# *GLADUE* AT TWENTY: *GLADUE* PRINCIPLES IN THE PROFESSIONAL DISCIPLINE OF INDIGENOUS LAWYERS

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## INTRODUCTION

As the Supreme Court of Canada recognized in *R v Gladue*, the estrangement of Canada's Indigenous peoples from the Canadian justice system is a national crisis—a crisis of which overincarceration is merely one symptom.[1] This reality has been emphasized by scholars such

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1. *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*]. See, for example, *Gladue* at paras 61 ("the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned") and 64 ("These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system.")

as Larry Chartrand, who in 2001 wrote that "This [overincarceration] is not disputed and is supported by countless national and provincial commissions and inquiries" and attributed it in part to "systemic discrimination in the justice system."[2] Similarly, James (Sákéj) Youngblood Henderson emphasizes the roots of this crisis in colonization, noting that "More than two decades of commissions, inquiries, reports, special initiatives, conferences and books have established the totalizing effects of colonization on Aboriginal peoples in Canada."[3]

Indeed, the justice system reinforces the adverse impacts of colonization. Henderson puts it clearly:

> Indigenous peoples know this crisis more as feeling than as theory. They have to build their lives around injustices and pollution that they cannot heal, undermining their lives and dignity. In the context of a failed justice system that we do not control, we are struggling to free our minds and our peoples from the worst manifestations of the Eurocentric colonial context.[4]

Likewise, Chartrand observes that "To be a member of a Nation of people who have been humiliated, discriminated against, abused and victimized by England and Canada is deeply disconcerting."[5] Despite *Gladue* and its progeny, Chartrand argues that "in the case of claims by Aboriginal peoples for justice the Supreme Court of Canada has largely been a source of injustice."[6] Chartrand also demonstrates "blatant ignorance on the part of the government of Canada" as to the impact of the criminal law on Indigenous persons.[7] These problems are often met with weak and insufficient responses. Indeed, in her study of colonization and the justice system, Lisa Monchalin dismisses *Gladue*, and the provision of the *Criminal Code* underlying it, as mere "tinkering."[8]

In the wake of the Truth and Reconciliation Commission, the legal profession and its regulators have focused on the training and education of lawyers and law students, particularly in "intercultural competency," as emphasized in Calls to Action 27 and 28.[9] For example, in 2018 the Advocates' Society, the Indigenous Bar Association, and the Law Society of Ontario jointly published a *Guide for Lawyers Working with Indigenous Peoples*, which observed—

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2. Larry N Chartrand, "Aboriginal Peoples and Mandatory Sentencing" (2001) 39 Osgoode Hall LJ 449 at 454, 457 [Chartrand, "Mandatory Sentencing"].

3. James (Sákéj) Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at 24 [citations omitted].

4. *Ibid* at 24 [citations omitted].

9. Truth and Reconciliation Commission of Canada, *Calls to Action* (Winnipeg: The Commission, 2015), online: National Centre for Truth and Reconciliation <nctr.ca/reports.php>. Call to Action 27: "We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism." Call to Action 28: "We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism."

among other things—that "there is no such thing as a culturally neutral practice of law."[10] However, this training and education focus is important but incomplete: The journey toward reconciliation will also involve law societies' re-examination of their relationship with and regulation of Indigenous lawyers.

A key facet of the regulation of Indigenous lawyers is the disciplinary process, including the determination of penalties. It is in this respect that the applicability of *Gladue* principles warrants consideration.

In the twenty years since *Gladue*, *Gladue* principles have been extended well beyond their origin in criminal sentencing.[11] However, there have been only two matters in which these principles have been explicitly applied by professional discipline tribunals—both in disciplining lawyers.[12] Neither of these decisions were judicially reviewed, which means no court has stated whether or not this extension is appropriate. Moreover, these discipline decisions are not considered in the leading treatise on lawyer discipline.[13] As a result, there is doctrinal uncertainty.

In this article, I address this doctrinal uncertainty by analyzing these disciplinary decisions and tracing the appellate extensions of *Gladue* that preceded them and the decisions of

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10. Advocates' Society, Indigenous Bar Association & Law Society of Ontario, *Guide for Lawyers Working with Indigenous Peoples* (Toronto: AS, IBA & LSO, 2018) at 10, online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/g/guide_for_lawyers_working_with_indigenous_peoples_may16.pdf>.

