Call to Action:  
The Need for National Standards Surrounding *Gladue*

by

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Abstract

It has been two decades since the Supreme Court rendered its decision in *R v Gladue*, and yet Indigenous over-incarceration continues unabatedly. This thesis is rooted in the Missing and Murdered Indigenous Women and Girls Inquiry and explores its recommendation for national standards surrounding *Gladue* reports in Canada. It has been suggested that national standards, particularly in the realm of *Gladue* training, *Gladue* reports and for *Gladue* report writers, may assist in bolstering the remedial potentials of the *Gladue* principles and ultimately reduce Indigenous incarceration rates across Canada. Following a thorough review of *Gladue*-relevant literature, it is apparent that we lack evidence to support the development of standards in these areas, and it is therefore necessary that further research be conducted to move forward.

**Keywords:** *Gladue*, Over-incarceration, *Gladue* reports, National Standards
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Chapter One: Introduction

In *R v K.K.*, the Indigenous accused was arrested and charged for unlawfully importing heroin into Canada. At sentencing, the Court requested a formal *Gladue* report but was denied on the grounds that such reports were not available in the province of Quebec. Instead, the Indigenous accused was granted a pre-sentence report (PSR) with added *Gladue* content, written entirely in French – a language the accused did not understand. When the PSR was translated, the Court found no *Gladue* analysis and concluded that the report was “entirely inadequate.”

After the hearing, the accused, on her own volition, traveled to a courthouse in Montreal to obtain a *Gladue* report, only to find that she would have to pay for it herself. In the end, Aboriginal Legal Services (ALS) prepared a comprehensive *Gladue* report - eight months after she entered a guilty plea. Justice Hill, who presided over this case, identified the circumstances of the delay to be a “shameful wrong. [A] contempt for the rights of Aboriginal Canadians. A denial of equality.”

In *R v McKay*, the Indigenous offender was charged and convicted for drug related offences. A PSR was prepared for the sentencing hearing. The report, however, did not “expressly contain a *Gladue* component.” When the defence counsel requested an adjournment to obtain a proper *Gladue* report, the sentencing judge declined, stating that “I don’t think it’s necessary for a Pre-Sentence Report to address this issue. I think…I’m quite capable of addressing it as I am required to do.” It was of the view of the Court that the PSR provided

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3 *Ibid* at para 71.
5 *Ibid* at para 5.
6 *Ibid* at para 5.
sufficient information to address any Gladue factors, even in the absence of a Gladue analysis. When the case reached the British Columbia Court of Appeal, Justice D. Smith concluded that a post-sentence Gladue report would not have “benefitted Mr. McKay in regard to the outcome of the sentencing hearing.”

In R v Corbiere, the Indigenous offender pled guilty to one count of sexual assault and one count of robbery. At sentencing, Justice Pomerance noted that the Gladue report – previously completed for an offence from 2006 – needed to be updated. Counsel for the accused advised the Court that Aboriginal Legal Services (ALS) “did not have the funding to send a trained Gladue caseworker to Windsor” and that a Gladue report could only be completed if “correctional officials transferred [the accused] to the Sarnia jail.” The Court refused the suggestion of a transfer, stating that it merely offered a “band-aid solution” for the much larger systemic problem of limited Gladue services outside of city centres. Justice Pomerance subsequently ordered that funding for a Gladue worker to attend Windsor to prepare a Gladue report be provided by the Ministry of Community Safety and Correctional Services (MCSCS). However, before the Court could settle the funding matter with the Ministry, the Indigenous offender was transferred to the Sarnia jail where a Gladue report was completed. This transfer was conducted without any notice and against the Court’s order.

The aforementioned cases are just three examples of the decisions that have encouraged me to examine the systemic challenges faced by Indigenous people in exercising their Gladue rights. Each case demonstrates the complex challenges currently hindering the remedial

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7 Ibid at para 7 & 34.
8 R v Corbiere, 2012 ONSC 2405 [Corbiere].
9 Ibid at para 8.
10 Ibid at para 14.
11 Ibid at para 16.
capacities of *Gladue*. Furthermore, they highlight how these challenges have deleterious impacts on Indigenous offenders at sentencing and contribute to the much larger, ongoing crisis of Indigenous overincarceration.

Indigenous people are significantly overrepresented in Canadian prisons. In the context of admissions to custody, overrepresentation is most commonly determined by comparing the percentage of the national Indigenous population to the percentage of the Indigenous federal inmate population. In January 2020, the Correctional Investigator of Canada confirmed that the population of Indigenous people in federal custody has surpassed 30%, even though they account for roughly 5% of the national population. If Indigenous people comprise nearly 5% of the Canadian population then in terms of proportionality, they should account for no more than 5% of federal admissions to custody. However, the fact that they account for more than 30% of federal prison populations signifies that they are grossly overrepresented in the Canadian carceral system. Over the last 10 years, the non-Indigenous federal prison population has steadily decreased by 13.7% while Indigenous admissions to federal custody has increased, unabated by 43.4%.

Concerned about the seemingly intractable rise of Indigenous incarceration rates, the federal government in the early 1990’s began deliberating on sentencing reforms as a possible

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14 *Ibid. See also* Julian V. Roberts and Andrew A. Reid, “Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story” (2017) 59:3 *Canadian Journal of Criminology and Criminal Justice* 313 at 322.
means for responding to this growing social and political problem. In 1996, the Parliament of Canada enacted section 718.2(e) of the Criminal Code as a remedial provision to address the grossly disproportionate incarceration rates of Indigenous offenders in Canadian prisons. The provision obliged the judiciary to “consider all available sanctions, other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or to the community, … with particular attention to the circumstances of Aboriginal offenders.” This provision became one of the guiding principles for sentencing Indigenous offenders in Canada.

The first case to interpret section 718.2(e) was R v Gladue, which confirmed that courts sentencing Indigenous offenders 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.

This Supreme Court decision in Gladue created what has since become known as the Gladue principles and which serve as a mechanism to aid courts in crafting fit and proportionate sentences. It imparts a statutory responsibility on sentencing judges to use their discretion within the limits of the law to determine the most appropriate sanction based on an offender’s unique and individual circumstances. Together, section 718.2(e) and the Gladue principles are intended to combat Indigenous overincarceration. What is surprising, however, is that in the 20 years that have passed since the creation of the section and the Gladue principles, the remedial objectives of the Gladue decision and section 718.2(e) have utterly failed to produce any

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16 Criminal Code of Canada, RSC., 1985, C-46, s. 718.2(e).
18 Ibid at para 66.
19 Ibid.
meaningful reduction in Indigenous incarceration rates in Canada.\textsuperscript{20} When section 718.2(e) was enacted in 1996, Indigenous people accounted for 15\% of federal admissions to custody and 16\% of provincially sentenced admissions.\textsuperscript{21} Today, Indigenous people represent more than 30\% of admissions to custody in both federal and provincial/territorial institutions.\textsuperscript{22}

In the years following the \textit{Gladue} decision, \textit{Gladue} reports emerged as common practice in some jurisdictions to assist judges in the application of the \textit{Gladue} principles during sentencing.\textsuperscript{23} \textit{Gladue} reports are comprehensive pre-sentence reports (PSRs) that provide judges with a complete picture of an Indigenous offender’s background, family, and life circumstances. These reports are crafted specifically for Indigenous offenders and include “the unique context in which the offender committed the crime, while also addressing what continues to bring the offender before the court”.\textsuperscript{24} Under case law, access to a \textit{Gladue} report has been deemed a positive right held by Indigenous offenders.\textsuperscript{25} However, as will be demonstrated throughout this thesis, there are numerous challenges limiting access to \textit{Gladue} reports across Canada.

Over the past two decades, scholars investigating the remedial impacts of \textit{Gladue} have produced a complex set of reasons for \textit{Gladue}’s failure to reduce Indigenous incarceration rates.

\begin{itemize}
\item \textsuperscript{24} \textit{Ibid} at 278-79; Hebert, \textit{supra} note 20, at 157; Jay Istvanffy, \textit{Gladue Primer}, reprinted ed (British Columbia, Legal Services Society: 2012).
\item \textsuperscript{25} \textit{Ibid} at 156; R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at para 60.
\end{itemize}
Some of these reasons include concerns regarding the amount of cultural, historical and contextual information available to judicial officers; a lack of clarity across some courts on how best to apply the Gladue principles; the absence of an intersectional lens in Gladue reports for Indigenous women; a failure at federal and provincial levels to resource and equip not only Gladue organizations to provide Gladue reports to courts, but also to support community-based programs and alternatives to incarceration; and longstanding tensions between law enforcement and Indigenous people. While these reasons are important to discussions concerning Gladue, for purposes here, this thesis takes its lead from the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) and engages with one particular challenge: the need for national standards surrounding Gladue. Here, I will discuss how the implementation of national standards may assist in bolstering the remedial potential of Gladue while remedying some of the current challenges facing the principles by engaging in a critical discussion of what those standards should encompass.

In 2019, the National Inquiry into MMIWG launched an investigation into the “systemic causes of all forms of violence against Indigenous women and girls.”\textsuperscript{32} The purpose of this inquiry was to examine the “underlying historical, social, economic, institutional and cultural factors” that contribute to the increased violence endured by Indigenous females and to report on existing policies and practices that may assist in “reducing violence and increasing safety” for this vulnerable population.\textsuperscript{33} Results of the inquiry confirmed that Indigenous females experience disproportionate levels of racial and gendered violence.\textsuperscript{34} As part of the report, the inquiry proposed 231 Calls for Justice, one of which recommended national standards for \textit{Gladue} reports:

\begin{quote}
5.15 We call upon federal, provincial, and territorial governments and all actors in the justice system to consider \textit{Gladue} reports as a right and to resource them appropriately, and to create national standards for \textit{Gladue} reports, including strength-based reporting.\textsuperscript{35}
\end{quote}

Currently, there is limited research examining the challenges surrounding \textit{Gladue} from a policy standpoint. Most of the literature exploring the \textit{Gladue} decision has tended to analyze the impacts of this phenomenon from a legal or theoretical perspective.\textsuperscript{36} However, since the publication of the national inquiry into MMIWG, there has been no serious engagement with the question of whether national standards could be a viable solution to some of the limitations of the \textit{Gladue} requirements.\textsuperscript{37} Hence, this thesis offers a critical discussion on why such standards are


\textsuperscript{33} Ibid.

\textsuperscript{34} MMIWG Inquiry, \textit{supra} note 31, at 174.

\textsuperscript{35} Ibid, at 185.

\textsuperscript{36} Hebert, \textit{supra} note 20; Baigent, \textit{supra} note 28; Savarese, \textit{supra} note 28; Dickson & Smith, \textit{supra} note 29, at 25; Samantha Jeffries & Christine E. W. 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.

necessary and what they ought to address. As will be shown, the establishment of national standards is important for at least three key considerations related to the quality, impact and reach of *Gladue* reports, including specifically: (1) adequate and accessible training for criminal justice actors involved in the *Gladue* report process; (2) appropriate standards for writers in the production and delivery of *Gladue* reports; and (3) clear guidelines on the content and formatting of *Gladue* reports.\(^3\)

**Structure of the Thesis:**

My thesis is presented in four chapters. Following this introduction, Chapter Two opens with a brief history of section 718.2(e), *R v Gladue* and a review of key cases that have refined and reiterated the significance of the *Gladue* principles. This initial chapter will establish a foundation for the thesis and an understanding of *Gladue* by providing a legislative history of the principles and identifying the statutory obligations imparted on the Canadian judiciary under section 718.2(e) when sentencing Indigenous offenders. Chapter Three examines governmental inquiries, particularly the Truth and Reconciliation Commission (TRC) Final Report and the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG), that have explicitly acknowledged rising Indigenous incarceration rates and, in the MMIWG report, the need for national standards in the implementation of the *Gladue* principles. Examining governmental inquiries is noteworthy for the purposes of identifying the decades of national inquiries that have called attention to Indigenous overincarceration in Canada and the

need for further governmental intervention to remedy this growing crisis. Following this, Chapter Four demonstrates the need for national standards for Gladue through a critical discussion on the multifaceted challenges facing Indigenous people in exercising their rights under section 718.2(e) and the Gladue principles. And finally, Chapter Five addresses the current challenges facing Gladue by identifying research gaps and proposing several recommendations that should be considered by any policy surrounding Gladue.

Methodology

The fundamental goal of this thesis is to investigate whether the development of national standards can mitigate Indigenous overincarceration rates by addressing the current policy limitations impacting the implementation of the Gladue principles. While national standards could apply to many aspects of the Gladue principles, the limited available research surrounding Gladue suggests that standards are strongly required for Gladue report writers, the format of Gladue reports and the training provided to criminal justice actors involved in the Gladue process, including judges, lawyers, and Gladue writers.39 As such, this thesis project employs a qualitative analysis of case law and governmental inquiries exploring the significance of section 718.2(e) and the Gladue principles as well as the need for such standards.

A critical examination of case law is necessary to an analysis of section 718.2(e) and the Gladue principles. The foundational elements of these sentencing requirements are embedded within 20 years of precedent that has refined and reiterated the statutory obligations imparted on

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the Canadian judiciary. Thus, precedent is essential in identifying the legal requirements that must be considered for any policy surrounding Gladue. The inclusion of governmental inquiries serves to highlight the decades of research that have recapitulated similar findings: that Indigenous overincarceration rates are a crisis requiring further attention and governmental intervention. Many of these inquiries have put forward recommendations and solutions to address rising incarceration rates, however, none appear to have had positive effects or proven able to arrest the relentless rise in Indigenous prison populations. And lastly, scholarly literature is required to situate the research topic within academia and to inform readers of the systemic issues that currently disadvantage Indigenous people in the Canadian criminal justice system.

**Key Considerations**

Historically, a wide variety of terminology has been used to describe the first inhabitants of Canadian lands, including the terms “Aboriginal” and “Indigenous.” Prior to 2012, the term “Aboriginal” was predominately used within society and it continues to be the most commonly used term amongst courts. In more recent years, critics have denounced the use of that term indicating that it usurped individual identity and placed Indigenous groups within a broad, homogenous category, and that we should instead be using the term “Indigenous” as a form of

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41 Ibid.

recognition of the diverse First Nations, Inuit, and Métis groups in Canada. Shifting from “Aboriginal” to “Indigenous”, however, simply reframes the same group of individuals from one broad homogenous group to another. Both titles mask the individuality and cultural diversity of the first inhabitants of Canada. As the resolution of this issue is beyond the parameters of this thesis and not the appropriate task for a non-Indigenous person, for purposes here, the term “Aboriginal” will be used when referring to the language noted within case law and governmental inquiries. Outside of this context, the term “Indigenous” will be used.

Finally, as a non-Indigenous, East Indian woman, exploring the delicate topic of Indigenous overincarceration and the need for national standards supporting Gladue, I acknowledge my position of privilege and the Eurocentric upbringing that I have lived. Despite being a minority, I have not lived the same experiences of Indigenous people in Canada. Their realities are unique, distinct, and diverse. I do not wish to speak for Indigenous people, but rather assist in raising awareness of the systemic challenges precluding many from effectively exercising their Gladue right.
Chapter Two: A Brief History of Gladue

In 1991, the province of Manitoba published the *Report of the Aboriginal Justice Inquiry of Manitoba*, which detailed the egregious overincarceration rates of Indigenous people in Manitoba institutions and provided several recommendations to combat the rising admissions to custody. The report demonstrated that, although Indigenous people accounted for 11.8% of the general population, they represented more than 50% of the prison population in Manitoba.\(^{43}\) This report fostered a growing acknowledgement of the seriousness of the crisis of Indigenous overincarceration, so much so that it prompted the Canadian legislature to create a new sentencing regime for Indigenous offenders.

In 1996, the Parliament of Canada enacted section 718.2(e) of the *Criminal Code* as a remedial provision to address the grossly disproportionate incarceration rates of Indigenous offenders in Canadian prisons. The provision instructed the judiciary as follows:

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

... \(^{11}\)

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.\(^{44}\)

Prior to 1996, background information corresponding to an offender’s circumstances or “narratives of cultural and race histories”, were often disregarded and considered irrelevant in

\(^{43}\) The Aboriginal Justice Implementation Commission, *supra* note 40.

\(^{44}\) *Criminal Code of Canada, supra* note 16, at s. 718.2(e). This section has been amended since 1996. See legislation for full text and updated section: <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-718.2.html>.
criminal justice proceedings.\textsuperscript{45} The establishment of section 718.2(e) “enabled evidence of contextualized Aboriginal knowledges to enter the courtroom.”\textsuperscript{46} At the time of its enactment, Indigenous people represented only 3\% of the national population, but accounted for 15\% of admissions to federal institutions and 16\% of provincial and territorial admissions to custody in Canada.\textsuperscript{47} Thus the provision sought to remedy the growing involvement of Indigenous peoples within the criminal justice system.

Section 718.2(e) is one of the guiding principles for sentencing Indigenous offenders within Canada. However, its proper application and understanding cannot be simply derived from its plain text. Rather, the true meaning of this particular provision is located within twenty years of precedent that has refined and reiterated its intended purpose.\textsuperscript{48} The following section outlines the legal principles behind section 718.2(e) by referencing the relevant case law that has expressly defined the affirmative obligations of sentencing judges in Canada. The purpose here is to demonstrate the roles and responsibilities of criminal justice actors under this provision, which will later be juxtaposed with how it is utilized in the trenches of the Canadian legal system.

\textit{R v Gladue and the Sentencing Principles of Section 718.2(e)}

In 1999, \textit{R v Gladue} became the first Supreme Court of Canada case to determine the applicability and significance of section 718.2(e). The case involved a young Indigenous woman named Jamie Tanis Gladue, charged with manslaughter for the death of her common law partner.\textsuperscript{49} While the Supreme Court deemed the appellant’s initial sentence to be reasonable and


\textsuperscript{46} Ibid.

\textsuperscript{47} Reed & Roberts, \textit{supra} note 21.

\textsuperscript{48} \textit{R v Sand}, 2019 SKQB 18 at para 16 [\textit{Sand}].

\textsuperscript{49} \textit{Gladue}, \textit{supra} note 17.
proportionate to the facts of the case, the court found that both the sentencing judge and the Court of Appeal erred in their application of section 718.2(e). Specifically, the Supreme Court found that the lower court decisions failed to consider the background circumstances of the offender that could have influenced her deviant behaviour.\textsuperscript{50} As such, the Supreme Court sought to clarify the role of sentencing judges under section 718.2(e) by creating a new sentencing regime applicable to Indigenous offenders. This specific sentencing regime imparts a statutory obligation on judges to consider “the distinct situation of Aboriginal peoples in Canada,” particularly and including:

(c) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(d) 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.\textsuperscript{51}

This Supreme Court decision created what has since become known as the \textit{Gladue} principles, through which the Court sought to affirm the significance of section 718.2(e) and to oblige the judiciary to use their discretion within the limits of the law to consider alternatives to incarceration for Indigenous offenders. As stated by the Court in \textit{Gladue}, the fundamental purpose behind section 718.2(e) is to remedy the overincarceration rates of Indigenous offenders by calling upon judges to use a different “method of analysis…in determining the nature of a fit sentence for an aboriginal offender.”\textsuperscript{52} It should be emphasized that this principle does not automatically grant Indigenous offenders a lesser sentence, nor does it trump or restrain full consideration of the sentencing objectives of “deterrence, denunciation, and separation”.\textsuperscript{53}

Instead, the \textit{Gladue} principles employ a specific methodology to sentencing – one that is holistic

\textsuperscript{50} \textit{Ibid} at para 94-95.

