, which was often gifted to the Frenchmen for their assistance.[23] At the time, Ojibwe individuals interacting with French missionaries revealed to them non-sacred locations where copper could be found in the region.[24] Once Britain assumed control of Canada in 1760, the knowledge was disseminated to Alexander Henry, a North West Company trader, and the then Indian superintendent, Sir William Johnson.[25] Notably, Johnson recognized at the time that the minerals in the region ought not to be used without the consent of Indigenous peoples as it was their property.[26]

Despite this initial respect held by early settlers towards Indigenous mineral knowledge, by the mid-nineteenth century, settler miners began to illegally mine in areas known to be rich in minerals.[27] The alarming influx of settler miners did not go unnoticed by Ojibwe Chiefs; they petitioned with regional superintendents that they wished for protection on their land from intruders and "no mineral exploitation without compensation."[28] In 1857, four Ojibwe Chiefs petitioned to the Governor General that the government should not be unilaterally selling their land without treaties in place.[29]

Although there were no treaty negotiations surrounding ownership of mineral rights and land title, Commissioner of Crown Lands Denis Papineau began issuing mining exploration licenses to a few prospectors and allowed them to survey unceded lands.[30] Commissioner Papineau's power to grant licenses originated from order-in-council regulations "to license prospectors, to fix boundaries of claims, and to establish a price for the sale of lands bearing base minerals."[31] Initially, these regulations were accompanied by a pre-existing regulation granting the Crown the reservation of gold and silver in each land patent, but was later abandoned due to objections by mining companies.[32] In its place, Canada's first mining law, the *General Mining Act*,

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[21] Wayne E Daugherty, "Treaty Research Report – Treaty Three (1873)" (1986) at 33, online: *Crown-Indigenous Relations and Northern Affairs Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1100100028671/1564413174418>.
[22] Telford, *supra* note 10 at 54.
[23] *Ibid* at 56.
[24] *Ibid* at 60.
[25] *Ibid* at 66. The copper veins revealed to the settlers by the Ojibwe were often so abundant that later settler mines were built over those spots.
[26] *Ibid.*
[27] *Ibid* at 122–3. By illegal, I am referring to not legal under Indigenous law.
[28] *Ibid* at 128–9.
[29] *Ibid* at 131.
[30] *Ibid* at 128–9.
[31] HV Nelles, *The Politics of Development: Forests, Mines & Hydro-Electric Power in Ontario, 1849-1941,* 2nd ed (Montreal: McGill-Queen's University Press, 2005) at 20.
[32] *Ibid* at 21.

was enacted in 1869, repealing any Crown reservation on royalties, taxes and duties on all metallic ores.[33]

In effect, the lack of regulation over Ontario's mining industry replicated the "free entry" system which had defined mining legislation in medieval Europe for centuries.[34] In Europe, the free entry system enabled citizens to reap the "free gifts of Nature" and acted as the basis for the evolution of capitalism within the mining industry, argues historian Jeannette Graulau.[35] In medieval Bohemia, private citizens organized as a mining society, or *Gewerken*, and explored the land to discover ores.[36] Once the *Gewerken* or *colonii principalii* received approval from the king to go ahead and develop the mine, they could lease the rights to sink the shaft to second and third colonists, who would in turn hire manual laborers to dig.[37] Therefore, intrinsic to Ontario's mining law at the time—and to great extent, today—was a hierarchical structure which enabled, quite literally, unfettered colonization of the land by private entities.[38] Treaties were arguably the means of legitimizing the active colonization of the land through mining, and the Anishinaabeg, well aware of this fact, took a firm position in protecting their minerals and land during Treaty 3 negotiations, as discussed below.[39]

b. "The sound of the rustling of the gold is under my feet where I stand"[40]: Mineral Value and Treaty 3

In 1869, Canada finally responded to the Ojibwe's demands for a treaty covering the land in present-day northwestern Ontario after the federal government realized that they would need the right of way to swiftly respond to the Red River Resistance in present-day Manitoba.[41] In the summer of 1870, treaty commissioner Wemyss Simpson offered gifts to the Ojibwe, expecting an easy start to negotiations, but this was initially refused by Chief Blackstone.[42] In 1871, upon the discovery of minerals by two Ojibwe men in the proposed treaty area, what began as negotiations for a right-of-way treaty soon evolved to that of a land cessation treaty.[43] Between the summer of 1871 and 1872, treaty commissioners attempted to negotiate the treaty, but to no avail.[44] In letters drafted by the commissioners at the time, the Ojibwe were deemed to be uncooperative as they were aware of the "valuable discoveries of the precious metals within their territory."[45] For instance, the Ojibwe requested an annuity of $15 per head as a counter offer to the treaty

[33] *Ibid* at 23.
[34] Dawn Hoogeveen, "Sub-surface Property, Free-entry Mineral Staking and Settler Colonialism in Canada" (2015) 47:1 Antipode 121 at 126.
[35] Jeannette Graulau*, The Underground Wealth of Nations: On the Capitalist Origins of Silver Mining, AD 1150–1450* (New Haven: Yale University Press, 2019) at 90.
[36] *Ibid*.
[37] *Ibid* at 91.
[38] *Ibid.*
[39] Minerals were not the only resources that was of interest for settler negotiators; timber, hydro-electricity, agrarian land, oil and gas were all a part of the motivation to engage in treaties with Indigenous peoples. For the purpose of the paper, I will not be discussing how these resources affected the positions of treaty negotiators.
[40] Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, 10th ed, (2004) 60, quoting Chief Mawedopenais, online: <www.gutenberg.org/files/7126/7126-h/7126-h.htm>.
[41] Telford, *supra* note 10 at 193.
[42] *Ibid* at 194.
[43] *Ibid* at 195.
[44] *Ibid* at 201.
[45] *Ibid* at 203.

commissioners meagre of $3 per head, as they were aware that profits generated by the discovered minerals would be worth far more than what Canada was willing to pay.[46]

After a brief pause in negotiations in 1872, Alexander Morris reopened negotiations with the Ojibwe in 1873 having been appointed Lieutenant-Governor of Manitoba the year prior.[47] Although the Ojibwe were still firm in their position that they were to retain rights to the land and the minerals, the mounting pressure from increased white settlement, unrest due to illegal liquor trading at the American-Canadian border, and a dismal wild rice harvest that year resulted in the Ojibwe eventually relenting to some of the treaty's terms.[48] Throughout treaty negotiations, the Ojibwe orally affirmed the two terms that would constitute their mineral rights: minerals found on-reserve would belong to the Ojibwe residing on those reserves, and any minerals found off-reserve would belong to the Ojibwe who found it.[49] Importantly, these terms were under the condition that the Ojibwe could designate their own reserve locations, which they had strategically mapped out to include land with known mineral deposits.[50] Joseph Nolin, a Métis negotiator retained by the Chiefs, captured these terms in his notes—now referred to as the Paypom Treaty—which he provided to Morris after the Treaty was signed.[51] The notes stipulate: "If some gold or silver mines be found in their reserves it will be to the benefit of the Indians, but if the Indians find any gold or silver mines out of their reserves they will only be paid the finding of the mines."[52]

Notwithstanding the oral promise, Morris only acknowledged the Ojibwe's mineral claim on-reserve, but dismissed the Ojibwe's rights to minerals off-reserve.[53] Even worse, the text of Treaty 3 signed in 1873 did not include *any* provision concerning mineral rights.[54] That being said, the fact that the text of Treaty 3 only authorizes a transfer of surface rights but not subsurface rights makes it difficult for colonial governments to rely on it to ground legitimate mineral claims. Nor can the treaty be interpreted as a document authorizing land surrender, particularly when the document lacks any mention of consideration for the 55,000 square miles of land.[55] In more ways than one, the document referred to as Treaty 3 is incomplete and to gleam its full meaning, one must interpret it in conjunction with the notes recording the oral promises.

c. Promises Broken, Sovereignty Undermined: Government Responses to Treaty 3 Mining Rights

Not long after Treaty 3 was signed, both Canada and Ontario broke their promises with the Ojibwe signatories surrounding mineral rights on reserve.[56] As previously mentioned, the Ojibwe clearly indicated that they had already decided where they wanted their reserves during treaty

[46] *Ibid* at 193.
[47] Brian Walmark, "Alexander Morris and the Saulteaux: The Context and Making of Treaty Three, 1869-73" (1993) at 67, online (pdf): <www.collectionscanada.gc.ca/obj/s4/f2/dsk3/ftp04/MQ52083.pdf>.
[48] *Ibid* at 96, 103.
[49] Telford, *supra* note 10 at 208.
[50] *Ibid.*
[51] Telford, *supra* note 10 at 210.
[52] *Ibid* at 209.
[53] Morris, *supra* note 40 at 70.
[54] *Ibid* at 212. Some theorize that the text of Treaty 3 is from a draft treaty which Simpson wrote in 1872 before the treaty provisions were finalized: Walmark, *supra* note 47.
[55] Kate Gunn, "Agreeing to Share: Treaty 3, History & the Courts" (2018) 51:1 UBC LR 75 at 83.
[56] Although Ontario was not a signatory or party to the treaty, they were aware of the mineral rights implications associated and the promises made with it: see, Telford, *supra* note 10 at 196.

negotiations.[57] Nevertheless, in 1875, the commissioners designated Ojibwe reserves not in accordance with their requests, but "as far as possible from the area of future settlement as well as excluding all known mineral lands."[58] For First Nations with reserves where minerals were found, any benefit arising from the minerals would flow to the government of Ontario, as mineral rights were believed to have been granted to the provincial governments under s. 109 of the *Constitution Act, 1867*.[59] A mere two decades after the treaty was signed, the premier of Ontario declared provincial rights to "Precious Metals and Other Minerals in, and Timber On, Indian Lands and Reserves"; uncoincidentally, Ontario granted upwards of 6,414 mining locations during that period.[60]

Soon afterwards, Canadian courts released judgments affirming this very position, notwithstanding the fact that it was in violation of treaty promises. In *St. Catherines Milling and Lumber Co v R* ("*St Catherines Milling*"), the Judicial Committee of the Privy Council ("the Judicial Committee") held that the lands and resources in Treaty 3 territory belonged to the Province of Ontario.[61] The Judicial Committee reached this conclusion by interpreting the Ojibwe right to land and resource use as usufructuary, and could be extinguished by or surrendered to the Crown.[62] The *St. Catherines Milling* ratio was followed in *The Ontario Mining Company v Seybold et al*, a case which dealt with whether mineral licenses granted by the government of Canada was valid on land surrendered by a First Nation.[63] Of concern was the fact that the First Nation did not receive any profits from the gold mine constructed on once reserve land as it was deemed not to have interest over mineral rights.[64]

Emboldened by the courts' confirmation of mineral rights on treaty land as belonging to the province, Canada and Ontario brazenly ignored their treaty obligations in 1924 when they entered into the *Canada-Ontario Indian Reserve Lands Agreement* (the "1924 *Indian Reserve Lands Agreement*") without obtaining the consent of the Indigenous communities involved.[65] As if mineral rights on reserve did not already belong to respective First Nations, the agreement declared that half of the mineral royalties and benefits would be entitled to the province while the other half would be placed in trust for the benefit of the Indigenous band.[66] The 1924 lands agreement remained in force as *An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Reserve Lands* until 1986, at which point, the *Indian Lands Agreement (1986) Act* (the "1986 *Indian Lands Agreement*) replaced it.[67] The

[57] Morris, *supra* note 40 at 60.
[58] Daugherty, *supra* note 21 at 48.
[59] Tim Holzkamm and Leo Waisberg, "'We Have Kept Our Part of the Treaty'- The Anishinaabe Understanding of Treaty #3" (Kenora, ON: Grand Council Treaty #3, 2012) at 34.
[60] Telford, *supra* note 10 at 279.
[61] *St Catherines Milling and Lumber Co v The Queen,* [1888] UKPC 70, 14 AC 46 at 601 [*St. Catherines Milling*].
[62] *Ibid.*
[63] *The Ontario Mining Company v Seybold et al*, [1903] AC 73; "Ontario Mining Company Ltd. and Attorney-General for Canada v. Seybold et al. and Attorney-General for Ontario", online (blog): *Dialog* <https://jurisprudence.reseaudialog.ca/en/case/ontario-mining-company-ltd-and-attorney-general-for-canada-v-seybold-et-al-and-attorney-general-for-ontario/>.
[64] *Ibid* citing Michael Coyle "Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future" (2005) 31 Queen's LJ. A similar conclusion was drawn in the *Attorney General of Quebec v Attorney General of Canada (The Star Chrome Mining Case),* [1920] 90 LJPC 33.
[65] Richard H Bartlett, "Mineral Rights on Indian Reserves in Ontario" (1983) 3:2 The Canadian Journal of Native Studies 245 at 264.
[66] *Ibid* at 265.
[67] *Indian Lands Agreement (1986) Act,* SC 1988 c 39.

1986 *Indian Lands Agreement* allows for Indigenous bands to enter into specific agreements with the Governments of Canada and Ontario regarding unjust land or natural resource claims which had arisen as a consequence of the 1924 *Indian Reserve Lands Agreement*.[68]

3. Current Issues to the *Mining Act*

In addition to the direct undercutting of treaty rights, Ontario's mining regime established by the *Mining Act* inadvertently challenges the ways that the Ojibwe practice mineral sovereignty over Treaty 3 territory. Despite explicit acknowledgement of the "recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982"* in the purpose clause of the *Mining Act,* there are at least two ways that the *Mining Act* contradicts itself and disrupts treaty rights: by enabling free entry of mineral prospectors onto treaty territory and failing to properly implement an adequate consultation process with Indigenous communities in the mine development process.

As previously mentioned, the free-entry system is "a principle, a law, and a regime" originating from medieval Europe which enables the free-entry and exploration of minerals on Crown land.[69] The free-entry system relies on the notion that minerals are objects which could be owned separately from ownership of surface rights, and that in instances where mineral rights and surface rights conflict, mineral rights will prevail.[70] On Indigenous lands, the system favours liberal property ideologies and corporate interests seeking to generate profit from mineral extraction.[71] Consequently, scholar Dawn Hoogeveen argues that "there is nothing free about" the free-entry system and in effect, continues to perpetuate settler colonialism.[72]

Although there has been some effort in the *Mining Act* to limit the prioritization of mineral rights over surface rights, the amendments have been limited in scope. S. 35.1(2) of the current *Act* withdraws Crown mining rights in Southern Ontario from "prospecting, mining claim registration, sale and lease" if there is already a surface rights owner, but this protection is not applied in Northern Ontario.[73] Instead, the Minister has only the *discretion* to withdraw mineral rights from lands with surface rights owners in Northern Ontario, and for lands which have no surface rights owners, which account for most of the mineral exploration lands on treaty territory, there is no protection from free-entry, as long as proponents file a mining claim online.[74] For these lands, mineral rights trump surface rights, with the exception of land which may be deemed sites of "Aboriginal cultural significance", defined narrowly in the *Act*'s regulations.[75] Although these provisions are important in recognizing Aboriginal or treaty rights, they are discretionary, limited in scope and subject to strict regulatory guidelines, ultimately doing little to acknowledge Indigenous sovereignty over minerals. Overall, free-entry is still widely enabled on Treaty 3 lands.

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[68] *Ibid* at s 3.
[69] Hoogeveen, *supra* note 34 at 128.
[70] *Ibid* at 130; Bruce Pardy and Annette Stoehr, "The Failed Reform of Ontario's Mining Laws" (2010) 23 JELP 1 at 6.
[71] Hoogeveen, *supra* note 34 at 130.
[72] *Ibid* at 133.
[73] *Mining Act*, *supra* note 7, s 35.1(2).
[74] *Ibid,* ss 35.1(8), 28. Issues surrounding the Minister's discretion are well articulated in Pardy and Stoehr, *supra* note 70 at 14.
[75] *Ibid,* s 51(4); *General,* O Reg 45/11, s 9.10. For Aboriginal cultural significance to be made out, the land must meet three priorities: it must be "strongly associated with an Aboriginal community for social, cultural, sacred or ceremonial reasons", it must be in a fixed location, and it must be identifiable by community and documentation; s. 9.10(1).

The second concern surrounding the existing *Mining Act* is its inability to enforce consultation and accommodation as required under s. 35(1) of the *Constitution Act, 1982*. The duty to consult and accommodate was established in Canadian jurisprudence in *Haida Nation v British Columbia (Minister of Forests),* in which the Supreme Court of Canada (SCC) held that "the government has a duty to consult Aboriginal peoples and accommodate their interests [which] is grounded in the honour of the Crown."[76] The duty to consult and accommodate arises when the "the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it."[77] In *Grassy Narrows v Ontario (Natural Resources),* the Court affirmed that this duty exists when governments act under sections 109 or 92A of the *Constitution Act, 1867*.[78] Nevertheless, the duty does not extend to third parties, as the duty to consult and accommodate "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group."[79] Instead, the Court implied that to keep third parties accountable, the Crown ought to utilize its legislative authority.[80]

The *Mining Act,* however, does not govern whether the duty to consult has been satisfied nor does it hold third party mining companies to high scrutiny. This has occasionally led to disputes between First Nations and mining companies: in two instances, mining companies sought injunction orders against Indigenous community members after they set up a blockade opposing mineral development in the region, which the mining company had begun without consultation with the affected First Nation communities.[81] These conflicts led to the *Mining Act* being amended in 2009 to require industry proponents to consult affected Aboriginal groups numerous times throughout the mine development process "in accordance with any prescribed requirements."[82]

Yet it is unclear whether these interim approvals of consultation are sufficient to guarantee that the duty to consult has been satisfied, especially when much of the consultation is undertaken by the industry proponent. Issues in deferring to industry proponents for consultation surfaced in *Wabauskang First Nation v Minister of Northern Development and Mines et al* ("*Wabauskang*").[83] There, the government of Ontario approved a mine rehabilitation plan submitted by Rubicon, a mining company, despite environmental concerns raised by Wabauskang First Nation ("WFN") during impact benefit agreement negotiations with the industry proponent.[84] The facts revealed that throughout the nine months leading up to the plan approval, there were never tripartite discussions held between Rubicon, WFN, and the government of Ontario surrounding the matter; the government of Ontario met Rubicon and WFN on separate occasions, or communicated over email.[85] The reason that Ontario was not involved in negotiations between Rubicon and WFN was because they did not want to become involved in the economic agreement between the parties.[86] Nevertheless, the court found that the institutional process established by Ontario to assess the

[76] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 16 [*Haida*].
[77] *Ibid* at para 35.
[78] *Grassy Narrows v Ontario (Natural Resources)*, 2014 SCC 48 at para 51.
[79] *Haida*, *supra* note 76 at para 53.
[80] *Ibid* at para 55.
[81] See *Kitchenuhmaykoosib Inninuwug First Nation v Platinex Inc.*, [2006] 4 CNLR 152, OJ No 3140; see also, *Frontenac Ventures Corp v Ardoch Algonquin First Nation,* 2008 ONCA 534.
[82] Proponents are required to consult First Nation communities when submitting an exploration plan, applying for an exploration permit, in having a rehabilitation plan approved, and in beginning mine production: see, *supra* note 7 at ss 78.2, 78.3(2), 139.2(4.1), 141.
[83] *Wabauskang First Nation v Minister of Northern Development and Mines et al,* 2014 ONSC 4424 [*Wabauskang*].
[84] *Ibid* at para 163.
[85] *Ibid* at paras 65–155.
[86] *Ibid* at para 72.

impact of a claim was reasonable and that they had met the duty to accommodate by convincing Rubicon to monitor the impact of the mine production.[87] The case can thus be interpreted as deeming consultation according to a protocol and accommodation without the express consent of the First Nation as satisfying the government's duty to consult.

The *Wabauskang* decision is problematic for two reasons. First, the consultation protocol referred to by the government of Ontario is not included in the *Mining Act* or its regulation, meaning that the only oversight of its adequacy is through judicial reviews in court. Second, the mere existence and adherence to a consultation protocol was deemed to fulfill the duty to consult without review of the content or adequacy of the protocol. However, it is difficult to comprehend that the duty was fulfilled when no actual government consultation occurred where all parties were present; the government of Ontario played an advisory role to the parties separately and in confidence. This could result in a conflict of interest, as the government is likely to approve an application as long as the proponent meets its request, which may not necessarily be the same request as that of the First Nation. Considering the capitalistic origins of Ontario's mining legislation, there is a strong possibility that the government's interest would align more closely with the industry than that of the First Nation.

The continuation of the free entry scheme compounded by the lack of sufficient oversight over consultation mechanisms in Ontario's *Mining Act* means that Aboriginal and treaty rights are in danger of being violated, notwithstanding the assertion of Indigenous mineral sovereignty.

4. Making the Case for Indigenous Mineral Sovereignty in Ontario

As evidenced by the history of promise-breaking by the settler-colonial government and the ongoing disrespect of Indigenous sovereignty in Ontario's mining legislation, Hoogeveen's assertion that mining contributes to settler colonialism rings true.[88] Therefore, I argue that to decolonize the existing mining regime, Indigenous mineral sovereignty must be recognized on two grounds.

a. Relationship as Sovereignty—Indigenous Conceptions of Sovereignty

At the time that European settlers arrived in North America, there was little to no recognition of the sovereignty of Indigenous peoples, due to the narrow conception of the term as defined under the *Treaty of Westphalia*.[89] What has since been adopted to international law, this Westphalian conception of sovereignty involves absolute authority figures acting within territorial bounds and defining the nation-state.[90] Yet this definition of sovereignty is strictly European and cannot be universalized as applying to Indigenous communities in North America.[91]

There is no question that Indigenous communities have both *de facto* and *de jure* sovereignty. *De facto* or factual sovereignty refers to an operational notion of sovereignty, which closely aligns with the concept of self-determination: the ability for a people to govern itself and

[87] *Ibid* at paras 230, 234.
[88] Hoogeveen, *supra* note 34 at 130.
[89] S James Anaya, *Indigenous Peoples in International Law,* 2nd ed, (Oxford: Oxford University Press, 2004) at 21.
[90] Kent McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 UC Davis J Int'l L & Pol'y 81 at 89.
[91] *Ibid* at 85.

make decisions without external interference.[92] From the political alliance building practices between the "Three Fires" confederacy[93]—the Ojibwe, Odawa, and Potawatomi—to the internalized principles that community members rely on to govern themselves, Indigenous peoples have practiced and still continue to practice factual sovereignty.[94] *De jure* sovereignty, on the other hand, is a relative matter which arises vis-à-vis other sovereign entities.[95] Kent McNeil argues that *de jure* sovereignty arises in the recognition of sovereignty through the principles of a certain legal system.[96] Treaties, whether between First Nations and the settler state, or those that exist between First Nations, are the main legal documents which recognize *de jure* sovereignty.[97]

Pre-Confederation, the Ojibwe residing in what is now Treaty 3 territory clearly satisfied both elements of sovereignty in their everyday lives, including in the ways they chose to manage their minerals. Mineral extraction was practiced with the principles of reciprocity and respect in mind, and even without the presence of authority, Indigenous miners were able to self-govern their extractive practices.[98] *De jure* sovereignty over minerals was also observed: the Ojibwe intentionally disclosed mineral deposits as means of gaining allegiance from settlers but kept sacred sites in confidence in an assertion of conservation and control.[99] Had it not been for the erosion of the true meaning of treaty promises by the settler state and the restraints imposed by the province's mining regime, one could presume that sovereignty would be vociferously practiced today. To a limited extent, First Nations are asserting their sovereignty over minerals today by engaging in mining activities and negotiating with industry proponents; thus, an extension of such control and management to the minerals themselves and the land whereupon it is found is not unimaginable.

b. Respecting International Law: Treaties and Principles

In addition to the intrinsic sovereignty found in Indigenous communities, Canada, as a sovereign state recognized under international law, is obliged to adhere to international treaties and principles. The Crown's nation-to-nation relationship in law began with the signing of the *Royal Proclamation of 1763* whose terms must simultaneously be interpreted with the *Treaty of Niagara*, the two-row wampum dictating the First Nations' principles in engaging in foreign affairs with the British Crown.[100] Read together, the two fundamental documents point to a relationship of peace and friendship, which involves the shared use of resources and land.[101] The historic treaties then must also be read with these underlying intentions in mind. To date, Canadian courts have required treaties to be interpreted liberally and any ambiguities to be resolved in favour of

[92] Kent McNeil, "Indigenous and Crown Sovereignty in Canada" in Michael Asch, John Borrows, and James Tully, eds, *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018) at 294.
[93] Heidi Kiiwetinepinesiik Stark, "Marked by Fire: Anishinaabe Articulations of Nationhood in Treaty Making with the United States and Canada" (Spring 2012) 36:2 American Indian Quarterly 119 at 121.
[94] McNeil, *supra* note 90 at 92.
[95] *Ibid* at 99.
[96] *Ibid* at 300.
[97] *Ibid* at 126.
[98] Telford, *supra* note 10.
[99] *Ibid* at 52.
[100] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government" (1997) at 4, online(pdf): *Simon Fraser University* <www.sfu.ca/~palys/Borrows-WampumAtNiagara.pdf>.
[101] *Ibid* at 6.