11. *Criminal Code*, *supra* note 8, s 718.2(e). I also note statutory extensions of *Gladue* to sentencing regimes outside the *Criminal Code*. See, for example, *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15, s 63(23), adding subsection c.1 to s 203.3 of the *Code of Service Discipline*, being Part III of the *National Defence Act*, RSC 1985, c N-5: "all available punishments, other than imprisonment and detention, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." (However, this was first read in by Pelletier J in *R v Levi-Gould*, 2016 CM 4003 at para 13. Thanks to Benjamin Ralston for bringing this case to my attention.) See also *Youth Criminal Justice Act*, SC 2002, c 1 [*YCJA*], s 38(2)(d): "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons," which was missing from the predecessor *Young Offenders Act*, RSC 1985, c Y-1. The presence of this provision in the *YCJA* is less a true extension of *Gladue* than merely avoiding a legislative gap between the *YCJA* and the *Criminal Code*. See Kent Roach & Jonathan Rudin, "*Gladue:* The Judicial and Political Reception of a Promising Decision" (2000) 42 Can J Criminology 355 at 357: "More troubling, the federal government initially decided not to include an equivalent of s 718.2(e) in its proposed *Youth Criminal Justice Act*. This would have produced the absurd result that judges would have had more legal resources to avoid placing adult rather than teenaged aboriginal offenders in jail."

12. While I would distinguish police discipline from professional discipline, in this respect see *Commissaire à la déontologie policière v Ross*, 2003 CanLII 57332 (QC CDP) at para 330, in which the decision maker seemed to hold that *Gladue* principles apply but was not specific about how. At the penalty hearing the police officers argued that *Gladue* principles should apply to penalty determination (*Police Ethics Commissioner v Ross*, 2003 CanLII 57340 at para 24 (QC CDP): "This is a case involving 'native' police officers and 'native' civilians in a 'native' community with unique experiences with law enforcement. The Committee can look to *Gladue*, a judgment of the Supreme Court of Canada, for sentencing principles in matters dealing with aboriginal peoples") but it is unclear whether and how the decision maker took *Gladue* principles into account.

13. Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada 1993) (loose-leaf updated 2019, release 4) at ch 26, 26.17 at 26-42 to 26-62.

the Supreme Court of Canada that followed them to determine whether these disciplinary decisions were correct in applying *Gladue* principles.

However, despite the spread of *Gladue* principles, there are no settled legal criteria or legal tests for when *Gladue* principles should be extended beyond the context of criminal sentencing. Thus, to demonstrate that *Gladue* principles properly apply to lawyer discipline, I must first establish a legal test for the extension of *Gladue* principles to new contexts. I identify four possible approaches to the extension of *Gladue* principles. Three of these approaches are identifiable in the decisions of appellate courts, while the fourth can be derived from a common theme among some of these decisions. Of these four approaches, two would apply to all discipline of Indigenous lawyers and one would apply depending on the nature of the particular conduct at issue. I ultimately conclude that while appellate guidance is desirable to confirm which of these four approaches, alone or in combination, is correct, *Gladue* principles should generally be applied to discipline of Indigenous lawyers.

This article is organized in three parts. I begin in Part I with an analysis of the reasons given in these lawyer disciplinary decisions, set within the context of background information on Indigenous lawyers in Canada and the purposes of law society discipline. Then, in Part II, I trace the extension of *Gladue* principles from the *Criminal Code* through to these disciplinary decisions to identify my four approaches to when *Gladue* principles should be extended to contexts outside criminal sentencing. I also consider the impact of decisions of the Supreme Court of Canada subsequent to these disciplinary decisions. In Part III, I consider how these four approaches interact and explain why *Gladue* principles should generally be applied to the discipline of Indigenous lawyers.

As a starting point, it is important to crystallize the meaning of the phrase "*Gladue* principles." While the Supreme Court of Canada often refers to "*Gladue* principles,"[14] suggesting that the phrase is a term of art, less often does it define what precisely those principles are or mean. As my analysis below will demonstrate, this ambiguity about what exactly *Gladue* principles are informs ambiguity about how they apply in contexts beyond criminal sentencing.

The Supreme Court of Canada in *R v Ipeelee* held that

> *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) 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.[15]

(In addition, the court held that "the *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular

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14. See, for example, *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] at paras 34, 63, 64, 74, 84, 87; *R v Kokopenace*, 2015 SCC 28 at para 98, rev'g 2013 ONCA 389 [*Kokopenace* SCC, *Kokopenace* CA].