\textsuperscript{51} \textit{Ibid} at para 66.

\textsuperscript{52} \textit{Ibid} at para 33.

\textsuperscript{53} \textit{Ibid} at para 78. See also \textit{R v Chanalquay}, 2015 SKCA 141 at para 38 [\textit{Chanalquay}].
and accompanied by an understanding of both (a) the unique systemic and background factors of a particular Indigenous offender and, (b) the available sentencing procedures and sanctions that may be appropriate for the offender, given their unique background, circumstances and Aboriginal heritage.\textsuperscript{54} As will be argued below, such consideration is vital to the reduction of Indigenous incarceration rates.

Indigenous Nations, communities, and people across Canada have a unique history that is separate and distinctive from non-Indigenous Canadians. The abhorrent history of colonization, dislocation, and residential schools has resulted in deleterious effects that continue to overwhelm Indigenous people today. It is these particular effects that the court in \textit{Gladue} has called attention to in part (a) of this two-pronged sentencing regime. Systemic and background factors, also known as \textit{Gladue} factors, provide additional context for sentencing judges. Such factors are unique to each Indigenous offender and can include a multitude of experiences, such as poverty, substance abuse, foster care, dislocation from an Indigenous community, and so on. Hence consideration of systemic and background factors serves to recognize how the deleterious effects of colonialism impact and accumulate over the generations and often reduce the life choices of Indigenous people:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters…provide the necessary context for understanding and evaluating the case-specific information presented by counsel.\textsuperscript{55}

\textsuperscript{54} Ibid.
\textsuperscript{55} Ipeelee, \textit{supra} note 25, at para 60; Note that the court’s depiction of \textit{Gladue} factors is not an exhaustive list and can include additional circumstances and/or considerations depending on the case at hand. See also \textit{K.K., supra} note 1, at para 54(4) for further explanation on the consideration of systemic and background factors.
It comes as no surprise that this history, along with its extensive list of implications, has produced a dramatic increase in Indigenous incarceration rates in Canada. While the Court in *Gladue* acknowledged that these factors may also impact non-Indigenous offenders, research has repeatedly shown that Indigenous people are continuously impacted by the residual effects of colonialism and are more likely to receive sentences that result in incarceration.\(^56\) Thus, section 718.2(e) serves to recognize that these factors warrant further consideration in the sentencing process to determine the most appropriate sanction for each Indigenous offender before the court.

When crafting a fit and proportionate sentence, judges ought to consider how the systemic and background factors of an offender may impact their level of culpability and moral blameworthiness. This process is highly individualized and is dependent on “all [the] surrounding circumstances of the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person.”\(^57\) Moral blameworthiness refers to an offender’s “morally culpable state of mind.”\(^58\) If the unique and systemic background factors are determined to have influenced the offender’s conduct and their involvement in the system, then “this would reduce his or her level of blameworthiness and, accordingly, mitigate the sentence”.\(^59\) Likewise, where an offender’s level of moral blameworthiness is believed to be elevated, the sentence can be increased accordingly. A fit and


\(^{57}\) *Ibid* at 81.


proportionate sentence cannot be rendered without an account of the offender’s level of moral blameworthiness.

Consideration of the background and systemic factors of an offender provides a context for sentencing judges in their deliberations on how best to sentence an Indigenous offender. Such factors, however, do not dictate what type of sentence an Indigenous offender shall receive. Where such factors prove to have significantly impacted a particular Indigenous offender, judges must consider whether incarceration would be the most appropriate sanction or whether the sentencing principles of deterrence, denunciation, and separation can be satisfied by a non-custodial sentence. This brings us to the second requirement of the Gladue principles – consideration of the types of sentencing procedures and sanctions that may be appropriate in the circumstances of the Indigenous offender.

Once having considered the background and systemic factors of an Indigenous offender, judges are obligated to consider available alternatives to incarceration that may be appropriate for the offender, based on their circumstances and Indigenous heritage. This sentencing requirement is crucial for the reduction of Indigenous prison populations because it acknowledges that our current sentencing regime fails to appropriately respond to the “needs, experiences, and perspectives of aboriginal people or aboriginal communities.” Thus, the court in Gladue stated that sentencing judges must consider how a restorative approach to sentencing – whether that be programming, community-based sanctions, or other available alternatives to incarceration – may be more conducive to rehabilitation and restoration for the offender. Where there is an absence or lack of available alternatives to incarceration, the court must continue to

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60 Gladue, supra note 17, at para 88; Chanalquay, supra note 53, at para 34.
61 Ibid at para 69.
62 Ibid at para 73.
employ a restorative approach to determine the most appropriate sanction. Said otherwise, courts must not assume that a lack of available programming, treatment, and community-based sanctions eliminates their statutory obligation to impose a sentence that “takes into account the principles of restorative justice and the needs of the parties involved.”

In the trenches of our criminal justice system, this is easier said than done. Given the significant lack of available alternatives to incarceration in many Indigenous communities, sentencing judges may not always be equipped with the appropriate resources and alternatives to impose a non-custodial sanction. In the absence of viable community-based options, courts may consider the quantum of sentence, but a lack of available alternatives to imprisonment does not automatically justify a shorter carceral sentence. In these instances, sentencing judges are simply limited in their choice of penalty and must carefully consider the length of term of imprisonment on a case-by-case basis. This, of course, is inconsistent with the remedial goals of the Gladue principles as it inhibits meaningful reduction in Indigenous overincarceration rates.

In sum, the Gladue principles direct judges to use their broad discretion to craft sentences that balance the objectives of sentencing with the circumstances of the offender and the case at hand. The Court in Gladue not only gave life and meaning to section 718.2(e) but it acknowledged that Indigenous people require more “creative and innovative solutions” to account for their social, political, and economic hardships. However, the determination of a “fit” sentence must occur on an individual, case-by-case basis, meaning each sentence must be

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63 Ibid at para 74.
65 Gladue, supra note 17, at para 80 & 93.
66 K.K., supra note 1, at para 7.
appropriate based on *all* the relevant information of a given offender as well as the nature of the offence. Thus, judges ought to consider the following question: “For *this* offence, committed by *this* offender, harming *this* victim, in *this* community, what is the appropriate sanction under the *Criminal Code*?”

As famously stated by Justice Hill in *R v KK*, “[t]his is not reverse discrimination. It is an acknowledgement that to achieve real equity, sometimes different people must be treated differently.”

**Gladue Reports**

In the years following the *Gladue* decision, *Gladue* reports emerged as a new form of pre-sentence reports (PSRs) to assist judges in determining appropriate sentences for Indigenous offenders. *Gladue* reports are intended to provide a comprehensive overview of an Indigenous offender’s background by “situating their information in a broader social-historical group context … and reframing [their] risk/need by holistically positioning the individual as part of a broader community and as a product of many experiences.” These reports typically contain several categories of information relevant to the Indigenous offender’s systemic and background factors, including the offender’s personal and family history (i.e., attendance at residential school, foster care, abuse, their personal relationships with friends and family, and so on), their current circumstances (poverty, health, and so on), an overview of their Indigenous community or Nation, and culturally appropriate, available alternatives to incarceration and/or mainstream healing resources.

In essence, *Gladue* reports serve to inform sentencing judges “of the unique

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67 *Gladue*, supra note 17, at para 80. Emphasis included in original text.
context in which the offender committed the crime, while also addressing what continues to bring the offender before the court.”

According to jurisprudence reaffirming the significance of the *Gladue* decision, the unique circumstances of an Indigenous offender are best relayed in the form of a *Gladue* report and should be done so in a timely matter in accordance with section 720 of the *Criminal Code*. These reports are intended to not only aid sentencing judges in fulfilling their statutory obligations under section 718.2(e) and the *Gladue* principles, but they can also serve as a remedial tool for Indigenous overincarceration rates by presenting a comprehensive history of each offender and recommending culturally informed alternatives to imprisonment. Such reports continue to be regarded by many judges and scholars as the most efficient method for relaying *Gladue* information to sentencing judges. Further information on the elements of a *Gladue* report can be found in Chapter 4 of this thesis.

**Jurisprudence Reaffirming the Significance of Section 718.2(e) and The *Gladue* Principles**

Over the past two decades, an abundance of case law has recapitulated the importance of section 718.2(e) and its objectives of reducing Indigenous overrepresentation in the Canadian criminal justice system. In 2012, the Supreme Court in *R v Ipeelee* further refined the *Gladue* principles and re-emphasized the remedial significance of section 718.2(e). This case involved two appeals, both of which involved Inuit offenders charged with breaching the terms of their long-term supervision orders and which the Court considered together. In both cases, the

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72 *Criminal Code of Canada*, *supra* note 16, at s. 720: “A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.”
Supreme Court found that the lower courts had failed to acknowledge the appellants’ Indigenous backgrounds.\textsuperscript{74} To this end, the Court sought to reaffirm the significance of section 718.2(e) and the \textit{Gladue} principles by providing further clarification of the statutory obligations of sentencing judges under these requirements.

The Court explained, first, that “sentencing judges have a \textit{duty} to apply section 718.2(e)” in every case involving an Indigenous offender, including those considered to be serious in nature, and that this obligation does not vary depending on the offender or the facts of the case at hand.\textsuperscript{75} This requirement is mandatory and the “failure to apply \textit{Gladue}…runs afoul of this statutory obligation.”\textsuperscript{76} Similar decisions have reinforced this position, including \textit{Chanalquay, K.K., Sand, Moise,} and \textit{Macintyre-Syrette}.	extsuperscript{77} This iteration of the \textit{Gladue} in \textit{Ipeelee} is quite significant as it emphasizes that section 718.2(e) is an inclusive sentencing principle that does not require a possible loss of liberty to be actioned, meaning that section 718.2(e) is applicable in all cases regardless of whether an Indigenous offender is facing a lengthy term of imprisonment and a subsequent loss of liberty. Unfortunately, Alberta is the only Canadian province that has accepted this iteration of \textit{Gladue} and thus mandates that \textit{Gladue} reports be provided to Indigenous offenders at sentencing, while elsewhere a possible loss of liberty has become a qualifying factor to obtain a \textit{Gladue} report.\textsuperscript{78} However, whether Alberta does in fact adhere to their mandated claims is a matter worth investigating as there remain several regions where access to a \textit{Gladue} report is reportedly not possible and the number of \textit{Gladue} reports produced within a year is inconsistent with the number of Indigenous offenders sentenced to custody.\textsuperscript{79}

\textsuperscript{74} \textit{Ipeelee, supra} note 25.
\textsuperscript{75} \textit{Ibid} at para 85-86; \textit{Macintyre-Syrette, supra} note 73, at para 18.
\textsuperscript{76} \textit{Ibid} at 87.
\textsuperscript{77} \textit{Chanalquay, supra} note 53, at para 34; \textit{K.K., supra} note 1, at para 54; \textit{Sand, supra} note 48, at para 21; \textit{R v Moise, 2015 SKCA 39} at para 26 [\textit{Moise}]; \textit{Macintyre-Syrette, supra} note 73, at para 18-19.
\textsuperscript{78} \textit{Hebert, supra} note 20, at 164; \textit{Dickson & Smith, supra} note 29, at 30.
\textsuperscript{79} \textit{Ibid}. Further exploration of these points is provided in Chapter 4.
Second, Indigenous offenders shall not bear the burden of establishing a causal link between their background factors and the commission of their offence before exercising their right to have the sentencing judge consider those matters on their own.\textsuperscript{80} As noted by the Court in \textit{R v Collins}, “[t]here is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused….”\textsuperscript{81} Such an expectation would undermine the remedial objectives of section 718.2(e). Third, the Court in \textit{Ipeelee} reaffirmed the significance of the statutory obligation imparted on sentencing judges to consider how the circumstances of an Indigenous offender bear on their culpability and level of moral blameworthiness.\textsuperscript{82} The purpose here is not to establish a relationship between the \textit{Gladue} factors and the offence, but rather to assess whether the circumstances of the offender influence their degree of blameworthiness.

And finally, the Court expressly acknowledged \textit{Gladue} reports as a method of assisting sentencing judges in conducting the \textit{Gladue} analysis for each Indigenous offender. Specifically, Justice LeBel noted that “case-specific information is often brought before the court by way of a Gladue report” and that bringing such information before the court “in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under section 718.2(e) of the \textit{Criminal Code}.“\textsuperscript{83}

There is an abundance of jurisprudence reaffirming the need for \textit{Gladue} reports at sentencing. For instance, the court in \textit{Macintyre-Syrette} confirmed that “the ordinary source of this information is the Gladue report.”\textsuperscript{84} Similarly, Justice Joy in \textit{R v Noble}, acknowledged that \textit{Gladue} reports, “since the late 1990s, [are] pretty well a mandatory requirement for the

\textsuperscript{80} \textit{Ipeelee}, supra note 25, at para 81.
\textsuperscript{81} \textit{R v Collins}, 2011 ONCA 182 at para 32-33 [\textit{Collins}].
\textsuperscript{82} \textit{Ipeelee}, supra note 25, at para 73.
\textsuperscript{83} \textit{Ibid}, at para 60.
\textsuperscript{84} \textit{Macintyre-Syrette}, supra note 73, at para 15.
sentencing of any Aboriginal offender…. Aboriginal offenders may waive the preparation of such a report, but the burden is on the judges, nonetheless, to satisfy themselves that they know enough about Aboriginal offenders who appear before them to proceed with sentencing hearings.”

Indeed, Indigenous offenders may choose to forgo a Gladue report; however, the burden remains with sentencing judges to acquire the relevant information of Indigenous offenders prior to sentencing. Despite the copious decisions supporting the application of Gladue reports, research continues to display the harsh reality that such reports are scarcely used in practice. Instead, Gladue information is presented in alternative means such as PSRs, Gladue letters, and most commonly, by way of oral submission by defence counsel. This does not necessarily indicate that an alternative submission to a Gladue report contravenes section 718.2(e), but as will be demonstrated in Chapter 4 of this thesis, it does present additional challenges and consequences at sentencing.

Calls to Action: The Need for National Standards

It has been two decades since the Supreme Court of Canada established the Gladue requirements through its landmark decision in R. v Gladue, requiring the courts to consider the unique systemic and background factors of Indigenous offenders and alternatives to incarceration.

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85 Noble, supra note 73, at para 68-69.
86 Section 718.2(e) of the Criminal Code is a right that every Indigenous person before the court can exercise at the sentencing phase. “Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived.” Gladue, supra note 17, at para 83. However, according to recent findings by Dickson & Smith, courts have attributed the two most common reasons behind an Indigenous offender’s choice to waive the Gladue requirements to (1) lengthy production times for a report that may exceed the offender’s time spent in custody, and (2) an unwillingness share and/or an inability to access their personal and family history. Dickson & Smith, supra note 29, at 17, 19.
87 Pfefferle, supra note 64, at 123; Hebert, supra note 20, at 152; Ralston & Goodwin, supra note 23, at 120.
88 Hannah-Moffat & Maurutto, supra note 23.
89 Dickson & Smith, supra note 29, at 14; Hebert, supra note 20; Pfefferle, supra note 64, at 124.
in sentencing. While the decision sought to affirm the remedial significance of section 718.2(e), research conducted within the years since *Gladue* demonstrates that the issue of Indigenous overincarceration has continued unabated. Indeed, the circumstances of Indigenous overincarceration in Canadian prisons and jails has worsened, suggesting that the *Gladue* principles failed to produce considerable change within the criminal justice system.

Currently, Indigenous people represent nearly 5% of Canada’s entire population, but account for more than “30% of all sentenced admissions to custody” in Canadian federal and provincial/territorial institutions.\(^{90}\) In 2019, Indigenous adults represented 31% of the inmate population in provincial and territorial institutions, and 29% federal institutions. In the same year, Indigenous youth, ages of 12-17, accounted for 43% of admissions to correctional services while representing only 8.8% of the Canadian youth population.\(^ {91}\) Even more surprising, however, are the statistics on incarcerated Indigenous women. While Indigenous men account for 28% of admissions to custody in provincial and territorial institutions, Indigenous women represent more than 42% of admissions to custody, which is a 66% increase in female incarceration rates since 2008.\(^ {92}\) Recently, the Office of the Correctional Investigator released a statement indicating that the proportion of incarcerated Indigenous women “is nearing 50% of all federally-sentenced women.”\(^ {93}\) It is important to note that these statistics on Indigenous overrepresentation in Canadian provincial/territorial and federal institutions may in fact be higher, given that they neglect to account for those for whom Indigenous identity is unknown.\(^ {94}\)

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\(^{91}\) Malakieh, *supra* note 22, at 7. (Statistics exclude the provinces of Nova Scotia, Quebec, Alberta and Yukon due to the unavailability of data).

\(^{92}\) *Ibid*.


In light of the data presented above, it is evident that the issue of Indigenous overrepresentation in the Canadian criminal justice system is nothing short of a national crisis that continues to persist. Yet despite the abundance of research showcasing ever-rising incarceration rates, the federal government has been reluctant to implement national policy standards that support the sentencing requirements under section 718.2(e). Establishing national standards would not only create consistency in the way Indigenous offenders are sentenced in Canada, but it would also be an acknowledgment of the need to uphold the Supreme Court decision in *Gladue*. However, as will be demonstrated in the forthcoming chapters, the establishment of national standards is easier said than done, as the lack of engagement from the Canadian government, along with the chronic misconceptions about the *Gladue* principles, have resulted in significant variability in the application of *Gladue* in sentencing decisions over the last twenty years.
Chapter Three: Calls to Action

Background

The history of Indigenous people and colonialism in Canada is one of trauma, loss and increasingly, resilience. Prior to settler-Indigenous contact, Indigenous communities across North America engaged in traditional and ceremonial practices, free from colonial restraints.95 Their identities and ontologies were shaped through their strong connections to ancestral lands, self-determination, oral histories, spirituality, and cultural practices.96 However, the lives of Indigenous people were severely disrupted upon the arrival of European settlers and the establishment of harmful state-sanctioned policies, including the Indian Residential School (IRS) system. For over 100 years, Indigenous children were stripped from their families, forced into residential schools, and subjected to educational regimes that sought to transform “savagery” into “civility”.97 The objective of the federal government was to indoctrinate Indigenous people into “self-sufficient entities” that could contribute to the dominant Euro-Christian society in the hopes that it would reduce the government’s financial obligation to support First Nation communities.98

Many, if not most, children interned in residential schools were prevented from practicing their Indigenous languages, traditions, and beliefs, and many were subjected to “chronic mental, physical and sexual abuses.”99 Numerous residential schools also experienced high rates of death resulting from the spread of infections, hunger, abuse, and a lack of medical attention.100 Early

96 Ibid; Lawrence, supra note 42.
97 Royal Commission on Aboriginal Peoples, supra note 40, at 349.
99 Amy Bombay, Kimberly Matheson & Hymie Anisman, “The Intergenerational effects of Indian Residential Schools: Implications for the concept of historical trauma” (2014) 51:3 Transcultural Psychiatry 320 at 323.
100 The Truth and Reconciliation Commission of Canada, They Came for the Children: Canada,
estimates of deaths at the schools fell between 40 and 60 percent\textsuperscript{101}, however, recent discoveries of unmarked graves in the vicinity of many of the schools suggest those rates may be much higher. Between May 2021 and March 2022, several First Nations communities in British Columbia, Alberta, Manitoba, and Saskatchewan uncovered more than 1,700 unmarked graves at the sites of former residential schools.\textsuperscript{102} The mass graves are believed to contain the remains of Indigenous children as young as three-years-old who previously attended these residential schools. It is estimated that the total IRS system death rate ranges from 6,000 to 25,000.\textsuperscript{103} Given that 75\% of all Indigenous children in Canada had, by 1930, attended the schools\textsuperscript{104}, it is likely that the residential school policy was responsible for the near eradication of roughly two generations of Indigenous children.