Indigenous signatories.[102] Although this is an interpretation adopted within a Canadian legal system, the court's guidance provides support to respecting the oral promises of mineral rights and the spoken intentions of the Ojibwe during Treaty 3 negotiations under international law.

The international law principle of permanent sovereignty over natural resources ("PSNR") also renders support to a claim of mineral sovereignty to Indigenous peoples across Canada. Whereas the discussion of sovereignty so far has referred to a more general notion of First Nation sovereignty, PSNR refers to the notion that a nation-state is free to dispose of natural wealth and resources within its territory, and conversely, has the duty to manage these resources responsibly to take care of the environment.[103] Although this principle emerged in the mid-twentieth century from post-colonial states asserting control over their resources in an attempt to protect themselves from foreign investors, PSNR has since been challenged for upholding capitalist notions of property and criticized for being used to justify a state's exploitation of its land *vis-à-vis* the collective interest of the citizens on that land most affected.[104] Nevertheless, modern iterations of the notion recognized in international law and by legal scholars suggest that PSNR could belong to a collective *people* and can be a means to assert internal self-determination.[105] Taken from this view, Ricardo Pereira and Orla Gough state that, "autonomous governance is not only instrumental but also necessary for indigenous peoples to control the development of their distinctive cultures, including the use of land and resources against undue interference by powerful economic interests or government."[106]

The notion of PSNR is closely linked to the rights to self-determination and resource management enumerated in UNDRIP. UNDRIP was passed as a non-legally binding resolution by the United Nations in 2007 but has since evolved to form a series of customary law principles intended to empower Indigenous peoples to reassert sovereignty within an international law framework rooted in Western notions of sovereignty.[107] The annex of the document provides that "control by Indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions", which echoes the arguments made by legal scholars regarding the potential of PSNR promoting Indigenous self-determination and rights.[108] Enumerated in UNDRIP's articles are the various ways this control ought to be afforded: article 25 provides the right to maintain and strengthen

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[102] *R v Badger*, [1996] 1 SCR 771 at para 41, 2 CNLR 77. The courts have provided this reasoning for the purpose of deducing treaty rights under section 35(1) of the *Constitution Act, 1982*. This document operates within the Canadian legal system and as such, would not be considered "law" for First Nations. The position for a more holistic interpretation of treaty has been asserted by First Nations for decades; however, meaning that the court's dicta on a generous interpretation of treaty is a shared idea between both First Nations and the Crown. It is in that sense that I refer to the court's dicta as "guidance."

[103] Amada S Tolentino, Jr, "Sovereignty over natural Resources" (2014) 44:3 Environmental Policy and Law 300 at 300.

[104] See, for example, Oliviero Angeli, "Self-Determination and Sovereignty over Natural Resources" (2017) 30:3 Ratio Juris 290 at 297.

[105] United Nations instruments recognizing PSNR includes the *Resolution on Permanent Sovereignty over Natural Resources,* GA Res 1803 (XVII)*,* UN GAOR, 17th Sess, 1194th Plen Mtg, UN Doc A/RES/1803(XVII) (14 December 1962) and the *Charter of Economic Rights and Duties of States,* GA Res 3281 (XXIX), UN GAOR, 29th Sess, 2315th Plen Mtg, Agenda Item 48, Supp No 31, UN Doc A/RES/3281(XXIX) (12 December 1974); Ricardo Pereira & Orla Gough, "Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples under International Law" (2013) 14:2 Melb J Int'l L 451 at 460.

[106] *Ibid* at 473.

[107] *Ibid* at 472.

[108] *UNDRIP*, *supra* note 8 at Annex 4.

distinct Indigenous spiritual relationships with resources; article 26 provides a right to the resources themselves, as well as a right to use them; and article 28 provides a right to "free, prior and informed consent" of the use of such minerals if restitution is not possible.[109] In June 2021, Canada passed Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, officially recognizing UNDRIP's force into Canadian law.[110] Therefore, in both international law and Canadian law, the Crown is obliged to make space for the creation of Indigenous-led mineral management processes.

CONCLUSION

Just as the story of Missibizi has been passed on from generation to generation, Indigenous sovereignty over minerals has also transcended generations. In this paper, the story of Missibizi acted as a guide to exploring the historic evidence of Indigenous mineral sovereignty, the ways in which treaties initially captured Indigenous mineral sovereignty, and the obligations settlers have in correcting the wrongs perpetuated by the settler state's repeated violation of treaty promises. These obligations are grounded in both Indigenous notions of sovereignty and international legal principles, which is inextricably linked to the Canadian constitution.

I set out to write this paper as a response to concerns I noticed throughout my law school placement over the Indigenous communities' lack of control in the province's mining decisions. As a settler, I believe that my role is to contribute to decolonization by critiquing Western legal systems and repatriating Indigenous land and life.[111] As such, I am not in the position to suggest, if Indigenous mineral sovereignty is recognized in the colonial state, how Indigenous communities ought to apply this sovereignty in their self-governance. Each First Nation has a different relation to minerals and throughout this paper, I may have oversimplified this relationship by framing it as a single definition captured under treaty. Yet, as law is an ever-evolving medium, I take this position as a starting point for Indigenous Elders and knowledge keepers to customize the work for their own needs and legal orders.

I began this paper with the recognition that minerals have defined societies today, including the current settler-colonial society I live in. Detaching settler control of minerals will not be a clean break, similar to how decolonization is never a clean break.[112] However, learning from Indigenous teachings such as that of Missibizi and being reminded of our obligations to our human and non-human kin, I believe that we can transform our settler-society into one that respects Indigenous sovereignty.

[109] *Ibid* at arts 25, 26, 28.
[110] See Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 43rd Parl, 2nd Sess (23 Sept 2020).
[111] Tuck and Yang, *supra* note 9 at 21.
[112] *Ibid* at 20.

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

Rhea Murti*

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]

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[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.

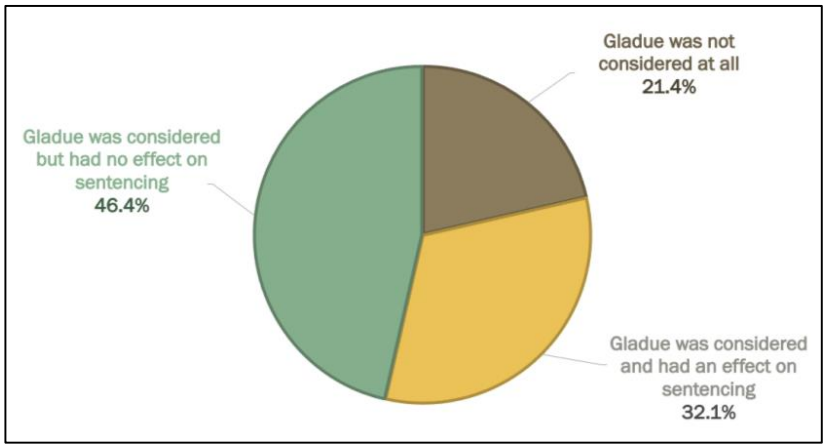
RESULTS

A. Quantitative Results

See Table 1–1 in Appendix for general results.

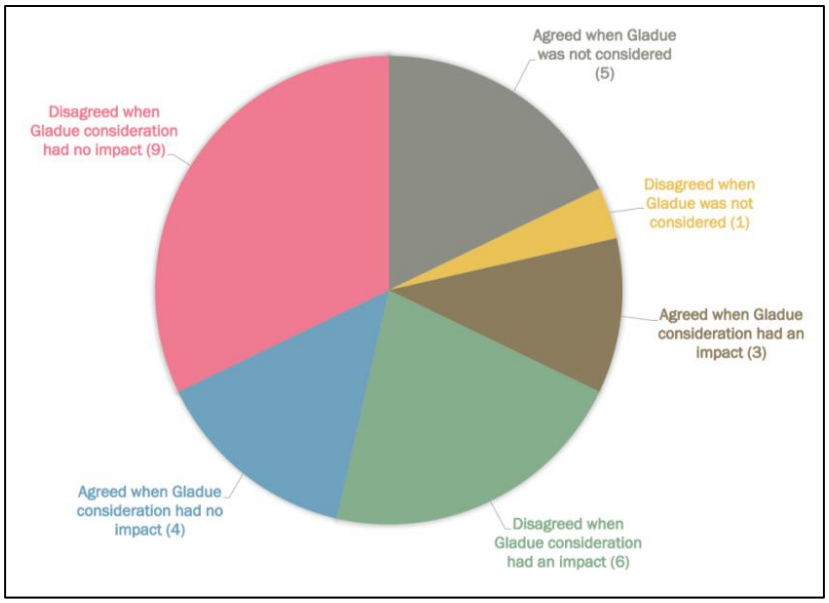
[59] Anderson, *supra* note 55 at 88.

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

Exploring Financial Disengagement of Indigenous Australians: Culture Matters

May Fong Cheong, Kunle Ola, Graeme Lyle La Macchia, and Ian Lam*

Indigenous Australians – Financial Literacy – Financial Disengagement – Financial Exclusion – Financial Capabilities – Culture – Community – Money

Financial disengagement of Indigenous Australians stems from external and internal sources. External factors include geographical location, unemployment, lower income, and lower financial literacy. Internal factors relate to Indigenous cultural norms of sharing which influence money management practices. The High Court of Australia's decision in Australian Securities and Investments Commission v. Kobelt highlights the cultural practice of 'demand sharing' and the use of the 'book-up' system within remote Indigenous communities. The majority 4:3 decision that Mr. Kobelt did not engage in unconscionable conduct with his practice of the book-up system with Indigenous customers indicates the relevance of cultural lenses in evaluating unconscionable conduct in Indigenous context.

Applying an Indigenous Standpoint Theory and using a mixed methodology of statistical and reflective analytical approaches with Indigenous oral testimonies, this article demonstrates that culture matters and that connection to culture and community is key to Indigenous Peoples' identity and strength. It provides resilience and is foundational to well-being, including financial wellbeing. Thus, effective design and implementation of financial literacy and capabilities programs worked by, or in consultation and collaboration with, Indigenous Peoples will contribute to financial engagement of Indigenous Australians. The lessons learned could also apply broadly to promoting financial engagement of Indigenous Peoples in the CANZUS nations.

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INTRODUCTION

Eddie Mabo's challenge of the Queensland Government on the precolonial land interest of Indigenous Australians[1] is a reminder that Indigenous Peoples consider community rather than the individual as the bedrock of society.[2] The High Court of Australia's seminal decision in *Australian Securities and Investments Commission v. Kobelt* ("*ASIC v Kobelt*")[3] highlights the prevalence of Indigenous communal living evident in the cultural practices of sharing and 'demand-sharing' that has influenced their approach to money and money management practices. Indigenous cultural practices and communal living have an impact on the financial wellbeing of Indigenous Peoples. Financial commentators like Vinita Godinho have noted that "in regional and urban areas, 'Money' is inextricably linked to a wider ongoing challenge to re-conceptualize Indigenous cultural identity and roles in relation to mainstream or Non-Indigenous Australia".[4]

A study on how Indigenous People relate and talk about money found that Indigenous Australians are more likely to experience financial stress (49%) than the general Australian population (11%).[5] More than three quarters of participants reported they give money to their families. Money has become a commodity in Indigenous sharing economy that both benefits and hurts financial resilience.[6] Recognising the emphasis on 'sharing' or 'communal ownership' that prevails in Indigenous communities, families and even government-supported Indigenous-controlled organisations can help banks and the financial system understand how Indigenous Australians think and manage money, and provide solutions that promote better financial resilience.[7] The retention and maintenance of traditional community relationships continues to cement cultural confidence and solidarity of many Indigenous Australians.[8] On a broader level, many First Nations communities, families and individuals perceive the *community* – not the individual - as the fundamental unit of society.

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[1] This article adopts the term "Indigenous" to refer to the two distinct cultural groups of Aboriginal and Torres Strait Islander peoples. It recognises that this will not fully reflect the diversity of the First Nations Peoples in Australia. The terms "Indigenous Peoples", "Indigenous Australians" and "First Nations Peoples" are used interchangeably. In recognizing Indigenous diversity, in this article unless otherwise stated, these references refer to Indigenous Peoples who reside in remote or regional areas as well as in urban centers.

[2] *Mabo & Other v Queensland (No.2)* (1992) 175 CLR 1.

[3] (2019) 93 ALJR 743; (2019) 267 CLR 1, [2019] HCA 18. The 4:3 majority decision of the High Court that the 'book-up' system practiced by Mr. Kobelt in a remote Indigenous community did not amount to unconscionable conduct within section 12CB of the *ASIC Act 2001* raised important questions on the Court's (divided) views on the impact of cultural factors in evaluating unconscionable conduct. This article examines the views of the majority judges on the Indigenous cultural norm and practice of 'demand sharing' which influenced their decision that Mr. Kobelt's book-up system was not disadvantageous to his Indigenous customers, thus Mr. Kobelt's conduct was not unconscionable. The article also considers the views of the dissenting judges that decided otherwise.

[4] Vinita Godinho, "Money, Financial Capability and Well-being in Indigenous Australia" (PhD Thesis, RMIT University, 2014) iii, iv. See also Vinita Godinho, Kathleen Eccles and Lauren Thomas, "Beyond Access: The role of microfinance in enabling financial empowerment and wellbeing of Indigenous clients: lessons from remote Australia" (2018) 24(2) Third Sector Review 57; Vinita Godinho et al, "When Exchange Logics Collide: Insights from Remote Indigenous Australia" (2017) 37(2) Journal of Macromarketing 153.

[5] Megan Weier et al, "Money Stories: Financial Resilience among Aboriginal and Torres Strait Islander Australians (First Nations Foundations" (May 2019) Centre for Social Impact and National Australia Bank, <https://www.csi.edu.au/media/NAB_IFR_FINAL_May_2019_web.pdf> at 16.

[6] *Ibid*, at 16.

[7] *Ibid*, at 16. See also Penny Taylor and Daphne Habibis, "Widening the Gap: White Ignorance, Race Relations and the Consequences for Aboriginal People in Australia" (2020) 55 Aust.Jnl.of Social Issues 354.

[8] Nicolas Peterson, "On the Persistence of Sharing: Personhood, Asymmetrical Reciprocity, and Demand Sharing in the Indigenous Australian Domestic Moral Economy" (2013) 24(2) The Australian Journal of Anthropology 166.

When community is the bedrock of social and cultural existence, it is logical and necessary for *communal ownership* to prevail over any other version – including individual ownership and the rights of the individual citizen. For most Indigenous Australians - and for Indigenous Peoples more generally – Indigenous rights, as collective rights, are understood to be distinct from and are significantly more valuable than human rights.[9] While Eurocentric philosophical and institutional tradition frame human rights through notions of the primacy of individualism, it has been argued that "[c]ollective rights are more aligned with Indigenous cultural realities. Since the late 20th Century, First Nations participants at the United Nations have repeatedly sought to move beyond human rights".[10] The cultural context of the First Nations' *communal* and *collectivist* traditions provide an important lens to explore financial disengagement of Indigenous Australians in the economic and financial landscape of Australia.

This article positions and locates the discussion on financial disengagement of Indigenous Peoples within the cultural emphasis of sharing and argues that financial literacy programs for Indigenous Peoples must be tailored to take cognizance of Indigenous distinctive cultural norms and implemented with cultural contexts. Effective design and implementation of financial literacy and capabilities programs worked by, or in consultation and collaboration with, Indigenous Peoples will increase financial engagement of Indigenous Australians.

The article is presented in six parts. Part I analyses *ASIC v Kobelt* with emphases on the views of the majority (and dissenting) judges on the cultural norm of demand sharing contributing to the 4:3 decision that Mr. Kobelt did not engage in unconscionable conduct with his practice of the book up system with Indigenous customers. Part II provides the theoretical framework using an Indigenous Standpoint Theory. Part III explains the authors' intentional choice to use the terminology "*financial disengagement*" instead of "financial exclusion" used in current literature. Part IV analyses the causes of financial disengagement using the latest available statistics. Part V discusses Indigenous Peoples' cultural views on money and money management practices. Part VI highlights the importance of respecting Indigenous cultural norms and cultural competency in designing and implementing financial literacy programs by, or in consultation and collaboration with, Indigenous Peoples.

The article adopts a mixed methodology of statistical, theoretical, and reflective analytical approaches with oral testimonies from an Aboriginal elder and researcher who is a co-author of this article.[11] The inclusion of oral testimonies is important as it acknowledges the preferred mode

[9] Irene Watson and Sharon Venne, "Talking up Indigenous People's Original Intent in a Space Dominated by State Interventions" in Elvira Pulitano, eds, *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 93. See also Claire Charters "'Finding the Right Balance' A Methodology to Balance Indigenous Peoples' Rights and Human Rights in Decision-Making" (2017) NZ L Rev 553 on a methodology to achieve a normatively fair balance between Indigenous individual human rights, Indigenous peoples' collective and evolved human rights, and Indigenous peoples' rights to authority. For a historical account, see Catherine J Iorns Maggallanes, 'International Human Rights and their Impact on Domestic Laws on Indigenous Peoples' Rights in Australia, Canada and New Zealand' in Paul Havemann, eds, *Indigenous Peoples' Rights in Australia, Canada & New Zealand* (New Zealand: Oxford University Press, 1999) 235 and that beginning in the 1970s, "international human rights law recognised the rights of indigenous peoples to exist as distinct separate people with their own cultural identity".

[10] C Charters, *Ibid*, note 9, at 96. See also P.G. McHugh, "New Dawn to Cold Light: Courts and Common Law Aboriginal Rights" (2005) NZ L Rev 485 on the "legalization" of aboriginal rights in the common law jurisdiction of North America and Australasia.

[11] The oral testimonies are provided by Dr Graeme Lyle La Macchia, an Indigenous Australian man and a member of the Gumbaynggirr and Yuin communities of coastal NSW. See Part II and Part V below.

of communication (oral testimony) by Indigenous Peoples[12] and reflects the adoption of the Indigenous Standpoint Theory. While acknowledging the diversity of Indigenous experiences, this article explores financial disengagement of Indigenous Australians, particularly in remote or regional areas. the common themes of culture and communal living may also find resonance in other First Nation contexts in jurisdictions such as Canada and New Zealand.

I. *ASIC v Kobelt*: Demand sharing, the book-up system and unconscionable conduct

The landmark case, *ASIC v Kobelt,* presented the High Court of Australia with a unique opportunity[13] to consider the issue of unconscionable conduct in the context of the "book-up" system that was practiced by storeowner Mr. Kobelt with his Indigenous customers. This case highlighted the Indigenous cultural norm and practice of "demand sharing" as well as vulnerabilities faced by some Indigenous Australians due to geographical remoteness, limitations of education, impoverishment, and limitations of financial literacy. These vulnerabilities were acknowledged by the High Court,[14] which are indicative of the wider structural problems, including financial disengagement that must be addressed in Indigenous communities, particularly in Australia's regional and rural areas.

In *ASIC v Kobelt*, the Australian Securities and Investment Commission ("ASIC") in their regulatory role commenced action against Mr. Kobelt for an alleged infringement of section 12CB of the *ASIC Act 2001* for unconscionable conduct in supplying financial services in trade or commerce using the book-up system. Mr. Kobelt operated a store known as "Nobbys Mintabie General Store ("Nobbys")", supplying food, groceries, fuel and second-hand cars in a remote community approximately 1,100 km from Adelaide, the capital city of South Australia. His customers were Indigenous Peoples residing in remote communities in the Anangu Pitjantjatjara Yankunytjatjara Lands.

The Full Court accepted that "Mr. Kobelt's Anangu customers' poverty and lack of financial literacy made them vulnerable in their dealings with Mr. Kobelt".[15] Under the book-up system, in order to obtain credit, the customers gave to Mr. Kobelt their debit cards (including key card and the personal identification number), which were linked to their bank accounts where wages or welfare payments (via Centrelink) were credited. Mr. Kobelt would withdraw the funds (at least 50%) to reduce the customers' debt and leave the remaining 50% for them to purchase groceries (generally limited to purchasing milk, bread and meat).[16] Most of the book-up credit was for the sale of second-hand motor vehicles; often vehicles that had been driven in excess of 200,000 km without statutory warranty and imposed with an expensive credit charge.[17] Mr. Kobelt knew most of his customers and was aware of their financial circumstances but did not inquire about their capacity to repay their debts before entering the book-up arrangement.[18] His record-keeping

[12] See Vinta Godinho et al, "Learning About the Money-Story through Stories, Art and Silences: Applying Indigenous Research Methodologies" (2015) 8(1) Creative Approaches to Research 132.
[13] Commentators have described it as a missed opportunity; see Gabrielle Golding and Mark Giancaspro, "Steering Statutory Unconscionability Out of a Jam at Last: Stubbings v Jams 2 Pty Ltd" (2021) 43(8) Bulletin (Law Society of South Australia) 42, and notes 38 and 39 below.
[14] *ASIC v Kobelt*, *supra* note 3, at paras 167 and 235 per Nettle and Gordon JJ; at para 312 per Edelman J.
[15] *Ibid,* at para 11.
[16] *Ibid,* at paras 23 and 24.
[17] *Ibid,* at para 26.
[18] *Ibid,* at paras 26, 27 and 29.

was "chaotic", and customers were not given any record of withdrawals or account statements.[19] There was, however, no suggestion that Mr. Kobelt was dishonest or that the withdrawals were not authorized. Further, the Anangu customers had a basic understanding of the system and could cancel their cards or arrange for their Centrelink payments to be credited to a different account.[20] By a 4:3 majority, the High Court held that Mr. Kobelt did not act unconscionably in using the book-up system with his customers.

The majority concurred with the Full Bench of the Federal Court findings that Mr. Kobelt's conduct was not unconscionable, while the dissenting judges agreed with the primary judge's findings of Mr. Kobelt's unconscionable conduct. Both the primary judge and the Full Court accepted that Mr. Kobelt's customers were vulnerable and that Mr. Kobelt knew of his customers' special disadvantage.[21] The focus of this article[22] is the contrasting views of the majority judges and the dissenting judges concerning the impact of the Indigenous cultural norm and practice of "demand sharing" and "boom and bust" spending patterns[23] in assessing unconscionable conduct of Mr. Kobelt's use of the book-up system.