15. *Ipeelee*, *supra* note 14 at para 72, citing *Gladue*, *supra* note 1 at para 66.

community."[16]) The court in *Gladue* specified, among these unique factors, that "many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions."[17] Similarly, the court in *Ipeelee*, quoting from the Report of the Manitoba Public Inquiry into the Administration of Justice and Aboriginal People, referred to "cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people."[18] Chartrand likewise states that "the inclusion of section 718.2(e) in the *Criminal Code* and the special direction given to sentencing judges to consider the unique circumstances of Aboriginal peoples is a response and an acknowledgment by government that Aboriginal crime is not simply a question of individual circumstances but *rather the result of complex social factors*."[19]

The majority of the Supreme Court of Canada in *Kokopenace* used the phrase "*Gladue* principles" interchangeably with "the estrangement of Aboriginal peoples from the criminal justice system."[20] This usage is consistent with the reasons in *Gladue*, which emphasized not only overincarceration but also "the greater problem of aboriginal alienation from the criminal justice system."[21]

Thus, for my purposes, *Gladue* principles may be described as a recognition of the unique circumstances of Indigenous persons, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural oppression, dislocation, and poor social and economic conditions.

# I INDIGENOUS LAWYERS, LAWYER DISCIPLINE AND *GLADUE* PRINCIPLES

In this section I analyze the reasoning in the two lawyer disciplinary decisions that have applied *Gladue* principles, as well as a third decision in which the panel acknowledged that *Gladue* principles could apply but declined to do so. I start, however, by considering the situations and experiences of Indigenous lawyers in Canada and then by setting out the purposes of law society discipline and the factors going to penalty.

## A. Indigenous Lawyers in Canada

16. *Ipeelee*, *supra* note 14 at para 74.

17. *Gladue*, *supra* note 1 at para 68. See also Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice That Applies to Prosecutors" (2016) 21:1 Can Crim L Rev 173 at 183, defining *Gladue* as "the principle that requires public agencies to take into account the status of Aboriginal people and their backgrounds when making decisions that can affect their liberty interests." See also Manikis at 184: "the *Gladue* principle entails that special consideration is attributed to Aboriginal status in every decision by a state agency that has the potential effect of undermining an Aboriginal person's life, liberty or security interests."

18. *Ipeelee*, *supra* note 14 at para 83, quoting Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1, *The Justice System and Aboriginal People* (Winnipeg: The Inquiry, 1991) at 86.

19. Chartrand, "Mandatory Sentencing," *supra* note 2 at 462–463 [emphasis added].

20. *Kokopenace* SCC, *supra* note 14 at para 97.

21. *Gladue*, *supra* note 1 at para 65.

A 2016 study reported that Indigenous lawyers comprise approximately 1 percent of the legal profession in Canada,[22] but there is considerable variation among the provinces. According to recent statistics from the Law Society of Ontario, Indigenous lawyers comprise roughly 1.5 percent of the Ontario bar, which is about half of their proportion in the general population.[23] Indigenous lawyers comprise about 0.5 percent of the Quebec bar[24] and about 5.5 percent of the Manitoba bar.[25] (Similarly, Indigenous lawyers as a proportion of the legal profession by province varied from a low of 0.4 percent in Quebec to a high of 4.9 percent in Saskatchewan as of 2006.[26])

As Sonia Lawrence and Signa Daum Shanks have noted, "the number of Indigenous lawyers [in Canada] doubled at some point in the 1990s."[27] Similarly, a 2009 report from the Law Society of Upper Canada (LSUC) concluded that "the Aboriginal bar in Ontario consists of mostly recently called lawyers…approximately 65% of self-identifying Aboriginal lawyers have been called since 2001."[28]

As several commentators recognize, Indigenous lawyers may face a challenge in reconciling their Indigeneity with their status as legal professionals "given the centrality of the Canadian legal system in the ongoing oppression of Indigenous Canadians."[29] As Lawrence and Daum

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22. Canadian Centre for Diversity and Inclusion, *Diversity by the Numbers: The Legal Profession* (Calgary and Toronto: CCDI, 2016) at 27, online: <https://ccdi.ca/media/2019/dbtn_tlp_2016.pdf> [1.06 percent]. According to figures from Tennant, in 1992 Indigenous lawyers made up 0.8 percent of the legal profession, which was approximately one-third of their proportion of the general population (2.3 percent): Chris Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15:2 Dal LJ 464 at 469 [citation omitted].