For those who survived, the effects of the IRS system had life-changing implications for their families, communities, and subsequent generations.\textsuperscript{105} These implications continue to affect Indigenous people today. Currently, the effects of colonization have manifested in a proliferation of post-traumatic stressors across generations, including childhood abuse, substance abuse, unemployment, mental illness, criminal behaviour, and higher rates of domestic and family

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\textsuperscript{101} Reconciliation Canada, “Background” (n.d.), online: Reconciliation Canada <https://reconciliationcanada.ca/about/history-and-background/background/>.


\textsuperscript{104} Suzanne Fournier & Ernie Crey, \textit{Stolen from our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities} (Toronto, Canada: Douglas and McIntyre, 1997).

\textsuperscript{105} Bombay et al, \textit{supra} note 99, at 324.
violence.\textsuperscript{106} Perhaps the most apparent effect of colonialism today is the overrepresentation of Indigenous offenders in the Canadian criminal justice system.

For the last several decades, Indigenous overrepresentation in the Canadian criminal justice system has been steadily increasing and reaching new highs each year.\textsuperscript{107} This phenomenon has prompted hundreds of studies and several national inquiries that have charted the underlying causes and possible solutions for this issue. Upon reviewing the findings of several national inquiries, it is evident that they articulate similar findings: Indigenous people and communities in Canada have been deliberately, persistently, and systematically oppressed and neglected by the Canadian government, which has inevitably contributed to further difficulties and hardships experienced by this vulnerable population, including increased rates of incarceration and criminal justice involvement.

\textbf{Reports and National Inquiries}

Signs of Indigenous overincarceration were first published as early as the 1960s. Indeed, in 1966, Harry B. Hawthorn produced the first federally funded study called \textit{A Survey of The Contemporary Indians of Canada} – also known as the “Hawthorn Report” - which investigated the educational, social, and economic conditions of First Nation communities.\textsuperscript{108} Results of the study demonstrated that Indigenous people were the most disadvantaged and marginalized group in Canadian society and that their communities experienced disproportionate rates of abuse, violence, arrests, poverty, unemployment, familial breakdown, and, of course, higher levels of

\textsuperscript{106} Ibid at 326; See also Brave Heart, Maria Yellow Horse et al, “Historical Trauma Among Indigenous Peoples of the Americas: Concepts, Research and Clinical Considerations” (2011) 43:4 Journal of Psychoactive Drugs 282 at 283.

\textsuperscript{107} Roberts & Reid, supra note 14.

delinquency and crime. Hawthorn attributed the systemic discrimination of Indigenous people to genocidal state policies, namely the IRS system, which perpetuated further abuse and failed to provide Indigenous children with the appropriate tools to succeed in modern society.\(^\text{109}\) The report concluded with recommendations on how best to acculturate Indigenous people into the Euro-Canadian economy, including “increasing the educational attainments of the Indian people”, establishing “special facilities…to ease the process of social adjustment as the tempo of off-reserve movement increases,” and implementing training programs for those who choose to stay on reserve so that they can acquire the appropriate “skills and functions that would enable them to cope better with their actual environment.”\(^\text{110}\)

The years following the Survey saw further research into the underlying causes of increasing rates of Indigenous crime and incarceration. Since 1966, there have been dozens of studies, inquires, and reports that have echoed similar findings, including the Canadian Correctional Association’s (CCA) report on Indians and the Law,\(^\text{111}\) the Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (also known as the “Cawsey Report”),\(^\text{112}\) the Report of the Aboriginal Justice Inquiry of Manitoba,\(^\text{113}\) the Law Reform Commission of Canada’s report on Aboriginal Peoples and Criminal Justice,\(^\text{114}\) The Royal Commission on Aboriginal Peoples (RCAP),\(^\text{115}\) and the Commission of Inquiry into certain events at the Prison for Women in Kingston\(^\text{116}\) – all of which included recommendations

\(^\text{113}\) The Aboriginal Justice Implementation Commission, supra note 40.
\(^\text{115}\) Royal Commission on Aboriginal Peoples, supra note 40.
\(^\text{116}\) Solicitor General of Canada, supra note 40.
and solutions for remedying the over-representation of Indigenous people throughout the criminal justice system and none of which appear to have had any positive effects or proven able to arrest the continuing rise of incarceration rates in particular. Recently, the federal government published the results from two major inquiries: The Truth and Reconciliation Commission’s (TRC) Final Report, and the National Inquiry on Missing and Murdered Indigenous Women and Girls (MMIWG). As with those that came before, both inquiries explicitly acknowledge the overincarceration of Indigenous people in Canadian institutions and conclude their report with recommendations to combat the crisis. And continuing the trend of previous inquiries and reports, these most recent initiatives have spawned little to no meaningful policy responses by government.

In the early 1990s, Indigenous residential school survivors began voicing their experiences and shedding light on the atrocities that occurred within the IRS system.\(^{117}\) Revelations of abuse, neglect, and mistreatment of First Nations children prompted the establishment of the TRC in 2008 – a Commission dedicated to investigating the injustices and lasting impacts of the IRS system, and to promoting reconciliation between Indigenous people, the Canadian government, Roman Catholic and Anglican churches, and broader Canadian society in general.\(^{118}\) Specifically, the TRC was mandated to “reveal the complex truth about the history and the ongoing legacy of the church-run residential schools…and guide and inspire a process of truth and healing, leading towards reconciliation within Aboriginal families, and

\(^{117}\) Miller, *supra* note 98, at 381.

\(^{118}\) The TRC was an extensive inquiry that investigated the harm incurred by Indigenous people from state-sanctioned policies that sought to forcibly extinguish Indigenous communities. The Commission spent six years (2008-2015) travelling around Canada to hear the stories of Indigenous people and to unearth the trauma and residual effects of the IRS system. After hearing from more than 6,500 individuals, the TRC published their report on December 2015 and hosted national events to educate Canadians on the history of the IRS system and to provide space for Indigenous families to share their experiences. Canada, “Truth and Reconciliation Commission of Canada” (15 December 2020) online: *Crown-Indigenous and Northern Affairs Canada*, <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525#chp2>.
between Aboriginal peoples and non-Aboriginal communities, churches, governments and Canadians generally.”

In 2015, the TRC published their final report which detailed significant findings of state misconduct, cultural genocide, and the irrevocable effects of the IRS legacy on Indigenous people in Canada. The report also provided 94 recommendations, or “Calls to Action”, for the federal government. Of the 94 Calls to Action, six explicitly urged the federal government to address the overrepresentation of Indigenous peoples in Canadian prisons and to implement criminal justice reforms to combat this crisis:

30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

37. We call upon the federal government to provide more supports for Aboriginal programming in halfway houses and parole services.

38. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to eliminating the overrepresentation of Aboriginal youth in custody over the next decade.

55. We call upon all levels of government to provide annual reports or any current data requested by the National Council for Reconciliation so that it can report on the progress towards reconciliation. The reports or data would include, but not be limited to:


120 Ibid.
v. Progress on eliminating the overrepresentation of Aboriginal children in youth custody over the next decade.

vi. Progress on reducing the rate of criminal victimization of Aboriginal people, including data related to homicide and family violence victimization and other crimes.

vii. Progress on reducing the overrepresentation of Aboriginal people in the justice and correctional systems.121

Similarly, in 2016, the federal government launched the National Inquiry into MMIWG. This inquiry was tasked with examining the “underlying historical, social, economic, institutional and cultural factors that contribute” to increased rates of violence against Indigenous females.122 For generations, Indigenous women, girls, and 2SLGBTQQIA people have been the targets of systemic violence and discrimination. Between 1980 and 2012, there were 1,181 “police-reported incidents of Aboriginal female homicides and unresolved missing Aboriginal female[s].”123 Despite representing 4.3% of the population, Indigenous women accounted for 16% of homicides during this time period. By 2014, the number of homicides involving an Indigenous female victim increased to 24%.124 Results of the MMIWG national inquiry confirmed that a history of genocide, colonialism, and systemic discrimination has amounted to disproportionate levels of violence towards Indigenous females:

The significant, persistent and deliberate pattern of systemic racial and gendered human rights and Indigenous rights violations and abuses – perpetuated historically and maintained today by the Canadian state, designed to displace Indigenous Peoples from their land, social structures, and governance and to

121 Truth and Reconciliation Commission of Canada, Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada 2015), at 3-6. Henceforth referred to as TRC.
124 Ibid.
eradicate their existence as Nations, communities, families, and individuals – is the cause of the disappearances, murders, and violence experienced by Indigenous women, girls, and 2SLGBTQQIA people, and is genocide.\textsuperscript{125}

As a response to these findings, the inquiry proposed 231 Calls for Justice to be fulfilled by governments, industries, institutions, service providers, partnerships, and Canadians in general.\textsuperscript{126} Although the inquiry focused strictly on the underlying causes of violence against Indigenous women, it nevertheless provided several recommendations relating directly to the overincarceration of Indigenous women and youth in Canada. Increased rates of violence and discrimination towards Indigenous females have historically correlated with higher levels of incarceration amongst this vulnerable population.\textsuperscript{127} Thus, it is only fitting that the inquiry included recommendations to reduce the overwhelming number of Indigenous females in Canadian correctional institutions. In addition, the inquiry also acknowledged the significance of \textit{Gladue} and the remedial potential of section 718.2(e) for the overincarceration of First Nations in Canada. This is the first – and thus far only - time a national inquiry has explicitly urged the federal government to draft national standards enforcing \textit{Gladue} and to recognize the importance of section 718.2(e) and \textit{Gladue} reports at sentencing. Below are the Calls for Justice that address Indigenous overincarceration and the need to implement policies that mandate section 718.2(e) and \textit{Gladue} reports:

\begin{quote}
5.14 We call upon federal, provincial and territorial governments to thoroughly evaluate the impact of mandatory minimum sentences as it relates to the sentencing and over-incarceration of Indigenous women, girls, and 2SLGBTQQIA people and to take appropriate action to address their over-incarceration.
\end{quote}

\textsuperscript{125} MMIWG Inquiry, \textit{supra} note 31, at 174.
\textsuperscript{126} Ibid.
\textsuperscript{127} According to Elspeth Kaiser-Derrick’s theory of the victimization-criminalization continuum, Indigenous women who are denied their full agency – whether it be through their lived experiences of abuse, trauma, male violence, and other forms of victimization – are left in vulnerable positions that contribute to their criminalization by restricting their access to available resources, options and support. Elspeth Kaiser-Derrick, \textit{Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women} (Winnipeg: University of Manitoba Press, 2019) at 44-47.
5.15 We call upon federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right and to resource them appropriately, and to create national standards for Gladue reports, including strength-based reporting.

5.16 We call upon federal, provincial, and territorial governments to provide community-based and Indigenous-specific options for sentencing.

5.17 We call upon federal, provincial, and territorial governments to thoroughly evaluate the impacts of Gladue principles and section 718.2(e) of the Criminal Code on sentencing equity as it relates to violence against Indigenous women, girls, and 2SLGBTQQIA people.

5.21 We call upon the federal government to fully implement the recommendations in the reports of the Office of the Correctional Investigator and those contained in the Auditor General of Canada (Preparing Indigenous Offenders for Release, Fall 2016); the Calls to Action of the Truth and Reconciliation Commission of Canada (2015); the report of the Standing Committee on Public Safety and National Security, Indigenous People in the Federal Correctional System (June 2018); the report of the Standing Committee on the Status of Women, A Call to Action: Reconciliation with Indigenous Women in the Federal Justice and Corrections Systems (June 2018); and the Commission of Inquiry into certain events at the Prison for Women in Kingston (1996, Arbour Report) in order to reduce the gross overrepresentation of Indigenous women and girls in the criminal justice system.

14.5 We call upon Correctional Service Canada to apply Gladue factors in all decision making concerning Indigenous women and 2SLGBTQQIA people and in a manner that meets their needs and rehabilitation.

Despite the overwhelming evidence showcasing the proliferation of Indigenous overincarceration, little to no effort has been made on behalf of the federal government to address the systemic issue. Both the TRC and the National Inquiry into MMIWG proposed numerous recommendations for all levels of government that have yet to be implemented, including those relating directly to Gladue and section 718.2(e). This, however, relates to a much larger discussion regarding the scope and purpose of national inquiries. Under the Inquiries Act, commissions of inquiry have the power to investigate and report on any matter concerning the

128 Ibid at 185-197.
Government of Canada or of national importance.\textsuperscript{129} They may also propose recommendations or solutions based on their findings. They do not, however, have the ability to enforce their recommendations.\textsuperscript{130} Said otherwise, regardless of their findings, the recommendations of any public inquiry established under the \textit{Inquiries Act} are not legally binding on the Government of Canada. This enables the federal government to easily set aside national inquiries and their various findings. Therefore, while the National Inquiry into MMIWG claims that their “recommendations… are legal imperatives” and that “Canada has a legal obligation to fully implement [their] Calls for Justice,”\textsuperscript{131} the federal government is free to act or fail to act on any recommendations as it sees fit.

This may explain how the Canadian government has continued to willfully disregard decades of inquiries that have echoed similar solutions and recommendations to aid in combating systemic discrimination and oppression against Indigenous people. As noted by the MMIWG inquiry,

\begin{quote}
...there has been very limited movement to implement recommendations from previous reports. What little efforts have been made have focused more on reactive rather than preventative measures. This is a significant barrier to addressing the root causes of violence. Further, insufficient political will continues to be a roadblock across all initiatives. We maintain now, as we did then, that proper prioritization and resourcing of solutions by Canadian governments must come with real partnerships with Indigenous Peoples that support self-determination, in a decolonizing way.\textsuperscript{132}
\end{quote}

While the Government of Canada has taken steps towards reconciliation and combating Indigenous overincarceration, including additional funding and the development of new

\textsuperscript{131} MMIWG Inquiry, \textit{supra} note 31, at 168.
\textsuperscript{132} \textit{Ibid}. 

35
resources and programs to reduce Indigenous involvement in correctional institutions, there has been no effort to implement national standards or policies that support compliance with both the Gladue decision and the Gladue principles. How many more inquiries, studies, and reports must be conducted before the federal government takes hold of this issue? How many other ways must we demonstrate that Indigenous overincarceration is a growing crisis?

The Need for National Standards Surrounding Gladue

Seven decades of inquiries, reports, and recommendations, and millions of dollars in funding directed toward documenting and understanding Indigenous overincarceration, and yet the issue continues unabated. While the federal government has articulated its intention to address the issue and has pledged millions of taxpayer dollars to the cause, very little action has taken place and thus, not surprisingly, there has been no positive policy or practical change. Instead, the federal government continues to invest money into new inquiries and new studies in the hope that they will provide different or better results. Inquires, however, are not the solution. This is due to the fact that they rarely produce significant social change. According to Michael Ignatieff, the former leader of the Liberal Party of Canada, truth commissions are more likely to succeed in societies where a strong political consensus for reconciliation already exists. In particular, Ignatieff claims that:

A truth commission cannot overcome a society’s divisions. It can only winnow out the solid core of facts upon which society’s arguments with itself should be conducted. But it cannot bring these arguments to a conclusion... The past is an

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133 The federal government’s 2021 budget allocates $216.4 million for the next five years, and $43.3 for every subsequent year after that, to support diversion programs and reduce the overrepresentation of Indigenous and Black youth in all provinces and territories. See Canada, “Budget 2021, Chapter 8: Strong Indigenous Communities” (19 April 2021) online: Department of Finance <https://www.budget.gc.ca/2021/report-rapport/p3-en.html#chap8>.

134 Barkaskas et al, supra note 38, at 40 & 96; Lafferty, supra note 37.
argument and the function of truth commissions, like the honest historians, is simply to purify the argument, to narrow the range of permissible lies."135

For a country such as Canada, where Indigenous sovereignty is highly disputed and systematic discrimination towards Indigenous people is upheld through political institutions of modern society, truth commissions have very little effect on social injustices.136 A prime example of this perspective is the overincarceration of Indigenous people in Canada, which the decades of inquiries have elucidated and confirmed, and which have utterly failed to remedy or alter the growing rates of Indigenous over-incarceration. That these initiatives prove better able to document the realities than to motivate real change is explained by Sherene Razack, who observes that the underlying purpose of inquiries has little to do with fixing the problems they document. Focusing specifically on the National Inquiry into MMIWG, Razack notes:

> Inquiries often function to reproduce colonial truths. In the case of an inquiry into missing and murdered Indigenous women, the colonial truth that is reproduced can be a story about Indigenous dysfunction rather than a story of colonial violence and dispossession. In a country where colonialism is widely denied, this is a frightening possibility. Treacherously speaking in the language of healing and reparations, the colonial state can maintain its own legitimacy through inquiries.»137

As such, national inquiries and their reports are unlikely to achieve real change. Created and mobilized by the state, inquiries have significant and compelling investment in the status quo and little to gain by supporting and realizing actual, positive change. Compared to the magnitude of the commitment to the status quo, the perceived rewards of arresting Indigenous incarceration rates almost disappear.

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135 Ignatieff, supra note 129, at 113.
136 ibid.
Where governments seem unwilling to act, courts have been slightly braver. The *Gladue* requirements, as legally mandatory aspects of “any case involving an Indigenous offender,” hold significant potential to avert the Indigenous incarceration crisis. However, the absence of any statement in the *Gladue* decision or any action by the federal government to set clear guidelines for what actions are sufficient to meet the requirements or support and resource *Gladue* services or alternatives to incarceration, *Gladue* has not realized that potential. While it cannot overcome all the impediments to the latter, national standards that explicitly mandate the *Gladue* principles could increase the potential impact of *Gladue*. The evidence and recommendations provided by decades of national inquiries have evidenced that governmental intervention is required to address Indigenous overincarceration in the Canadian criminal justice system. The implementation of multi-faceted national standards that support compliance with the *Gladue* principles is a viable solution that presents good potential for reducing Indigenous overincarceration, as this could ensure consistency across Canadian jurisdictions with regards to sentencing, access to justice, and compliance with the *Gladue* decision.\(^\text{139}\)

Since 1999, the federal government has neglected to institute the appropriate infrastructure and resources to support the *Gladue* decision in order to reduce Indigenous overincarceration. Research surrounding *Gladue* suggests that this principle possesses the potential to remedy Indigenous overincarceration, but that “sentencing innovation cannot by itself remove the causes of aboriginal offending, the greater problem of aboriginal alienation from the criminal justice system as well as the unbalanced ratio of imprisonment.”\(^\text{140}\) Hence, additional legislative initiative is required to support this decision and to combat Indigenous

\(^{138}\) *Ipeelee*, *supra* note 25, at para 87.