Kiefel CJ considered that the book-up system allowed the Anangu customers to avoid "demand sharing" and "ameliorating the effects of the boom and bust cycle of expenditure".[24] Gageler J stated that the Anangu customers using the book-up system "allowed them to manage customary obligations to share their resources with their relatives" and that the Anangu people's continued participation in the book-up system suited "their own preferences and distinctive cultural practices".[25] Keane J described Mr. Kobelt's services as a banker and supplier which allowed his customers to avoid the practice of demand sharing or "humbugging" as a positive

[19] *Ibid,* at para 31.
[20] *Ibid,* at paras 30 and 31.
[21] *Ibid* at para 235.
[22] It is not within the scope, nor is it the aim, of this article to analyse the Court's views on the elements, and the threshold standard required, of unconscionable conduct under s 12 CB(1) of the *ASIC Act.* To set this out concisely, the difference is the higher threshold that the majority ascribed to statutory unconscionability. Noting that the term used is "unconscionable" (rather than less morally tainted terminologies such as "unjust", "unfair" or "unreasonable"), the majority judges referred to the term "moral obloquy and considered that the assessment for the finding of unconscionability is a "heavy-one". As Mr. Kobelt had not taken advantage of his customers' disadvantaged situation and the customers had some understanding of the book-up system (thus an element of choice), the majority concluded that Mr. Kobelt's conduct was not so offensive as to be unconscionable. The minority judges, on the other hand, took a less restrictive view relying on the legislative history of statutory unconscionability which supports an interpretation that the threshold of statutory unconscionability must be lower than that required of equitable unconscionability. Focussing on the book-up system and the way it was implemented, the minority held that the book-up system took advantage of the Indigenous customers' vulnerabilities, and which offered them no real choice or alternative except to transact with Mr. Kobelt on his terms.
[23] "Demand sharing" refers to "an Anangu social obligation requiring sharing of resources with specific categories of kin, under which the giver has a responsibility to share and the recipient the right to share". A "boom and bust" expenditure refers to spending as money becomes available without consideration of the medium to long-term consequences", see *ASIC v Kobelt*, *supra* note 3, at para 171 per Nettle and Gordon JJ.
[24] *Ibid,* at para 69 referring to the Full Court's acceptance of this view relying on the statements of Dr Martin, an anthropologist who gave evidence on Indigenous cultural values and practices, and the Renouf report (see *infra* note 44 discussed below).
[25] *Ibid,* at paras 109 - 110.

advantage.[26] Concluding that these distinctive cultural practices should be respected, the majority upheld the Full Court's decision[27] that Mr. Kobelt's conduct was not unconscionable.

Paradoxically, it is questionable whether the majority judges gave too much weight to cultural factors: in this respect, the over emphasis on Indigenous agency and the advantages of the book up system (to avoid demand sharing and manage finances in the bust stage of the boom and bust cycle) led the majority to conclude that Mr. Kobelt's conduct using the book up system was not unconscionable. The dissenting judges' views on this issue were more guarded. Nettle and Gordon JJ considered that demand sharing "can give rise to bullying or exploitation" and while participating in the book-up system may give "some customers a degree of control over boom and bust expenditure patterns and an excuse to avoid demand sharing requests … none of that render Mr. Kobelt's conduct any the less conscionable".[28] Crucially, Edelman J noted that "there was little evidence to support the conclusion that any customer entered the Book-up arrangement in order to avoid demand sharing".[29]

According to Australian anthropologist Nicolas Peterson, demand sharing is a complex phenomenon.[30] Economist and anthropologist Jon Altman explained that it can be perceived positively or negatively: it is a generosity mechanism to redistribute resources or conversely, an aggressive form of demanding commonly referred to in Aboriginal English as "*humbugging*".[31] From the authors' knowledge, this term is considered culturally offensive within the Indigenous communities. Altman has criticised the way the term 'demand sharing' has been used interchangeably with the negative extreme of "humbugging".[32] The discourse on this have also "conflated the broad notion of kin-based distribution with demand sharing".[33] A simplistic view of 'demand sharing' without considering other important contexts could risk the danger that demand sharing "ultimately became a gloss, however, for either the dominant mode of distribution, or all Aboriginal forms of sharing" and to justify related policy positions[34] and in the case of *ASIC v Kobelt*, it contributed to the majority's view that Mr. Kobelt's conduct was not unconscionable.

Solicitor Rachel Yates and legal scholar Sharmin Tania argue that the majority judges' application in *ASIC v Kobelt* of a unified concept of demand sharing (that Altman has criticised)[35] ignores the complexity of Indigenous values and practices.[36] The Anangu customers' voluntary entry into the book-up system should be considered in terms of relevant Indigenous cultural norms, lack of alternative financial services and vulnerabilities arising from low levels of financial

[26] *Ibid,* at para 126.
[27] For a critique of the decision, see Sharmin Tania and Rachel Yates, "Australian Securities and Investments Commission v. Kobelt: Evaluating Statutory Unconscionability in the Cultural Context of an Indigenous Community" (2018) 40 Syd L Rev 557, 566-569.
[28] *ASIC v Kobelt*, *supra* note 3*,* at paras 171 and 262.
[29] *Ibid,* at para 301.
[30] Nicolas Peterson, "Demand Sharing: Reciprocity and the Pressure for Generosity among Foragers" (1993) 93 American Anthropologist 860, 870.
[31] Jon Altman, "A Genealogy of 'Demand Sharing': From Pure Anthropology to Public Policy" in Yasmine Musharbash and Marcus Barber (eds), *Ethnography & the Production of Anthropological Knowledge* (Canberra: ANU Press, 2011) 187, 188-191.
[32] *Ibid,* at 193.
[33] *Ibid,* at 192.
[34] *Ibid,* at 187.
[35] See *supra* notes 32 - 34.
[36] Rachel Yates and Sharmin Tania, "The Place of Cultural Values, Norms and Practices: Assessing Unconscionability in Commercial Transactions" (2019) 45(1) Monash L. R. 232, 268.

literacy.[37] Similarly, other legal scholars draw attention to the Court's inadequate investigation of the cultural values that it attributed to justify the business model operating in remote Indigenous communities and argue that in terms of both legal doctrine and policy outcomes, the approach of the minority judges is to be strongly preferred.[38] As a result, the majority judges characterised the book-up system as advantageous to Anangu customers and had thus (incorrectly) equated that to voluntariness.[39]

The dissenting judges disagreed that the Anangu customers voluntarily agreed to use Mr. Kobelt's book-up system. Notably, Edelman J described the choice if any, as "Hobson's choice – no matter how badly they need credit, they can either "choose" that system or "choose" no credit at all".[40] Gordon and Nettle JJ questioned whether the customers who were vulnerable due to the external factors above mentioned and having relatively little bargaining power would be in a position to negotiate before entering into the book-up system or possess the practical ability to frustrate the arrangements.[41] Thus, it was the unreasonableness of Mr. Kobelt's book-up system (noting that there were other book-up systems in the vicinity of the customers' location) that should be considered, regardless of any effects on demand sharing.[42] The focus on the unreasonableness of Mr. Kobelt's book-up system has raised questions on the provision to establish statutory unconscionability through "a system of conduct or pattern of behaviour".[43]

The views of the dissenting judges and academic commentaries on *ASIC v Kobelt* should not come as a surprise. The lack of access to banking systems and to credit in remote parts of Australia which impacts Indigenous financial disengagement was acknowledged as early as 2002 in a report commissioned by the ASIC to investigate problems associated with the book-up credit system.[44] The report observed that 'book-up' is often "the only means for Aboriginal consumers to obtain access to credit".[45] While the use of book-up has decreased,[46] it is "still prevalent across

[37] See S Tania and R Yates, *supra* note 27 at 562 in a critique of the Full Court of the Federal Court decision, which was subsequently upheld by the High Court.
[38] See Jeannie M Paterson, Elise Bant and Matthew Clare, "Doctrine, Policy, Culture and Choice in Assessing Unconscionable Conduct under Statute: *ASIC v Kobelt*" (2019) 13 J Eq 81.
[39] *Ibid*, at 99, the authors agreeing with the dissenting judgments that "notions of 'voluntariness' provided little justification for the book-up system operated by Mr. Kobelt".
[40] *ASIC v Kobelt, supra* note 3, at paras 266, 272 and 275, noting that the book-up system applied *only* to Mr. Kobelt's Indigenous customers (while Mr. Kobelt's non-Indigenous customers had other borrowing options and that as a result, the price of the sale of cars is three times the market rate for unsecured credit with an interest rate of more than 43% significantly more than commercial lending rates for unsecured personal loans of 14% -15.2%.
[41] *Ibid*, at paras 241, 242 and 243.
[42] *Ibid*, at para 240.
[43] J M Paterson and E Bant, "Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online" (2021) 44 Journal of Consumer Policy 1-19, 7. Critiquing the majority decision in *ASIC v Kobelt*, the authors argue that merely improving understanding to establishing unconscionable conduct in a "system of conduct or pattern of behaviour" is insufficient to resolve the inadequacy of the prohibition of unconscionable conduct to address exploitative business systems, and propose introducing the prohibition of unfair trading in Australia. See also Nicholas Felstead, "Beyond Unconscionability: Exploring the Case for a New Prohibition on Unfair Conduct" (2022) 45 University of New South Wales Law Journal 285.
[44] ASIC, *Report 12, Book up: Some Common Problems* (REP 12), (Australia, ASIC, March 2002) (Renouf Report).
[45] *Ibid,* at 5.
[46] ASIC, *Report 451, Book up in Indigenous Communities in Australia: A National Overview* (Australia, ASIC, October 2015) (Loban Report) at 16, paras 42 - 44. This has been attributed to the success of the Outback Stores model whose business objectives are to ensure food security to communities focussing on sound governance and financial management of the stores and which do not provide book-up. Another factor is the Federal Government's introduction of income management programs that change the way Centrelink payments are received and

Australia" and "heavily relied on" by some Indigenous communities.[47] The opaque book-up system, without clear disclosures, proper record keeping and the supplier's discretion to withdraw from the customers funds through their debit cards and personal identification numbers kept by the supplier, results in vulnerability to price exploitation and inability to control finances.[48]

The book-up system exemplified in the practices of Mr. Kobelt which was brought to light in *ASIC v Kobelt* has reignited issues on the vulnerabilities of Indigenous Australians.[49] It evinces challenges that are external and internal to Indigenous contexts which contribute to the problems Indigenous Australians experience in their effort to engage with the financial system. Externally, it shines the light on the socio-economic differences between non-Indigenous and Indigenous Australians, discussed in Part IV below. Internally, it amplifies the vulnerabilities of Indigenous Australians in terms of their cultural views of money which is far more collective/kin oriented in nature.[50] This is discussed in Part V below which shows that Indigenous cultural disposition to money is also contributory to why Indigenous Australians are financially disengaged.

Drawing on reflections from *ASIC v Kobelt*, one might ask whether Mr. Kobelt was the problem, or whether internal and external factors obstructed access to the financial system that has undermined the financial well-being of Indigenous Australians. The next part sets the theoretical context to these factors and introduces the Indigenous standpoint theory that underlies the central focus of this article that culture matters in exploring the financial disengagement of Indigenous Australians.

II. The Indigenous Standpoint Theory

Indigenous Australians are the predominant group of people associated with financial disengagement in Australia.[51] For too long the views and interests of Indigenous Peoples have been subjugated and considered inferior, thereby placing them in a state of vulnerability.[52] Indigenous researchers often become exasperated by the singularized narrative which superimpose Eurocentric methodologies, a process often culturally remote and unacceptable to the Indigenous epistemological approach to knowledge.[53] As the central focus of this research is on Indigenous Australians, discussions have been framed from an Indigenous epistemological perspective namely, Indigenous Standpoint Theory ("IST"). This approach has been vigorously advocated by Indigenous experts including Lester-Irabinna Rigney, Dennis Foley, and Martin Nakata. Discussing the emergence of this theory, Rigney stated that "it is only during the last decade that research by Indigenous scholars have attempted to represent our perspectives in Western scientific

prioritising essential expenses. Both programs however exist in limited locations and does not impact on the prevalence of book-up nationally.

[47] *Ibid*, at 5, para 10.

[48] *Ibid*, at 19-20 paras 52-53. For proposals to reform the book-up system, see Nathan Boyle, "Book Up: Current Regulations and Options for Reform" (2016) 8 ILB 3, 7.

[49] Andrew Hutchison and Dominique Allen, "Unsecured Lending and the Indigenous Economy in Australia and South Africa" (2021) 48 Aust. J. of Law & Society 84.

[50] M Weier et al, *supra* note 5.

[51] Australia and New Zealand Banking Group Limited (ANZ Report), *Home Ownership and Indigenous Australians: Final Report and Response* (ANZ, 2008) 2 <http://www.anz.com/Documents/AU/Aboutanz/Community/AN5610-Home-Ownership-August-FINAL.pdf>.

[52] Martha Fineman, "Vulnerability and Social Justice" (2019) 53 Valparaiso Univ. L. Rev. 341.

[53] Dennis Foley "Indigenous Epistemology and Indigenous Standpoint Theory" (2003) (22) 1 Social Alternatives 1.

traditions".[54] Foley, explaining the rationale for this approach noted that: "The British 'system' resulted in the elimination and extermination of Indigenous social systems, knowledge, traditions, and cultural sciences … The European scientists determined whose knowledge is and what was legitimate. The result was that Indigenous knowledge was seen as inferior".[55] To address this gap, Indigenous views need to be heard.[56]

While this was acknowledged by ASIC in its submission to an inquiry into the corporate sector's engagement with Indigenous consumers,[57] the challenge remains that the globally recognised medium for disseminating knowledge is Eurocentric based and if Indigenous views must be known they would have to come through the Eurocentric publication channel.[58] Nakata, therefore, emphasized the importance of the Indigenous voice in the academic and research spheres and applied it to the theory of "Cultural Interface" "so that the situatedness of Knowledge systems is highlighted".[59] Nakata's Cultural Interface – "the intersection of the Western and Indigenous domains" – recognizes that all knowledge systems are "culturally embedded, dynamic and respond to changing circumstances".[60] In the Cultural Interface, we see adaptability, attempts to blend cultures, effort to co-exist and the indispensability of change. The oral testimony below by one of the co-authors of this article, Graeme Lyle La Macchia, about Uncle Albert Namatjira's artworks enlivens the concept of cultural interface and encapsulates the living force of the IST.

> In the late 1950s, reproductions of landscape paintings by Arrernte man, Albert Namatjira, began appearing on the walls of private homes and even in schools, government buildings and commercial premises throughout Australia. Namatjira's work was distinct from what we now recognize as the 'Traditional Art' of Central Australia. Albert and other Aboriginal men were instructed by non-Indigenous teachers including Rex Battarbee and John A. Gardner - both originally from Victoria.[61]
>
> Post-WWII, Australians seized on Namatjira's artworks as tasteful representations of the distinctive landscapes of Australia's vast but little-known interior. An increasing percentage also embraced the concept that Albert and his peers were demonstrating the ability of Aboriginal Australians to master western skills. Namatjira's success in and around Alice Springs inspired the growth of an 'Artists' Colony' that became a focus of press and government attention. Gradually a consensus emerged that the 'Hermannsburg

[54] L Rigney, "A First Perspective of Indigenous Australian Participation in Science: Framing Indigenous Research Towards Indigenous Australian Intellectual Sovereignty" (2001) 7 Kaurna Higher Education Journal 1.
[55] Foley, *supra* note 53.
[56] Bethany Elliott et al. "We are not being heard: Aboriginal Perspectives on Traditional Foods Access and Food Security." (2012) J Environ Public Health. 2012; 2012:130945. doi: 10.1155/2012/130945. Epub 2012 Dec 31. PMID: 23346118; PMCID: PMC3549364.
[57] Submission by ASIC, *Inquiry into Corporate Sector Engagement with Aboriginal and Torres Strait Islander Consumers* (December 2021) 8 [30] (It is important that the voices of Indigenous Peoples are heard and that "solutions are formed based on those insights, values and perspectives").
[58] Raymond Lovett et al, "Knowledge and power: the tale of Aboriginal and Torres Strait Islander data" (2020) 2 Australian Aboriginal Studies' 3, 4 (highlighting the impact of "settler-colonial power and control over our [Aboriginal and Torres Strait Islander] data and knowledge"). See also Kathryn L Braun et al, "Research on Indigenous Elders: From Positivistic to Decolonizing Methodologies" (2014) 54(1) The Gerontologist 117.
[59] Martin Nakata, "Indigenous Knowledge and the Cultural Interface: Underlying Issues at the Intersection of Knowledge and Information Systems" (2002) 28 IFLA Journal 281.
[60] *Ibid*, at 285-286.
[61] Martin Edmond, *Battarbee and Namatjira* (Giramondo, 2014).

painters' were providing the larger society with 'accessible' artworks that proclaimed Australia's arrival as a notable contributor to the art of the mid-twentieth century.
The responses of members of urban and rural Aboriginal communities across Australia were mixed, covering the full spectrum from wholehearted support to uncompromising disdain as seen in the conversation below.

> *The 'Hermannsburg Boys' should not be criticized for accepting the conventions and techniques of European art. If they are, we would also need to condemn our Aboriginal footballers and other sport people for accepting the rules and traditions of their sports. We would need to reject the actions of our men and women who accepted the discipline and values of the armed forces by signing up and serving in the defence of this country . . . What about family members who have regular work in the city? Should they be criticized for supporting their children and (extended) families by taking regular 'whitefella' jobs in the cities and towns? No, of course not!*

Respectful appreciation as in the above family conversation was the most common response. Similar responses and conversations continue to permeate Aboriginal family lives in different situations.

Attempts by Indigenous Australians to embrace the Cultural Interface are manifest in stories like that of Uncle Albert narrated in the oral testimony above. However, the singularised Eurocentric approach to issues surrounding Indigenous Australians continue to drown Indigenous voices and hence the need for a dedicated Indigenous approach.[62] The IST approach has been affirmed in the United Nations Declaration on the Rights of Indigenous Peoples that "Indigenous peoples are equal to all other peoples", respecting their indigenous origin or identity.[63] Consistent with the position taken in the UN Declaration, this article recognises and acknowledges the need to respect the views and interest of Indigenous Peoples, and hence the adoption of the IST.

The IST emphasises culturally responsive and respectful research. It acknowledges Eurocentric or "Western" works but seeks to make a shift away from a monolithic approach dominated by Eurocentric methodologies to an approach respectful and inclusive of Indigenous perspectives and interests.[64] This monolithic worldview has subjected Indigenous Peoples into a state of vulnerability as Eurocentric concepts dominate many systems including the monetization and financial institutions as practised in contemporary Australia. Martha Fineman underscoring this subtle subjugation has noted that:

> Western systems of law and justice have inherited a political liberalism that imagines a 'liberal legal subject' – this subject is an autonomous, independent and fully-functioning adult, who inhabits a world defined by individual, – not societal responsibility – where state

[62] Ashley Quinn, "Bridging Indigenous and Western Methods in Social Science Research" (2022) Journal of Psychopharmacology, 21, 81–105. <https://doi.org/10.1177/0269881104042632>.
[63] *United Nations Declaration on The Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>. Article 2 states that "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity".
[64] S Choy and J Woodlock, "Implementing Indigenous Standpoint Theory: Challenges for a Tafe Trainer" (2007) 5 International Journal of Training Research 39.

> intervention or regulation is perceived as a violation of his liberty. Social arrangements and institutions with significant effects on everyone lives, such as the family, are deemed 'private' and their operation and functioning relegated to ideologies of meritocracy and the free market. Vulnerability theory challenges the dominance of this static and individualized legal subject, and argues for the recognition of actual human lives as socially and materially dynamic.[65]

Tanzanian scholar Hassan Iddy concurs with Fineman and is of the view that adopting an IST approach to Indigenous-related projects frees Indigenous Peoples from this state of vulnerability by ensuring that "the voices of Indigenous people may be heard, and the community has a greater degree of control and input in the planning and designing of the project, as well as the analysis and dissemination of the information".[66] Adopting this approach is important because it enables the development of the Cultural Interface and at the same time underscores the key difference between the Eurocentric approach and that of Indigenous Australians who perceive the *community* – not the individual - as the fundamental unit of society.[67] The dichotomy between Eurocentric and Indigenous culture is not one that would vanish overnight.

III. "Financial disengagement": moving beyond financial exclusion

Besides adopting IST as the theoretical framework and including oral testimonies of an Indigenous Australian, this article also provides original contribution to this field by making an intentional choice to use the concept of "financial *disengagement*" rather than the conventional approach of "financial *exclusion*".[68] Applying the lens of financial disengagement provides a broader, positive and inclusive approach that allows a holistic analysis of why Indigenous Peoples are not engaged and have remained largely distant from the complex but powerful Australian financial sector. Our choice is also to resist adopting a (negative) narrative of cultural loss; instead adopting a narrative of survival to protect future interests and enrich traditional practices to produce better outcomes.[69] "*Engagement*" is about a "relatively sustained and systematic interaction"[70] — using this concept allows an ongoing process and conversation, a relationship between groups of peoples towards shared goals. "Financial exclusion" on the other hand, invites negative connotations indicating a lack of access to the financial system,[71] lack of ownership or

[65] Martha A Fineman, "Understanding Vulnerability Theory" (26 August 2019) Scholarblogs <https://scholarblogs.emory.edu/vulnerability/2019/08/26/understanding-vulnerability-theory>.
[66] Hassan Iddy, "Indigenous Standpoint Theory: Ethical Principles and Practices for Studying Sukuma People in Tanzania" (2020) The Australian Journal of Indigenous Education 1.
[67] M Weier et al, *supra* note 5.
[68] ANZ Report, *supra* note 51. This is the first report commissioned by ANZ, one of the four big banks in Australia "as a first step in a research program aimed at measuring and understanding financial exclusion in Australia, so that policies and programs to address it could be better informed", Executive Summary at p 1.
[69] Martin Nakata, "Australian Indigenous Studies: A Question of Discipline" (2006) 17(3) The Australian Journal of Anthropology 265, 273.
[70] Brenton Holmes, "Citizen's Engagement in Policymaking and the Design of Public Services" (Research Paper, Parliament of Australia, 22 July 2011) 13.
[71] A Leyshon and N Thrift, "Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States" (1995) 20 Transactions of the British Institute of Geographers, New Series 312. In the Australian context, see Chris Connolly and Khaldoun Hajaj, *Financial Services and Social Exclusion* (Australia: Financial Services Consumer Policy Centre, 2001) 64.

access to particular types of financial products and services[72] and difficulties to use mainstream services such as bank accounts, home insurance[73] or credit card.[74] Financial exclusion could also contribute to, or result from, the broader notion of "*social exclusion*",[75] which is the process of becoming detached from broad moral orders of society[76] and individuals do not participate in key activities in society.[77] Moving beyond income poverty,[78] it marks an ongoing process of being "shut out, fully or partially, from any of the social economic, political and cultural systems"[79] that enable individuals to integrate in society. Moving forward, concepts such as "financial *capability*"[80] beyond "financial literacy", and "financial *resilience*"[81] now dominate the discourse in this area.