23. Law Society of Ontario, *Statistical Snapshot of Lawyers in Ontario* (Toronto: LSO, 2017) at 2, Table 1 (1.5 percent and 2.8 percent), online: <http://annualreport.lso.ca/2017/common/documents/Snapshot-Lawyers18_English.pdf> [*LSO Snapshot*].

24. Barreau du Québec, *Rapport annuel 2018–2019* (Montréal: Barreau du Québec, 2019) at 13, online: <https://www.barreau.qc.ca/media/1885/2018-2019-rapport-annuel.pdf> [134 of 27,581 (0.5 percent)].

25. Law Society of Manitoba, *2019 Annual Report* (Winnipeg: LSM, 2019) at 8, online: <http://www.lawsociety.mb.ca/Plone/publications/annual-reports/2019%20Annual%20Report.pdf/view> [114 of 2094 (5.4 percent)].

26. Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: LSUC, 2010) at 16, Table 11, online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/racialization_gender_report.pdf>. The three territories reported a pooled proportion of 13.7 percent, but that figure combined both Indigenous and racialized lawyers. On the need for better demographic data, see Sabrina Lyon & Lorne Sossin, "Data and Diversity in the Canadian Justice Community" (2014) 11 JL & Equality 85.

27. Sonia Lawrence & Signa A Daum Shanks, "Indigenous Lawyers in Canada: Identity, Professionalization, Law" (2015) 38:2 Dal LJ 503 at 504. See also Law Society of Upper Canada, *Final Report—Aboriginal Bar Consultation* (Toronto: LSUC, 2009) at paras 1–3, online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/2009-final-report-of-the-indigenous-bar-consultation_1.pdf> [*LSUC ABC Report*].

28. *LSUC ABC Report*, *supra* note 27 at para 37.

29. Lawrence & Daum Shanks, *supra* note 27 at 513. See also Patricia A Monture, "Now That the Door Is Open: First Nations and the Law School Experience" (1990) 15:2 Queen's LJ 179 at 189: "The work of Canadian legal scholars, the judiciary, politicians, and in fact all those involved with the shaping of Canada as a nation state, have actively, by omission or commission, participated in the direct oppression of First Nations." See also Jeffrey G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65 at 68: "Law schools produce legal actors and, through this production line, serve as a site of colonization because in Canada law has been, and continues to be, a vehicle to oppress Indigenous peoples" [citations omitted].

Shanks put it, "Indigenous lawyers occupy a complicated space."[30] Tracey Lindberg describes this tension in terms of language: "As students of law, Aboriginal people are in the position of having to learn an unfamiliar language while attempting at the same time to retain their own."[31] Similarly, Henderson writes that "Indigenous lawyers have had to resist the European categories and methods and redraw the map and consequences of the law of colonization."[32] He elaborates that "Eurocentrism and colonial thought still imprisons colonized Indigenous peoples and Indigenous lawyers…[who] seek to practice law, law reform, and empower our communities and peoples within the toxic parameters of our cognitive prison of our legal consciousness."[33] (At the same time, that colonized knowledge can be applied for change: "by using borrowed Eurocentric languages and skills, Indigenous lawyers can participate in unraveling Eurocentric visions."[34]) Indeed, Constance Backhouse argues that "the very concept of professionalism has been inextricably linked historically to masculinity, whiteness, class privilege, and Protestantism"—as well as Eurocentric colonization.[35]

Discrimination is a reality for many Indigenous lawyers and law students. Not surprisingly, the 2009 LSUC report concluded that discrimination was a major factor in the experience of Indigenous lawyers in Ontario.[36] Similarly, although somewhat dated, a 2000 survey of Indigenous lawyers by the Law Society of British Columbia found that 76 percent reported "discriminatory barriers" in law school, as did 81 percent in practice but only 59 percent while articling.[37]

While the discrimination faced by Indigenous lawyers shares some elements with racism generally, the two are not the same. For example, Lawrence and Daum Shanks explain:

> Indigeneity should not be conflated with other racializations. But, the ubiquity of racism directed at Indigenous people and the extent to which this figures in personal narratives mean that the treatment of Indigenous peoples and nations by colonial and imperial projects cannot be entirely separated from racial projects more generally.[38]

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30. Lawrence & Daum Shanks, *supra* note 27 at 504–505.

31. Tracey Lindberg, "What Do You Call an Indian Woman with a Law Degree? Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9:2 CJWL 301 at 321. See also 305–306: "Many of us recognized that we were being indoctrinated and we fought this indoctrination in different ways."