\(^{139}\) *Barkaskas et al*, *supra* note 38; *Hebert*, *supra* note 20.

\(^{140}\) *Manikis*, *supra* note 59, at 177.
overincarceration. In Chapter 4, I will engage with the challenge that, at present, there is no consistent policy approach embracing the *Gladue* requirements as expressed by the courts in 20 years of case law.\textsuperscript{141} There are also numerous challenges precluding the success and reach of the *Gladue* principles in every Canadian province and territory. As a result, Indigenous offenders are continuously limited in their ability to exercise their *Gladue* rights at sentencing.\textsuperscript{142} As will be demonstrated in Chapter 4, the establishment of national standards would not only assist in remedying the various challenges, but it would also bolster the remedial objectives of *Gladue*.

\textsuperscript{141} Barkaskas et al, *supra* note 38; Lafferty, *supra* note 37.
\textsuperscript{142} Roach & Rudin, *supra* note 26; Department of Justice, *supra* note 29.
Chapter Four: The Challenges Associated with Implementing National Standards

Despite the Supreme Court’s decision in *Gladue*¹⁴³ and the subsequent jurisprudence, academic research and literature reaffirming its significance, the *Gladue* principles and section 718.2(e) have proven ineffective and have failed to produce any meaningful reduction in Indigenous overincarceration rates in Canada.¹⁴⁴ This is arguably due to the multifaceted challenges and limitations that currently preclude the remedial objectives of *Gladue*, particularly with regard to the lack of available *Gladue* reports at sentencing,¹⁴⁵ the lack of adequate *Gladue* training offered to criminal justice actors,¹⁴⁶ the lack of unanimity from the courts on how best to apply the *Gladue* principles,¹⁴⁷ and the absence of sufficient funding and resources for *Gladue* services or programming to support those seeking Gladue services.¹⁴⁸ As such, this chapter offers a critical discussion on those challenges to demonstrate why national standards are necessary for *Gladue*.

National standards enforcing the *Gladue* decision are needed now more than ever to combat Indigenous overincarceration rates. As previously mentioned, Indigenous people represent nearly 5% of Canada’s entire population, but account for more than “30% of all

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¹⁴³ *Gladue*, supra note 17.
¹⁴⁵ Ibid; April & Orsi, supra note 39.
¹⁴⁶ Council of Yukon First Nations, supra note 38; Barkaskas et al, supra note 38.
¹⁴⁷ Maurutto & Hannah-Moffat, supra note 45; Stenning & Roberts, supra note 20.
sentenced admissions to custody” in Canadian federal and provincial/territorial institutions. In 2019, Indigenous adults represented 30% of the inmate population in provincial and territorial institutions, and 29% federal institutions. In the same year, Indigenous youth, ages 12-17, accounted for “43% of admissions to correctional services in nine reporting jurisdictions, while representing only 8.8% of the Canadian youth population”. Again, it is important to note that these statistics on Indigenous overrepresentation in Canadian provincial/territorial and federal institutions may in fact be higher, given that they “exclude admissions to custody in which Indigenous identity was unknown.”

**Gladue Reports vs. Pre-Sentence Reports**

While the *Gladue* decision sought to interpret section 718.2(e) of the *Criminal Code* and established new statutory obligations on courts to consider the unique systemic and background factors impacting Indigenous persons before the courts, research conducted on the remedial effects of this decision demonstrate that the *Gladue* principles and its subsequent requirements have been inconsistently applied and implemented within Canadian provinces and territories. More specifically, research has shown that multiple jurisdictions in Canada fail to provide comprehensive *Gladue* reports for Indigenous offenders at sentencing, and instead provide traditional pre-sentence reports (PSRs) with added *Gladue* factors. This inconsistent

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150 Malakieh, *supra* note 22, at 7. (Statistics exclude the provinces of Quebec and Alberta due to unavailability of data).
153 *Ibid* at 273. Gladue factors refer to the challenges and circumstances that Indigenous people are faced with that affect their livelihoods. Such challenges include substance abuse, poverty, the impact of residential schools on the offender and their family, racism etc.
application of *Gladue* reports arguably limits the ability of section 718.2(e) to systemically reduce the overincarceration of Indigenous people.

As mentioned in Chapter 2, the *Gladue* decision prompted the emergence of *Gladue* reports, which should provide the court with a “case-specific, timely, and comprehensive”\(^{154}\) overview of an Indigenous offender’s systemic and background factors. Since their inception, *Gladue* reports have been regarded by some courts and commentators as the more appropriate and effective method for imparting relevant *Gladue* information to sentencing judges.\(^ {155}\) The reports “provide the court with culturally situated information which places the offender in a broader social-historical group context… and reframe[s] the offender’s risk/need by holistically positioning the individual as part of a broader community and as a product of many experiences”.\(^ {156}\) Said otherwise, *Gladue* reports should provide sentencing judges with a complete picture of the offender’s life circumstances. Additionally, *Gladue* reports serve to inform the court “about culturally relevant or mainstream healing resources and relevant alternatives to incarceration”\(^ {157}\).

Preparing a meaningful *Gladue* report requires an extensive amount of time and dedication.\(^ {158}\) The process often involves researching the offender’s cultural background, reviewing the offender’s previous criminal history, and conducting in-depth interviews with the offender, their immediate family and friends, and, when required, their community members and Elders.\(^ {159}\) Interviews with the offender’s relatives and ‘community of care’ enable *Gladue* report

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\(^{157}\) *Ibid*.


\(^{159}\) Ibid at 276. *See also* Legal Services Society, *supra* note 70, at 22-23; Ralston, *supra* note 155, at 245.
writers to make recommendations for alternatives to incarceration and provide further considerations of the relevant Gladue factors that may have influenced the offender’s unlawful behaviour, such as substance abuse, dislocation, poverty, attendance at residential schools, and so forth.\textsuperscript{160} In essence, the lengthy completion process for a Gladue report results in a considerably more detailed analysis of Indigenous person’s “background, family, and life circumstances than PSRs.”\textsuperscript{161} However, research conducted on the remedial effects of Gladue reports and section 718.2(e) reveals that most provinces and territories do not provide Gladue reports to Indigenous offenders in their region and instead, provide PSRs with added Gladue factors.\textsuperscript{162}

Like Gladue reports, PSRs provide a synopsis of the life history of an offender to inform a sentencing judge’s final decision. However, they differ from Gladue reports with regard to their purpose and intent. In Canada, most jurisdictions have modified the structure of traditional PSRs to focus directly on the criminogenic risks and needs of offenders.\textsuperscript{163} Such modifications include “mandating the use of standardized actuarial risk assessment instruments… that use statistical techniques to assess and classify offenders’ criminogenic need(s) and to predict the likelihood of recidivism”.\textsuperscript{164} As a result, most PSRs now focus on “objective criteria (i.e. type of offence, prior criminal history, age, gender, and sentence length) and factors that are empirically shown to be statistically correlated with recidivism”.\textsuperscript{165} This ultimately redefines the offender as “a series of risk factors” requiring treatment and isolation in order to decrease the likelihood of recidivism.\textsuperscript{166} In this framework, Gladue factors such as race, poverty and abuse become

\textsuperscript{160} Ibid at 19.
\textsuperscript{161} Hannah-Moffat & Maurutto, supra note 23, at 276.
\textsuperscript{162} Hebert, supra note 20.
\textsuperscript{163} Hannah-Moffat & Maurutto, supra note 23.
\textsuperscript{164} Ibid at 263.
\textsuperscript{165} Ibid; Maurutto & Hannah-Moffat, supra note 45, at 455.
\textsuperscript{166} Hebert, supra note 20, at 159.
secondary to criminogenic and actuarial risk-based indicators. For Indigenous offenders, this often reduces their experiences of discrimination and dislocation to individualized problems that reinforce common stereotypes of the belligerent and alienated offender. Finally, while *Gladue* and *Ipeelee* have obliged the judiciary to consider available sentencing alternatives in an Indigenous offenders’ particular community, PSRs may not explore these sentencing options in rural and remote communities and may even advocate for incarceration.

In Canada, most provinces and territories, with the exception of Alberta, “do not consider *Gladue* reports mandatory in sentencing Indigenous offenders, nor do they deem the absence of a *Gladue* report as grounds for an appeal”.

Alberta is the only province that has interpreted the Supreme Court decision in *Ipeelee* as mandating *Gladue* reports for every Indigenous offenders at sentencing. This has been confirmed in several cases, including *R v Napesis* and *R v Mattson*, where the Alberta Court of Appeal declared that *Gladue* reports are mandatory in all cases involving Indigenous offenders and that the required *Gladue* analysis can only be informed by these unique reports. Now whether Alberta does in fact fulfill these requirements is another question. In 2017, the *Gladue* Pre-Sentence Report Program in Alberta spent $900,000 to complete a mere 784 formal *Gladue* reports.

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169 Hebert, supra note 20, at 163
170 Ibid at 164.
173 Ibid at para 50; *Napesis*, supra note 171, at para 8.
persons were admitted to custody.\textsuperscript{175} Unless 16,830 individuals waived their right to the \textit{Gladue} requirements, it is highly unlikely that the province was able to maintain their publicly stated policy as they should have produced far more than 784 reports.

The provinces of British Columbia, Prince Edward Island, Yukon, Manitoba, Ontario, and Saskatchewan have deemed “PSRs with added \textit{Gladue} components to be satisfactory” to represent the systemic and background factors of Indigenous offenders.\textsuperscript{176} In \textit{R v Burwell}, the Queen’s Bench for Saskatchewan held that PSRs enable sentencing judges to adequately assess \textit{Gladue}-relevant information and that there is no indication that \textit{Gladue} reports are mandatory in all cases involving an Indigenous offender:

[80] In the case at bar, I was (and am) satisfied that I had sufficient information to properly assess \textit{Gladue} factors affecting Mr. Burwell. Defence counsel and the author of the pre-sentence report have provided me with a great deal of information in this regard. Had I not been satisfied, I would have canvassed the issue with counsel and contemplated obtaining more information, in some manner. As well, unlike the situation in \textit{Moise} (see para. 28) it was evident that the lawyers before me were properly prepared for this sentencing and had given due consideration to this issue. Both addressed aspects of this issue.

[81] In carefully considering this issue I reviewed the relevant authorities. None indicate that a full \textit{Gladue} report is mandatory in all cases, or even in most cases. The “label” is not important, the information is. Form does not triumph over substance.\textsuperscript{177}

Similar decisions were also rendered in \textit{R v Wells},\textsuperscript{178} \textit{R v Lawson},\textsuperscript{179} \textit{R v Corbiere},\textsuperscript{180} and \textit{R v Sand},\textsuperscript{181} wherein the courts reaffirmed the position that PSRs are an appropriate means of


\textsuperscript{176} Hebert, \textit{supra} note 20, at 165.

\textsuperscript{177} \textit{R v Burwell}, 2017 SKQB 375, at paras 80-81.


\textsuperscript{179} \textit{R v Lawson}, 2012 BCCA 508, 294 CCC (3d) 369.

\textsuperscript{180} \textit{Corbiere}, \textit{supra} note 8.

\textsuperscript{181} \textit{Sand}, \textit{supra} note 48.
presenting *Gladue* information to sentencing judges.\textsuperscript{182} This inconsistent application of *Gladue* reports and PSRs across Canada has amounted to a systematic inability for Indigenous offenders in these regions to receive full *Gladue* reports, as they can only obtain traditional PSRs that include few *Gladue* elements.\textsuperscript{183} This is evidently contradictory to the objectives of the *Gladue* decision because PSRs fail to provide sentencing judges with a holistic analysis of an Indigenous offender’s systemic and background factors, as required under section 718.2(e) of the *Criminal Code*.\textsuperscript{184}

Traditional PSRs in Canada provide sentencing judges with a limited understanding of the impacts of “racial histories on offending, sentencing and treatment options.”\textsuperscript{185} Presentence reports’ focus on risk factors and criminal behaviour has periodically been shown to lack the essential information required for sentencing judges\textsuperscript{186} – thus falling short of the requirements prescribed within *Gladue* and *Ipeelee*. Consequently, there are arguments to be made that Indigenous offenders who are unable to obtain a full *Gladue* report are prevented from exercising their right to full consideration of their background under section 718.2(e).

According to Alexandra Hebert, regional disparities surrounding *Gladue* reports and PSRs are the result of two factors: the absence of a positive right to a *Gladue* report in most jurisdictions, and the lack of *Gladue* services across Canada.\textsuperscript{187} While regional disparities may exist, the application of the *Gladue* principles and section 718.2(e) remains a matter of federal law that must be upheld within all regions of Canada.\textsuperscript{188} With this in mind, national standards

\textsuperscript{182} *Ibid* at 30, 54. See *Wells*, supra note 178, at paras 53-55; *Lawson*, supra note 179, at paras 26-27; *Corbiere*, supra note 8, at para 23.

\textsuperscript{183} *Ibid* at 163.

\textsuperscript{184} Hannah-Moffat & Maurutto, supra note 23; Dickson & Smith, supra note 29; Hebert, supra note 20; Maurutto & Hannah-Moffat, supra note 45; Macintyre-Syrette, supra note 73, at para 14.

\textsuperscript{185} *Ibid*, at 264.

\textsuperscript{186} April & Orsi, supra note 39, at 10; *R v Quock*, 2015 YKTC 32, at para 109.

\textsuperscript{187} Hebert, supra note 20, at 163.

\textsuperscript{188} K.K., supra note 1, at para 56; *Ipeelee*, supra note 25, at para 51 & 87.
enforcing compliance with the *Gladue* decision possesses the potential, as a regulatory mechanism, to reduce jurisdictional inconsistencies and promote the remedial objectives of section 718.2(e). Without a national policy, inconsistencies across Canada will persist and deprive Indigenous offenders of their rights to full consideration of their background and systemic factors.

**Inconsistent Application of Section 718.2(e) Among Judges and Lawyers**

The inconsistent application of section 718.2(e) amongst judges and lawyers presents yet another challenge for the success of *Gladue*. Research investigating the impacts of the *Gladue* decision has revealed more than two decades of inconsistencies, misunderstandings, and erroneous interpretations of the *Gladue* requirements by criminal justice actors.\(^{189}\) In a study conducted on defense lawyers in Manitoba, author Rana McDonald demonstrates how most defense counsel utilize *Gladue* reports quite infrequently for a number of reasons, including financial and resource restraints associated with collecting the required information for a *Gladue* submission, inadequate reports prepared by probation officers, the beliefs of several lawyers that *Gladue* reports do not assist Indigenous offenders at sentencing, and a lack of monetary incentive and willingness from lawyers to dedicate extra time and effort to include *Gladue* reports in cases where the impact of Gladue for lesser crimes is minimal.\(^ {190}\) McDonald found that such reasoning heavily coincided with subjective misunderstandings of *Gladue* reports, which in turn has created a significant lack of *Gladue* submissions within courts.\(^ {191}\)


\(^{190}\) Ibid, at 146, 149, 156.

\(^{191}\) David Milward & Debra Parkes, "Gladue: Beyond Myth and towards Implementation in Manitoba" (2011) 35:1 Man LJ 84.
For instance, McDonald states that a number of defense counsel are reluctant to use Gladue reports because they believe they provide a level of consideration that goes beyond the traditional legal principles of equality and impartiality. Specifically, many believe that by providing Indigenous offenders with a Gladue report, “the government is essentially imposing inequality in a system where none previously existed.”

This is ironic given that the Gladue principle was established to provide equity in a system that has historically marginalized and disadvantaged Indigenous people. Furthermore, many defense lawyers also expressed beliefs that Gladue factors, such as low incomes, lack of education, and substance abuse offer considerations and mitigating factors at sentencing that are not necessarily unique to Indigenous offenders, which is true, however these disadvantages are the products of colonialism and thus create significant differences – both quantitatively and qualitatively – between non-Indigenous and Indigenous offenders as they experience vastly different realities. Hence, this distinction is noteworthy and is a key factor to understanding the importance of Gladue consideration at sentencing.

Even more surprising, however, were McDonald’s findings pertaining to the applicability of Gladue reports in cases involving serious or violent offenders. McDonald states that many participants expressed a strong belief that Gladue reports have little to no effect on an offender’s sentence where the offence committed is serious or violent in nature (i.e., murder, manslaughter,

192 McDonald, supra note 26, at 85-86.
194 Ibid at 91.
or violence against women and/or children). Consequently, there is a strong reluctance on behalf of the defence lawyers to provide Indigenous clients with meaningful Gladue reports if their offence is extreme in nature.\footnote{Ibid at 96.} These results demonstrate that the participants in the study fail to understand the complexities and underlying impacts of Gladue factors on Indigenous people and continue to represent their clients in a way that further marginalizes this population within the Canadian criminal justice system. It should be noted that these perspectives have also been prominent amongst numerous judges in cases where the actions of Indigenous offenders were deemed to be so serious that they rendered Gladue inapplicable.\footnote{Wells, supra note 178; Hebert, supra note 20; Pfefferle, supra note 64; Roach \& Rudin, supra note 26, at 366; Department of Justice, supra note 29; Andrew Welsh \& James R.P. 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. Criminol. Crim. Justice 491, at 494. See also Carol La Prairie, “Sentencing Aboriginal Offenders: Some Critical Issues” in Julian V. Roberts \& David P. Cole, Making Sense of Sentencing, (Toronto: University of Toronto Press, 1999) 173, at 177, for research on how a previous criminal record and the seriousness of an offence are the principal factors for determining the severity of an offence.}

In \textit{R v Wilson},\footnote{\textit{R v Wilson}, [2001] MJ No 179, 49 WCB (2d) 492.} the judge found the offender’s prior criminal history to be an indication that the offender had “no sense of self control… and that Gladue factors had no role in this lack of self-control.” Incarceration was therefore necessary for the offender in this case.\footnote{Milward \& Parkes, supra note 191, at 95.} Similarly, in \textit{R v Hayden},\footnote{Ibid.} the court held that both an Indigenous and non-Indigenous offender should receive similar sentences with the given circumstances, regardless of Gladue.\footnote{Ibid.} While there are multiple cases where judges prioritize the seriousness of an offence over Gladue factors, there also exists a multitude of judicial decisions that explicitly contradict the objectives of the Gladue decision. For example, there are several cases, including \textit{Wells}, that suggest that restorative justice practices and “conditional sentences may not be appropriate for Indigenous
and other offenders who commit serious crimes which require denunciation and deterrence."

And as noted in the preceding section, many courts, including the British Columbia Court of
Appeal in Lawson, and the Queen’s Bench for Saskatchewan in Sand, have deemed PSRs with
added Gladue factors to be satisfactory for presenting the required information to sentencing
judges. Even in cases where a PSR or Gladue report were provided, some judges such as R v
Reykdal and R v McKay, believed they could effectively engage in contextualized
sentencing without full acknowledgement of the report itself and/or in circumstances where a
Gladue component is not provided.

The inconsistent use of Gladue reports and PSRs relates to a much larger issue that
remains largely unresolved today. While the Gladue decision provided strong directives for
judges when sentencing Indigenous offenders, "there has been a great deal of confusion and
ambiguous direction from the Supreme Court regarding how the principles should be applied."