The authors have made this deliberate choice of terminology accepting that there is generally (and frequently) an overlap, especially at the local level, in terms of exclusion/disengagement. While the two concepts are not mutually exclusive, choosing the term "disengagement" assists in responding to the related issues on both the Indigenous and Non-Indigenous sides of the equation. The word "*exclusion*" can be problematic. It denotes an intentional action of not allowing someone or an institution to participate. It represents an active intention from an external source to lock out, block and prevent someone from being a part of something. For some time, the word "exclusion" represented the status quo for Indigenous Peoples, and it may be argued that it is still the case. However, in the twenty-first century, Indigenous Peoples are not always directly excluded from the financial sector. Instead, at community level, versions of financial disengagement (or self-distancing) probably remain the dominant (but largely unrecognized) pattern of behaviour across rural and especially remote Indigenous Australia, although they form only a minority of the total Indigenous population. The concept of disengagement is an acknowledgement that Indigenous Australians are not participating as expected in the financial sector and creates the opportunity to explore the lack of participation from both external and particularly internal, points of view. The potential of looking inward which embodies the concept of community, family, individual agency, and simultaneously incorporates the powerful notion of ongoing cultural traditions within the community should be recognised rather than deliberately denied or misinterpreted. External factors are analysed at Part

[72] Ben Rogaly, "Poverty and Social Exclusion in Britain: Where finance fits in" in Ben Rogaly, Thomas Fisher and Ed Mayo, *Poverty, Social Exclusion and Microfinance in Britain* (Oxfam GB: Oxford, 1999).
[73] Pamela Meadows et al, "Social Networks: Their Role in Access to Financial Services in Britain" (2004) 189 National Institute of Economic Review 99.
[74] See the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Background Paper 18, Aboriginal and Torres Strait Islander Consumers of Financial Products, 15 June 2018) <https://financialservices.royalcommission.gov.au/publications/Documents/fsrc-paper-18.pdf>.
[75] Peter Saunders, Yuvisthi Naidoo and Megan Griffiths, "Towards New Indicators of Disadvantage: Deprivation and Social Exclusion in Australia" (2008) 43(2) Aust. Jnl. of Social Issues 175.
[76] G Room, "Poverty and Social Exclusion: The New European Agenda for Policy and Research" in G Room, eds, *Beyond the Threshold* (The Policy Press, Bristol, 1995), 1-9, at 6.
[77] T Burchardt, J Le Grand and C Piachaud, "Degrees of Exclusion: Developing a Dynamic, Multidimensional Measure" in J Hills, J Le Grand and D Piachaud, eds, *Understanding Social Exclusion* (Oxford University Press, 2002) 30.
[78] Rogaly B, Office of the Deputy Prime Minister 2004, Social Exclusion Unit website: www. social exclusion.gov.uk. See also Rogaly et al, *Poverty, Social Exclusion and Microfinance in Britain* (*supra* note 72).
[79] A Walker and C Walker, eds, *Britain Divided: The Growth of Social Exclusion in the 1980s and 1990s* (London, Child Poverty Action Group, 1997) 8.
[80] See Part VI.
[81] M Weier et al, *supra* note 5.

IV below, while internal factors and culture are discussed at Part V, followed by Part VI which proposes financial literacy programs for Indigenous Peoples.

IV. Causes of financial disengagement

It has been recognised that a disproportionate population of Indigenous Australians find it difficult to participate in the financial sector. Adopting the terminology of "disengagement" as explained above allows an analysis that the reasons for non-participation could be externally structured and internally generated. In this part, statistical information from the last available census in Australia in 2021 (and earlier census) as well as information from relevant research reports are analysed to determine the causes of financial disengagement of Indigenous Australians. While using an IST lens, this article acknowledges that the statistics are drawn from Eurocentric based concepts; this however should not be unexpected as available statistical information is predominantly Eurocentric based.

Cumulatively, the statistical information provides an indication of the economic and social conditions of Indigenous Australians which contribute to the problem of financial disengagement, and if not addressed, may fall through the crevices of social exclusion. The findings narrow the causes of financial disengagement of Indigenous Australians to geographic location, lack of identification documents, unemployment, lower incomes and lower financial literacy.[82] Besides these factors, cultural or language barriers to access financial services and products, lack of digital access and the challenges of navigating complex financial systems are issues that need to be addressed for Indigenous Peoples in the Australian financial system.[83] Some of these factors are common to First Peoples living in the CANZUS group (Canada, Australia, New Zealand, and the United States) of European-settler nations[84] and while there is no consistent measure for Indigenous financial exclusion across the CANZUS nations, financial disparities between Indigenous and Non-Indigenous Peoples continue to exist in each country.[85] The external barriers to financial disengagement of Indigenous Australians are discussed below.

(a) Geographic location

Aboriginal and Torres Strait Islander people are more likely than other Australians to live outside major cities. In 2021, almost 4 in 10 (37.1%) Aboriginal and Torres Strait Islander people

[82] See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, (Background Paper 19 Aboriginal and Torres Strait Islander Consumers of Financial Products, 21 June 2018) <https://financialservices.royalcommission.gov.au/publications/Documents/aboriginal-and-torres-strait-islander-consumers-of-financial-products-background-paper-19.pdf>.

[83] Submission by ASIC, *supra* note 57, at 5, para 11.

[84] In Canada, barriers to financial capability and well-being include *inter alia*, limited financial and general literacy, geographic remoteness, lack of access to financial services and capital, and cultural language and value differences, see D Collin, *Aboriginal Financial Literacy in Canada: Issues and Directions.* (Task Force on Financial Literacy, Waterstone Strategies, 2011) <http: // publications.gc.ca/collections/collection_2011/fin/F2-201-2011-eng.pdf>

[85] Carmen Daniels, Janya McCalman and Roxanne Bainbridge, "Meeting People Where They're At: A Systematic Review of Financial Counseling for Indigenous Peoples" (2021) 32(3) Journal of Financial Counseling and Planning 417, at 419, Table 1.

lived in major cities in 2021[86] compared to 67.9% of the entire population in Australia.[87] This means that 62.9% of Indigenous Australians live outside major cities (compared to 32.1% of the entire population). The more remote the area, the greater the proportion of Aboriginal and Torres Strait Islander persons.[88] Although the 2016 census show that 81.4% of the Indigenous population live in urban or regional areas and the Indigenous population in remote regions has decreased,[89] geographic location however is only one factor in the equation to financial disengagement. Statistics confirm the absence or low availability of bank branches, agencies, or other access points to financial products and financial services outside of capital cities.[90] Further, recent closures of bank branches have reduced access points for Indigenous Australians to engage in the financial system.[91] Replacements to online banking assumes internet connectivity and skills which may not be the case for Indigenous Peoples in remote areas.

Lack of access to banking services caused by bank branch closures has resulted in rural Indigenous communities using the 'book-up' system, an informal banking practice in remote areas.[92] While providing otherwise unavailable short term credit, the informal finance providers have abused the system.[93] The High Court decision in *ASIC v Kobelt*[94] discussed in Part I above highlighted the book-up system practised by Mr. Kobelt which overpriced the products sold and the withdrawal of monies to pay for them from the customers' bank accounts with their debit cards which were held by Mr. Kobelt. The lack of access to banking services in remote areas and the opportunity for abuse is exacerbated by geographic location and is a clear cause of financial disengagement.

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[86] Australian Bureau of Statistics, Australia: *Aboriginal and Torres Strait Islander Population Summary* (1 July 2022) <https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary>

[87] Australian Bureau of Statistics, *Location: Census* (28 June 2022) < https://www.abs.gov.au/statistics/people/people-and-communities/location-census/2021>, <https://www.abs.gov.au/statistics/people/population/regional-population/2021#capital-cities>.

[88] Australian Bureau of Statistics, Australia: Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians (19 February 2018) < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-characteristics-aboriginal-and-torres-strait-islander-australians/latest-release>.

[89] Francis Markham and Nicholas Biddle, "Recent changes to the Indigenous population geography of Australia: evidence from the 2016 census" (2018) 2(1) Australian Population Studies 1, 11.

[90] See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Background Paper 21 Aboriginal and Torres Strait Islander Consumers' Interactions with Financial Services, 22 June 2018) < https://financialservices.royalcommission.gov.au/publications/Documents/ATSI-background-paper-21.pdf>.

[91] See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Background Paper 18, Aboriginal and Torres Strait Islander Consumers of Financial Products, 15 June 2018) 16 <https://financialservices.royalcommission.gov.au/publications/Documents/fsrc-paper-18.pdf> showing a reduction in bank branches and other face-to-face points of presence in 2015 and 2016.

[92] S McDonnell and N Westbury, "Banking on Indigenous communities: Issues, Options, and Australian and International Best Practice" (Working Paper No 18/2002, Centre for Aboriginal Economic Policy Research, Australian National University) 3-4. <https://www.researchgate.net/publication/237577051_Banking_on_Indigenous_Communities_Issues_Options_and_Australian_and_International_Best_Practice>. The problem of 'book-up' due to lack of financial literacy and informed access to appropriate banking and financial services have been acknowledged by the authorities, see p 5.

[93] See ASIC, *Report 12, Book-up Some Consumer Problems, supra* note 44; ASIC, *Report 451, Book-up in Indigenous Communities in Australia: A National Overview, supra* note 46.

[94] See *ASIC v Kobelt*, *supra* note 3, and discussions at Part I.

(b) Lack of identification documents

There is no available data as to the extent of the problem in relation to identification documents among different age groups, or locations of Indigenous Peoples. However, a survey conducted in 2011 revealed that among those who were severely excluded from access to mainstream financial services, 17.9% of Aboriginal and Torres Strait Islander people had difficulties in opening a bank account because they were unable to provide identity documents, compared with 8.7% of non-Indigenous people.[95]

The lack of identity documents is related to the registration lag of birth being the interval between the occurrence and registration of a birth. For Aboriginal and Torres Strait Islander people, 7.1% of birth registration recorded in 2019 was for birth that occurred in 2012 or earlier, compared with 1.3% at a national average level. [96] In some remote areas, the problem of delay could be problematic.[97] For example, for birth of Aboriginal children in Western Australia, amongst 49,694 births between 1980 and 2010, 18% of those aged under 16 years had unregistered births, compared to 3% of those aged 16 to 32 years.[98]

Another important form of identification document is the driver licence. Unlicensed driving is frequent in remote Aboriginal communities accompanied by a low level of licence participation among Aboriginal Peoples.[99] It is estimated that Aboriginal Peoples represents 2% of the adult population, but only comprise 0.5% of licensed drivers in New South Wales.[100]

(c) Educational levels and lower financial literacy

Lower levels of literacy and numeracy have contributed to the financial disengagement of Indigenous Peoples. While the situation has improved in recent years, with 19% of Aboriginal and Torres Strait Islander people aged 25 to 64 years having left school at Year 9 or below, compared with 30% in 2006, the position is still unsatisfactory. Indigenous Australians aged 25 to 64 years were more likely than non-Indigenous of the same age to have left school at Year 9 or below (19% compared with 6.7%).[101] The lower level of educational attainment has a direct impact on financial literacy which is a key barrier to effectively engaging with mainstream finance.[102]

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[95] Australian Government, The Treasury, *ATM Taskforce – Report on Indigenous ATM Issues* (28 February 2011) 6 <http://banking.treasury.gov.au/content/reports/atm_indigenous/downloads/atm_indigenous.pdf>.

[96] Australian Bureaus of Statistics, *Births, Australia Methodology, Aboriginal and Torres Strait Islander Peoples* (9 December 2020) <https://www.abs.gov.au/methodologies/births-australia-methodology/2019#aboriginal-and-torres-strait-islander-peoples>.

[97] Jewel Topsfield, "Aborigines Lack Proof of Identity" *The Sydney Morning Herald*, (Sydney, 23 January 2009) <https://www.smh.com.au/national/aborigines-lack-proof-of-identity-20090122-7nx3.html>.

[98] Alison J Gibberd, Judy M Simpson and Sandra J Eades, "No Official Identity: A Data Linkage Study of Birth Registration of Aboriginal Children in Western Australia" (2016) 40(4) Australian and New Zealand Journal of Public Health 388.

[99] Kathleen Clapham et al, "Understanding the Extent and Impact of Indigenous Road Trauma" (2008) 39 (Supplement 5) Injury 19.

[100] Patricia Cullen et al, "Challenges to Driver Licensing Participation for Aboriginal People in Australia: A Systematic Review of the Literature" (2016) 15 International Journal for Equity in Health 134.

[101] Australian Bureau of Statistics*, Aboriginal and Torres Strait Islander Population, 2016: 2016 Census Article: Education: Leaving school early* (31 October 2017).
<https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20islander%20Population%20Article~12>.

[102] See below at Part VI: Culture matters: financial literacy programs for Indigenous Peoples.

Statistics on young Indigenous Australians reveal a similar situation.[103] Between 2006 and 2013, young people, particularly adults aged 18 to 24 years were in the category of severely or fully financially disengaged segment compared to other age groups.[104] Further, their rate of financial disengagement was higher than the national average.[105] Financial disengagement is causally linked to lower financial literacy. The statistical information provided at Part VI relating to financial literacy show that Indigenous Australians have the lowest financial literacy levels in Australia. This reiterates the urgency and importance of implementing effective financial literacy programs for Indigenous Australians.

(d) ***Unemployment and lower income***

In 2021, 56.7% of Aboriginal and Torres Strait Islander people aged 20 to 24 years completed Year 12 or equivalent as their highest year of school, compared with 37.1% in 2011. For persons aged 18-24 years, one in ten (10.2%) were attending university or other higher education institutions at the time of the 2021 Census. The lower educational level of Indigenous young people is a concerning factor as they form the majority of the Indigenous population, the median age being 24 years in 2021.[106]

There is also a significant disparity between Indigenous and non-Indigenous participation in the labour force. In the 2018–19 National Aboriginal and Torres Strait Islander Health Survey, an estimated 60% (299,700) of Indigenous Australians of working age — those aged 15-64 years — were participating in the labour force, and 49% (243,780) were employed. Compared to this, for non-Indigenous Australians, 80% of the working-age population was in the labour force, and 76% were employed.[107] The employment rate for Indigenous Australians of working age was lowest in very remote areas at 35%. (See Figure 1 below).

[103] First Nations Foundation, *The Financial Economy and Indigenous Young People in Australia* (March 2016) <https://www.csi.edu.au/media/uploads/Financial_Economy_and_Indigenous_Young_People_In_Australia_-_Summary_Report.pdf>.

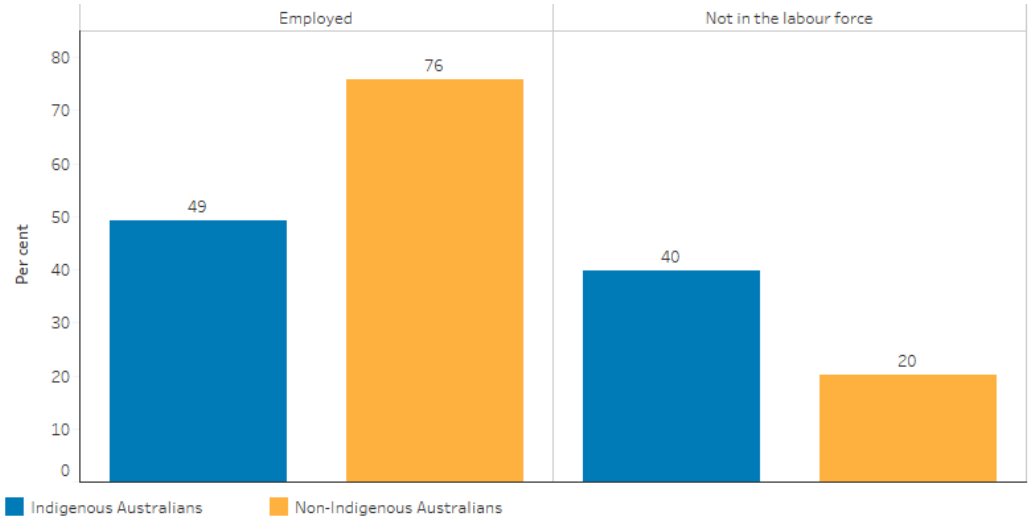
[104] Kristy Muir, Axelle Marjolin and Sarah Adams, *Eight Years on the Fringe: What Has it Meant to Be Severely or Fully Financially Excluded in Australia* (Centre of Social Impact for the National Australia Bank, 2015) 15 <https://www.csi.edu.au/media/uploads/Eight_Years_on_the_Fringe_FINAL_FINAL.pdf>.

[105] Chris Conolly, *Measuring Financial Exclusion in Australia* (Centre of Social Impact for the National Australia Bank, 2014) <https://www.csi.edu.au/media/uploads/Measuring_Financial_Exclusion_in_Austraila_-_May_2012.pdf>.

[106] Australian Bureau of Statistics, *Australia: Aboriginal and Torres Strait Islander population summary* (1 July 2022) < https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary#aboriginal-and-torres-strait-islander-people-by-age>.

[107] Australian Institute of Health and Welfare, "National Aboriginal and Torres Strait Islander Health Survey" (20 September 2021) Aboriginal and Torres Strait Islander Health Performance Framework <https://www.indigenoushpf.gov.au/measures/2-07-employment> 2.07.

Figure 1: Employment outcomes, people aged 15–64, by Indigenous status, 2018–19



Source: Figure 2.08.6 National Aboriginal and Torres Strait Islander Health Survey 2018–19

The latest Overcoming Indigenous Disadvantage Report 2020 notes an employment rate for Indigenous 15 to 64 years old at 54% in 2008 which decreased to 49% in 2018-2019.[108] This translates to half the Indigenous population being unemployed. The figure generally tallies with statistics of Indigenous Peoples aged 50 and above; in 2014-15, 59% of this group were not in the labour force, 2 in 5 lived in households with incomes at the bottom of 20% of all households, and as at 30 June 2017, 51% were receiving some form of income support.[109] The social costs of unemployment impacts not only the unemployed person but spills over onto other family members and the community. The social exclusion of unemployed Indigenous Peoples from mainstream society and the economy perpetuates the circle of welfare dependency and unemployment.[110]

Mean household income varied by remoteness. The 2016 mean gross weekly equivalised household income for Indigenous adults was highest in *Major cities (*$931) and lowest in *Very remote* areas ($520). The mean income for non-Indigenous adults in *Major cities* was $1,140, $209 higher than that for Indigenous adults. However, the largest gap between Indigenous and non-Indigenous Australians was in *Very remote* areas (this further underscores the geographical location as one of the causes), a difference of $690 per week. (See Figure 2 below).

[108] Productivity Commission, "Key Indicators 2020 Overview" (3 December 2020). <https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2020/report-documents/oid-2020-overview.pdf>, 15. With a notation that the data is difficult to interpret due to changes in the Community Development Employment Projects program, now the Community Development Program.
[109] Australian Institute of Health and Welfare, "Insights into Vulnerabilities of Aboriginal and Torres Strait Islander People Aged 50 and over-in-brief" (2019) <https://www.aihw.gov.au/getmedia/a87628df-a3ea-4e9c-8453-892d6f3c6fdc/aihw-ihw-207.pdf.aspx?inline=true> 42.
[110] Boyd H Hunter, "Social Exclusion, Social Capital, and Indigenous Australians: Measuring the Social Costs of Unemployment" (Discussion Paper No 204, Centre for Aboriginal Economic Policy Research, ANU, 2000).

Figure 2: Mean gross weekly equivalised household income of persons aged 18 and over, by Indigenous status and remoteness, 2016.[111]

Over one third (36.7%) of Aboriginal and Torres Strait Islander households reported an equivalised total household weekly income of $1,000 or more in 2021. The median equivalised total household weekly income for Aboriginal and Torres Strait Islander households was $830,[112] which is less than half of the median weekly household income in each state in Australia other than Tasmania.[113]

The 2018–19 Health Survey found that 40% (153,700) of Indigenous adults were living in households that had experienced days without money for basic living expenses, such as for food, clothing and bills, in the previous 12 months.[114] Additionally, 54% (164,170) of Indigenous Australians were living in households that reported they would not be able to raise $2,000 within a week for an emergency (an indicator of financial stress). This was more likely for households in *Remote* areas (75%) than for those in *non-remote* areas (49%).[115]

The above statistical information confirms that Indigenous Peoples are the most marginalized group in Australian society. Indigenous poverty and economic marginality have been explained in terms of the historical legacy of colonization and exclusion of Indigenous Peoples from the mainstream economy. In addition, the structural factors of a largely rural population and a high youth dependency ratio impacting employment opportunities, and cultural factors constrain

[111] *Figure 2.08.6: Mean gross weekly equivalised household income of persons aged 18 and over, by Indigenous status and remoteness, 2016* (2020), online: Australian Institute of Health and Welfare < https://www.indigenoushpf.gov.au/measures/2-08-income>.
[112] Australian Bureau of Statistics, *supra* note 106.
[113] Australian Bureau of Statistics, *Income and Work Census* (28 June 2022) <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/income-and-work-census/latest-release>.
[114] Australian Institute of Health and Welfare, "National Aboriginal and Torres Strait Islander Health Survey, 2.08 Income" (03 December 2020) Aboriginal and Torres Strait Islander Health Performance Framework <https://www.indigenoushpf.gov.au/measures/2-08-income> refers to Table D2.08.7 of AIHW and ABS analysis of Census of Population and Housing 2016.
[115] *Ibid*, refers to Table D2.08.6 of AIHW and ABS analysis of Census of Population and Housing 2016.

Indigenous Peoples from participating in the mainstream labour market.[116] The government has responded to address Indigenous socioeconomic disadvantage broadly in health, housing, employment and education including special measures to transfer land back to Indigenous Peoples and providing enterprise grants and loans to promote Indigenous businesses. Consistent with a 2000 report indicating little improvement in the relative and absolute economic status of Indigenous Peoples in Australia for the past four decades,[117] the improved figures from more recent statistics show only marginal improvements.

An example could be seen in the community in Mimili, South Australia where Mr. Kobelt operated the book up system examined in *ASIC v Kobelt*. The 2011 census recorded 281 people including 246 Indigenous Peoples.[118] The primary judge referred to data published by the Australian Bureau of Statistics in 2012 which suggests that a little less than 40% of the Anangu community had either never attended school at all or had attended only to year 8 or below. Only about 7% of the Anangu people had completed Year 12. Only 14.8% of Anangu people had incomes of over $400 per week, and 61.5% had incomes between $200 and $399 per week. His Honour said that this was consistent with a number of Anangu people being unemployed and/or in receipt of social security benefits.[119] Ten years later, the 2021 census reported 277 people including 239 Indigenous Peoples. Educational literacy improved; compared to previous figures, 15% of the Anangu people had either never attended school at all or had attended only to year 8 or below and about 25% of the Anangu people had completed Year 12. While income figures also improved, again the increase is nominal. Only 28% of Anangu people had incomes of over $400 per week, and 43% had incomes between $150 and $399 per week.[120] These figures when compared to the Australian national median personal income of $805 per week in 2021,[121] and national Year 12 certification rate of 76% in 2020,[122] indicates a wide gulf in the socio-economic position between Indigenous and non-Indigenous Australians.[123]

Overall, the external factors of geographic location, lack of identification documents, educational levels and lower financial literacy as well as unemployment and lower income result in structural imbalances between Indigenous and non-Indigenous Australians. Cumulatively, they significantly aggravate the problem of financial disengagement when account is given to internal and cultural factors discussed in the next Part below.

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[116] Jon C Altman, "The Economic Status of Indigenous Australians" (Discussion Paper No 193, Centre for Aboriginal Economic Policy Research, ANU, 2000).
[117] *Ibid*.
[118] Australian Bureau of Statistics, *Mimili 2011 Census*, <https://www.abs.gov.au/census/find-census-data/quickstats/2011/UCL422030>.
[119] *Kobelt v Australian Securities and Investments Commission* [2018] FCAFC 18, at [94] – [96]
[120] Australian Bureau of Statistics, *Mimili 2021 Census Community Profiles* (2021) https://www.abs.gov.au/census/find-census-data/community-profiles/2021/SAL40881>.
[121] This includes the adult population from 15 years to over 85 years, including those who are unemployed or retired. Source: Australian Bureau of Statistics, *Income and work: Census 2021,* <https://www.abs.gov.au/statistics/labour/earnings-and-working-conditions/income-and-work-census/2021>.
[122] Australian Curriculum Assessment and Reporting Authority, "Year 12 Certification Rates" (2020) <https://www.acara.edu.au/reporting/national-report-on-schooling-in-australia/national-report-on-schooling-in-australia-data-portal/year-12-certification-rates>.
[123] See generally Jon C Altman, Nicolas Biddle and Boyd H Hunter, "Prospects for 'Closing the Gap' in Socioeconomic Outcomes for Indigenous Australians?" (2009) 49(3) Australian Economic History Review 225.