32. Henderson, *supra* note 3 at 9.

33. *Ibid* at 14, 15.

34. *Ibid* at 54.

35. Constance Backhouse, "Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 126 at 128. See also 132–133 on Indigenous lawyers and prospective lawyers.

36. *LSUC ABC Report*, *supra* note 27 at para 41. On the experiences of Indigenous law students, see generally Monture, *supra* note 29 and Lindberg, *supra* note 31.

37. Law Society of British Columbia, Aboriginal Law Students Working Group, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: LSBC, 2000) at 17, 34-35, 38-39, online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/AboriginalReport.pdf>.

38. Lawrence & Daum Shanks, *supra* note 27 at 509.

Similarly, the final report of the Challenges Faced by Racialized Licensees Working Group of the Law Society of Upper Canada noted "that Indigenous peoples face barriers that are unique to Indigenous licensees and barriers that are shared by both racialized and Indigenous licensees."[39]

In this context, it would not be surprising if at least some Indigenous lawyers have complicated relationships with and attitudes toward law societies as regulators.[40] Little information is available on the experiences of Indigenous lawyers with law society investigations and discipline. While there are no statistics that directly suggest Indigenous lawyers are disciplined at a greater level than lawyers overall, they are more likely than lawyers overall to practise as sole practitioners (in Ontario, 24 versus 21 percent) or in small firms of fewer than five lawyers (of those lawyers practising in firms, 42 versus 29 percent)—groups that are generally considered to be investigated and disciplined at a higher rate than lawyers in larger firms.[41] Of the ten reported penalty decisions over the last twenty years in which the lawyer is identifiable as Indigenous, the reasons in only the three I will discuss below consider *Gladue* principles.[42] (As for good character hearings for admission to the bar, of the three decisions in the last twenty years in which the applicant is identifiable as Indigenous none considers *Gladue* principles.[43])

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39. Law Society of Upper Canada, Challenges Faced by Racialized Licensees Working Group, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (Toronto: LSUC, 2016) at para 18, online: <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/w/working-together-for-change-strategies-to-address-issues-of-systemic-racism-in-the-legal-professions-final-report.pdf>.

40. See, for example, *Law Society of Ontario v Bogue*, 2019 ONLSTA 19 at paras 7–8, where the lawyer argued that the Law Society Tribunal lacks jurisdiction over Indigenous lawyers, on unceded land, or both. Consider also the difficult experience of an Indigenous lawyer applicant convincing the LSUC to allow her to wear traditional regalia for her call to the bar: Duncan McCue, "First Nations Law Student Gets OK to Wear Regalia to Call to Bar in Ontario" *CBC News* (22 June 2015), online: <https://www.cbc.ca/news/indigenous/first-nations-law-student-gets-ok-to-wear-regalia-to-call-to-bar-in-ontario-1.3123665>.

41. *LSO Snapshot*, *supra* note 23 at 7, Table 5a, and 8, Table 5b. Again, there is arguably a need for better data. See note 26 and accompanying text. Better data could quantify the degree to which sole practitioners and small-firm lawyers are investigated and disciplined and could also reveal whether Indigenous licensees are being overinvestigated and overdisciplined.

42. *Law Society of Alberta v Willier*, 2018 ABLS 22, [2018] LSDD No 244 [*Willier*]; *Law Society of Saskatchewan v Winegarden*, 2017 SKLSS 8, [2017] LSDD No 262; *Law Society of Upper Canada v Batstone*, 2017 ONLSTH 34, [2017] LSDD No 39 [*Batstone*]; *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214, [2015] LSDD No 263; *Law Society of Alberta v Mirasty*, 2016 ABLS 21, [2016] LSDD No 109, aff'd 2016 ABLS 58, [2017] LSDD No 135 [*Mirasty*, *Mirasty Appeal*]; *Law Society of Alberta v Shanks*, 2013 ABLS 21, [2013] LSDD No 214; *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSAP 18, [2013] 4 CNLR 129, [2013] LSDD No 75, var'g 2012 ONLSHP 115, [2012] LSDD No 130 [*LSUC v Robinson* AP, *LSUC v Robinson* HP]; *The Law Society of Manitoba v Nadeau*, 2013 MBLS 4 [*Nadeau*]; *Law Society of British Columbia v Bauder*, 2013 LSBC 7, [2013] LSDD No 17; *Law Society of Alberta v Hendricks*, [2005] LSDD No 4. (These are the ten decisions that use terms such as "Indigenous" or "Aboriginal" or "Métis" or "First Nations." There may well be additional decisions regarding Indigenous lawyers in which the lawyer was not identifiable as Indigenous from the reasons.) See also *Law Society of Upper Canada v Harry*, 2014 ONLSTH 173, [2014] LSDD No 223, relating to discipline of an Ontario paralegal, again in which *Gladue* was not considered.