Specifically, the Supreme Court in Gladue neglected to specify the degree of consideration
required, as well as the quality and quantity of Gladue information that must be adduced, to
satisfy the Gladue requirements. In Ipeelee, the court stated that sentencing judges must
provide “tangible consideration” to the Gladue principles, but failed to provide further context
or supplement this decision by identifying the amount of Gladue-relevant information necessary
to achieve ‘tangible consideration’. This lack of clarity has also been noted among lower court
decisions:

203 Wells, supra note 178; Roach & Rudin, supra note 26, at 357.
204 Hebert, supra note 20.
205 In R v Reykdal, (2008), 81 W.C.B. (2d) 10, 2008 NSCA 110 (C.A.), the trial judge was provided with a Gladue
report but made no reference to the report in their reasons for judgement.
206 McKay, supra note 4, at para 5.
207 LSSBC, supra note 168, at 6-7.
208 Ralston & Goodwin, supra note 23, at 117; Dickson & Smith, supra note 29; Hebert, supra note 20.
209 Ipeelee, supra note 25, at para 30.
Lower courts have been equally unclear about the degree of attention to *Gladue* information necessary to meet the requirements. For example, *R v Collins* (2011: paras 32-33) framed the requirements as “modest” and requiring only that courts “give attention to” an offender’s “unique background and circumstances,” while a British Columbia Court stressed “judge[s] must consider and explain” the *Gladue* factors integral to sentencing (*R v SR* 2020: para 75), and the Alberta Court of Appeal stated that attention to *Gladue* information must be “thorough” and “properly appl[lied]” (*R v Wolfleg* 2018: paras 60 and 52).

The lack of clarity surrounding the degree of consideration given to *Gladue* information, as well as the quality and quantity of that information, has arguably led to substantial variations in *Gladue* submissions at court, ranging from the use of *Gladue* reports, PSRs, *Gladue* letters, and oral submissions. Evidence of these variations were also noted above in *Burwell*, *Lawson*, and *Sand* wherein the sentencing judges in these cases rendered decisions in support of the use of PSRs for *Gladue* analyses. In essence, these inconsistencies denote that there are “several unresolved issues in terms of how to best obtain full information on *Gladue* factors and how to meaningfully apply that information” when sentencing Indigenous offenders.

Finally, in addition to the fallacious interpretations of *Gladue*, empirical research has demonstrated that criminal justice actors, particularly prosecutors, have contributed to the over-representation of Indigenous people in Canadian carceral system. And, not surprisingly, this research has been apparent for quite some time now. In 1991, the Aboriginal Justice Inquiry of Manitoba confirmed that Indigenous accused persons are more likely to be charged with multiple offences than their non-Indigenous counterparts in similar circumstances. Interestingly enough,

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210 Dickson & Smith, *supra* note 29, at 35.
212 Burwell, *supra* note 177.
many of these charges are “never proceeded with and appear to [be] unnecessary.”  

The Inquiry further concluded that the overrepresentation of Indigenous people “occurs at virtually every step of the judicial process, from the charging of individuals to their sentencing.” These results have also been replicated by Australian literature that exhibits a correlation between racial bias in sentencing and the overrepresentation of Indigenous peoples. According to a recent study published by Lucy Snowball and Don Weatherburn, Indigenous status remains a strong predictor of adult imprisonment and appears to interact with other legal factors, including prior convictions and legal representation. While some scholars attribute the overrepresentation of Indigenous people to the misunderstandings of judges and lawyers, alternative research suggests that increased rates of incarceration are the result of previous decisions taken by other criminal justice actors, such as police officers. Even in those instances, the work of judges and lawyers remains ever more crucial for mitigating injustices and ensuring the right to Gladue-informed due process is maintained for all Indigenous offenders.

In light of the evidence presented above, it is clear that judges and lawyers contribute to the inconsistent application of section 718.2(e) of the Criminal Code. The lack of judicial clarity and strict enforcement of the Gladue decision has inevitably created space for these criminal justice actors to arbitrarily decide when and how to adhere to their statutory obligations. This significant level of inconsistency in understanding of and respect for the requirements ultimately hinders the potential of Gladue and section 718.2(e) to create meaningful change within the

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217 The Aboriginal Justice Implementation Commission, supra note 40.
218 Ibid.
Canadian criminal justice system. While it is evident that a coherent, single national approach to
Gladue could go some distance to addressing these inconsistencies and promote greater
jurisdictional consistency in the application of Gladue at sentencing, such an initiative could be
met with resistance by courts concerned about judicial independence, the individual nature of
sentencing and the responsibilities of the courts in this regard. It is also likely that the success of
a new, uniform approach would also require considerably more judicial education on Gladue and
the broader contextual realities facing Indigenous people. Regrettably, given the approach to this
training in Canada, which places the responsibility and control over judicial education firmly
within the courts and relies on their actually knowing what they do not know, there is limited
potential for improving Gladue training for the courts. It is also likely that national standards
supporting a uniform approach to Gladue would introduce bona fide procedures that would
require all Canadian courts to align their discretion with the Gladue requirements, regardless of
whether they subjectively agree or disagree with the Gladue decision. Given this, such a policy
could be unwelcomed by many judicial actors and met with significant resistance.

Inadequate Resources and Lack of Funding

The implementation of national standards enforcing compliance with the Gladue decision
would require ample resources and funding to effectively support the preparation of Gladue
reports in every province and territory. However, research conducted on the varying degrees of
compliance with section 718.2(e) and the Gladue decision demonstrates that many jurisdictions
already lack the fiscal and human resources to effectively provide Indigenous offenders with
formal Gladue reports.221 Now whether this is simply a question of political will on the part of

221 Roach & Rudin, supra note 26; Hebert, supra note 20, at 166; Milward & Parkes, supra note 191, at 108;
Edwards, supra note 148.
the federal government to allocate appropriate funding to *Gladue* services, or how *Gladue* services choose to utilize their resources, the reality remains that all *Gladue* services across Canada lack the appropriate infrastructure to provide comprehensive *Gladue* reports to all Indigenous offenders in their region. Consequently, the lack of sufficient resources has inevitably created greater jurisdictional disparities with regards to sentencing, access to resources, and how *Gladue* relevant information is presented in court.

In most provinces, the lack of available *Gladue* services has hampered the ability of most Indigenous offenders to obtain a full *Gladue* report, thus restricting them to alternatives: PSRs with added *Gladue* factors, *Gladue* letters or oral submissions by their legal counsel.\(^{222}\) For example, the province of Manitoba has “no dedicated program in place to support judges in the gathering of information on the circumstances of Indigenous offenders.”\(^{223}\) For this reason, PSRs are completed by probation officers employed by Manitoba Justice and will “incorporate *Gladue* factors within the reports upon the request of a judge or defense counsel.”\(^{224}\) This is troublesome considering that probation officers have been noted to spend significantly less time preparing PSRs than is required, and that “most probation officers rely on their own subjective judgement of risk factors to complete PSRs.”\(^{225}\) More troubling is the fact that courts have been shown to comply with the sentencing directions provided in PSRs approximately 77% to 80% of the time.\(^{226}\)

In contrast, the province of Ontario has several Indigenous agencies that prepare *Gladue* reports, such as Aboriginal Legal Services (ALS), the Nishnawbe Aski Legal Services

\(^{222}\) PSRs are not the only alternative to *Gladue* reports. *Gladue* information can also be submitted to the court in the form of an oral submission, by legal counsel, Elders, court workers, or other advocates. In fact, *Gladue* information is most commonly presented to courts through oral submissions. Dickson & Smith, *supra* note 29.

\(^{223}\) Milward & Parkes, *supra* note 191, at 87.

\(^{224}\) *Ibid* at 87-88.


\(^{226}\) *Ibid*, at 264.
Corporation, Tungasuvvingat Inuit (TI), and Kaakewaaseya Justice Services, to name a few.\textsuperscript{227} Furthermore, funding in this jurisdiction is supplemented by various sources including the Ministry of the Attorney General of Ontario, Legal Aid Ontario and, to a lesser extent, the Department of Justice.\textsuperscript{228} While Ontario may appear to have more \textit{Gladue} services than other Canadian provinces and territories, some of these resources only provide \textit{Gladue} reports to particular groups of individuals within a selected region in Ontario. For instance, the Akwesasne Community Justice Program only responds to \textit{Gladue} report requests for Indigenous accused who are a member of the Mohawks of Akwesasne or who reside in the Akwesasne Mohawk Territory within Ontario.\textsuperscript{229}

Similarly, the Thunder Bay Indigenous Friendship Centre only prepares \textit{Gladue} reports for Indigenous offenders located within the Thunder Bay region as they have their own \textit{Gladue} writers equipped to prepare reports for their community members.\textsuperscript{230} Given the paucity of available research on \textit{Gladue}, it is nearly impossible to dictate whether this regional or community-based approach demonstrated by the aforementioned organizations, is a more effective approach in the production of \textit{Gladue} reports than a uniform method. This is major research gap and worthy of further investigation to determine the most appropriate method for not only producing comprehensive \textit{Gladue} reports, but also for rectifying access to justice issues for Indigenous offenders seeking to obtain a report.

In essence, there is great variance across Canada with regards to the number of resources available to support the completion of a \textit{Gladue} report. In some provinces, the responsibility to provide the appropriate services is centralized – belonging to one organization or agency – while

\begin{itemize}
\item \textsuperscript{227} Council of Yukon First Nations, \textit{supra} note 38; Barkaskas et al, \textit{supra} note 38, at 52.
\item \textsuperscript{228} \textit{Ibid.}
\item \textsuperscript{229} \textit{Ibid} at 52.
\item \textsuperscript{230} \textit{Ibid.}
\end{itemize}
others employ several entities to assume the responsibility of assembling *Gladue* reports. This is due, in part, to the fact that there is “no national approach, guideline, or policy with respect to the production and delivery of [*Gladue*] reports.”231 The result, however, is disparity in the quality and quantity of *Gladue*-relevant information within these reports, as every service provider is different and has their own method for completing a report232 Thus, the challenge for national standards would be to mediate these inconsistencies by implementing a uniform method for the production and delivery of *Gladue* reports and establishing equitable access to resources and funding in order to achieve this endeavour.

In addition to the regional discrepancies in access to *Gladue* services, insufficient resources and funding can produce insurmountable delays within the system and impede the ability of many Indigenous offenders in various jurisdictions to effectively exercise their rights under section 718.2(e) at sentencing. A prime example of these consequences was pointedly noted in *R v K.K.* wherein the Court requested a formal *Gladue* report but was initially denied on the grounds that such reports were not available in the province of Quebec. The offender was only able to obtain a report from ALS 8 months after she entered a guilty plea.233 Similarly, in *R v Corbiere*, counsel for the Indigenous defendant requested a *Gladue* report but was informed that ALS did not have enough funding to send a *Gladue* caseworker to Windsor to complete the report and suggested transferring the offender to Sarnia jail so that he could benefit from *Gladue* programs.234 Justice Pomerance called the suggested transfer a “band-aid solution” for the lack in

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232 Ibid.
234 *Corbiere*, *supra* note 8, at para 8.
access to *Gladue* services that would have otherwise been available to the defendant in other city centres.\(^\text{235}\)

While funding deficits lie at the epicentre of most of the challenges facing *Gladue* services, it is also important to consider how many *Gladue* agencies and organizations limit access to *Gladue* reports for Indigenous offenders. Across Canada, most *Gladue* organizations have followed the lead of Aboriginal Legal Services (ALS) in Toronto and implemented a 90-day “cut-off” rule whereby Indigenous offenders facing a sentence of imprisonment for 90-days or less will not receive a *Gladue* report.\(^\text{236}\) This policy was first introduced by ALS based on the assumption that *Gladue* reports will have little impact on offenders receiving shorter jail times or because *Gladue* reports cannot be completed within a 90-day timeline.\(^\text{237}\) This, of course, places a significant disadvantage on those facing a sentence of 90-days or less, and is a direct product of the protracted timelines for preparing comprehensive *Gladue* reports.

Based on the limited research available, many *Gladue* organizations have indicated timelines that exceed 90 days to complete a fulsome *Gladue* report.\(^\text{238}\) This means that an Indigenous offender seeking a *Gladue* report may spend more time in remand awaiting a *Gladue* report for trial than their term of imprisonment. While the logical approach is to not to prolong an offender’s time spent in remand, we must also consider that 97% of Indigenous offenders in the system are housed within provincial and territorial institutions and serving shorter sentences,

\(^\text{237}\) Dickson & Smith, *supra* note 29.
\(^\text{238}\) Barkaskas et al, *supra* note 38; Council of Yukon First Nations, *supra* note 38; Legal Aid Ontario, *supra* note 236.
than those placed in federal institutions.\textsuperscript{239} For example, in 2018/19, 81% of those in sentenced custody in provincial and territorial jails in Canada were held for less than 90 days, while a further 60% were held for less than 30 days.\textsuperscript{240} Notwithstanding this, a 30-, 60- or 90-day sentence of incarceration still constitutes a loss of liberty and must be informed by the \textit{Gladue} principles. Thus, it is imperative that attention be given to providing \textit{Gladue} reports in a timely manner for Indigenous offenders facing any loss of liberty, including sentences of 90-days or less, as Indigenous offenders account for the majority of those sentenced to provincial custody.\textsuperscript{241} This would assist in furthering the remedial objectives of the \textit{Gladue} decision in addressing Indigenous overincarceration rates in Canada.

While additional resourcing and funding would most certainly assist \textit{Gladue} services to meet their demands, consideration must also be given to how these organizations mobilize their resources. \textit{Gladue} services may continuously articulate how a sincere lack of human and fiscal resources hinders their ability to provide reports to more Indigenous offenders, however questions should be raised about how \textit{Gladue} services actively choose to allocate their resources and perhaps how those resources could be utilized in a more efficient manner. This is noteworthy as the Integrated Justice Program in Regina, Saskatchewan, has been successfully completing \textit{Gladue} reports for Indigenous offenders within 14 days.\textsuperscript{242}

Over the past two decades, sentencing judges have brazenly denounced regional disparities and obstructive policies in access to \textit{Gladue} reports, stating that such reports remain a

\textsuperscript{239} Note that time served in pretrial detention (remand) can be credited towards an offender’s full sentence if convicted. Malakieh, \textit{supra} note 22; Dickson & Smith, \textit{supra} note 29; Roberts & Reid, \textit{supra} note 14, at 217.

\textsuperscript{240} Canada, “Adult releases from correctional services by sex and aggregate time served”, Table 35-10-0024-01 (20 April 2022), online: Statistics Canada \textltt{https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510002401}.

\textsuperscript{241} \textit{Ibid}.

\textsuperscript{242} Communications with Dr. Jane Dickson.
statutory obligation that ought to be fulfilled for each and every Indigenous offender.\textsuperscript{243} However, the limited and disparate access to \textit{Gladue} services across Canada has intensified the inability of Indigenous offenders in various regions to obtain a full \textit{Gladue} report, thus creating serious access to justice issues. As a result, many are left opting for PSRs with add-on \textit{Gladue} content, which has historically shown to fall below the threshold required for a \textit{Gladue} analysis, or oral submissions by defense counsel.\textsuperscript{244} The inability for Canadian provinces and territories to provide Indigenous offenders with \textit{Gladue} reports, therefore, presents a challenge for the implementation of national standards enforcing \textit{Gladue}, as there is a significant lack of infrastructure in place to support a policy of that magnitude.

\textbf{Lack of \textit{Gladue} Training Across Canada}

Although there is a lack of systematic information about \textit{Gladue} training for criminal justice actors,\textsuperscript{245} it appears that training in this domain is relatively scarce and inconsistent across Canada. Given that access to funding and resources is limited, it comes as no surprise that \textit{Gladue} training may also be a rarity.\textsuperscript{246} This, however, creates several challenges for Indigenous people, as facile understandings of the \textit{Gladue} requirements can result in uninformative reports, sentencing disparities, and further perpetuate the systemic discrimination endured by First Nations groups in Canada.\textsuperscript{247} Moreover, the lack of sufficient \textit{Gladue} training implies the disturbing reality that, for more than two decades, some among the Canadian judiciary may well have presided over cases involving Indigenous people with only limited knowledge of

\textsuperscript{243} See Ipeelee, supra note 25, at para 60; K.K., supra note 1, at para 56; \textit{R v McCook}, 2015 BCPC 1, [2015] 2 CNLR 320, at paras 76-78.
\textsuperscript{244} Dickson & Smith, supra note 29; Hannah-Moffat & Maurutto, supra note 23, at 275.
\textsuperscript{245} In this context, criminal justice actors include judges, lawyers, probation officers, and \textit{Gladue} report writers.
\textsuperscript{246} Roach & Rudin, \textit{supra} note 26.
Indigenous culture and history and how these impact Indigenous lives. Hence, national standards enforcing Gladue training is imperative in order to reduce the number of sentencing discrepancies that arise from a lack of cultural awareness.

Currently, only half of Canadian provinces and territories offer Gladue training for judges on the application of section 718.2(e) and the Gladue decision. These include Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, and Prince Edward Island. Each jurisdiction provides their own rendition of Gladue training:

For most of those jurisdictions (British Columbia, Ontario, Newfoundland and Labrador, Prince Edward Island), training is given in the form of workshops offered at national (e.g. Osgoode Conference on Gladue) or provincial (e.g. Provincial Court Judges Association Conference of British Columbia) conferences. In Nova Scotia, a non-governmental organization (Mi’kmaw Legal Support Network) gives information sessions on this subject. Newfoundland and Labrador and Prince Edward Island mentioned that their judges have the opportunity to visit and observe the Gladue Court in Toronto. Moreover, in some jurisdictions (Nova Scotia, Ontario), training is also offered internally by the courts. The participants from New Brunswick, Northwest Territories and Saskatchewan said they did not know whether this type of training is available.

Most of the jurisdictions listed above also provide workshops on the history of Indigenous people in Canada. However, it is unclear whether any of the aforementioned training is mandatory or must be completed periodically by every judge within a designated region. Conversely, Nunavut, and Yukon have reported that formal training is not provided in their regions, as judges receive cases involving Indigenous people on a daily basis, thereby fostering a “familiarity” with Gladue principles, and rendering additional training unnecessary. Training on the history and culture of Indigenous people is not formally offered in these regions.

248 April & Orsi, supra note 39, at 6.
249 ibid.
250 ibid at 7.
251 April & Orsi, supra note 39; Council of Yukon First Nations, supra note 38.
While arguments can be made that additional training is necessary, the reality of the criminal justice system is that judicial officers across Canada cannot be obligated or required to participate in training.252

But whether *Gladue* training is indeed provided within the aforementioned jurisdictions is relatively moot, as new and emerging literature has demonstrated that additional cultural competency training on the *Gladue* principles is required and requested.253 This was recently confirmed in a study conducted by Dickson and Smith examining the perceptions and experiences of sentencing judges with *Gladue*, whereby the responses by judicial officers indicated that training on *Gladue* remains insufficient.254 This is important given that the remedial impacts of the *Gladue* decision rely heavily on the subjective understandings of *Gladue* held by judicial officers.255 Thus, it is imperative that judges have an appropriate grasp of the *Gladue* principles and appropriate contextual knowledge of Indigenous lives and histories in order to engage in *Gladue*-informed sentencing.