V. Indigenous cultural norms to money and money management

A distinctive Indigenous cultural framework and orientation shapes the views of Indigenous Peoples when it comes to money and money management.[124] Caring and sharing are perhaps the first two principles of Aboriginality.[125] Indigenous Peoples have a strong obligation to family and community, placing a high value on family ties and responsibilities within the extended family.[126] The bonds of community inculcate an obligation to share and/or to pool resources. The cultural practice of sharing has given rise to 'demand sharing' — the expectation to share resources if demanded which was acknowledged by the High Court in *ASIC v Kobelt* discussed in Part I. Anthropologist David Martin expresses the shared identity with kin and others as 'relatedness' in tangible forms of distribution of material goods, food and particularly cash; and demand-sharing as 'egalitarianism' — insistence of equality between individuals through social transactions.[127] The tension between connectedness and personal autonomy makes deflecting or avoiding of demands a delicate issue, as a direct refusal is tantamount to breaking off relations.[128] The validation of social relations through sharing of material resources, termed "performative sociality" is central to Indigenous use of money.[129] Thus, the institution of demand sharing and Indigenous use of money can be seen from the perspective of 'social *capital*'.[130] Public policy advisor Patrick McClure has defined 'social capital' as "the reciprocal relationships, shared values and trust which binds societies together and enable collective action".[131] Godinho describes 'Indigenous money' as a medium of relationship — it is a medium of relationship where family is the store of long term value and 'caring' is the preferred behaviour.[132] This contrast sharply with standard economic (Eurocentric) views of money as a medium of exchange, a store for long-term value and a unit of account.[133]

While sharing behaviour is valued as a major aspect of Indigenous obligations, the reduced ability to save comes into tension with cultural beliefs about helping others. In Aboriginal communities, generosity is viewed as a cultural norm, while saving for oneself is viewed as selfish.[134] Indigenous Peoples have experienced challenges "reconciling kinship, reciprocity and

[124] Catherine Demosthenous et al, "Identity and Financial Literacy: Australian Aboriginal Experiences of Money and Money Management" (Conference Paper, Financial Literacy, Banking and Identity Conference 2006) 2.
[125] Kevin Gilbert, *Living Black: Blacks Talk to Kevin Gilbert* (London, Penguin, 1978) 304.
[126] Diana Eades, "They Don't Speak an Aboriginal Language, or Do They?" in Ian Keen (ed), *Being Black: Aboriginal Cultures in Settled Australia* (Aboriginal Studies Press, 1994).
[127] D F Martin, "Money, Business and Culture: Issues for Aboriginal Economic Policy" (Discussion Paper No 101, Centre for Aboriginal Economic Policy Research, The Australian National University, 1995) 6-8.
[128] Nicholas Peterson and John Taylor, "The Modernising of the Indigenous Domestic Moral Economy" (2003) 4 (1 & 2) The Asia Pacific Journal of Anthropology 105, 109-110.
[129] See Martin, *supra* note 127 at 7.
[130] Yasmine Musharbash, "The Yuendumu Community Case Study" in D E Smith (ed) *Indigenous Families and the Welfare System* (Canberra: Centre for Aboriginal Economic Research, ANU, 2000) 53, 59.
[131] P McClure, *Participation Support for a More Equitable Society: Final Report of the Reference Group on Welfare Reform* (Canberra: Family and Community Services, 2000) 32.
[132] See Godinho, *supra* note 4 at 178-9.
[133] Jens Mattke, Christian Maier and Lea Reis, "Is Cryptocurrency Money? Three Empirical Studies Analyzing Medium of Exchange, Store of Value and Unit of Account" (Conference Paper, Computers and People Research Conference, 2020).
[134] S M Danes, J Garbow & B H Jokela, "Financial Management and Culture: The American Indian Case" (2016) 27(10) Journal of Financial Counselling and Planning 61.

concepts of shared resources with mainstream notions of the financial economy".[135] Despite the challenges, cultural norms of sharing and communal living continue to be a source of strength and resilience among Indigenous Australians as reflected in the oral testimony below by one of the co-authors of this article, Graeme Lyle La Macchia.

> In the 1970s, when I was a first-year student at the University of New England in Armidale NSW, I departed my all-male residential college to 'move into town'. One estate agent suggested a 'self-contained bedsit' just off the highway at the bottom end of town. The rent was low and the place was small, but quiet and clean. There was a larger unit at the front which had been the 'main house' in earlier times. There were signs that small children, adults and elderly persons lived together in the main house. For the moment, there was no one else around. Late on the Sunday of the first weekend the residents returned home. Suddenly the place was jumping. I was informed by one of the younger children that there were six children and four adults – two of them elderly.
> Soon I was asked to assist my neighbors in their dealings with 'those people at the bank' and with 'people at the real estate'. Without fully realizing what was happening, I slowly came to understand that I had become an 'in house financial advisor' to an extended Aboriginal family and associated Indigenous community members. In this environment, financial engagement arose within a community created through connectedness and solidarity. When my football team was playing nearby, there were wild cheers when I ran onto the field, touched the ball, or tackled a member of the opposing team. Towards the end of the year when I departed for Melbourne, local community members whose names I never knew wished me well, sometimes on an almost daily basis.

The personal reflection from the oral testimony above provides an example of the strong communal spirit amongst Indigenous Australians. It emphasizes their preference for community, family, household and kin-based groups. It is a reminder of the open disposition to sharing and the strong family-like support mechanism. At the same time, it points to a marked difference between the Eurocentric market-based financial system and the First Nations system that prioritises relationality and community. This reflection also identifies the known challenge of the lack of financial literacy where it notes, "*I was asked to assist my neighbours in their dealings with 'those people at the bank*'". The communal lifestyle where everyone's life is intertwined is a daily reality in Indigenous settings. These cultural norms should be viewed as a solution or ameliorator to Indigenous disadvantage and not as part of the problem.[136]

The majority judges in *ASIC v Kobelt* recognised the practice of demand sharing in Aboriginal communities and that these distinctive cultural practices should be respected.[137] It is evident that culture matters in money and money management practices of Indigenous Peoples. Financial literacy plans would be imperative in bridging the gap between Eurocentric and Indigenous cultural orientation to money and money management practices, and as "important parts of the solution to addressing Indigenous consumer problems with book up".[138] In designing

[135] First Nations Foundation, "The Financial Economy and Indigenous Young People in Australia" (March 2016) <https://www.csi.edu.au/media/uploads/Financial_Economy_and_Indigenous_Young_People_In_Australia_-_Summary_Report.pdf> 8.
[136] Alfred M Dockery, "Culture and Wellbeing: The Case of Indigenous Australians" (2010) 99 Social Indicators Research 315.
[137] *ASIC v Kobelt*, *supra* note 3, paras 77-79 per Kiefel CJ.
[138] Submission by ASIC, *supra* note 57, 31 [78].

financial literacy plans by Indigenous Peoples for Indigenous Peoples, or in consultation and collaboration with Indigenous Peoples, these distinctive Aboriginal cultural norms, values, orientations, practices and views towards money and money management must be recognised, respected and included. This is addressed in the next part below.

VI. Culture matters: financial literacy programs for Indigenous Peoples

In Part IV, statistical evidence highlighted four causes of financial disengagement of Indigenous Australians. Low financial literacy was identified as one of the causes. Financial literacy is a key step towards financial engagement. The Closing the Gap report identifies that genuine and successful engagement with Indigenous Peoples requires "cultural competency (including awareness of Indigenous history, culture and values)".[139] Thus, a critical step towards improving financial engagement of Indigenous Australians is to promote financial literacy programs that are designed with an understanding of the cultural context of Indigenous Peoples' approach to money and money management practices.

The OECD defines 'financial literacy' as "… the knowledge and understanding of financial concepts and risks, and the skills, motivation and confidence to apply such knowledge and understanding in order to make effective decisions across a range of financial contexts, to improve the financial well-being of individuals and society, and to enable participation in economic life".[140] The expansive OECD definition of financial literacy embraces both the Eurocentric and Indigenous cultural orientation to money and money management practice in that it notes that the focus is to improve the financial well-being of individuals (Eurocentric disposition) and society (Indigenous disposition).

The ANZ Survey of Adult Financial Literacy[141] shows that Indigenous peoples have lower scores within the population on three of the five behavioural indicators of a person's financial literacy.[142] Similar results are shown for the younger Indigenous population. The OECD survey 2015 shows that the mean financial literacy score for Indigenous students was 411 points, resulting in a 97-points performance disparity with non-Indigenous students having a mean score of 508 points.[143] It is also lower than the OECD average (489 points), and almost half (48%) of Indigenous students (compared to 18% of non-Indigenous students) did not reach the OECD's

[139] Australian Institute of Health and Welfare and Australian Institute of Family Studies, "Engaging with Indigenous Australia – Exploring the Conditions for Effective Relationships with Aboriginal and Torres Strait Islander Communities" (Issue Paper No. 5 produced for Closing the Gap Clearinghouse, October 2013) 7 <https://www.aihw.gov.au/getmedia/7d54eac8-4c95-4de1-91bb-0d6b1cf348e2/ctgc-ip05.pdf.aspx?inline=true>..

[140] OECD, *Program for International Student Assessment (PISA) 2012 Results: Students and Money (Volume VI): Financial Literacy Skills for the 21st Century* (OECD Publishing, 2014) 33.

[141] Australia and New Zealand Bank (ANZ), *The ANZ Survey of Adult Financial Literacy in Australia*, (Full Report, ANZ, 2014) <https://www.anz.com/resources/3/1/31cbc1fd-9491-4a22-91dc-4c803e4c34ab/adult-financial-literacy-survey-full-results.pdf>, 11. The ANZ survey is the foremost survey on adult financial literacy in Australia; this 2014 report presents the fifth report in this series.

[142] *Ibid.* The report notes that the results should be treated with caution given their small number in the survey. In New Zealand, similar results are seen with New Zealand's Maori people who have lower levels of financial literacy than the non-Maori population, see David Crossnan, David Feslier and Roger Hurnard "Financial Literacy and Retirement Planning in New Zealand" (2011) 10(4) Journal of Pension Economics & Finance 619, 626.

[143] OECD, *Program for International Student Assessment (PISA)* 2015: Financial Literacy in Australia (Australian Council for Educational Research, 2015) Sue Thompson and Lisa De Bortoli. <https://www.oecd.org/pisa/PISA-2105-Financial-Literacy-Australia.pdf>. First conducted in 2000, PISA is an international assessment that measures the financial literacy of 15-year old students every three years.

international baseline proficiency level. Specifically, the detailed difference in scores was attributed to the lower socioeconomic levels of Indigenous students, and their weaker performance in mathematical literacy and reading literacy.[144]

The National Financial Literacy Strategy 2014-2017 identified Indigenous Peoples as having the lowest financial literacy levels in Australia and recognized the importance of education programs for all Australians, including Indigenous Peoples.[145] The National Capability Strategy 2018 made the transition from 'financial literacy' to 'financial *capability*' to reflect the ongoing dynamic process.[146] The National Financial Capability Strategy 2022 recognised that enhancing the financial capability of Aboriginal and Torres Strait Islander peoples within their cultural context was fundamental.[147] This key responsibility is placed on the government which is delivered through agencies within the Treasury portfolio, particularly ASIC. Improving financial literacy skills of Indigenous Australians has also been shown to contribute to their overall financial well-being.[148]

The national approach by ASIC, in promoting financial well-being, has been compared with the position in Canada.[149] ASIC oversees two important activities contributing to financial well-being. Through the concept of responsible lending, ASIC supervises credit-providing organisations, besides its role in promoting financial literacy. Unlike the ASIC, the Canadian regulator, the Financial Consumer Agency of Canada operates at more localized levels and is not responsible for the fringe bank/sub-prime lending sector; however, in recent years it has taken a more strategic approach with banks.[150]

The active involvement of the ASIC in promoting the Indigenous Outreach program[151] and specific financial literacy programs[152] supports the Indigenous "local communities to identify what they want their future to look like, in order to feel safe, to feel connected and to have a sense of

[144] *Ibid*, Ch 4 "Financial literacy results for students within Australia", 52-54

[145] Australian Securities and Investments Commission, *National Financial Literacy Strategy 2014-17* (1 August 2014) <https://download.asic.gov.au/media/1344650/rep403-published-1-August-2014.pdf> at p 26. In New Zealand, while the gap in financial knowledge between the Maori and Pacific peoples with the New Zealand European population has closed substantially, it remains wide in 2013. The importance of financial education is reflected in the National Strategy for Financial Literacy and the activities led and coordinated by the Commission for Financial Literacy and Retirement Income, see Michael P Cameron and Pushpa Wood, "The Policy Context for Financial Education in New Zealand" in Carmela Aprea et al (eds) in *International Handbook of Financial Literacy* (Springer, 2016) 190.

[146] See Financial Capability - Australian Government, *National Financial Capability Strategy 2018*, <https://www.financialcapability.gov.au/strategy/download/national-financial-capability-strategy-2018.pdf>.

[147] The National Financial Capability Strategy (February 2022) <https://www.financialcapability.gov.au/sites/www.financialcapability.gov.au/files/2022-02/Financial-Capability-Strategy-2022_0.pdf > at p 23.

[148] Productivity Commission, Overcoming Indigenous Disadvantage (2020). <https://www.pc.gov.au/ongoing/overcoming-indigenous-disadvantage>.

[149] Jerry Buckland, Carmen Daniels and Vinita Godinho, "Does Australia Have an Advantage in Promoting Financial Well-being and What Might Canada and Other Countries Learn?" (2020) 29(1) Canadian Journal of Urban Research 39, 43-44.

[150] *Ibid*.

[151] ASIC's Stretch Reconciliation Action Plan 2017-2020 identifies "Engaging with Indigenous Financial Consumers, Investors and Regulated Population" as a focus area through the work of the Indigenous Outreach Program < https://download.asic.gov.au/media/5228489/asic-rap-2017-20.pdf > at p 11.

[152] The ASIC MoneySmart website provides specific Indigenous Peoples financial literacy resources including an outreach program directed towards Indigenous Peoples, see <https://moneysmart.gov.au/indigenous>.

ownership and control over their own destiny".[153] Successful financial literacy and capabilities programs must involve consultations with local Indigenous bodies, especially Indigenous Elders, to design programs that seek to achieve the communities' life aspirations with an understanding of the cultural context and socioeconomic factors that constrain their participation in mainstream financial services.[154] Elders in Indigenous communities perform a central role and contribute to individual and community wellness.[155] Elders contribute to financial literacy programs by transmitting financial knowledge and application in a cultural context. This enables leaders and communities the opportunity to participate in analysing problems and seeking agreed solutions.[156] Consultation is a way of life with Indigenous Peoples – this accord with the principle of Free, Prior and Informed Consent encouraging their participation,[157] and supports the IST approach adopted in this article.

Financial literacy programs which respond to Indigenous needs and works *with* Indigenous communities, instead of *for* a community are available in Australia,[158] New Zealand[159] and Canada.[160] New programs should address distinctive Indigenous cultural understandings highlighted in Part V above. The Closing the Gap report recognises that engagement with Indigenous Australians must take into account Indigenous cultural forms and practices for policies and programs to succeed.[161] Thus, financial literacy and capability programs for Indigenous Peoples need to be designed to embed an understanding of cultural influences and socioeconomic factors that would enable Indigenous Peoples to engage with the financial system while retaining their underlying cultural values.[162] The strong focus on sharing resources (including money) among Indigenous Peoples remains important. Traditional financial literacy education focusing on individual wealth accumulation challenges Indigenous norms and practices of sharing.[163] Thus, the conventional one-size-fits-all approach to financial literacy must be realigned and tailored with

[153] Heather Saunders and Martha Piper, *Enhancing Indigenous Financial Capability Programs* (December 2011) First Nations Foundation <https://www.reconciliation.org.au/wp-content/uploads/2017/11/2011-Enhancing-Indigenous-Financial-Capability-Programs.pdf> 6.
[154] *Ibid*, Recommendations 3, 4, 5 and 8 of nine recommendations.
[155] Chantal Viscogliosi et al, "Importance of Indigenous Elders' Contributions to Individual and Community Wellness: Results from a Scoping Review on Social Participation and Intergenerational Solidarity" (2020) 111 Canadian Journal of Public Health 667.
[156] *Ibid*.
[157] Johannes Rohr and Jose Aylwin, *Business and Human Rights, Interpreting the UN Guiding Principles for Indigenous Peoples*, (Report 16, IWGIA, European Network on Indigenous Peoples, 2014) 44.
[158] See Mark Brimbe and Levon Blue, "Tailored financial literacy education: An Indigenous perspective" (2013) 18(3) Journal of Financial Services Marketing 207. <https://doi.org/10.1037/fsm.2013.16. See also S Wagland and S Taylor, "The conflict between financial decision making and indigenous Australian culture" (2015) 1(1) Financial Planning Research Journal 33.
[159] See J Couchman, K Baker, T Upokorehe and T Whakatōhea, "One step at a time: Supporting families and whanau in financial hardship". A Families Commission Research Report. Families Commission. <https: //thehub.swa.govt.nz/assets/documents/one-step-at-a-time.pdf>
[160] Levon Blue, "Financial Literacy Education with Aboriginal People, the Importance of Culture and Context" (2016) Financial Planning Research Journal 91, 94-95.
[161] Closing the Gap report, note 139, at 8 citing MC Dillon and ND Westbury *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (South Australia: Seaview Press, 2007).
[162] See Recommendations 5 and 8 in Saunders and Piper, *supra* note 153 at 5.
[163] Levon E Blue & Laura E Pinto, "Other Ways of Being; Challenging Dominant Financial Literacy Discourses in Aboriginal Context" (2017) 44 Australian Education Research 55, 57.

approaches that assist Indigenous Australians to meet their individual needs within community obligations.[164]

With appropriate design, change must be implemented with cultural competency and in a culturally safe environment. Cultural competency is "the ability to understand, communicate and effectively interact across cultures".[165] Cultural safety refers to an environment which is secure for people allowing "shared respect, shared meaning, shared knowledge and experience, of learning together with dignity and truly listening".[166] Translating cultural competency and awareness to praxis, financial counselling training entails the skills to understand how an Indigenous client relates to money within his or her cultural value system.[167] One financial counsellor expressed it as follows:

> … So I say to them 'how much do you feel you must send your parents? And we just put it in the budget and see how everything else fits. That's just the way things have got to be … it's part of their culture, so you just deal with it.[168]

Some financial literacy programs have infused Indigenous cultural norms in their programs to meet individual client needs. For example, the "My Moola" was developed in 2007 through a partnership between the First Nations Foundation and ANZ, under a collective commitment to improve financial inclusion of Indigenous Australians. A participant of My Moola said:

> In our way of life, our kinship system, saying 'no' to others is very hard to do, especially to older family members. Sometimes you can't say 'no'. Respect from your family is more important than money. But you do get a new perspective about money, and about managing your money, and it [My Moola] teaches you new skills like how to do a budget with the money you've got left over. [169]

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[164] Levon E Blue, "Financial Literacy Education with an Aboriginal Community: Identifying Critical Moments for Enabling Praxis" (2019) 9(1) Education Sciences 1; M Brimble and L Blue "Tailored Financial Literacy Education: An Indigenous Perspective", *supra* note 158 at 209.

[165] Federation of Ethnic Communities' Councils of Australia, *Cultural Competency in Australia*, *A Guide,* (FECCA, 2019) 3, citing the definition by Terry L Cross et al *Towards a Culturally Competent System of Care* (Georgetown University Development Centre, 2019) as follows: " … a set of congruent behaviours, attitudes and policies that come together in a system, agency or professionals and enable that system, agency or those professionals to work effectively in cross cultural situations".
<https://spu.edu/~/media/academics/school-of-education/Cultural%20Diversity/Towards%20a%20Culturally%20Competent%20System%20of%20Care%20Abridged.ashx>.

[166] Robyn Williams, "Cultural Safety – What Does It Mean for Our Work Practice?" (1999) 23(2) Australian and New Zealand Journal of Public Health 213, citing A Eckermann et al *Binang Goonj: Bridging Cultures in Aboriginal Health* (Armidale: University of New England Press, 1992).

[167] Blendie P Hawkins and Virginia S Zuiker, "Financial Counsellors' Experiences Working with Clients of Color: Lessons of Cultural Awareness" (2019) 30(1) Journal of Financial Counselling and Planning 6, 6.

[168] *Ibid* 15.

[169] Nikki Moodie, Fatoumata D Roost and Eric Dommers, *My Moola, Report from the Evaluation of an Indigenous Financial Literacy Program* (First Nations Foundation, September 2014) <https://minerva-access.unimelb.edu.au/bitstream/handle/11343/129803/2014%20Moodie%20_%20My%20Moola%20-%20report.pdf?sequence=1&isAllowed=y>.

Exemplifying the IST approach, Aboriginal literacy campaigns have been effective in empowering individuals to gain self-control and confidence.[170] Similarly, financial literacy and capabilities programs which are tailored to immerse Indigenous cultural norms and implemented with cultural competence and awareness will contribute to the efforts to increase financial engagement of Australia's Indigenous Peoples. Innovative programs such as "My Money Dreams" which have been developed by Indigenous People for Indigenous People with the support of Indigenous Business Australia and Australian Unity Foundation, has provided unique financial literacy programs which are made more accessible to more Indigenous Peoples through digitalisation.[171] The concept of 'train the trainer" which works with Aboriginal organisations to train financial counsellors on how to deliver financial literacy training to Indigenous communities has taken root.[172]

CONCLUSION

The High Court of Australia's decision in *ASIC v Kobelt* has drawn attention to the vulnerabilities impacting the financial well-being of Indigenous Australians in rural and remote parts of Australia. This article discussed external and internal factors exacerbating financial disengagement of Indigenous Peoples within Australia's mainstream financial system. External factors include geographical location, lack of identification documents, unemployment, lower income, and lower financial literacy. Internal factors centre around Indigenous cultural norms of sharing and "demand sharing", which were acknowledged in *ASIC v Kobelt*.

Analysing these issues from the lens of Indigenous standpoint theory, the article highlights the indispensability of the Cultural Interface which shows that connection to culture and community is key to Indigenous Peoples' identity and strength. Culture matters in establishing resilience and inculcate wellbeing, including financial wellbeing. An effective design and implementation of financial literacy and capability programs that respect and embeds distinctive Aboriginal cultural norms, values, and practices on money management will increase financial engagement of Indigenous Australians. The cross-cultural discourses brought by *ASIC v Kobelt,* and the lessons learned in Australia more broadly, can have broader applications in promoting financial engagement of Indigenous Peoples in the CANZUS nations.

[170] Frances Williamson & Bob Boughton, "I Can Speak on This: Empowerment within an Aboriginal Adult Literacy Campaign" (2021) 50 The Australian Journal of Indigenous Education 168.

[171] First Nations Foundations, First Nations Foundation Launches World-first Indigenous Digital Financial Literacy Program, (2019) online <https://firstnationsfoundation.org.au/first-nations-foundation-launches-world-first-indigenous-digital-financial-literacy-program/>.