43. *Law Society of Upper Canada v Levesque*, 2005 CanLII 27007, [2005] LSDD No 38; *Law Society of Upper Canada v Schuchert*, [2001] LSDD No 63 (*sub nom Schuchert, Re*, 2001 CanLII 21499); *Moore v Law Society of British Columbia*, 2018 BCSC 1084 [*Moore*] (the underlying decision is unreported).

## B. Law Society Discipline: Purpose and Penalty

Law society legislation and codes of professional conduct across the country say little, if anything, about the purposes of lawyer discipline and the factors that determine penalties. The legislation does often indicate the purposes of the law society and self-regulation, which apply to discipline along with all other law society functions, among which most importantly "the Society has a duty to protect the public interest." [44] Given this relative silence it is necessary to turn to disciplinary decisions themselves and case law related to them as relevant primary sources. In a passage that has been quoted with approval in lawyer disciplinary decisions in the majority of Canadian jurisdictions, Gavin MacKenzie writes that "the purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession."[45] MacKenzie also refers to "the protective and deterrent functions of the discipline process."[46] Many aggravating and mitigating factors have been held to apply to penalty determination. The most detailed list, although explicitly not exhaustive, has been adopted by the BC Court of Appeal:

a. the nature and gravity of the conduct proven;
b. the age and experience of the respondent;
c. the previous character of the respondent, including details of prior discipline;
d. the impact upon the victim;
e. the advantage gained, or to be gained, by the respondent;
f. the number of times the offending conduct occurred;
g. whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;
h. the possibility of remediating or rehabilitating the respondent;
i. the impact on the respondent of criminal or other sanctions or penalties;
j. the impact of the proposed penalty on the respondent;
k. the need for specific and general deterrence;
l. the need to ensure the public's confidence in the integrity of the profession; and
m. the range of penalties imposed in similar cases.[47]

A similar list has been recognized by the Ontario Divisional Court, of which two factors are in substance absent from the BC list:

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44. *Law Society Act*, RSO 1990, c L.8, s 4.2, para 3.

45. MacKenzie, *supra* note 13 at Ch 26, 26.1, p 26-1. See *Guttman v Law Society of Manitoba*, 2010 MBCA 66 at para 75, 255 Man R (2d) 151; *Howe v Nova Scotia Barristers' Society*, 2019 NSCA 81 at para 190 [*Howe*]; *Vlug (Re)*, 2018 LSBC 26 at para 164, [2018] LSDD No 190; *Law Society of Upper Canada v Walton*, 2015 ONLSTA 8 at para 29, [2015] LSDD No 41; *Law Society of Alberta v Schwartzberg*, 2017 ABLS 23, [2017] LSDD No 306; *Winegarden*, *supra* note 42 at para 78; *Hutton, Re*, 2006 CanLII 38726 (NL LS); *McNiven (Re)*, 2016 CanLII 32391 at para 63 (NWT LS). See also *Law Society of Upper Canada v Kazman*, 2008 ONLSAP 7 at para 75: "Disciplinary orders are directed toward four main purposes: a) Specific deterrence; b) General deterrence; c) In appropriate cases, improved competence, rehabilitation and or restitution; and d) Most important of all, maintaining public confidence in the legal profession."

46. MacKenzie, *supra* note 13 at Ch 26, 26.1, p 26-1.

47. *Faminoff v The Law Society of British Columbia*, 2017 BCCA 373 at para 36, 4 BCLR (6th) 324.

g. whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct;
h. whether the misconduct is out-of-character or, conversely, likely to recur.[48]

Other than "extenuating circumstances," there is no explicit reference to the background of the lawyer or, paraphrasing the words of the court in *Gladue*, the "factors which may have played a part in bringing the particular [lawyer] before the [panel]." This absence makes it unclear where "the unique systemic and background factors" of Indigenous lawyers would be considered. From these lists, *Gladue* principles appear primarily relevant to "the need for specific and general deterrence," "extenuating circumstances," possible remediation or rehabilitation, and "the need to ensure the public's confidence in the integrity of the profession," but, as I will explain below,[49] may also be relevant to the lawyer's character.