And yet, the implementation of *Gladue* training for judicial officers presents a complex challenge on its own. In Canada, training provided to judges is regulated by the National Judicial Institute and provincial educational entities.256 As a result, the approach to judicial education has typically balanced the needs of judges and the need to preserve confidence in the Canadian judiciary, as concerns about the need for further training could present negative consequences and lay bare what judges do not know (and possibly what they do not realize they don’t know).

252 Personal communication shared by Dr. Jane Dickson (2 May 2022).
254 Dickson & Smith, supra note 29.
Moreover, the establishment of training typically involves the judges themselves, who decide on what training is needed and who can train them. These considerations impede knowledge transfer and create an inability to adequately address systemic issues within the judiciary.

When examining the literature for signs of Gladue training provided to prosecutors and defence counsel, it is clear that similar concerns exist. To date, there is only a handful of research that generally speaks to the training provided to lawyers in Canada, including an evaluation of Aboriginal Legal Services of Toronto from 2008 which claimed that Crown Attorneys, defence counsel and duty counsel in the Toronto region receive “specific education sessions” provided by the organization. However, the evaluation also mentioned that these sessions “were not well attended” by defence counsel and there is no indication of the content or quality of that training. Aside from these statements, very little is known about Gladue training provided to lawyers. And yet, research has ascertained that lawyers often lack the cultural competencies, “knowledge or expertise on the systemic factors that have led to Aboriginal over-representation” – a concerning finding that demonstrates how Indigenous “histories or circumstances continue to be framed by the ‘common knowledge’ of the judiciary or defence counsel.”

Finally, information on training for Gladue report writers is quite limited within the academic scene. Based on the limited research available, there appears to be no standard training model for writers and that training offered for writers varies by organization. Apart from this,

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257 Personal communication shared by Dr. Jane Dickson (2 May 2022).
258 Campbell Research Associates, supra note 38, at 1; Department of Justice, supra note 29, at 41; Clark, supra note 253.
260 Maurutto & Hannah-Moffat, supra note 45, at 459.
261 Campbell Research Associates, supra note 38; April & Orsi, supra note 39; Council of Yukon First Nations, supra note 38; Barkaskas et al, supra note 38.
– and from what is reported by Gladue organizations on their supposed training – very little is known about the training received by Gladue report writers. Additional research is required to attest to the level of training they receive. What is perhaps more concerning is what we do know of the educational requirements of Gladue writers. With the exception of Nova Scotia, writers in Canada do not require an undergraduate degree and are employed with few competency requirements such as interviewing and writing skills, computer skills, the ability to work well with others, and knowledge of the criminal justice system. What is concerning is that every other position within the criminal justice system requires, at a minimum, an undergraduate degree. This includes, judges, lawyers, and probation officers. It is interesting that this requirement is not expected of Gladue report writers, however it is unknown whether this does in fact affect the quality and quantity of Gladue-relevant content in reports. Further research is most definitely required to investigate the impact of low competency requirements for Gladue report writers.

What is clear from the available literature on Gladue is that additional training is required for those involved in the Gladue process as well as the recipients of Gladue reports. While training may be provided to these groups, we are still unaware of the quality, content, and extent of the provided training. What is suggested from the relevant case law and academic literature is a serious need to foster better understandings of the cultural, contextual, and legal requirements outlined under the Gladue principles. Thus, national standards engaging with the Gladue principles.

262 Ibid. See also the following link from ALS regarding their recent job posting. While this posting is from just one organization, ALS has been highly influential on establishing the status quo for Gladue writers across Canada. Aboriginal Legal Services, “Job Opportunities” (2021), online: Aboriginal Legal Services <https://aboriginallegal.ca/downloads/gladue-writer-sudbury.pdf>.

263 University of Toronto, “So, You Want to Become a Lawyer” (24 August 2021), online: University of Toronto <https://www.law.utoronto.ca/getstarted>; Canada, “Probation and Parole Officers near Toronto” (5 October 2021), online: Job Bank <https://www.jobbank.gc.ca/marketreport/requirements/3806/22437>.

264 Chanalquay, supra note 53; Ipeeele, supra note 25; Hebert, supra note 20; Roach & Rudin, supra note 26; Hannah-Moffat & Maurutto, supra note 23.
principles must consider how to adequately deliver this training to all criminal justice actors and must ensure that it is accessible across all regions of Canada. Further discussion of what research is required for the creation of comprehensive Gladue training will be provided in Chapter 5.

**Probation Officers and Pre-Sentence Reports**

In Canada, traditional PSRs are completed by probation officers. As previously stated, PSRs differ in quality, substance, and form from Gladue reports. Their focus on actuarial risk assessments and criminogenic need(s) often repositions an offender’s unique experiences in a context of recidivism. This is concerning given that the accuracy of structured risk scales in predicting recidivism is lower for Indigenous offenders than non-Indigenous offenders. Researchers have hypothesized that this may be the result of the inability of risk assessments to adequately capture the present and historic circumstances that are unique to Indigenous offenders. Most jurisdictions that lack the appropriate infrastructure to provide Gladue reports to every Indigenous offender provide PSRs with additional Gladue components instead. However, the issue here lies not only within the fundamental differences between PSRs and Gladue reports, but also with the author of PSRs and their level of training.

Probation officers in most jurisdictions are trained to complete PSRs from a risk-assessment perspective and, in some cases, their training does not include a thorough review of the history of Indigenous people, the Gladue decision, section 718.2(e), and Gladue factors.

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265 Parkes et al, *supra* note 70.
268 Hebert, *supra* note 20.
Without the appropriate training and cultural awareness, probation officers risk producing inadequate PSRs which can “undermine the principles articulated in Gladue… and lead to disproportionate sentences.”\textsuperscript{270} In fact, the lack of sufficient training has arguably led to probation officers using their own subjective judgement to complete PSRs and craft sentencing recommendations.\textsuperscript{271} As early as the 1960s, researchers have documented a strong correlation between the recommendations crafted by probation officers and their own perception of an offender’s prior criminal record, the seriousness of the offence, level of remorse, and likelihood of successful completion of probation.\textsuperscript{272}

In a more recent study, Hannah-Moffat et al. revealed that actuarial risk language, commonly found within PSRs, shapes a probation officer’s professional discretion, and that the exercise of such discretion “reciprocally shapes their interpretation of risk” and what information should be included in a report.\textsuperscript{273} Thus, the decisions of probation officers “continue to be shaped by [their] professional ideologies and by personal dispositions, beliefs, and purpose.”\textsuperscript{274} This is concerning given that PSR literature has exhibited strong concordance between recommendations drafted by probation officers and the sentences imposed by judges.\textsuperscript{275} Indeed and as noted above, based on the limited studies available, sentencing judges have shown to

\textsuperscript{271} Hannah-Moffat & Maurutto, supra note 23, at 270.
\textsuperscript{274} Ibid, at 394.
follow PSR recommendations “in nearly 80% of cases.”276 It is therefore crucial that probation officers receive *Gladue* and related Indigenous-informed training to deliver clear, concise, and comprehensive reports in order to avoid miscarriages of justice.

Alternative research investigating the relationship between PSRs and *Gladue* reports has also raised concerns about whether probation officers further exacerbate the systemic discrimination and overincarceration rates of Indigenous people in Canada. For many Indigenous people, probation officers who complete PSRs are perceived as “part of a system that has historically marginalized them.”277 For this reason, Indigenous offenders are “inherently distrustful of the process” and typically desist from divulging sensitive information.278 This, however, can result in inadequate PSRs at sentencing and affect judicial consideration, thereby furthering sentencing discrepancies and perpetuating the overincarceration of Indigenous people in Canada.

Inadequate PSRs can also cause significant delays within the justice system, which too can aggravate Indigenous overrepresentation. In *R v Noble*, the court ordered a formal *Gladue* report, but received an adulterated “Pre-Sentence Report (Gladue Perspective).”279 Upon notice of the insufficient report, the Crown called Jackie Compton Hobbs, the senior Labrador probation officer, to testify that “she and all the other Labrador probation officers had absolutely no training in the preparation of *Gladue* reports” and that no one had advised the court of the

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277 LSSBC, supra note 168, at 38.
279 Noble, supra note 73, at para 38.
significance of the change from *Gladue* reports to Pre-Sentence reports (*Gladue* perspective).\(^{280}\)

Frustrated by this change, the Court stated the following:

[51] For some time we were under the impression that probation officers were training to prepare and did prepare [*Gladue Reports*], but the probation authorities, perhaps with the Knockwood case in mind, instructed probation officers to change the title of their reports to "Pre-Sentence Reports (Gladue Perspective)" without advising the court about the government's failure to train probation officers to write Gladue Pre-Sentence Reports. I find myself learning of this slight-of-hand during the course of the Stanley Noble case, and I am not pleased to make this discovery.

[52] It is also clear that the province has failed to hire sufficient probation officers to prepare these reports in Labrador, and conduct their other responsibilities. They are not trained to prepare Gladue Pre-Sentence Reports in a jurisdiction like Labrador where judges in almost all sentence hearings order Gladue Pre-Sentence Reports and they are served up the thin gruel of "Pre-Sentence Reports (Gladue Perspective)." The probation officers are also overworked. Even if they had the training, they would not have the time to do this work properly.\(^{281}\)

The Court in *Noble* concluded that the lack of training provided to Newfoundland and Labrador probation officers is unacceptable, and that “provincial and territorial governments have an obligation to provide probation officers, or other trained officials, with the appropriate training to enable them to provide [*Gladue Reports*].”\(^{282}\) Following this decision, additional self-directed, online training has been provided to probation officers in Newfoundland and Labrador by an Indigenous educational organization.\(^{283}\) Nevertheless, this case still provides a clear example of how the absence of comprehensive *Gladue* report training can result in access-to-justice issues for Indigenous offenders as well as significant delays within the justice system.

In light of the evidence provided in this section, it is clear that probation officers have a profound effect on Indigenous sentencing in Canada. Probation officers have historically focused
on a risk-need-responsivity approach whereby they are tasked with identifying recidivism through structured risk assessments. The problem, however, is that these risk assessments have demonstrated low accuracy rates in identifying recidivism amongst Indigenous offenders as they fail to capture the complex histories and ongoing disadvantages endured by Indigenous people in Canada. As a result, Indigenous offenders are almost always overclassified in terms of risk and presented as likely recidivists. What is needed, first, is training for all probation officers in Gladue and Indigenous cultures, histories and realities, and second, some way to assess and ensure that probation officers understand that Gladue-relevant information is unique and must be treated and presented as such in traditional presentence report. These ends can be achieved through comprehensive and uniform training established through and consistent with national standards. How to achieve and create this type of comprehensive training is worthy of a fulsome discussion and will be provided in Chapter 5.

**Reflections**

In this chapter, I demonstrated the practical challenges facing the Gladue principles and the obstacles that currently impede their ability to successfully mitigate Indigenous overincarceration in Canada. Based on the informed assessments made within this chapter, it is evident that Gladue remains far from its intended goal of generating positive systematic change for criminal justice system-involved Indigenous people. Certainly, research exploring the impacts of Gladue has consistently shown great disparities predominantly with regards to the

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application of the *Gladue* principles,\(^{286}\) training provided to criminal justice actors on the *Gladue* principles,\(^{287}\) and the accessibility and availability of comprehensive *Gladue* reports across Canada.\(^{288}\) As a result, many Indigenous offenders are faced with access-to-justice issues when exercising their right to *Gladue* consideration at sentencing.

While the available literature on *Gladue* clearly articulates these limitations, the same research also showcases the strong potential of *Gladue* in remedying Indigenous overincarceration if it were consistently available across Canada and consistent with the spirit and intent of *Gladue* and *Ipeelee*.\(^{289}\) Indeed, research has continued to reiterate the remedial potential of *Gladue*, and how this potential could achieve positive systematic changes for Indigenous offenders if it were unanimously applied within jurisdictions in Canada. As such, several scholars as well as the MMIWG Inquiry have expressed the need for further procedural guidelines or some form of legislative action,\(^{290}\) such as national standards, in order to establish further consistency surrounding the *Gladue*.\(^{291}\) However, implementing a national policy is more than just establishing new guidelines and rules surrounding *Gladue*. It would be challenging 20 years of practices that have long been debated and would force many criminal justice actors to reimagine an entirely new sentencing regime for Indigenous offenders – one that they may have been reluctant to acknowledge in the past. It would impact the duties of many professionals including judges, lawyers, probation officers, *Gladue* services, and Legal Aid. All levels of the system would and should be targeted and designated new guidelines that align and compliment

\(^{286}\) Hebert, *supra* note 20; McDonald, *supra* note 26; Milward & Parkes, *supra* note 191; Roach & Rudin, *supra* note 26; Sylvester & Denis-Boileau, *supra* note 144.


the duties of other criminal justice actors. As Charlotte Baigent states, “all institutional actors have a role in reducing reliance on incarceration for Indigenous [people].\(^\text{292}\)

As you will see in the following chapter, the implementation of national standards is easier said than done. Currently, we remain without insight or evidence on how best to address the current limitations impacting the *Gladue* principles. In order to establish national standards surrounding *Gladue*, further empirical and investigatory research is required within the realm of *Gladue* in order to foster consistency through policy initiatives. Although *Gladue* is far from achieving its intended objective, there is still time for systematic change.

\(^{292}\text{Baigent, supra note 28, at 27.}\)
In Chapter 4, I provided a critical discussion on the various challenges currently limiting the remedial objectives of the Gladue principles, and in doing so, demonstrated why further engagement and intervention through the implementation of national standards is necessary. The initial intention of this following chapter was to offer a response to those challenges by discussing a series of options and policy responses that could not only mediate some of these challenges, but also assist in bolstering the remedial impacts of Gladue nation-wide. In other words, this chapter was going to showcase what national standards for Gladue should encompass based on an informed assessment of the locations where standards could positively advance Gladue, most notably with regard to standards for training, Gladue writers, and for Gladue reports themselves. However, after conducting a fulsome review of the available literature on Gladue, it is clear, that at this time, we simply lack the appropriate research to inform the development of any national standards surrounding Gladue.

The implementation of any policy must be evidence based. Policies should be grounded in empirical research that clearly defines the issue and how best to mitigate that issue. Currently, there are several sources that identify the various challenges facing Gladue, particularly with regards to training, Gladue writers, and Gladue reports, but what we do not know is how best to address the challenges that exist in these areas. Although Gladue literature has continued to denote that some form of consistency in these three areas would assist in

294 Ibid.
295 Dickson & Smith, supra note 29; April & Orsi, supra note 39; Hannah-Moffat & Maurutto, supra note 23; Hebert, supra note 20.
remedying some of the challenges identified at sentencing, we still require additional, systematic research that articulates exactly how to attenuate the present challenges.

Given that it is difficult to fully dictate at this time what national standards surrounding Gladue should encompass, this chapter focuses on the current research gaps that exist within the literature and articulates what evidence is required to inform the development of such standards. This discussion will be informed by governmental inquiries and academic literature that have explored possible solutions to the current limitations of the Gladue principles.

**Consistent and Uniform Gladue Training**

As illustrated in Chapter 4, there are many inconsistencies and discrepancies that exist with regard to the application of the Gladue principles, the production and delivery of Gladue reports nationally as well as the content included in these reports. This was exemplified in discussions regarding the disparities between Gladue reports and PSRs with added Gladue content, the facile understandings of Gladue demonstrated by judicial officers and the lack of available resources to assist in reducing the number of insufficient and/or untimely Gladue reports. These inconsistencies, however, heavily coincide with the lack of available and accessible Gladue training for criminal justice actors involved in the Gladue process.

In this section, I explore how further empirical and investigatory research is needed to inform national standards surrounding Gladue training for not only those involved in the Gladue

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300 *Ibid*.
report process but also for the recipients of those reports. However, before diving into this
discussion, it should be noted that the creation of comprehensive *Gladue* training for judges,
lawyers, and *Gladue* report writers, must be satisfactory in quality, reasonably priced, consistent
and accessible within every Canadian province and territory.\(^\text{304}\) Furthermore, in taking lead from
the recommendations outlined within the TRC and the MMIWG National Inquiry, training
should incorporate “appropriate cultural competency training, [including] the history and legacy
of residential schools,”\(^\text{305}\) the distinct realities of Indigenous women and girls, anti-racism and
anti-bias approaches,\(^\text{306}\) and the sentencing requirements outlined in *Gladue* and *Ipeelee*.\(^\text{307}\)
Those involved in the *Gladue* process would also benefit from a thorough review of the
expectations for comprehensive *Gladue* reports.\(^\text{308}\) Inclusion of all these elements would ensure
that the aforementioned criminal justice actors have an understanding of the cultural, contextual,
and legal requirements outlined under the *Gladue* principles.\(^\text{309}\)

**Judges**

Currently, there is little to no research conducted on the quality, content, and extent of *Gladue*
training provided to judges in Canada. Based on the limited research available, it appears that
only half of Canadian provinces and territories offer *Gladue* training for judges on the
application of section 718.2(e) and the *Gladue* decision, including Alberta, British Columbia,

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\(^{305}\) TRC, *supra* note 121, at 3.

\(^{306}\) National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power
1a (2019), at 191-193.

\(^{307}\) *Ipeelee*, *supra* note 25, at para 60; Hannah-Moffat & Maurutto, *supra* note 23; McDonald, *supra* note 26; Roach,
*supra* note 27.

\(^{308}\) *ibid*; Hebert, *supra* note 20; Maurutto & Hannah-Moffat, *supra* note 45.

\(^{309}\) *Ipeelee*, *supra* note 25, at para 60.
Newfoundland and Labrador, Nova Scotia, Ontario, and Prince Edward Island.\textsuperscript{310} What is for certain, however, is the growing consensus that further training is needed, not only for those jurisdictions that do not offer Gladue training, but also for those that do.\textsuperscript{311} Evidence of this need for further Gladue training amongst judicial officers has been apparent within scholarly literature as well as several court decisions that contradict the statutory obligations outlined in Gladue\textsuperscript{312} or that demonstrate some level of uncertainty on how best to apply the Gladue principles.\textsuperscript{313}

Based on this information, it can be argued that national standards that introduce a uniform approach to training for judicial officers may assist in promoting consistency on the application of the Gladue principles and may bolster the remedial potential of Gladue by addressing misunderstandings and erroneous interpretations of the principles held by some courts. However, at this time, we remain without any insight or evidence that could inform the development and implementation of any national standards surrounding Gladue training for judges. Specifically, there is a significant lack of empirical research demonstrating what, and how, training should be standardized for judicial officers. In order to create national standards on Gladue training for judges, further research in the following areas is required.

First, additional participatory research with sentencing judges across Canada on the extent of Gladue training they receive is certainly necessary to inform any standards on this matter. Judges themselves possess the knowledge and experience to adequately attest to the types of training they receive and should therefore be engaged directly. The perspectives of judicial officers on their experiences with current training regimes would assist in addressing key gaps

\textsuperscript{310} April & Orsi, \textit{supra} note 39, at 6; Hebert, \textit{supra} note 20; Maurutto & Hannah-Moffat, \textit{supra} note 45, at 459-460
\textsuperscript{311} \textit{Ibid}; Dickson & Smith, \textit{supra} note 29, at 24; Department of Justice, \textit{supra} note 29.
\textsuperscript{312} Wells, \textit{supra} note 178; Wilson, \textit{supra} note 198; Hayden, \textit{supra} note 201; Corbiere, \textit{supra} note 8; Sand, \textit{supra} note 48; Sylvester & Denis-Boileau, \textit{supra} note 144, at 559; Klein, \textit{supra} note 189; Jeffries & Bond, \textit{supra} note 36; Roach, \textit{supra} note 27.
\textsuperscript{313} Collins, \textit{supra} note 81, at para 32-33; \textit{R v Wolfleg}, 2018 ABCA 222, at para 60; Dickson & Smith, \textit{supra} note 29.
within the literature, including the types of training provided to judicial officials, the extent and frequency of *Gladue* training provided, the experiences of judges with the *Gladue* principles and *Gladue* training, and how current training programs could be supplemented or ameliorated to better fulfill the *Gladue* requirements. However, as discussed in Chapter 4, the implementation of new training regimes is easier said than done, as judicial education is heavily regulated by the National Judicial Institute, provincial judicial education entities and judges across the country.