[172] See for eg., the support and resources from various partnerships with First Nations Foundation to build financial well-being and inclusion of Indigenous Australians, <https://www.ecstra.org.au/indigenous-australians>.

Copyright Law, Access to Translations, and Indigenous Peoples: Towards Inclusive Education and Development in Australia and Beyond

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Indigenous Peoples – Copyright – Access to Translations – Development – Education – Australia

Indigenous peoples are suffering from loss of language and culture, and the need to preserve existing Indigenous languages from extinction cannot be overemphasized. Indigenous peoples have a strong spiritual connection to their language that makes access to copyrighted works in Indigenous languages integral to the education and overall development of Indigenous peoples. Copyright law can play a role in enabling access to copyrighted works and inclusive education for Indigenous peoples. However, in many countries, the copyright system does not provide an enabling framework for addressing legal barriers to translations.

Using Australia as a case study, this article considers the existing development challenges of Indigenous Australians and hinges some of these on the lack of access to copyrighted works and inclusive education in Indigenous languages. It examines the Australian copyright framework vis-à-vis its potential to facilitate access to copyrighted works for education in Indigenous languages. It argues that the copyright framework in Australia can and should be revised to foster access to copyrighted works and inclusive education for the overall development of Indigenous Australians. The article also makes recommendations in this regard. Further, in recognition of the fact that Indigenous peoples everywhere face challenges to translation, this work also considers the international copyright framework for access to translated works and the reforms necessary within that framework to foster such access for Indigenous peoples globally.

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I. INTRODUCTION

Indigenous languages are at the core of the personalities, identities, and cultures of Indigenous peoples,[1] and the loss of their languages often leads to a strong sense of loss of personhood.[2] Before and after the Western invasion of indigenous territories, Indigenous peoples communicated, interacted within the communities, and transmitted culture, traditions, and knowledge through their languages.[3] Although many Indigenous people today speak Western languages, this has not in any way reduced the significance of Indigenous languages to Indigenous peoples.[4] Yet, the traditional publishing industry does not cater to the reading requirements of Indigenous peoples because many Indigenous groups and their communal institutions are relatively poor and therefore have a low ability to pay for copyrighted works,[5] making them unattractive markets for commercial publishers who would rather serve affluent and larger markets.[6] The choice of which Indigenous language, due to the multiplicity of Indigenous languages,[7] is another challenge commercial publishers could raise, even if they choose to publish in Indigenous languages. The population of an Indigenous language community may also be too small to be profitable for publishers. This puts Indigenous peoples in a position where they either must learn to read in "colonial" languages or have very limited access, if any at all, to the existing and growing body of useful works of knowledge.

In the absence of direct catering to Indigenous populations by copyright owners, Indigenous peoples access existing copyrighted works in their own languages by translating the published works into Indigenous languages independently of the copyright owner. This can be done by institutions and persons, other than the copyright owner, that are interested or committed to the availability of works in those languages. Such translation would provide Indigenous peoples access to useful works of knowledge in their languages when needed or preferred even if the traditional publishing market neglects the access needs of these groups. However, to embark on the translation of copyrighted works into Indigenous languages, in the absence of copyright exceptions to the translation right, the permission of the copyright owners of the original edition of the works must be sought and obtained because copyright law grants owners an exclusive right to translate their works. Negotiating and obtaining a copyright licence usually requires considerable time and expenses which can make the process cumbersome, time-consuming, and unaffordable.[8]

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[1] 'Indigenous people are the 'first' or 'original' people belonging to land or territories to which they are historically and culturally tied.' United Nations Educational, Scientific and Cultural Organization, *Education for People and Planet: Creating Sustainable Futures for All* (2016), online: UNESCO Digital Library 27 <https://unesdoc.unesco.org/ark:/48223/pf0000245752>.

[2] Anthony Ayodele Olaoye, "The Role of Indigenous Languages in National Development: A Case Study of Nigerian Linguistic Situation" (2013) 2:3 International Journal of Applied Linguistics and English Literature at 31.

[3] Ibid at 29.

[4] Ibid.

[5] Quentin Wodon & Gina Cosentino, *Education, Language and Indigenous Peoples* (August 2019), online: World Bank Blogs <https://blogs.worldbank.org/education/education-language-and-indigenous-peoples>. Indigenous people though make up only 5% of the world's population, represent 15% of the poorest in the world.

[6] Andrew Franklin, *The Profits from Publishing: A Publisher's Perspective* (March 2018), online: The Bookseller <https://www.thebookseller.com/comment/the-profits-from-publishing-a-publishers-perspective>.

[7] Wodon, supra note 5. It is estimated that there are 7,000 Indigenous languages globally.

[8] William M Landes & Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18:2 The Journal of Legal Studies 326.

The access to translation conundrum is further exacerbated by the fact that copyrights, including the right to translate, subsist in the copyright owner for an excessively long time, the lifetime of the author of the original edition plus at least 70 years after the death of the author.[9] In the absence of any limitation or exception to the translation right, copyright laws will stand in the way of translating works to foster access for underserved or unserved linguistic groups. Given the widespread consensus that copyright works are integral to education,[10] and the connection between education and development,[11] access to copyrighted works in a plurality of languages ought to be fostered to ensure that no linguistic group is left behind in the pursuit of knowledge/education and development. Inclusive and equitable educational opportunities must be created to support all groups of people. Education is recognized as a sustainable development goal (SDG) that must be realized in all nations of the world in the United Nations' 2030 Agenda for Development. One of the targets of SDG4 (the education goal) is to 'ensure equal access to all levels of education and vocational training for the vulnerable, including indigenous people'.[12] A necessary step in equal and inclusive access to education for Indigenous peoples is the availability of educational instruction in their Indigenous languages and access to educational and learning resources in those languages.[13] There is evidence that a shortage of textbooks and reading books in Indigenous languages has significantly affected the quality of education in many regions of the world.[14] Steps must be taken to close rather than widen knowledge and developmental gaps. Considering how important education is to human development,[15] access to copyrighted works that are important for education and lifelong learning should not be restricted to people who because of the circumstances of their birth have an understanding of the dominant and affluent languages of the world. Further, education is internationally recognized as a fundamental human right that must be enjoyed by everyone regardless of status or race.[16]

This paper is divided into five parts. Following this first introductory part is Part II, which highlights the significance of access to works in Indigenous languages to the educational and overall development of Indigenous peoples, with a special focus on the Indigenous peoples of Australia. Part III examines if and to what extent the Australian copyright framework facilitates access to translations for Indigenous Australians and makes recommendations for reform. In Part IV of the paper, we consider the international copyright framework for access to translated works and the reforms necessary within that framework to foster access to translations for Indigenous peoples globally. Part V provides a summary of the arguments and recommendations made in the paper.

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[9] *Copyright Act,* Cth 1968, s 33(2) [*Copyright Act*].

[10] Ruth Seotendorp & Bartolomeo Meletti, *Education,* online: CopyrightUser.Org <https://www.copyrightuser.org/understand/exceptions/education/>.

[11] Ibid.

[12] Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1 (2015) at para 4.

[13] United Nations Educational, Scientific and Cultural Organization, supra note 1, at 189.

[14] Ibid at 190.

[15] Melanie Walker & Monica McLean, *Professional Education, Capabilities and the Public Good: The role of universities in promoting human development*, 1st ed (Routledge, 2013) at 14; United Nations Development Programme, *Human Development Report 1990: Concept and Measurement of Human Development* (Oxford University Press, 1990) at 10; Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) at 33-34; Sen, *Development as Freedom* (Oxford University Press, 1999) at 5.

[16] *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) at 26.

II. SIGNIFICANCE OF INDIGENOUS LANGUAGES IN INCLUSIVE EDUCATION AND DEVELOPMENT

Australia has an increasing Indigenous population of about 812,728 people, who make up 3.2% of the total Australian population.[17] The Indigenous population is expected to rise to 1.1 million people by 2031.[18] Even though the Indigenous population is rapidly growing, with a 19% increase between 2011 and 2016,[19] there is a growing decline in the percentage of people speaking any of the Indigenous languages spoken in Australia.[20] For Indigenous Australians, this is concerning as their language is a core component of their social and emotional well-being.[21] Indigenous people have communicated, exchanged, and transferred knowledge through their languages for many centuries.[22] It is therefore not surprising that the availability of educational instruction and content in Indigenous languages is important in ensuring Indigenous people enjoy quality education, realize their right to education in the same way as non-Indigenous peoples, and preserve their language.[23]

In a bid to close the gap in real-life outcomes between Indigenous and non-Indigenous Australians, the Australian government found that promoting Indigenous languages and facilitating access to information, knowledge, books, and art amongst others in these languages is essential to ensuring equal and inclusive development of Indigenous Australians.[24] Education is one of the strategic reform priority areas identified by the Australian Government, which requires equality and inclusion for Indigenous Australians.[25] However, given the significance of Indigenous languages to the receiving and transmission of knowledge and information for Indigenous Australians, it is difficult to imagine an inclusive and meaningful education if such education is not made accessible in Indigenous languages. As such, in 2019, the Australian Government committed to facilitating access to education, information, and knowledge in Indigenous

[17] Australian Bureau of Statistics, *Australia: Aboriginal and Torres Strait Islander Population Summary* (July 2022) online: Australian Bureau of Statistics < https://www.abs.gov.au/articles/australia-aboriginal-and-torres-strait-islander-population-summary>.

[18] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, 2006 to 2031* (July 2019) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-and-projections-aboriginal-and-torres-strait-islander-australians/latest-release>.

[19] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (August 2018) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release>.

[20] Australian Bureau of Statistics, *Language Statistics for Aboriginal and Torres Strait Islander Peoples, June 2016* (April 2022) online: Australian Bureau of Statistics <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/language-statistics-aboriginal-and-torres-strait-islander-peoples/latest-release>.

[21] Department of Prime Minister and Cabinet, *Closing the Gap Report* (2019), online: NIAA at 22 < https://www.niaa.gov.au/sites/default/files/reports/closing-the-gap-2019/sites/default/files/ctg-report-20193872.pdf> [Closing the Gap]; Department of Health, *My Life My Lead: Opportunities for Strengthening Approaches to Social Determinants and Cultural Determinants of Indigenous Health* (December 2017), online: Health.gov.au at 8-10 <https://www.health.gov.au/sites/default/files/documents/2020/12/my-life-my-lead-report-on-the-national-consultations-my-life-my-lead-consultation-report.pdf>.

[22]Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Living Languages* (June 2022), online: AIATSIS <https://aiatsis.gov.au/explore/living-languages>.

[23] Human Rights Council*, Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*, UN Doc A/HRC/EMRIP/2009/2 (2009).

[24] Closing the Gap, supra note 21 at 22.

[25] Closing the Gap, supra note 21at 15.

Australian languages.[26] While Australia is a predominantly English-speaking country, a reasonable number of Indigenous peoples in Australia do not speak English as a first language.[27] Also, despite the decline in the number of Indigenous languages spoken in Australia over the years, there are still about 120 Indigenous Australian languages spoken today in the country, including 13 that are spoken by all age groups.[28] Consequently, for many Indigenous Australians, access to education also means access in Indigenous languages even to those who speak English well. To buttress this, UNESCO observed that there is a strong connection between mother tongues, literacy, and educational outcomes.[29] According to UNESCO, many students do not attend school, drop out of school, or do not perform well at school because of a lack of access to learning in their mother tongues.[30] While many public schools in Australia offer the learning of Indigenous languages as part of their curriculum,[31] it is more beneficial for Indigenous peoples for educational instruction to be delivered in their languages. Indigenous languages are widely acknowledged as a fundamental pillar for upholding the cultural integrity and well-being of Indigenous communities.[32] Educating Indigenous children in their native languages can serve as a powerful means to reinforce the inherent historical, social, and cultural significance of their linguistic heritage. Moreover, it can positively impact the happiness and overall well-being of the students, extending even to their physical and mental health.[33] Facilitating access to education in Indigenous languages not only promotes inclusive education and quality education outcomes for Indigenous peoples, but the Australian Institute of Aboriginal and Torres Strait Islanders Studies has observed that it also improves their general well-being.[34] In a recent empirical study, researchers found a positive relationship between Indigenous language use and community-based well-being in four Indigenous groups in Mexico.[35]

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[26] Australian Government, *Australian Government Action Plan for the 2019 International Year of Indigenous Languages* (2019) online: Arts.gov.au at 11 < https://www.arts.gov.au/sites/default/files/iyil_2019_action_plan.pdf>.
[27] Australian Bureau of Statistics, supra note 20. According to the Australian Bureau of Statistics, 8.9% of Indigenous Australians in 2011 do not speak English well and 2.2% of Indigenous Australians don't speak English at all.
[28] Closing the Gap, supra note 21, at 22.
[29] UNESCO, *Language Brochure* (2008) online: UNESDOC Digital Library < https://unesdoc.unesco.org/ark:/48223/pf0000158378>; UNESCO, *Why Language Matters for the Millennium Development Goals* (June 2019), online: UNESDOC Digital Library at 4 < https://bangkok.unesco.org/content/why-language-matters-millennium-development-goals>.
[30] UNESCO, supra note 29; UNESCO, supra note 29, at 12. 'School systems that do not use learners' own languages or respect their cultures make it extremely difficult for children to stay in school and learn.'
[31] Department for Education, *Aboriginal language-schools offering a program* (February 2022) online: Education.sa.gov.au <https://www.education.sa.gov.au/aboriginal-language-schools-offering-program>; Keane Bourke, *Indigenous Languages being Taught to 10,000 West Australian School Kids* (July 2022) online: ABC News<https://www.abc.net.au/news/2022-07-04/wa-students-learn-indigenous-languages-at-record-rate/101194088>; Henrietta Cook, *Record Number of Students Flock to Aboriginal Languages* (July 2019) online: The Age <https://www.theage.com.au/national/victoria/record-number-of-students-flock-to-aboriginal-languages-20190720-p52935.html>.
[32] Tracy Coates and Philip Leech-Ngo, "Overview of the Benefits of First Nations Language Immersion, Wise Practices for Indigenous Language Immersion, and Provisions for Supporting Immersion Education in the First Nations Control of First Nations Education Act" (2016) 3:1 Canadian Journal of Children's Rights 46 at 47.
[33] Ibid.
[34] Australian Institute of Aboriginal and Torres Strait Islanders Studies, *Indigenous Australian Languages* (May 2022), online: AIATSIS <https://aiatsis.gov.au/languages-aiatsis>.
[35] Justyna Olko et al, "The Positive Relationship Between Indigenous Language Use and Community-Based Well-Being in Four Nahua Ethnic Groups in Mexico" (2022) 28(1) Cultural Diversity and Ethnic Minority Psychology 132-143.

The UN Permanent Forum on Indigenous Issues has emphasized the importance of educational instruction in Indigenous languages and recommended that educational instruction take place in these languages to ensure equal participation of Indigenous peoples in education.[36] The inclusion of Indigenous languages in education can also increase the involvement of Indigenous communities in education.[37] Bilingual/multilingual education (i.e. teaching and learning in both the mainstream and Indigenous languages) is also important to give Indigenous people a chance to compete equally with their peers and as such integral to achieving meaningful and inclusive education for Indigenous peoples.[38] In Canada, it has been found that Indigenous language-based education can help support quality and inclusive teaching and learning for Indigenous peoples.[39] Quality education must necessarily reflect the dynamic cultures and languages of the learners in a way that makes them feel valued and equal.[40]

Incorporating Indigenous languages into education will also help to preserve Indigenous languages, many of which are on the verge of extinction.[41] According to the UN Nations Permanent Forum on Indigenous Issues, 'The majority of the languages that are under threat are indigenous (sic) languages. It is estimated that one indigenous language dies every two weeks.'[42] Australia has one of the world's fastest rates of language loss.[43] Indigenous languages in Australia comprise only 2% of languages spoken in the world but represent 9% of the world's critically endangered languages.[44] Before colonization, more than 250 Indigenous languages and over 750 dialects were originally spoken in Australia.[45] However, as some experts estimate, only 40 Indigenous languages are still spoken, with just 12 being learned by children in Australia.[46] The lack of support for education in Indigenous languages is one of the greatest threats to Indigenous languages as the more a person is educated in the mainstream education system and mainstream languages, the less they use their Indigenous languages.[47] Education in Indigenous languages, therefore, presents a great opportunity for the preservation of existing Australian Indigenous

[36] United Nations, *Important of Indigenous Education and Culture Highlighted, as Permanent Forum Continues Second Session,* UN Doc HR/4674 (2003).
[37] Denise Angelo et al, "Learning (in) Indigenous Languages: Common Ground, Diverse Pathways" (2022) OECD Education Working Papers, No. 278, 3.
[38] United Nations, supra note 36; Wodon, supra note 5; Human Rights Council*, Study on Lessons Learned and Challenges to Achieve the Implementation of the Right of Indigenous Peoples to Education*, UN Doc A/HRC/12/33 (2009) at para 51-53.
[39] Government of Northwest Territories, *Aboriginal Language and Culture Based Education*, online: Education, Culture and Employment <https://www.ece.gov.nt.ca/en/services/education-renewal/aboriginal-language-and-culture-based-education>.
[40] *Human Rights* Council, supra note 23, at para 8.
[41] United Nations, *The United Nations Permanent Forum on Indigenous Issues* (2018), online: United Nations<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/04/Indigenous-Languages.pdf>.
[42] Ibid.
[43] Australian National University, *1,500 endangered languages at high risk* (December 2021), online: Australian National University <https://www.anu.edu.au/news/all-news/1500-endangered-languages-at-high-risk>; Lisa Lim, Carly Steele & Toni Dobinson, *We are on the Brink of Losing Indigenous Languages in Australia – Could Schools Save Them?*, (July 2022) online: *The Conversation* < https://theconversation.com/we-are-on-the-brink-of-losing-indigenous-languages-in-australia-could-schools-save-them-184736>.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Lindell Bromham et al, "Global Predictors of Language Endangerment and the Future of Linguistic Diversity" (2022) 6 Nature Ecology & Evolution 163 at 163-173.

languages,[48] which must remain a fundamental and valued element of Australian culture and society. Even for the preservation of valuable Indigenous knowledge, Indigenous languages must be preserved. Indigenous language is so intrinsically linked to Indigenous knowledge that it is impossible to separate the two. As Nakata points out 'Without our languages, Indigenous knowledges cannot be expressed in their fullest terms or transmitted to convey their deepest and most intricate meanings. This means that as Indigenous languages are lost, so is diverse and valuable knowledge associated with the health and survival of the planet'.[49]

After conducting an empirical study on Indigenous languages learning in Australia, Canada, and New Zealand, Denise Angelo et al. found that:

> Providing access to strengthening Indigenous languages leads to many benefits for Indigenous students and their families and communities as well as non-Indigenous students and communities. These benefits include: progress towards redress and reconciliation; the transmission of Indigenous knowledges to Indigenous children and youth, as well as wider community members; strengthened cultural identity, well-being and resilience; and improved education outcomes, such as increased retention and achievement rates.[50]

Indigenous peoples, like everyone, have a right to education,[51] and receiving education in their own language is important to the realization of this right. In a study commissioned by the UN Human Rights Council on the challenges to the realization of the right of Indigenous peoples to education, it was found that to achieve the full realization of educational rights for Indigenous peoples, education must be adaptable to the languages of the Indigenous peoples concerned.[52] It is in the best interest of Indigenous peoples that their languages are integrated into mainstream education systems, especially at the primary and secondary education levels.[53] The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of Indigenous peoples to all levels and forms of education and states are obliged to ensure that Indigenous peoples have access to education in their language.[54]

Policies and laws that support bilingual/multilingual education are important to the effective participation of Indigenous peoples within the education system and the achievement of quality education outcomes.[55] Policies and laws that ignore access to knowledge in Indigenous languages do not advance the cause of Indigenous peoples and often hamper their development and progress.[56] Countries must ensure that education is flexible and adaptable to the languages of Indigenous peoples.[57]

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[48] See Coates and Leech-Ngo, supra note 32 at 49 ("Bilingual immersion programs are an effective tool for reviving and preserving Indigenous languages").
[49] N.M. Nakata, "Indigenous Languages & Education: Do We Have the Right Agenda" (2023) The Australian Educational Researcher 1 at 3.
[50] Angelo et al, supra note 37 at 18.
[51] *Universal Declaration of Human Rights*, supra note 16.
[52] *Human Rights Council*, supra note 23, at para 26.
[53] Ibid at para 51-53.
[54] *United Nations Declaration on the Rights of Indigenous Peoples,* UN GAOR, UN Doc A/RES/61/295 (2007) at 14.
[55] *Human Rights Council*, supra note 23, at para 54-55.
[56] Ibid at para 51-52.
[57] Ibid at para 26.

A necessary step in ensuring that Indigenous peoples in Australia and beyond have access to education in their language is the provision of educational materials in Indigenous languages. For there to be inclusive education and equal development of Indigenous people in Australia, efforts must be made to make educational resources available and accessible in Indigenous languages. The Australian Institute of Aboriginal and Torres Strait Islanders Studies noted that producing and translating knowledge resources in Indigenous Australian languages provide significant socio-economic benefits to Indigenous individuals and their communities.[58] The absence of educational materials in these languages has been found to create an educational gap between Indigenous and non-Indigenous peoples.[59] For example, the Indigenous Literacy Foundation in Australia found that the absence of adequate books in the Kriol language for Binjari children had great negative impacts on their knowledge and their literacy level.[60]

Despite the known benefits and significance of education in Indigenous languages to Indigenous students and their families and communities, there remain legal and non-legal limitations and barriers around efforts to support and restore the usage of Indigenous languages, including efforts to have access to educational materials and other copyrighted contents in Indigenous languages.[61] To facilitate access to books in Indigenous languages to support the education of Indigenous people, with the help of Indigenous people, books must be written/produced in Indigenous languages and existing books in English Language or other "dominant" languages that are relevant to education at different levels (especially primary and secondary education levels) must be translated into Indigenous languages. This paper focuses on the latter medium of facilitating access to books in Indigenous languages and the role of copyright in the availability of translations. In the next part, we examine the extent to which Australia's copyright system can support access to educational content and resources in Indigenous languages through translations.

III. AUSTRALIAN COPYRIGHT LAW & ACCESS TO TRANSLATIONS

Education and learning have always been crucial factors in shaping the development of copyright laws and policies both in national and international systems. The earliest English copyright legislation, the *Statute of Anne* has as its long title: 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned.'[62] The Statute's objectives included the encouragement of learning and the dissemination of knowledge, thereby putting public interest at the fore of copyright recognition and protection.[63] Copyright was therefore historically conceived as a means to an end

[58] Australian Institute of Aboriginal and Torres Strait Islanders Studies, supra note 22.

[59] UNESCO, supra note 1, at 190; United Nations, Education, online: Department *of Economic and Social Affairs Indigenous People* <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/education.html>; William Fogarty & Inge Kral, "Indigenous Language Education in Remote Communities" (2011) 11 ANU Centre for Aboriginal Economic Policy Research at 6.

[60] Australian Government, *Lifting Literacy Levels and Instilling Lifelong Love of Reading*, (September 2018) online: *indigenous.gov.au* < https://www.indigenous.gov.au/news-and-media/stories/lifting-literacy-levels-and-instilling-lifelong-love-reading>.

[61] See Nakata supra note 49 at 5.

[62] *The Statute of Anne 1710*, 8 Anne, c 19.