## C. *Gladue* in Lawyer Discipline

The first disciplinary matter in which *Gladue* principles were applied was *Law Society of Upper Canada v Terence John Robinson*.[50] The unusual facts in *LSUC v Robinson* were that the lawyer enlisted a client to violently attack a non-client. The lawyer, being harassed and eventually pursued by a non-client who accused the lawyer of an affair with his girlfriend, contacted a client for assistance in "teach[ing] him a lesson" to end the harassment.[51] The client and a fourth man attacked and seriously wounded the non-client.[52] The lawyer pled guilty to aggravated assault.[53] The lawyer argued that his Indigenous background was a mitigating factor, following *Gladue*, and more specifically that his "life experiences as an Aboriginal caused him to be suspicious of police and he therefore felt he was unable to call the police for assistance."[54] The lawyer admitted the charge of conduct unbecoming and the hearing panel imposed a two-year suspension.[55] The hearing panel equated the lawyer's conduct to misappropriation of client funds: "A lawyer's integrity is the foundation of his practice. The public must have confidence that when a lawyer is retained he will never steal the client's trust funds nor will the lawyer solicit the client to commit a criminal act."[56]

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48. *D'Mello v The Law Society of Upper Canada*, 2015 ONSC 5841 at paras 84, 91, 340 OAC 160 (Div Ct).

49. See below note 62 and accompanying text.

50. *LSUC v Robinson* AP, *supra* note 42. *LSUC v Robinson* AP is particularly persuasive given its panel, including two future treasurers (Janet A Leiper and Malcolm M Mercer), a former attorney general (Marion Boyd), and a highly regarded criminal law specialist (Mark Sandler). (*Gladue* principles were invoked in the prior matter of *Law Society of Upper Canada v Selwyn Milan McSween*, 2012 ONLSAP 3, [2012] LSDD No 15, but to argue that the principles should be applied to black lawyers.)

51. *LSUC v Robinson* AP, *supra* note 42 at para 6, quoting *LSUC v Robinson* HP, *supra* note 42 at paras 4–7.

52. *LSUC v Robinson* AP, *supra* note 42 at para 6, quoting *LSUC v Robinson* HP, *supra* note 42 at paras 8–9.

53. *LSUC v Robinson* AP, *supra* note 42 at para 1; *LSUC v Robinson* HP, *supra* note 42 at para 2.

54. *LSUC v Robinson* HP, *supra* note 42 at para 2.

55. *Ibid* at paras 17, 48.

56. *Ibid* at para 44. See similarly *LSUC v Robinson* AP, *supra* note 42 at para 51: "To state the obvious, the act of enlisting a client to break the law, and to do so violently, is contrary to everything that our profession stands for."

While the hearing panel held that the lawyer's Indigeneity was not a mitigating factor, citing "the lack of evidence…or 'case-specific information,'"[57] the appeal panel—holding that there was such evidence—substituted a lesser suspension of one year.[58] The appeal panel recognized that the professional disciplinary context was different from criminal sentencing—in particular, "that a licensee's liberty is not at stake in disciplinary proceedings"—but also that the *Gladue* provision of the *Criminal Code* did not apply, that disciplinary penalties did "not addres[s] the crisis of over-incarceration of Aboriginal people," and that the objective of discipline was to maintain public confidence in the profession.[59] However, it held that *Gladue* principles applied to disciplinary proceedings, they just applied differently:[60]

> Hearing panels are concerned with the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation. They are concerned with the culpability or moral blameworthiness of the licensee, and any facts that bear on those issues. They are concerned about the character of the licensee who appears before them. And they are concerned about crafting dispositions that meet the required objectives while promoting access to justice for everyone, including of course, the Aboriginal community. The latter is especially true for the Aboriginal community and others whose access to justice has been deeply problematic.
>
> None of the above concerns are incompatible with maintaining public confidence in the legal profession. Indeed, consideration of unique systemic and background factors, as they reflect upon the seriousness of a licensee's conduct, and his or her culpability or moral blameworthiness, is necessary to enhance respect for, and confidence in our profession and the self-regulation of all of its members.[61]

The panel also linked the lawyer's Indigeneity to good character, observing specifically that "the systemic racism and discrimination which the appellant overcame to become a lawyer speaks powerfully about his character."[62] The law society conceded that the panel should consider "background and systemic factors," that the lawyer "need not prove a causal connection between being an Aboriginal person and the subject conduct as long as the background and systemic factors may have played a role in bringing the offender before the hearing panel," and that panels "may take judicial notice of systemic racism and discrimination."[63]

The hearing panel did recognize as a mitigating factor that the lawyer provided services to the underserved Indigenous community:

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57. *LSUC v Robinson* HP, *supra* note 42 at para 36, quoting from *Ipeelee*, *supra* note 14. See also para 31: "There is absolutely no evidence that the Lawyer was adversely affected because of his mother and grandmother having been sent away to residential schools as children."