Second, while some literature does report that sentencing judges receive *Gladue* training in select jurisdictions,\(^{314}\) there is still a lack of awareness as to whether training provided to judges is adequate and inclusive of the necessary cultural and historical information on Indigenous people in Canada. As outlined by the court in *Ipeelee*, “courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools, and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.”\(^{315}\) While some judges do acknowledge these factors, it is imperative that judges fully understand how *Gladue* factors amalgamate to reduce the life choices of Indigenous people, thus sustaining their disadvantaged positions and contributing to their criminalization, and how the unique experiences of Indigenous people differ between Indigenous men and women.\(^{316}\)

To date, there is no research depicting the extent to which *Gladue* training engages with these topics or whether sentencing judges have a thorough understanding of the “unique and

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\(^{315}\) *Ipeelee, supra* note 25, at para 60.

systemic background factors” that bring Indigenous offenders before the court. Given that the remedial potential of Gladue in sentencing is likely shaped and influenced by the level of understanding of the Gladue requirements by the courts, it is imperative that judges have a strong understanding of Indigenous people and their history in Canada. As such, further evaluation of current judicial Gladue training programs is required to assess whether the programs in place equip judicial officers with the appropriate cultural competencies necessary to engage in contextualized sentencing. This would better inform the development of a standardized approach to Gladue training and would ensure that training provided is holistic, inclusive, and reflective of the knowledge needed to better assist sentencing judges in fulfilling their statutory obligations.

And finally, over the past two decades, sentencing judges taking notice of the Gladue principles have contested and disputed over the degree of engagement with Gladue and quantity of Gladue information required to fulfil their statutory obligations. In Chapter 4, I discussed how many lower courts, including Burwell, Lawson, and Sand, have delivered contradictory decisions regarding the use of PSRs versus Gladue reports as well as the extent of information required to render a fit and proportionate sentence. These discrepancies within the law itself have arguably hampered Gladue’s ability to facilitate positive systematic change for Indigenous offenders. As such, further investigation into the thresholds for Gladue information – namely the amount of Gladue information required to engage in contextualized

317 Dickson & Smith, supra note 29.
318 Ibid; Hebert, supra note 20.
319 Burwell, supra note 177.
321 Sand, supra note 48. In the aforementioned cases, the courts deemed PSRs with added Gladue content to be satisfactory for presenting Gladue-relevant information despite the fact that PSRs often lack the essential information required for sentencing judges.
322 Stenning & Roberts, supra note 20; Hebert, supra note 20; Department of Justice, supra note 29; Maurutto & Hannah-Moffat, supra note 45; Roach, supra note 27.
sentencing, how such information should be presented, and when *Gladue* relevant-information fails to meet such thresholds – is required in order to create standardized training for judicial officers and thus foster further consistency in Indigenous sentencing.

**Lawyers**

Scholarly literature investigating *Gladue* in the legal practices of prosecutors and defence counsel is also relatively scarce. Currently, there is only one study that engages in this area and that is the work of Rana McDonald, which illustrated that the vast majority of lawyers in her study did not utilize *Gladue* reports in their court submissions for various reasons including financial and resource constraints, presuppositions surrounding Indigeneity and the *Gladue* principles, and an unwillingness to fund *Gladue* reports for offenders facing lesser crimes with lesser sentences.\(^{323}\) While this study offered a glimpse into the application of the *Gladue* principles by lawyers, the study itself was quite limited, as it only engaged with 12 lawyers in the Manitoba region.\(^{324}\) Beyond this study, there is only a handful of research that generally speaks to the *Gladue* training received by lawyers in some Canadian jurisdictions\(^ {325} \) – none of which divulges the extent of *Gladue* training provided to lawyers, whether this training is sufficient, and whether such training could be altered to better assist lawyers in the trenches of the criminal justice system.

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\(^{323}\) McDonald, *supra* note 26.

\(^{324}\) Ibid.

\(^{325}\) In a 2007 evaluation of ALST conducted by Campbell Research Associates, the assessment briefly mentioned that Crown Attorneys and duty counsel in the Toronto region received “specific education sessions, provided by ALST”. The report went on to mention that training was also provided to defence counsel but that these sessions were “not well attended.” Campbell Research Associates, *supra* note 38, at 1; Department of Justice, *supra* note 29, at 41; Clark, *supra* note 253.
Given that prosecutors and defence counsel share a responsibility in informing themselves and the courts of the various background circumstances relevant to a case at hand, it is imperative that lawyers be cognisant of the unique factors that bring Indigenous offenders before the court. A lack of cultural awareness and understanding from defence counsel and prosecutors can result in inadequately prepared court submissions, thus undermining the remedial potentials of the *Gladue* principles and further perpetuating the overincarceration of Indigenous people in the system. However, despite this responsibility, research has shown that lawyers often lack the cultural competencies, “knowledge or expertise on the systemic factors that have led to Aboriginal over-representation,” and thus require further training in this area to ensure that they obtain the skills required to prepare substantive court submissions and meet the *Gladue* requirements.

Like the suggestions made for judicial officers, direct engagement with lawyers – specifically Crown Attorneys, duty counsel, and defence counsel from all regions in Canada – is required for any policy surrounding *Gladue* training for these respective groups. Research should examine all avenues of training provided to each of these categories of lawyers including, how they understand and apply the *Gladue* principles within their respective positions, whether lawyers believe they are adequately equipped with the appropriate cultural competencies for Indigenous sentencing, whether additional training is required, and how training can be ameliorated or tailored to meet their needs in the field. Exploring these research gaps would

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327 Ibid; Dickson & Smith, *supra* note 29.
329 Ibid; Rudin, *supra* note 20, at 703; Rudin, *supra* note 259.
assist policy makers in understanding how lawyers engage with the principles, how they fulfill their requirements, and how standardized training should be structured to support their responsibilities.

Most of literature in the post-\textit{Gladue} era has been comprised of lawyerly commentary and case analyses of judicial decisions on the application of the \textit{Gladue} requirements as well as the role of judges at sentencing.\textsuperscript{330} Very little research has delved into current legal practices of Crown Attorneys, duty and defence counsel in relation to these requirements. Considering this, it is important that a national evaluation of the current practices of lawyers with regards to \textit{Gladue} is conducted to better understand whether their initiatives are presently conducive to the remedial goals of the \textit{Gladue} principles, or whether they hamper the ability of the principles to produce meaningful systematic change. This research would also inform future policy as to whether current practices could be altered or better informed through standardized training to assist lawyers in promoting the remedial potentials of \textit{Gladue}.

\textit{Gladue Report Writers}

Over the past two decades, there have been only a handful of studies detailing the training provided to \textit{Gladue} report writers across Canada. According to the limited research available, it appears that writers receive \textit{Gladue} training within their respective agencies and that training continues to vary from one organization to the next.\textsuperscript{331} While many \textit{Gladue} agencies claim to provide some degree of training to their writers, the absence of uniform \textit{Gladue} training for


\textsuperscript{331} Council of Yukon First Nations, \textit{supra} note 38; April & Orsi, \textit{supra} note 39; Department of Justice, \textit{supra} note 29; Barkaskas et al, \textit{supra} note 38.
writers has arguably contributed to many challenges at sentencing, including substantial variations in the quality and quantity of Gladue-relevant information presented within reports.\textsuperscript{332} Gladue literature has suggested that national standards establishing uniform training regimes for Gladue writers may assist in alleviating some of the current inconsistencies and challenges commonly noted within Gladue report submissions.\textsuperscript{333} However, at this time, there is simply not enough research demonstrating how to formulate and address standardized training programs for Gladue report writers. To bridge this gap within academia, additional research examining the training provided to Gladue writers is certainly required to inform any national standard on this matter.

Inconsistencies and discrepancies within Gladue report submissions across Canada have been a notable challenge facing the remedial objectives of section 718.2(e) and the Gladue principles. It is suggested that this particular challenge is the result of inadequate training and/or the absence of comprehensive and accessible training programs for Gladue writers.\textsuperscript{334} While there have been several studies attesting to the training provided to Gladue report writers, most if not all of the available studies were surface-level evaluations that neglected to voice the lived experiences and perspectives of Gladue report writers in the field.\textsuperscript{335} Hence, these studies failed to ascertain whether Gladue writers truly believe that current training regimes are adequate, extensive, and inclusive of the appropriate knowledge required to produce good quality Gladue reports. What is required is further participatory research with Gladue writers on their perspectives of current Gladue training programs, namely whether they believe current training

\textsuperscript{332} Ibid; Balfour, supra note 316; Roach, supra note 27; Pfefferle, supra note 64, at 121; Downing & Lynch, supra note 275.

\textsuperscript{333} Ibid.

\textsuperscript{334} Ibid.

\textsuperscript{335} Ibid.
programs deliver the appropriate knowledge and skills required to complete good quality *Gladue* reports, whether training is frequent and/or available to them when needed, and how they believe training can be ameliorated or altered to better adhere to their needs in the field.

*Gladue* literature has also correlated a lack of adequate training with *Gladue* report delays at sentencing.\(^{336}\) Studies have shown that most *Gladue* writers require several months to complete comprehensive *Gladue* reports for Indigenous offenders.\(^{337}\) While *Gladue* organizations have been quick to attribute these delays to a lack of human and fiscal resources,\(^{338}\) there is no research from the perspectives of *Gladue* report writers that provides further detail on these delays. Thus, it is imperative that writers be consulted on production delays and asked whether the training they receive is reflective of the demands they encounter in their day-to-day taskings, whether additional support is required and how it can be provided, and whether training can be modified to assist in completing *Gladue* reports in a timely fashion. There are infinite questions that can be posed to *Gladue* writers that would complement the development of standardized *Gladue* training – many of which are included in the ensuing sections. Nevertheless, engaging with the abovementioned research gaps are starting points that will certainly address how training can be amended to alleviate some of the challenges facing the *Gladue* principles at sentencing.

**Standards for *Gladue* Report Formatting**

Research conducted in the post-*Gladue* era has suggested that standardized *Gladue* report formatting could also assist in bolstering the remedial potentials of *Gladue* principles while

\(^{336}\) *Ibid; Noble, supra* note 73, at para 38-39; *K.K., supra* note 1, at para 71.

\(^{337}\) Council of Yukon First Nations, *supra* note 38; *April & Orsi, supra* note 39; Department of Justice, *supra* note 29; Barkaskas et al, *supra* note 38.

mediating some of the present challenges commonly noted at sentencing. Currently, there is no national standard, framework, or format for the production, completion, and delivery of Gladue reports in Canada. Such reports are completed differently within each Canadian jurisdiction, organization, and agency. The absence of a uniform approach to Gladue reports has arguably produced several consequences impacting Indigenous offenders at sentencing, including insufficient and/or inadequate Gladue reports. Indeed, as demonstrated in Chapter 4, many courts have expressed concern for the profound inconsistencies and ambiguity in the quality and quantity of Gladue information presented during sentencing. This is troublesome as poor quality Gladue reports can undermine the remedial intentions of section 718.2(e), prevent Indigenous offenders from accessing proper due process, impact the ability of judges to render informed sentencing decisions, and thus perpetuate disproportionate sentencing. These consequences have been largely attributed to the absence of clear thresholds for information provided in Gladue reports, funding and resources shortages, insufficient training, and

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339 Ibid; Lafferty, supra note 37. See also MMIWG Inquiry, supra note 31, at 185, for recommendation on national standards for Gladue reports.
340 Ibid; Barkaskas et al, supra note 38, at 40 & 96.
341 MMIWG Inquiry, supra note 307, at 719; Hebert, supra note 20, at 163-167; Council of Yukon First Nations, supra note 38; Barkaskas et al, supra note 38, at 40.
342 Hannah-Moffat & Maurutto, supra note 23; Dickson & Smith, supra note 29; Hebert, supra note 20. See also McKay, supra note 4, at para 5; Noble, supra note 73, at para 38; K.K., supra note 1, at para 16, 70; Downing & Lynch, supra note 275.
343 Burwell; supra note 177; K.K., supra note 1; April & Orsi, supra note 39; Council of Yukon First Nations, supra note 38; Barkaskas et al, supra note 38; Balfour, supra note 316; Pfefferle, supra note 64, at 121; Ashley Joannou, “Ad hoc production of aboriginal sentencing reports “unsustainable”” (12 August 2015), online: Yukon News <https://www.yukon-news.com/news/ad-hoc-production-of-aboriginal-sentencing-reports-unsustainable/>.
344 Parkes, supra note 270, at 24; Stenning & Roberts, supra note 20; Department of Justice, supra note 29, at 27; Hebert, supra note 20, at 169; Milward & Parkes, supra note 191; Sylvester & Denis-Boileau, supra note 144; Parkes et al, supra note 70, at 13-14; Maurutto & Hannah-Moffat, supra note 247.
345 April & Orsi, supra note 39; Department of Justice, supra note 29; Hebert, supra note 20; Council of Yukon First Nations, supra note 38.
346 Ibid; Roach & Rudin, supra note 26, at 375; Milward & Parkes, supra note 191; Barkaskas et al, supra note 38.
347 Ibid; McDonald, supra note 26; Clark, supra note 253, at 48; Dickson & Smith, supra note 29, at 24.
constricting policies from within Gladue organizations that curtail access to reports for Indigenous offenders.\(^{348}\)

It is suggested that a uniform approach to the structure, design, and presentation of Gladue reports presents the potential to alleviate some of the above mentioned challenges while also establishing jurisdictional consistency in the quality and quantity of Gladue submissions across Canada.\(^{349}\) Establishing clear guidelines and thresholds concerning the format of Gladue reports would not only ensure that Gladue services convey Gladue-relevant information in a manner that is clear, competent, and comprehensive, but it may also assist in ensuring that reports adhere to the requirements prescribed by the court in Ipeelee.\(^{350}\) Consistency amongst Gladue report submissions may then enable the judiciary to render more informed decisions and engage in contextualized sentencing.

However, notwithstanding the literature showcasing the potentials of standardized Gladue report formatting, we continue to lack sufficient information to inform national standards on this matter. Of the available research, none thoroughly engage with the topic of a uniform approach to Gladue reports. Hence, we are left without clear direction on how Gladue reports could be standardized to better accommodate not only the expectations of the judiciary, but also of Gladue services and Indigenous offenders who qualify for a Gladue report. In light of this, additional research must be conducted to support the development of policies surrounding standardized Gladue report formatting.

**Judges**

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\(^{348}\) Department of Justice, supra note 29, at 27; Council of Yukon First Nations, supra note 38; Dickson & Smith, supra note 29, at 25; Legal Aid Ontario, supra note 236.


\(^{350}\) Ipeelee, supra note 25, at para 60.
Sentencing judges play a significant role in discussions surrounding *Gladue* reports. Although jurisprudence proceeding the *Gladue* decision has heavily disputed the significance and utility of *Gladue* reports, critical research in this area has demonstrated that comprehensive reports are the most preferred method for presenting *Gladue*-relevant information and ultimately better assist judges in fulfilling their statutory obligations.\(^{351}\) This was recently confirmed in a study conducted by Dickson and Smith, wherein “72.5% of respondents ranked full *Gladue* reports as ‘most satisfactory’ compared to 15% for pre-sentence reports with *Gladue* content.”\(^ {352}\) Despite the fact that *Gladue* reports have been considered “helpful to all parties at a sentencing hearing” and “indispensable to a judge in fulfilling his duties under section 718.2(e) of the *Criminal Code*,”\(^ {353}\) there remains great uncertainty over the quality and quantity of information required in these reports.

As noted in Chapter 4, the absence of clear thresholds on the quality and quantity of *Gladue* information has arguably created space for substantial variations in *Gladue* submissions, including PSRs, oral submissions and *Gladue* letters.\(^ {354}\) Given that the judiciary has yet to meaningfully engage or critically address this concern within case law, it is imperative that researchers take the opportunity to question sentencing judges on their perceptions of good quality *Gladue* reports and the amount of *Gladue*-relevant information they require to confidently satisfy their statutory obligations. While the “quality” of a *Gladue* report is surely a subjective determinant and likely to vary on a case-by-case basis and/or between one judge and


\(^{353}\) *Ipeelee*, *supra* note 25, at para 60.

another, research continues to demonstrate that clear, competent, and comprehensive *Gladue* reports assist judges in engaging in contextualized sentencing. National standards concerning *Gladue* report formatting requires greater input not just from those who write reports, but also from those who heavily rely on such reports in practice. Thus, judicial officers should be consulted on their understanding of good quality *Gladue* reports as well as the context behind their perspectives on a good quality report. Access to judges for research purposes is an arduous endeavour that has been accomplished by very few scholars. Should participatory research with judges be pursued in the future, I believe that these points of departure will provide the most insight for policy makers on how such reports can be tailored to support the judiciary and their sentencing requirements.

*Gladue* Report Writers

Another group that certainly must be considered in the establishment of standardized report formatting is *Gladue* report writers. *Gladue* writers are arguably the most essential component to any policy surrounding the *Gladue* principles as their line of work directly corresponds with the quality and quantity of *Gladue* information presented at sentencing. However, at this time, very little is known about the experiences of *Gladue* writers. Most insight into the roles and responsibilities of writers have come from surface-level evaluations of *Gladue* agencies that neglected to thoroughly voice the perspectives of *Gladue* writers. Given that standardized report formatting would directly impact the duties of *Gladue* writers, it is crucial

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357 Downing & Lynch, *supra* note 275, at 188.
that writers be consulted as they possess the knowledge to clearly attest to the challenges within their field.

Substantial research in nearly all avenues of the experiences of Gladue writers is required. Gladue writers need to be approached and asked about their experiences with the Gladue report production process within their respective organizations and the various struggles they face. Research has repeatedly shown that Gladue report writers require several months to complete Gladue reports, which has been criticized by many courts as causing delays within criminal justice proceedings.359 Interestingly, between 2004 and 2007, three organizational evaluations were conducted on Aboriginal Legal Services of Toronto; each evaluation articulated similar concerns regarding delays in obtaining Gladue reports.360 Nearly 18 years later, we are still faced with the same issue. While an adjustment to Gladue report timelines is not necessarily indicative of an improvement in the quality of such reports, Gladue writers should be consulted on how Gladue reports could be standardized to allow writers to be more agile and meet expected timelines with limited resources.