[63] Craig Joyce, "The Statute of Anne: Yesterday and Today" (2010) 47:4 Houston Law Review 779 at 784. See also Anindya Bhukta, *Protecting Traditional Knowledge: Ways and Means* (Emerald Publishing, 2020) 82.

and not an end in itself.[64] It was important at the time to grant copyright to authors to encourage them to write useful books as a means to an end – the end being the availability of books for learning (education). As such, the monopoly granted to copyright authors was limited and by also granting the initial copyright to authors, the statute also weakened the monopoly of the Stationers' Company, which had exclusive printing rights and misused them.[65] Several provisions of the *Statute of Anne* clearly point to copyright grant as a means. For instance, the term of the copyright grant was limited to a period of fourteen years,[66] renewable for an additional term of fourteen years.[67] This means that copyright grant was not to exist in perpetuity or even for a long time, but rather copyright was meant to be granted for a short time while works were to fall into and remain in the public domain for the longest of time. The falling of works into the public domain after a short period of copyright monopoly was of significant consequence for learning and liberty since members of the public are free to copy and reproduce public domain works.[68]

Most notably, the *Statute of Anne* only granted copyright owners, a reproduction right; authors were not granted an exclusive right to control the translation of their works.[69] The exclusive right of translation was not clearly recognized in the United Kingdom until the beginning of the 20th century.[70] This is not surprising as from the outset, translation had been recognized as instrumental to the dissemination of knowledge, information, and culture across jurisdictions and languages.[71] The lack of copyright restriction on the translation of works led to the distribution of knowledge across borders at a faster pace.[72] The restriction of the scope of copyright to reproduction while giving members of the public wide powers to carry out acts, such as translation, without the need for a copyright licence in the Statute of Anne further points to the fact that copyright was meant to serve the public interest. The Statute of Anne also included a legal deposit scheme under which publishers were required to deposit nine copies of every book for the use of certain libraries.[73]

In a 2009 decision, the High Court of Australia described copyright as envisaged under the *Statute of Anne* as a form of social contract between the public and an author; the import of the contract being that 'an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.'[74] The court still considers this social contract as underlying the current Australian *Copyright Act 1968* (Cth),[75] especially in light of the historical connection

[64] Ariel Katz, "Competition Policy in Copyright Law", in Anderson, Robert D., Nuno Ferreira de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2021) 423 at 424-25 ('copyright law was not born as a response to a world of free copying. Quite the contrary, as much as it was responsive to publishers' demands for statutory exclusive rights, copyright law was also a countermeasure against an oppressive regime of press control in which censorship and exclusive print privileges were conflated.')
[65] Ibid at 425.
[66] *Statute of Anne 1710* (n 62) s II.
[67] Ibid s XI.
[68] Joyce, supra note 63 at 784.
[69] *Statute of Anne 1710* (n 62) s II.
[70] David Vaver, "Translation and Copyright: A Canadian Focus" (1994) 16:4 European Intellectual Property Review 159 at 164.
[71] Tong King Lee, "Translation and Copyright: Towards a Distributed View of Originality and Authorship" (2020) 26:3 The Translator 241 at 243.
[72] Vaver, supra note 70 at 165.
[73] *Statute of Anne 1710* (n 62) V.
[74] *IceTV Pty Limited v Nine Network Australia Pty Limited,* 2009 HCA 14 at para 25.
[75] Ibid.

of the Australian copyright framework to the English copyright framework.[76] However, copyright today in Australia as in many other countries lasts much longer than the duration granted to works under the Statute of Anne (generally now the life of the author plus at least 50 years after the death of the author). While the historical goal of the Statute of Anne that copyright is for the encouragement of learning remains paramount today, it is not very much reflected in the Act and needs to be defended.

More importantly, for the purpose of this paper, unlike the *Statute of Anne*, the Australian *Copyright Act* and the copyright laws of most countries now confer on authors, the right to control the translation of their works, amongst other rights within the copyright bundle.[77] During the 19th century, there was a growing movement to acknowledge and respect authors' rights over translations, driven by the rising demand from literate middle classes to access literature from different parts of the world.[78] European writers of the time pushed strongly for exclusive translation rights and were oblivious to the unmet access needs of readers and knowledge seekers in far-flung places.[79] In 1886, the first international copyright treaty – the Berne Convention, a treaty chiefly between European countries, granted an exclusive right to translation to authors for the full duration of the copyright in the original work.[80] The implication of this was and is that no one can translate a work made in a Berne Convention member country without the prior consent of the copyright owner. By 1911, through the Imperial Copyright Act, the UK began to grant exclusive translation rights to authors of all works[81] and the Act extended to its colonies,[82] including Australia, and remains a part of Australian copyright law.[83]

Given the recognition of an exclusive right of translation for copyright owners, translating works into other languages, including Indigenous languages, will therefore depend on the scope and length of copyright control in translations as well as the presence of limitations and exceptions on such copyright control. In Australia, the monopoly over the translation of works subsists in the copyright owner for the life of the author plus 70 years post-death.[84] At the end of this term, the protected works will automatically fall into the public domain and be free of all copyright restrictions on use and adaptation. However, the excessively long term of copyright protection and the wide gap in the educational and developmental outcomes of Indigenous and non-Indigenous Australians makes waiting until the end of the copyright term to translate useful works into Indigenous languages highly undesirable.

Although the Australian *Copyright Act* contains a few provisions that seek to promote the social ends of copyright protection by limiting the scope of copyright control over literary works,[85] none of the provisions within the Act specifically seeks to promote and facilitate access to translations for Indigenous Australians. The statutory licensing provisions under the *Copyright*

[76] Mark J Davison, Ann L Monotti & Leanne Wiseman, *Australian Intellectual Property Law*, 4th ed (Cambridge University Press, 2016) at 198.
[77] *Copyright Act* (n 9) pt 3 div 1 s 31.
[78] Vaver, supra note 70 at 165.
[79] Ibid.
[80] For commentary on international developments at Berne relating to the right of translation, see Lee supra note 71 at 243-45.
[81] *Copyright Act 1911* c. 46, s 1(2).
[82] See section 25(1) of the 1911 Copyright Act which extended the provisions of the Act to British Colonies and Order-in-Council Extending the Copyright Act, 1911 (1 & 2 Geo. V, c. 46) to Certain British Protectorates (Statutory Rules and Orders, 1912, No. 912).
[83] See *Copyright Act* (n 9) pt 3 div 1 s 31.
[84] Ibid s 33(2).
[85] Ibid pt 3 div 3 s 40- 44F.

Act, which permits educational institutions in Australia to copy and communicate copyright material for educational purposes subject to the payment of an agreed equitable remuneration to a collecting society, do not cover the translation of copyrighted materials for educational purposes.[86] Since there is no specific exception to the translation right that can be relied on to translate works into Indigenous languages for educational purposes, it may be possible to rely on the "miscellaneous" exception in section 200AB of the *Copyright Act*.

Access to Translations and the Section 200AB exception

Section 200AB(1) provides that:

> (1) The copyright in a work or other subject-matter is not infringed by a use of the work or other subject-matter if all the following conditions exist:
> (a) the circumstances of the use (including those described in paragraphs (b), (c) and (d)) amount to a special case;
> (b) the use is covered by subsection (2) or (3);
> (c) the use does not conflict with a normal exploitation of the work or other subject-matter;
> (d) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright.

Section 200AB(1) is an adaptation of the three-step test in Article 13 of the *TRIPS Agreement*.[87] Unsurprisingly, section 200AB(7) provides that the following phrases in section 200AB(1) have the same meaning as in article 13 of the *TRIPS Agreement*: "special case", "conflict with a normal exploitation" and "unreasonably prejudice the legitimate interests". Section 200AB(1) introduces one more step to its adaptation of the *TRIPS'* three-step test – the use of the work must be covered by section 200AB(2) or (3). Section 200AB(2) covers uses of a work that:

> (a) is made by or on behalf of the body administering a library or archives; and
> (b) is made for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives); and
> (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

Section 200AB(3) covers a use that:

> (a) is made by or on behalf of a body administering an educational institution; and
> (b) is made for the purpose of giving educational instruction; and
> (c) is not made partly for the purpose of the body obtaining a commercial advantage or profit.

[86] Ibid pt 4 div 7 s 113N-113U.
[87] *Agreement on Trade Related Aspects of Intellectual Property Rights* (15 April 1994, adopted 23 January 2017) art 13: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'.

Section 200AB exception only covers 'any act that would infringe copyright' if section 200AB were not in the *Copyright Act*.[88] In order to distribute works in Indigenous languages to support education among Indigenous students, it may be necessary to rely on section 200AB of the Australian Copyright Act. While translating without consent from the copyright owner would be considered infringement, section 200AB offers a legal avenue for translation if all requirements are met. Translating works into Indigenous languages serves the purpose of providing educational instruction. Therefore, the requirement that the use of the work for educational instruction in section 200AB(3)(b) can be easily met. Also, the requirement in section 200AB(3)(a) that the use of work is made by or on behalf of a body administering an educational institution is not difficult to satisfy. The entity translating for Indigenous Australians may be an educational institution or it may be a public/private institution that decides to embark on the translation of educational resources into Indigenous languages for use in educational institutions, thereby qualifying as a use made on behalf of an educational institution. In any of these cases, section 200AB(3)(a) would have been satisfied. Further, public institutions, educational institutions, and institutions serving the interests of Indigenous peoples are not likely to embark on the translation of works to support the education of Indigenous peoples to obtain a commercial advantage or profit, thereby satisfying section 200AB(3)(c). Moreover, the translation of works into these languages would not fail to meet the section 200AB(3)(c) requirement merely because of the charging of a fee for the translated copy that is no more than the nominal cost of production.[89]

As the requirements of section 200AB(3) can be easily navigated and satisfied to provide access to translations to Indigenous peoples for educational purposes, it follows that the other requirement in section 200AB that remains to be examined is the iteration of *TRIPS Agreement's* three-step test. The three-step test in the *TRIPS Agreement* operates both to enable states to devise copyright exceptions and limitations in national copyright law and to limit the exceptions and limitations to those that satisfy each of the three steps in the test.[90] In the context of section 200AB, the three-step test can be construed as a set of guidelines that can be used to determine if a use of work that is not expressly covered by any other section of the Australian *Copyright Act* as an acceptable use of a copyrighted work is nonetheless non-infringing. While it is limited to uses made by or on behalf of a body administering a library, archive, or educational institution, section 200AB provides a somewhat open, flexible, and broader exception to copyright protection. Section 200AB covers any use of a work made by or on behalf of these institutions, thereby making it a provision that can potentially be relied on to translate works into Indigenous languages to support the education of Indigenous peoples and bypass the requirement of obtaining the copyright owner's permission. However, it is a very complex provision to navigate, as the use of the work must satisfy the three-step test incorporated into the section.

To be protected by section 200AB, the translation of a copyrighted work into an Indigenous language for educational instruction must (a) amount to a special case; (b) not conflict with the normal exploitation of the work or subject matter; and (c) not unreasonably prejudice the legitimate

[88] *Copyright Act*, supra note 9, s 200AB(7).
[89] Ibid, s 200AB(6A).
[90] Christophe Geiger et al, "Declaration on a Balanced Interpretation of the "Three-step Test" in Copyright Law" (2008) 39:6 *IIC International Review of Intellectual Property and Competition Law* 707 at 710; P Bernt Hugenholtz & Ruth L Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright* (March 2008) online: Open Society Foundations at 25 < https://www.opensocietyfoundations.org/publications/conceiving-international-instrument-limitations-and-exceptions-copyright>.

interests of the owner of the copyright.[91] Since section 200AB provides that these three phrases have the same meaning as in article 13 of the *TRIPS Agreement*, it is important to consider how the three-step test in the *TRIPS Agreement* has been judicially interpreted by the World Trade Organization's (WTO) Dispute Settlement Panel. The only case in which the three-step test in Article 13 of the *TRIPS Agreement* has been interpreted and applied by the WTO Dispute Settlement Panel is the *United States – Section 110(5) of the US Copyright Act* ('*IMRO Decision*').[92]

The European Communities, acting on behalf of the Irish Music Rights Organisation (IMRO), against the United States (US), initiated the dispute that led to the WTO Panel's decision.[93] The case of the European Communities was that section 110(5) of the *US Copyright Act* of 1976, as amended by the *Fairness in Music Licencing Act*, violated the US obligations under Article 13 of the *TRIPS Agreement*.[94] They argued that the copyright exemptions under section 110(5) were prejudicial to the legitimate interests of rightsholders, while the US argued that limitations on exclusive rights in the *US Copyright Act* are justified under Article 13 of the *TRIPS Agreement*.[95] The main issue was whether the two exemptions provided in section 110(5) are compatible with the three-step test in Article 13 of the *TRIPS Agreement*. The first exemption, "homestyle exemption", in section 110(5)(A) allows transmission of dramatic musical works on a single receiving device commonly used in private homes. The second exemption, "business exemption", in section 110(5)(B) permits the playing of music in retail shops, bars, and restaurants, under certain conditions, without the payment of royalties. The WTO Panel found that the homestyle exemption met the requirements of Article 13 of the *TRIPS Agreement* while the business exemption did not.[96] In coming to this conclusion, the WTO Panel considered the exemptions against each step of the three-step test. While the *IMRO Decision* focuses on copyrights in music, the WTO Panel gave general interpretations of the three-step test that apply to E&Ls to copyrights in literary works. The following headings present the interpretation of the WTO Panel on each step of the *TRIPS Agreement's* three-step test.

Step 1: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases'

The relevant phrase here is "certain special cases". The WTO Panel consulted dictionaries and adopted the ordinary meaning of 'certain' in the Oxford English Dictionary as '"known and particularised, but not explicitly identified", "determined, fixed, not variable; definitive, precise, exact"'.[97] According to the Panel, the word "certain" in the first step implies that 'an exception or limitation in national legislation must be clearly defined' to an extent that guarantees a sufficient degree of legal certainty.[98]

Concerning the term "special", the Panel stated that:

[91] *Copyright Act*, supra note 9, s 200AB(1).
[92] Panel Report, *United States – Section 110(5) of the US Copyright Act,* WTO Doc WT/DS160/R (15 May 2000) [*United States - Section 110(5)*].
[93] Ibid at para 1.2.
[94] Ibid at para 3.1.
[95] Ibid at paras 3.1- 3.3.
[96] Ibid at para 7.1.
[97] Ibid at para 6.108.
[98] Ibid.

> The term "special" connotes "having an individual or limited application or purpose", "containing details; precise, specific", "exceptional in quality or degree; unusual; out of the ordinary" or "distinctive in some way". This term means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation must be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as a qualitative sense. This suggests a narrow scope as well as an exceptional or distinctive objective. To put this aspect of the first condition into the context of the second condition ("no conflict with a normal exploitation"), an exception or limitation should be the opposite of a non-special, i.e., a normal case.[99]

The Panel found that the homestyle exemption in the *US Copyright Act* was confined to "certain special cases" because it was well-defined and limited in its scope as only about 13 to 18 percent of establishments were covered by the exemption.[100] On the other hand, the Panel found that the business exemption was not so confined because its scope in terms of potential users was substantially large.[101]

Applying the above interpretation and holding on step 1 in interpreting section 200AB(1)(a) of the *Copyright Act* in the context of making and distributing translations of copyrighted works for the educational instruction of Indigenous Australians, the question is whether the circumstances of the translation amounts to a special case. The circumstances would likely be considered as amounting to a "special case" within the meaning given to the phrase by the WTO Panel in the *IMRO Decision.* The translation use proposed in this paper is quite specific to a particular group of people – Indigenous Australians – and the languages in which the works can be translated are limited to Indigenous Australian languages. This makes the circumstance of the use quite specific and the scope of its intended beneficiaries is well defined and narrow. Indigenous Australians represent 3.2% of the total Australian population.[102] For these reasons, it is more likely than not that section 200AB(1)(a) would be satisfied if a copyrighted work is translated into an Indigenous language for educational use by Indigenous peoples.

Step 2: 'which do not conflict with a normal exploitation of the work'

The Panel interpreted exploitation of the work as 'the activity by which copyright owners employ the exclusive rights conferred on them to extract economic value from their rights to those works.'[103] The term "normal" was given two connotations – empirical and normative. It was empirically interpreted as what is 'regular, usual, typical or ordinary'.[104] It means 'conforming to a type or standard' in normative terms.[105] Normal exploitation was interpreted to mean 'those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire

[99] Ibid at para 6.109.
[100] Ibid at para 6.160.
[101] Ibid at para 6.133. About 70 percent of eating and drinking establishments and 45 percent of retail establishments in the US were covered by the exemption: at paras 6.125-6.126.
[102] Australian Bureau of Statistics, supra note 17.
[103] Ibid at para 6.164.
[104] Ibid at para 6.166.
[105] Ibid.

considerable economic or practical importance'.[106] Accordingly, to pass the second test, an exception must not deprive the rightsholder of an actual or potential economic return that is significant. An exception would be presumed not to conflict with a normal exploitation of works if it is confined to a scope that does not enter 'economic competition with non-exempted uses'[107] that the right holder may want to exploit.

Concerning step 2, the Panel consequently found that the homestyle exemption did not conflict with a normal exploitation of the work because there was little or no direct licencing by individual rightsholders for the works covered by the exemption.[108] By contrast, the Panel found that the business style exemption did not meet the requirements of step 2 because it deprived rightsholders of the royalties that would otherwise have been paid for the use of their work by these businesses.[109]

Applying the interpretation in step 2 to the context of the use advocated in this paper, it is arguable that the translation of a copyrighted work into Indigenous languages for educational purposes would not conflict with a normal exploitation of the work. There is a shortage of works in Indigenous Australian languages for educational purposes,[110] and the market for works in Indigenous languages is not commercially viable enough for copyright owners to exploit. Given the absence of exploitation of that market and the evidence that commercial publishers do not normally respond to non-affluent markets, it is very unlikely that rightsholders would consider the Indigenous Australian market as one of considerable economic importance which would deprive them of a significant potential economic return. Furthermore, considering that Indigenous Australians who will be the beneficiaries of permitted translations of copyrighted works into their languages make up a very small percentage of the total Australian population, the translation of works into their languages will not cause economic competition with works in other dominant languages that are being commercially exploited by copyright owners in Australia. For example, it is very unlikely that a native English speaker in Australia or someone who has primarily only learned in English would consider translated editions of works in Indigenous languages a viable substitute for educational purposes.

Overall, it is highly unlikely that the translation of a copyrighted work into Indigenous Australian languages for educational purposes would conflict with a normal exploitation of the work in Australia.

Step 3: 'do not unreasonably prejudice the legitimate interests of the right holder'

The third step appears to have many similarities with the second step and the fact that the WTO Panel repeated much of their analysis on the second step supports this. It has been suggested that the WTO Panel confused the two steps.[111] Notwithstanding this, the Panel gave some guidance on the interpretation of this step. The term "prejudice" means harm or injury.[112] "Legitimate interests" was interpreted as 'the economic value of the exclusive rights conferred by copyright on

[106] Ibid at para 6.180.
[107] Ibid at para 6.181.
[108] Ibid at para 6.219.
[109] Ibid at para 6.211.
[110] Jenn Korff, *Barriers to Aboriginal education* (August 2021) online: Creative Spirits <https://www.creativespirits.info/aboriginalculture/education/barriers-to-aboriginal-education>.

[111] Hugenholtz & Okediji, supra note 90, at 24.
[112] *United States – Section 110(5)*, supra note 92, at para 6.225.

their holders.'[113] However, it was suggested that the legitimate interest of a rightsholder is not limited to economic value.[114] According to the Panel, 'prejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner'.[115]

The Panel found that the homestyle exemption did not cause unreasonable prejudice to the legitimate interests of rightsholders because of its limited scope and lack of evidence of direct licensing by individual rightsholders for the works covered by the exemption.[116] On the other hand, the Panel found that the US failed to show that the business exemption did not unreasonably prejudice the legitimate interests of rightsholders considering the broad scope of establishments covered by the exemption.[117]

Applying the reasoning of the court on the third step to the case of translation of works into Indigenous Australian languages, it is arguable that the translation would not unreasonably prejudice the legitimate interests of the owner of the copyright in the works that would be translated. Copyright owners in Australia do not translate their works into Indigenous languages for commercial exploitation, and as such permitting translations of their works into these languages under section 200AB will not lead to a loss of income, whether actual or potential. The general attitude of commercial publishers is to respond to economically affluent markets and given that Indigenous Australians represent 3.3% of the Australian population and speak diverse languages, it is unlikely that commercial publishers would find the market, particularly a lucrative one to cater to now or in the future. In fact, it is the high unlikelihood of commercial publishers catering to this market that strongly necessitates a legal intervention in the form of an exception to prevent copyright from limiting access to educational materials in accessible languages for a population that would otherwise not be considered by commercial publishers. It is therefore hard to think of how permitting translations into Indigenous Australian languages will harm or prejudice the economic interests of copyright owners in Australia. Although because the consideration under the third step is not limited to economic interests, there may be other non-economic interests that could be significant in the case of translations, such as the preservation of the literary value and meaning of a work in the course of translation. However, this should not negatively impact the recognition of translation for educational purposes as an exempted use under section 200AB since the possibility of improper translation is not synonymous with a high likelihood of improper translation of works by persons other than the copyright owner or their authorized translator.

The above analysis points strongly to the fact that translating copyrighted works into Indigenous Australian languages for educational instruction would most likely satisfy the requirements of section 200AB of the *Copyright Act* and therefore be legally permissible. However, one of the downsides of provisions like section 200AB is the fact that one cannot be too certain of the interpretation of the provision until it is judicially interpreted by an Australian court.[118] The correct import of the provisions in section 200AB and the full range of activities that

[113] Ibid at para 6.227.
[114] Ibid.
[115] Ibid at para 6.229.
[116] Ibid at para 6.272.
[117] Ibid at paras 6.265-6.266.
[118] Emily Hudson, "The Copyright Amended Act 2006: The Scope and Likely Impact of New Library Exceptions" (2006) 14:4 *Australian Law Librarian* 25, at 32-33; Amanda Bellenger & Helen Balfour, "Copyright in the Time of COVID-19: An Australian Perspective" (2021) 5:1 *Journal of Copyright in Education and Librarianship* 1, at 4: 'Although s200AB is supposed to be a flexible dealing exception for educational institutions and libraries, it has proved to be difficult to apply because of its drafting choices that incorporate the "three-step test" with unclear terms.'

are permitted under the section can be very difficult for users of copyrighted works to ascertain with sufficient precision. This uncertainty, no matter how small, can have some chilling effects, especially in a world where many people have copyright anxiety.[119] The fear of possible copyright infringement, even in the face of clear exemption clauses in copyright law often deters people from using copyrighted works in ways that they would otherwise have wanted to.[120] It is, therefore, not too far-fetched to assume that despite the provision of section 200AB and the high possibility that translations into Indigenous languages for educational purposes would satisfy the requirements of the section, many organizations and institutions would refrain from embarking on altruistic translation projects for the benefit of the Indigenous peoples if there is a risk of copyright infringement liability. For this reason, it is more access-enabling to have a specific exception within the Australian *Copyright Act* tailored to permit translations of copyrighted works into Indigenous Australian languages for educational purposes.

Proposed National Law Reform for Access to Translations

The absence of any specific and clear exception that can be relied on for access to translation in Australia is further worsened by the fact that the traditional publishing industry cannot be relied upon to cater to the lack of translations in Indigenous languages because of the low purchasing power of persons who may be interested in works in Indigenous languages. Publishing industries are mainly for-profit entities and respond primarily to the needs of economically advantaged groups,[121] making it unlikely that they will create a market for translated editions of their works in Indigenous languages. There is no viable commercial market for works in Indigenous languages that can serve as sufficient motivation for authors and publishers who cater to the more affluent and economically advantaged linguistic groups. Thus, persons who have non-economic motivation in providing access to literary works, especially persons and groups working for the benefit of Indigenous peoples, would most likely be more interested in the translation of useful copyrighted works to Indigenous languages than copyright owners and commercial publishers.

However, in the absence of any clear exception or limitation within the *Copyright Act* that can be relied on as the legal basis for translating copyright-protected works, such persons or groups wishing to embark on the translation of works to support access to education in Indigenous languages must seek and obtain translation licenses from the copyright owners. This is a strong disincentive and invariably increases the costs associated with translation since the translation licences are usually negotiated for a fee.[122] Arguably, a rational publisher would be willing to grant a licence at a low fee for the translation of works into Indigenous languages because they have

[119] Inga-Lill Nilsson, "Developing New Copyright Services in Academic Libraries" (2016) 29:1 *Insights: The UKSG Journal* 7, at 81: Copyright anxiety is used to describe a situation where users of copyright works are afraid 'that everything they do violates the law instead of trying to find best practice in handling copyright issues'.

[120] Emily Hudson, supra note 118, at 32; Amanda Wakaruk, Céline Gareau-Brennan & Matthew Pietrosanu, "Introducing the Copyright Anxiety Scale" (2021) 5:1 *Journal of Copyright in Education and Librarianship* 1, at 1-38.

[121] Franklin, supra note 6.

[122] Arts Law Centre of Australia, *Translations*, (September 2001), online: *Arts Law* < https://www.artslaw.com.au/article/translations/>. ARC Industrial Transformation Training Centre for Uniquely Australian Foods, *Copyright, Open Access and Translation for Scientific and Academic Research* (2020) online: *Uniquely Australian Foods*, at 2 < https://uniquelyaustralianfoods.org/wp-content/uploads/2020/03/UAF22-Copyright-Open-Access-and-Translation-Fact-Sheet.pdf>.

nothing to lose and perhaps a lot to gain from the extended readership of their work to Indigenous communities. However, there is no evidence that copyright owners would charge low licensing fees and what is low is relative to the economic power of the Indigenous community or person seeking the licence.

Furthermore, the actual licensing fee is one of many copyright-related translation costs that may be incurred. Other transaction costs may include the costs of seeking the copyright owner, negotiating a license and drawing up a licensing contract. Often copyright exceptions and limitations have been justified by the existence of various transaction costs of copyright licencing[123] and the case of translation licence for Indigenous persons need not be different. Furthermore, Indigenous peoples have faced historic discrimination and one cannot assume that such discrimination would not arise in cases of direct license requests to translate works into Indigenous languages. Racism is still very much in the fabric of our society. Some authors might just be unwilling to grant a licence for no reasonably justifiable reason.

Where the costs of licensing are high and persons seeking to obtain translation licenses either do not have a means of recouping the licensing costs or seek translation for altruistic purposes, this can deter them from embarking on translation exercises which will result in complete unavailability or extreme shortage of books in Indigenous languages. It is expected that educational institutions, public institutions, and some not-for-profit institutions will most likely take up the translation of existing works into Indigenous languages. Since there are other significant costs associated with translation beyond the costs of obtaining copyright licenses to be borne by these institutions, it would be more socially desirable for these institutions to take on the project of translating existing works if the overall costs and expenses involved in translating are subsidized through the copyright system. Without such subsidization, the expenses involved in getting works translated and accessible in Indigenous languages may be grossly unmanageable.

Although it may be argued that copyright owners should not be required to subsidize translation activities, copyright is a state grant and the state can and should define and redefine the contours of that grant in a way that balances the interests of copyright owners and the public interest, including the interests of marginalized groups. Exempting or limiting copyright protection in favour of translation into Indigenous languages is one of the ways of ensuring a balanced copyright system preventing the use of copyright law, whether consciously or unconsciously, as a tool for furthering inequality in society. Moreover, the market of translation into Indigenous languages is largely underexploited by copyright owners and as such, the economic impact of such exemption or limitation on copyright owners might be minimal, if felt at all.

As emphasized earlier, a primary goal of the copyright system is or should be to facilitate access to works for educational purposes. Considering the absence of any provision in the current Australian *Copyright Act* that can be confidently leveraged to translate copyrighted works without the need to negotiate and obtain copyright licences from copyright owners or their agents and the significant connection between access to translations and education for Indigenous Australians, there is a genuine need to reform the Act to facilitate inclusive education and development for Indigenous Australians. We propose that a specific and clear exception to copyright control in translation be included in the Australian *Copyright Act* for the benefit of Indigenous Australians.

A translation exception for the benefit of Indigenous Australians should permit any entity recognized by the government to provide education, instructional training, or literary materials to Indigenous peoples on a non-profit basis to translate, without the authorization of the copyright owner, published works into an accessible Indigenous language, and supply translated copies of

[123] See Katz, supra note 64 at 434-35

the works to Indigenous persons by any means. This exception should be subject to the following conditions:

1. The entity must respect the moral rights of the author as contained in Part IX of the *Copyright Act* in translating the work and publishing the translated edition of the work, including the author's rights of attribution and integrity of authorship. This requirement could ensure that those embarking on translation activities under this exception respect the integrity of the expression of the author of the work in rendering their translation and acknowledge the creative work of the author in conceiving and producing the original edition.
2. The translated edition of the work should be subject to an open licence[124] that permits the non-commercial use (including adaptation) of the work for the benefit of Indigenous peoples without the authorization of the copyright holder of the translated edition. Subjecting the translated edition to an open licence would further the dissemination of the translations since a translated work enjoys a separate copyright that could, in the absence of an open licence, hinder the wide dissemination of the translated work.
3. The translated edition of the work must not be distributed to obtain a commercial advantage or profit. However, the distributor of the work may charge a fee that does not exceed the nominal costs of production if the work is distributed in print. Copyright owners are more likely not to oppose an exception that does not lead to commercial exploitation of their work in a way that deprives them of any significant revenue accruing from that exploitation.

The recognition of a translation exception for the benefit of Indigenous Australians will no doubt facilitate access to useful works of knowledge and enhance the opportunities for Indigenous Australians to enjoy their right to education on an equal basis with others in Australia. In addition to equitable access to education, access to translated works will also expand the human development capabilities of Indigenous peoples.

IV. INTERNATIONATIONAL COPYRIGHT FRAMEWORK FOR ACCESS TO TRANSLATIONS

There are almost 476 million Indigenous peoples in the world, living across 90 countries, making Indigenous peoples represent about 6% of the world population.[125] There are thousands of Indigenous languages spoken by Indigenous peoples around the world, many of which are on the verge of extinction.[126] Whether in Australia, Canada, America, or different parts of Africa and Asia, Indigenous languages are key to the identity of Indigenous peoples everywhere and play a significant role in their educational development. Access to books in Indigenous languages is therefore not necessary only for the educational development of Indigenous peoples in Australia,

[124] Creative Commons Australia, *Open Licenses* (2017), online: *Australasian Open Access Strategy Group* at 1 < https://aoasg.files.wordpress.com/2013/12/aoasg-factsheet_cclicensing-0021.pdf>. An 'open license' is a license that can be placed on a work to make the work accessible and available to use under certain conditions outlined in the license.
[125] World Bank Group, 'Indigenous Peoples', *The World Bank* (Web Page, 14 April 2022).
[126] Lim, supra note 43.

but also for Indigenous peoples everywhere. Translations of works into a language that a group of people are conversant with are key for providing access to knowledge for that group.

Notwithstanding the above, there is no general translation flexibility within international copyright laws that may be appropriated for the benefit of Indigenous peoples. The *Berne Convention for the Protection of Literary and Artistic Works* ('*Berne Convention'*) which is the primary international copyright treaty provides for the grant of translation rights to authors for a minimum term of the life of the author plus 50 years post-death, similar to the term of protected for reproduction right.[127] Historically, the *Berne Convention* offered a shorter term of protection for translation rights. Article 5 of the 1886 text of the *Berne Convention* granted authors a translation right for a maximum term of 10 years from the publication of the original edition of the work.[128] The 10-year term was chosen to meet the needs of developing nations, particularly Scandinavian countries in Europe, who were primarily importing literary works from developed countries like France and England.[129] These countries also produced their own literary works but had limited access to those produced by developed nations, which could only be made available by translating them into languages that their citizens could understand. As such, a liberal translation right would hamper access to many valuable foreign works for those developing countries and limit the dissemination of knowledge for education and learning. The moratorium on the translation right did not however last for long as the developed countries of the time fought for the grant of the same term to the translation right as the reproduction right.[130]

A subsequent revision of the *Berne Convention* at Paris in 1896 saw a gradual increase in the term of the translation right. Authors were granted translation right for the same term as the reproduction right with the exception that the translation right in a work expires for the purpose of a language for which protection is claimed if a translation of the work has not been published in the ten years from the publication of the original edition of the work.[131] This allowed the translation of works into languages that would not be catered to by the copyright owners. This flexibility in the 1896 Act was however short-lived by another revision of the Convention at Berlin in 1908 ('*Berlin Act 1908'*). The *Berlin Act* granted authors full term of copyright protection in the translation of their works without the possible ten-year expiration allowed in the 1896 iteration of the Convention.[132] Since then, the minimum term of protection required for translation rights under the Berne Convention has been the life of the author plus fifty years post-death.[133] The stipulation within the Berne Convention, which obliges member countries to safeguard translation rights for the same duration as other copyrights in a work, can be viewed as posing challenges to the timely and cost-effective translation endeavours needed to foster access to knowledge, particularly in developing nations.[134]

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[127] *Berne Convention for the Protection of Literary and Artistic Works*, 28 September 1979, (entered into force 19 November 1984) art 12 ['*Berne Convention*'].
[128] Ibid art 5.
[129] See Chamila S. Talagala, *Copyright Law and Translation: Access to Knowledge in Developing Economies* (Routledge 2021) 126-128; Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford University Press, 2nd ed, 2006) vol 1, 80-95.
[130] Ibid.
[131] *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act 1896), 4 May 1896.
[132] *Berne Convention for the Protection of Literary and Artistic Works* (Berlin Act 1908), opened for signature 9 September 1908 (entered into force 13 November 1910) art 8.
[133] *Berne Convention* (n 130) art 2 & 7.
[134] See Talagala, supra note 129 at 126.

Following concerns over access to knowledge through translations in developing countries, the 1971 Paris revision of the *Berne Convention* introduced an Appendix to the Convention that provides flexibility that can be appropriated to translate foreign works into local languages to meet the education and research needs of developing countries.[135] However, as will be shown, this flexibility is limited in many regards and cannot significantly cater to the translation needs of Indigenous peoples globally.

The *Berne Appendix* permits a developing country to adopt a system of compulsory licenses for the translation of literary works under certain conditions for teaching, scholarship, and research.[136]

To be able to use the *Berne Appendix* flexibility to translate foreign works, a country must be regarded as a developing country according to the established practice of the UN General Assembly.[137] This is the first major restriction on the use of the flexibility. Countries that are not recognized as developing countries with the UN framework cannot appropriate the translation flexibility in the Appendix. This is notwithstanding the huge need for translated works by Indigenous peoples in developed countries like Australia, Canada, and the United States. Therefore, the Berne Convention's obligation regarding translation rights impedes affordable and timely access to knowledge in developing and linguistic minority communities within developed countries without providing any flexibility to cushion its effect.

Even for developing countries, the compulsory licensing system in the Berne Appendix cannot be automatically adopted. A country that desires to adopt the compulsory licensing system for translations must make a declaration to the Director-General of the World Intellectual Property Organization that it wishes to adopt the system.[138] This declaration gives the country the right to adopt the system for a ten-year term, renewable by the deposit of another declaration at least three months and at most 15 months before the end of the ten-year term.[139] Where a country has an effective declaration in place, it may then grant compulsory licences for the translation of a work, but only if a translation of the work sought to be translated by the applicant has not been published in 'a language in general use' in that country or where all the editions of the translation are out of print.[140]

In essence, the availability of a translation of a work in a language in general use in a country precludes a grant of a compulsory license for translation into languages that are not in general use and even for translation into other languages that may be in general use. While the Appendix does not define 'a language in general use', the General Report of the Paris Conference that led to the development of the Berne Appendix provides an authoritative interpretation for this requirement. According to the Report, 'it was understood that the notion of "a language in general use" in a country included languages in general use by less than the totality of the country's population. Thus, such a language could be a language in general use in a given geographic region of the country, the language of an ethnic group of the population, or a language generally used for

[135] *Paris Act 1971*, 24 July 1971, (entered into force 10 October 1974) art II [*Berne Appendix*]. See Salah Basalamah, "The Thorn of Translation in the Side of the Law: Toward Ethical Copyright and Translation Rights" (2001) 7:2 The Translator 155 at 156-7.
[136] Ibid art II sub-s (5).
[137] Ibid art I sub-s (1).
[138] Ibid art I sub-s (1)-(2).
[139] Ibid.
[140] Ibid art II sub-s (2).

particular purposes, such as government administration or education.'[141] This interpretation makes clear that "a" language in general use might not be spoken by everyone in the country and yet, once a work is available in such language, a translation licence cannot be obtained for translation into other languages that may be in use in the country. The flexibility in the *Berne Appendix*, therefore, provides no solution to the access needs of Indigenous peoples in developing countries where copyrighted works are available in a language in general use in the country they are geographically located in. Yet, as Cerda Silva points out, "When copyright blocks the translation of works into a minority language, its native speakers are forced to adopt a more generally used language, possibly condemning the minority language to extinction."[142]

If the developing country and availability of translation in a language in general use hurdles are successfully scaled, a person would be able to apply for the grant of a compulsory license for translation but not before the end of three years after the publication of the original edition of the work.[143] Even after this, the license cannot be issued until a further period of six months has elapsed from the date when the requirements as to notifications to the rightsholder are met.[144] If during this further six-month waiting time the rightsholder makes the translation of the work available in the language for which the translation licence is sought, the licence application must not be granted.[145] There is no requirement that copies of the translated work made by the rightsholder be widely available and/or affordable before the compulsory licence request is denied. A rightsholder can therefore act in bad faith to sabotage the compulsory licensing process without meaningfully catering to the market for translations by providing widespread and affordable access. Although Article 40 of the TRIPS Agreement allows Member States to specify in their national laws 'licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition', this provision only pertains to contractual licenses and not compulsory licenses. There is, however, no reason why countries may not apply such measures to prevent abuses of intellectual property rights under compulsory licensing schemes.

Where the rightsholder does not make a translated edition of the work available during the further waiting period, the translation licence would be granted subject to the payment of just compensation to the rightsholder.[146] It is required under the *Berne Appendix* that the compensation must be 'consistent with standards of royalties normally operating on licences freely negotiated between persons in the two countries concerned'.[147] The requirement to pay compensation makes it more expensive to embark on translation exercises for the benefit of Indigenous peoples and linguistic minorities. This is especially so in cases where the applicant for the compulsory license

[141] World Intellectual Property Organisation, *Records of the Diplomatic Conference for the Revision of the Berne Convention* (Paris, July 5 to 24, 1971), "General Report" (unanimously adopted on July 22, 1971 by the Plenary Conference) para 30.

[142] Alberto Cerda Silva, "Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright" (2012) PIJIP Research Paper No. 2012-08 at 25.

[143] *Berne Appendix* art II sub-s (2)(a). It is only in circumstances where the language sought to be translated to is not a language in general use in any of the developed countries within the Berne Union can the three-year waiting period be reduced to one-year. See *Berne Appendix* art II sub-s (3)(a).

[144] Ibid art II sub-s (4)(a). In terms of notifications to the rightsholder, an applicant must establish that a request to translate a work has been made to the rightsholder and been denied, or that after due diligence by the applicant, the rightsholder cannot be found. The applicant must also inform any pre-designated information centre in the country in which the publisher of the work carries on business. See *Berne Appendix* art IV sub-s (2).

[145] Ibid art II sub-s(4)(b).

[146] Ibid art IV sub-s (6).

[147] Ibid.

seeks to make translations of a work available on a not-for-profit basis. Considering that for a compulsory license to translate to be granted under the Appendix, there must be a decline by the rightsholder to directly cater to the market that needs access to translations, it seems quite unreasonable to require such rightsholder to be compensated for a market they are uninterested in and for such compensation to be at the same rate as freely negotiated licenses. It may be argued in the alternative that the requirement of paying royalties to the copyright owner should be retained while whether a work translated under a compulsory licence would be published and distributed on a non-profit basis should be a factor in determining the quantum of royalties. In this case, it would be expected that a licensee who hopes to make a profit would be willing to pay higher royalties than a licensee who has no such plan. However, the non-payment of royalties for persons who seek to make translations available on a non-profit basis must still be strongly considered as an incentive for the making of translations in Indigenous languages. This will further subsidize the costs of translations.

The many limitations and hurdles within the *Berne Appendix* make it ineffective as a tool for facilitating access to Indigenous peoples globally.[148] Perhaps the most significant of these limitations in the context of this paper is the inaccessibility of the flexibility in the Appendix to Indigenous peoples in developed countries who face similar challenges in accessing translation of useful works of knowledge for educational and other development purposes. Also important is the unavailability of the compulsory license for other local languages once a work has been translated into a language considered to be in general use in a country. These and other limitations and hurdles to enjoying the flexibility in the *Berne Appendix* necessitate a reform of the international copyright framework for access to translations. Even for developing countries, the Berne Appendix has been a failure as a framework for access.[149] As Silva pointed out, 'the Appendix comes across as an obsolete, inappropriate, bureaucratic, and extremely limited attempt to provide an air valve for developing countries'.[150]

The other flexibility for translations within the *Berne Convention* is contained in Art 30(2)(b) and is known as the 'ten-year regime'. By the provision of art 30(2)(b), a developing country is allowed to terminate the exclusive right of translation of a copyright owner if the work in which copyright subsists is not available in a language of general use in that country within ten years of the work's first publication. After ten years, the work falls into the public domain as far as the right of translation into a language of general use in that country is concerned, and translation can be freely done. In addition to being fraught with the developing country limitation, most countries cannot adopt the ten-year regime, because only countries that made a reservation to take advantage of this flexibility when ratifying or acceding to the *Paris Act* of the *Berne Convention* can have this exception in their domestic legislation. As such, since the adoption of the *Paris Act* of the *Berne Convention*, only four developing countries have reserved the right to adopt the ten-year regime.[151]

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[148] For a detailed review of the Berne Appendix and its limitations, see Basalamah, supra note 135 at 157-61 and Cerda Silva, supra note 142.

[149] Ruth L Okediji, "The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries" (Issue Paper No. 15, International Centre for Trade and Sustainable Development, March 2006) 15-16; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Queen Mary College 1987) 663.

[150] Cerda Silva, supra note 142 at 11.

[151] Since the adoption of the Berne Convention, only the following countries have reserved this right: Slovenia, Bosnia and Herzegovina, Croatia, and Serbia. See WIPO, WIPO Administered Treaties <https://www.wipo.int/treaties/en/ShowResults.jsp?search_what=N&treaty_id=15>.

The irrelevance of the ten-year regime further strengthens the argument that the international copyright system is in dire need of a viable legal framework for supporting access to translations for Indigenous peoples. While states have some autonomy to include an exception or limitation on copyright protection in their national copyright, the exception must meet the three-step test in Article 13 of the *TRIPS Agreement*.[152] Given the uncertainty around what exceptions will be interpreted as complying with the three-step test, it is important to have a more useful and certain mechanism for facilitating access to translations for Indigenous peoples within the international copyright system. Also, the importance of translations to education and human development necessitates incorporating mandatory exceptions in international copyright law that states must include in domestic copyright laws for the benefit of Indigenous peoples.

To facilitate access to translations for Indigenous peoples globally, it is recommended that a set of specific mandatory provisions that will serve as exceptions to the exclusive right of translation be introduced within the international copyright corpus. This should be similar to the legal intervention within the international copyright system for access to published works for visually impaired persons and other print-disabled persons.[153] At a minimum, the translation of a work into any Indigenous language in which such work is not hitherto available should be permitted by persons representing or working for the benefit of Indigenous peoples, without the authorization of the copyright owner. However, copies of such translation must be distributed to Indigenous peoples at no cost (other than the nominal cost of production) and the translated edition must be subject to an open licence. The moral rights of the author of the original edition of the work must be respected in the making, publication, and distribution of the translated edition.

Like the exceptions and limitations for access to published works for the benefit of print-disabled persons in the *Marrakesh Treaty*, there is human rights justification for the inclusion of a translation exception for the benefit of Indigenous groups in a country. The acute shortage or total lack of access to published works in Indigenous languages for the benefit of Indigenous peoples limits the ability of these persons to receive ideas, knowledge, and information in languages understandable to them. This invariably affects their enjoyment of the fundamental human right to education which is recognized in several international human rights instruments,[154] including the *UN Declaration on the Rights of Indigenous Peoples*.[155] The language barriers to access to published works suffered by Indigenous groups in developing and developed countries and the impact of that on the rights to education and the overall development of Indigenous peoples make it imperative to improve access to published works in Indigenous languages by exempting translations into such languages from the scope of the exclusive translation right granted to a copyright owner.

V. CONCLUSION

Australian Indigenous languages are on the verge of extinction. Incorporating Indigenous languages into the Australian educational curriculum will help preserve Indigenous languages. The

[152] Article 13 of the *TRIPS Agreement* provides that: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

[153] *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled*, (entered into force 30 September 2016) art 2-4.

[154] *Universal Declaration of Human Rights*, supra note 16, art 26; *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A(XXI) UNTS 993 (16 December 1966) art 13.

[155] *United Nations Declaration on the Rights of Indigenous Peoples*, supra note 54, art 14.

problem with this strategy is that the relevant educational contents required for learning are unavailable and inaccessible in Indigenous Australian languages. A solution would be to translate the relevant works from the original language to Indigenous languages. This strategy is however met with translation legal restrictions based on international and local copyright legislation, which restrict the translation of works without authorization. This paper emphasizes the importance of preserving Indigenous identity and argues for a translation exception at both national and international levels to overcome the current access and translation restrictions.

Translation facilitates access to knowledge, which is crucial to quality education for Indigenous peoples. For all to have equal access to knowledge embedded in copyrighted works, access must be possible in a language beyond the language in which the work was originally published. While copyright owners have translation rights that may be used to facilitate the translation of their works into other languages, it is impractical to expect that they would publish works in all languages of the world (particularly in the non-dominant and non-affluent languages) or grant translation licenses to every applicant. The transactional costs and administrative expenses involved in seeking a copyright owner for every work that is useful for education and learning and concluding a translation licensing contract with them make it more undesirable to rely on the translation right as a tool for facilitating translation for Indigenous peoples.

A mechanism that allows the translation of works into Indigenous languages for non-commercial purposes is essential to facilitate equal and inclusive access to education and development for Indigenous language speakers. In Australia, there is no specific translation exception that can be appropriated to promote access to translations for Indigenous Australians, and the blanket exception in section 200AB of the *Copyright Act* does not offer much support given the uncertainty surrounding the exact meaning of the exception and what uses will be permitted thereunder. It is therefore imperative that future law reform efforts be directed at including a translation exception into the *Copyright Act* for the benefit of Indigenous Australians. Efforts to close the development gap between Indigenous and non-Indigenous Australians, including notable gaps in educational outcomes, must necessarily include access to education and educational materials in Indigenous languages. A translation exception that facilitates access to useful works in these languages is an essential step toward closing the gap and promoting access to quality education amongst Indigenous peoples.

The need for access to translation is not limited to the Indigenous peoples of Australia. As shown in this paper, access to education in one's mother tongue is significant to great educational outcomes. The hundreds of millions of people who speak Indigenous languages must not be left behind in the global pursuit of quality education and learning for all, as outlined in the UN SDG4. An international response is required to address the existing challenge of access to translation. This challenge is worsened by the exclusive rights to translation that copyright owners hold for a long period. We argue that such an international response should take the form of a specific mandatory translation exception to facilitate access to published works in Indigenous languages in all countries within the international copyright system.

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