A lack of available resources has been pointedly noted as a large contributor to Gladue report delays at sentencing. Evaluation reports of Gladue organizations have continuously stressed a significant lack of fiscal and human resources for Gladue writers,361 which can lead to numerous consequences including poor quality Gladue reports. Although arguments can be made that a lack of resources are also a result of the decisions made by Gladue services in how they choose to allocate and utilize their resources, Gladue writers should nevertheless be consulted on

359 Dickson & Smith, supra note 29, at 17; K.K., supra note 1, at para 71; Noble, supra note 73; Hannah-Moffat & Maurutto, supra note 23.
360 Campbell Research Associates, supra note 38.
361 Ibid; Barkaskas et al, supra note 38; Council of Yukon First Nations, supra note 38; Department of Justice, supra note 29; Hebert, supra note 20, at 168; Milward & Parkes, supra note 191, at 107; Roach and Rudin, supra note 26, at 375.
what resources and types of support they need to assist in the completion of Gladue reports. Finally, policies surrounding standardized report formatting would also benefit from critical discussions with Gladue writers about how the entire report production process can be ameliorated or streamlined to alleviate some of their challenges. Note that additional areas of research that may assist in the development of standardized Gladue report formatting can also be found in the following section, titled “Gladue report writers”.

**Indigenous Offenders**

Policies surrounding standardized Gladue report formatting should also engage with those it intends to benefit – Indigenous offenders. The Gladue report production process is an extensive undertaking that requires Indigenous offenders to divulge intimate details of their life experiences. This, of course, can be difficult for many, and seeing as Indigenous offenders are directly impacted by this process, it is essential that their perspectives be captured so as to avoid any adverse effects, including retraumatization. Indigenous offenders should be consulted on the report production process – particularly their experiences working alongside Gladue writers and being interviewed about their life history – and how the procedures in place could be structured or improved to fit the needs of Indigenous offenders. They should be asked questions such as how they felt during the interview process, whether they understand the role of Gladue writers, and what they would change about the interview process. In doing so, this research would shed light on the firsthand experiences of Indigenous offenders with the Gladue report process – an area of Gladue literature that has been largely overlooked.

This approach was previously attempted by Professor Carmela Murdocca, however, her study only captured the perspectives of fifteen Indigenous offenders (thirteen men and two
women) with first-hand experience with the *Gladue* process in southern and southwestern Ontario.\(^{362}\) These offenders were not the result of a random sampling but rather were selected by the organization that provided their *Gladue* services, which means the findings should be approached with caution. Findings from her study demonstrated that Indigenous offenders experienced barriers in accessing *Gladue* reports within Ontario but that most participants felt supported by their *Gladue* writers and found the process to be both an emotional and educational experience.\(^{363}\) While this study is a step forward for *Gladue* research, the study was limited to the Ontario region and had a small sample size. It is worth noting that Murdocca’s study was also in partnership with Aboriginal Legal Services – an organization that spearheaded the 90-day cut off policy restriction that allows only those facing a term of imprisonment longer than 90-days to qualify for a *Gladue* report. It may be worth investigating how other organizations, such as the Integrated Justice Program in Regina, Saskatchewan, is able to provide *Gladue* reports to Indigenous offenders in less than 90-days and without this policy restriction.

A similar research approach was taken by Jane Campbell in her three-year evaluation of Aboriginal Legal Services’ (ALS) *Gladue* caseworker program. In addition to consulting with judges, Crown attorneys, defence counsel, court workers, and ALS employees, Campbell also conducted interviews with Indigenous offenders. Results from Campbell’s study were quite similar to Murdocca’s, however, the Indigenous offenders were chosen by ALS, which raises questions of selection bias.

Additionally, research should also explore the perspectives of Indigenous offenders on the quality and accuracy of *Gladue* reports. As exhibited in Chapter 4, *Gladue* report


\(^{363}\) Ibid.
submissions at sentencing have occasionally fallen short of court expectations and/or have utterly failed to convey *Gladue* information in a manner that is conducive to contextualized sentencing.\textsuperscript{364} Given that Indigenous offenders are directly impacted by the quality of *Gladue* reports, it is important that research also be conducted on whether they believe *Gladue* reports truly capture their life histories in a comprehensive and accurate manner, and whether they believe *Gladue* reports should be altered to better reflect their experiences. This approach would capture the voices of Indigenous offenders while also providing them with the opportunity to suggest reforms that could ameliorate current practices.

**Standards for *Gladue* Report Writers**

The third and final realm of national standards explored in this thesis is standards for *Gladue* report writers. While national standards for training and *Gladue* report formatting certainly possess the potential to alleviate some of the challenges explored in Chapter 4, research examining the *Gladue* principles has suggested that standards are also required for *Gladue* report writers.\textsuperscript{365} Consistency across the skillsets required by and provided to *Gladue* report writers is necessary in several areas of their operations. First, *Gladue* literature has alluded that standards for *Gladue* writers in their approach to the production and completion of *Gladue* reports presents the potential to mitigate inconsistencies commonly noted within these reports at sentencing, including the absence and/or lack of clear and concise *Gladue* information.\textsuperscript{366} Establishing structured guidelines and thresholds for writers would assist in ensuring that reports across Canada are comprehensive and that they adhere to the legal, ethical, and contextual requirements

\begin{footnotesize}
\textsuperscript{364} K.K., *supra* note 1; McKay, *supra* note 4; Noble, *supra* note 73; Dickson & Smith, *supra* note 29.
\textsuperscript{366} Ibid at 30.
\end{footnotesize}
prescribed by the courts as well as the ethical conduct of research more generally.\textsuperscript{367} This initiative would aid courts in engaging in contextualized sentencing and rendering more fit and appropriate sentences for Indigenous offenders. It could also ensure that Indigenous persons receiving \textit{Gladue} reports do so in a manner that is shaped by informed consent, confidentiality and culturally, trauma-informed practices integral to safely sharing Indigenous stories.

And second, standards for \textit{Gladue} writers are also necessary to reduce lengthy timelines in the completion of \textit{Gladue} reports and to manage expectations between \textit{Gladue} organizations and sentencing judges requesting such reports. As discussed, most \textit{Gladue} organizations\textsuperscript{368} have a 90-day “cut off” whereby funding and resources for \textit{Gladue} reports for Indigenous offenders facing a sentence of 90 days or less are withheld\textsuperscript{369} arguably based on the perception that such reports will foster little to no impact for the offender or because such reports cannot be researched and written within 90 days.\textsuperscript{370} Unfortunately, many \textit{Gladue} services indicate that their timelines exceed far beyond 90 days and often require more time to complete reports than that prescribed by courts,\textsuperscript{371} which is interesting considering that the Integrated Justice Program in Regina, Saskatchewan, has been successfully completing \textit{Gladue} reports within much shorter timelines and a number of Indigenous organizations, such as the Ontario Native Women’s Association and the Barrie Friendship Centre provide \textit{Gladue} for bail in less than 48 hours.\textsuperscript{372}

\textsuperscript{367} \textit{Ipeelee}, supra note 25, at para 60.
\textsuperscript{368} In Ontario, ALST, the Nishnawbe-Aski Legal Services, and the Grand Council Treaty No.3 Kaakewaaseya Justice Services, have a 120 day, 90 day, and 60 day “cut off” for \textit{Gladue} reports. Dickson & Smith, \textit{supra} note 29; Barkaskas et al, \textit{supra} note 38.
\textsuperscript{369} \textit{Ibid}, at 64.
\textsuperscript{370} \textit{Ibid}.
\textsuperscript{371} Council of Yukon First Nations, \textit{supra} note 38; Barkaskas et al, \textit{supra} note 38; April & Orsi, \textit{supra} note 39; See also \textit{K.K.}, \textit{supra} note 1, for an example of inadequate timelines for the production of a \textit{Gladue} report.
\textsuperscript{372} Communications with Dr. Jane Dickson; Council of Yukon First Nations, \textit{supra} note 38; \textit{Legal Aid Ontario}, \textit{supra} note 236; Bryan Eneas, “A \textit{Gladue} report changed his life. Like many other marginalized offenders, he didn’t know it was his right” (6 February 2022), online: \textit{CBC News} <https://www.cbc.ca/news/canada/saskatchewan/gladue-writing-team-reconciliation-justice-system-1.6325968>; Personal communication with Dr. Jane Dickson, (12 July 2022).
Indigenous offenders simply cannot afford to wait six to eight months for a *Gladue* report, nor should they. Standards for *Gladue* report writers ought to establish best practices and reasonable timelines that balance the needs of Indigenous people, the judiciary and *Gladue* writers.

At this time, there is a severe lack of evidence to inform what national standards for *Gladue* report writers should entail. While evaluations of some *Gladue* organizations have been completed\(^{373}\), there continues to be a significant gap within academia dedicated to voicing the opinions of those heavily involved in the *Gladue* report process. Considering this, extensive research on the roles and responsibilities of *Gladue* writers is required. Specifically, research in this area should engage with *Gladue* writers, judges and lawyers and should explore how individuals in these professions understand their role in the *Gladue* report process, how they believe the process could be ameliorated, and what their experiences have been thus far.

**Opportunities for Further Research**

Considering that this thesis focused predominantly on national standards for *Gladue* training, *Gladue* reports and *Gladue* writers, I would like to conclude with additional comments on potential opportunities for further research on my topic. New and emerging literature exploring the remedial impacts of *Gladue* has increasingly drawn attention to the unique experiences of Indigenous women and have criticized the lack of intersectionality and gendered

consideration available at sentencing.\footnote{374}{Baigent, \textit{supra} note 28; Balfour, \textit{supra} note 316.} Despite representing only 4% of the national population, Indigenous women represent the fastest-growing demographic in Canadian carceral institutions,\footnote{375}{Howard Sapers, “Annual Report of the Office of the Correctional Investigator 2014-2015” (June 2015), online: \textit{Office of the Correctional Investigator} <https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt20142015-eng.pdf>.} as they account for more than 41% of female admissions to federal and provincial custody.\footnote{376}{Ivan Zinger, “Annual Report of the Office of the Correctional Investigator 2018-2019” (25 June 2019), online: \textit{Office of the Correctional Investigator} <https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20182019-eng.aspx?texthighlight=annual+report#s7>.} Several scholars have noted that Indigenous females are disproportionately affected by indicators of colonialism, including ongoing experiences of abuse, isolation, violence, racism, and victimization, and thus require further consideration at the sentencing stage to bring forth these realities.\footnote{377}{While these factors are not unique or exclusive to Indigenous women specifically, they nevertheless contribute to the overrepresentation of this particular population in the criminal justice system. Baigent, \textit{supra} note 28; Angela Cameron, “Chapter 9: R v. Gladue: Sentencing and the Gendered Impacts of Colonialism”, in Angela Cameron, \textit{Moving Toward Justice: Legal Traditions and Aboriginal Justice, by John Whyte (ed),} (Saskatoon, Sask: Purich Pub in association with the Saskatchewan Institute of Public Policy, 2008) at 160; Mandy Wesley, “Marginalized: The Aboriginal Women’s Experience in Federal Corrections” (2012), online: \textit{Public Safety Canada} <https://www.publicsafety.gc.ca/cnt/rsrscs/pbldtns/mrgnlzd/mrgnlzd-eng.pdf>.} However, the gender-neutral nature of the \textit{Gladue} analysis has shown to preclude such consideration and ultimately results in Indigenous women being reduced and reframed within an essentialized understanding of Indigeneity.\footnote{378}{Baigent, \textit{supra} note 28; Balfour, \textit{supra} note 316.} While research has exhibited that an intersectional lens to the \textit{Gladue} analysis provides a more holistic overview of the unique circumstances of Indigenous women, this level of consideration has been controversial and is not consistently provided to Indigenous women at sentencing.\footnote{379}{Ibid.} In light of this, future research should examine whether national standards supporting an intersectional lens to the \textit{Gladue} analysis would assist in reducing the rates of incarcerated Indigenous women.
Finally, while *Gladue* already experiences significant challenges at the sentencing phase, some scholars have suggested extending the remedial potentials of this principle beyond the sentencing stage. \(^{380}\) Contrary to some Supreme Court decisions that have been reluctant to expressly acknowledge the requirements beyond sentencing, \(^{381}\) *Gladue* consideration has successfully expanded to other avenues of the criminal justice system including “extradition proceedings, dangerous offender designations, bail hearings, parole hearings, Ontario Review Board hearings, and administration appeals from solitary confinement.” \(^{382}\) This demonstrates that *Gladue* and its remedial objectives have utility beyond the sentencing stage and therefore can, and should be, expanded as a means of combating Indigenous overincarceration. Thus, future research should critically explore how and whether national standards could be implemented to support the *Gladue* principles in additional criminal justice processes.

**Reflections**

It is clear that we are currently faced with significant barriers to the implementation of national standards surrounding *Gladue*. The sincere lack of engagement with *Gladue* has made it nearly impossible to establish any meaningful change within the Canadian criminal justice system or arrest the precipitous rise of Indigenous incarceration rates. Hence, further exploration of *Gladue*, particularly within the realms of *Gladue* training, *Gladue* report formatting and *Gladue* report writers, is certainly warranted. Without sound knowledge and evidence demonstrating the potential, content, and foci of national standards, we cannot move forward. This research must incorporate a structured and efficient way of securing the views of those


\(^{382}\) Hebert, *supra* note 20, at 173-4.
heavily involved in the *Gladue* report process; only then will we be able to identify how further legislative action from the federal, provincial and territorial governments should proceed.

Action on behalf of the federal government is especially important and necessary. The growing consensus within available literature has aligned with the notion that “sentencing innovation cannot by itself remove the causes of aboriginal offending” or reduce Indigenous incarceration rates in Canada.\(^{383}\) Interestingly, Tim Quigley offered the following in response to the need for greater federal leadership on matters of *Gladue*:

Since Parliament has the constitutional authority with respect to all Aboriginal Canadians, it would be incumbent on the federal government to accompany statutory amendments with the provision of resources for the administration and preparation of *Gladue* reports. Although provinces have clear authority over the administration of justice, this is a situation that requires leadership at the national level.\(^{384}\)

While the administration of justice is under the purview of provincial governments, federal engagement is most definitely necessary to advance the remedial potential of the *Gladue* decision. However, in order to reach a stage where this can be possible, additional research must be conducted to better inform the Canadian legislature.

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\(^{383}\) Manikis, *supra* note 59, at 177; Hebert, *supra* note 20; Department of Justice, *supra* note 29, at 40; Ralston & Goodwin, *supra* note 23.

Chapter Six: Conclusion

In this thesis, I set out to examine whether the implementation of national standards surrounding *Gladue* would assist in reducing Indigenous incarceration rates by mitigating some of the current challenges impacting section 718.2(e) and the *Gladue* principles at sentencing. Following a critical analysis of secondary research including academic research, case law, and governmental inquiries, it is evident that national standards possess the potential to create further consistency across Canada with regards to *Gladue* training, *Gladue* reports and *Gladue* writers. However, this thesis contends that while there appears to be great potential in *Gladue*, a close examination of the available literature reveals a profound lack of research that can adequately inform the development of national standards surrounding *Gladue*.

Since as early as the 1960’s, research has recapitulated concerns about the escalating overrepresentation of Indigenous people within federal and provincial/territorial institutions. To combat this crisis, the Government of Canada implemented section 718.2(e) of the *Criminal Code* which was later given further significance by the Supreme Court of Canada in *Gladue*. Together, the *Gladue* decision and section 718.2(e) arguably created space for sentencing innovation and meaningful change within the criminal justice system. But as demonstrated within this thesis, both initiatives have utterly failed to mitigate this social and political crisis. This failure has been echoed within the work of scholars and governmental inquiries, including the TRC and the MMIWG inquiry, both of which expressed the need for serious federal engagement with this crisis and proposed several recommendations to cease the rising admissions to custody.\(^{385}\) To this day, the MMIWG inquiry remains the first and only

governmental inquiry to explicitly call attention to the use of national standards supporting the Gladue decision as a means of reducing Indigenous incarceration rates. And yet, as noted in Chapter 2, there has been no serious engagement with the Gladue-relevant recommendations proposed by this inquiry.

This thesis is the first piece of academic work to thoroughly engage with the topic of national standards for Gladue. When I first set out to explore the potentials of national standards, I did so with the intention of concluding my project with a proposed policy for Gladue, thereby assuming that the pre-existing literature in this area was sufficient to confidently identify some requisite features of standards for training, for Gladue reports and for Gladue writers. However, an essential revelation of this thesis was that (1) there exists a multitude of issues that limit Gladue at sentencing, and that (2) there is a profound lack of research that clearly articulates how to combat these issues through the development of national standards.

My analysis of the available literature in this area implicated a series of complex challenges currently hindering the remedial objectives of Gladue at the sentencing stage. Many of these challenges were discussed in Chapter 4, of which included the inconsistent application of section 718.2(e) by judges and lawyers, the use of PSRs with added Gladue components, funding and resources constraints, and the lack of training provided to judges and lawyers. Discussions surrounding the various limitations facing the Gladue principles laid bare the current state of the criminal justice system when sentencing Indigenous offenders. As evidenced in this thesis, there appear to be obstacles at virtually every step of the Gladue process. Whether it be from the initial limitations and restrictions in accessing Gladue reports, to the production of the Gladue report, or the recipients of these reports, it is clear that the system lacks the appropriate
mechanisms to support the *Gladue* decision and the Indigenous persons *Gladue* was intended to assist.

A salient takeaway from Chapter 4 was the understanding that these challenges impact one another and form organic consequences resulting from an ill-equipped criminal justice system. Indeed, challenges such as a lack of adequate resources or funding, can result in compounding issues that delay processes and *Gladue* reports for offenders. It is a cyclical, domino-effect whereby problems at one point in the process anticipate and inform those at other points. However, it is important to note that the totality of these challenges demonstrate the harsh reality that section 718.2(e) has been unsuccessful in generating meaningful change and that perhaps “sentencing innovation cannot by itself remove the causes of aboriginal offending” or reduce Indigenous incarceration rates in Canada.

Finally, while my initial intent was to complete my thesis with a recommended policy, I realized I had to shift the course of my project and instead focus on identifying research gaps pertaining to national standards for *Gladue* training, *Gladue* reports and *Gladue* writers. In Chapter 5, I contend that there is a sincere lack of literature to support and inform the development of any policy supporting the *Gladue* decision. Policy in this area of the criminal justice system must be informed by the perspectives of those heavily involved and impacted by the *Gladue* process. To date, there are only a handful of studies that engage with legal practitioners on matters concerning *Gladue*. As a result, we continue to lack insight on how best to approach any policy surrounding *Gladue*. While I express the need for further participatory and investigative research, we must also be cognisant of the fact that access to judges, lawyers,

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Gladue report writers and Indigenous people for research purposes is an arduous endeavour and easier recommended than done.

This thesis sought to further the discussion on the use of national standards surrounding Gladue. From the available literature, it is strongly suggested that national standards, particularly with regards to Gladue training, Gladue reports and Gladue writers, possess the potential to establish further consistency and national cohesion in the Gladue process. Consistency in these realms of practice would assist in mitigating some of the challenges currently limiting the remedial potentials of the Gladue principles at sentencing and potentially attenuate the rising Indigenous admissions to federal and provincial/territorial custody. However, to develop and implement good policies, significant research must be conducted and must recognize that the crisis of Indigenous overincarceration and the limitations of Gladue are “complex and…connected to all levels of the justice system.”387 Thus, to generate meaningful change within the system there must be positive change within all levels of the Gladue process.

387 LSSBC, supra note 168, at 6.
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