58. *LSUC v Robinson* AP, *supra* note 42 at para 4.

59. *Ibid* at para 73.

60. *Ibid* at para 74.

61. *Ibid* at paras 72–73.

62. *Ibid* at para 55.

63. *Ibid* at para 75.

> It is evident…that the Lawyer worked diligently for his clients who were disadvantaged and that he is committed to serving the Aboriginal community. We know Aboriginal people are over-represented in our justice system. We also know Aboriginal people face challenges in retaining lawyers. Permitting the Lawyer to return to practising law may serve to increase access to justice for the Aboriginal community. The panel is of the opinion that an Aboriginal lawyer providing legal services to Aboriginal clients will be a benefit to the public and to the courts.[64]

The appeal panel agreed on this point, noting that this factor "has relevance to what penalty is required to maintain confidence in the legal profession."[65]

This principle in itself—that a lawyer's past and future service of an underserved community, usually a particular ethnic or linguistic community (and typically the lawyer is a member of the community), is a mitigating factor to penalty—is not necessarily unique to Indigenous lawyers. For example, it has recently been accepted by the Nova Scotia Court of Appeal as a principle applicable to discipline of "racialized lawyer[s]" generally.[66] Moreover, it can be applied in the discipline of Indigenous lawyers in the absence of *Gladue* principles.[67]

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64. *LSUC v Robinson* HP, *supra* note 42 at paras 39–41.

65. *LSUC v Robinson* AP, *supra* note 42 at para 56.

66. *Howe*, *supra* note 45 at paras 179 (describing the principle: "when addressing the sanctioning of a racialized lawyer, it is appropriate to consider the community's need to have access to lawyers from their community in the justice system") and 186–187 (holding it properly applies in Nova Scotia).

67. See, for example, *Mirasty*, *supra* note 42 at para 131, aff'd *Mirasty Appeal*, *supra* note 42 at para 29: "It is acknowledged that Mr. Mirasty is an aboriginal person, practices in Northern Alberta in the area of criminal law, and has a unique ability, because of his cultural heritage and his ability to speak Cree, to provide access to legal services to a geographic and cultural community which is in significant need of legal assistance and support." See also *Moore*, *supra* note 43 at para 97, reviewing an admissions decision: "As Ms. Moore notes and I am sure the Law Society would agree, it is also in the public interest to have practising Indigenous lawyers who can provide culturally appropriate services to clients. Supporting Indigenous lawyers in the process of becoming admitted to the bar and remaining members of the bar, whether that is accomplished through future policies or other means, will foster the process of reconciliation that the Law Society has, on its own initiative, embarked upon."

However, this principle is sometimes contested.[68] Consider, for example, the panel in *The Law Society of Manitoba v Nadeau*, holding that underserved groups deserve and require protection against lawyer misconduct just as the general public does:

> Being of a particular ancestry, ethnicity, culture or background often creates a rapport with people having similar traditions or characteristics. We accept that many of Nadeau's clients were attracted to him because of his Aboriginal background.…We know that the Society is concerned that Aboriginal people, especially those in northern and other remote areas of the Province, are underserved in having access to legal services. However, the Society and its discipline panels have the duty and legal obligation to protect all Manitobans, including those of Aboriginal ancestry, from exposure to dishonest or unethical acts by lawyers.[69]

Nonetheless, this aspect of *LSUC v Robinson* is binding on Ontario hearing panels.

*LSUC v Robinson* was followed by a subsequent hearing panel in *Law Society of Upper Canada v Batstone*.[70] The Indigenous lawyer had practised while suspended, but instead of the presumptive penalty of suspension the panel ordered only a reprimand.[71] The panel noted both that the lawyer "has overcome significant barriers to get where she is" and that she served an Indigenous clientele.[72]

While not citing *LSUC v Robinson*, the panel in *Law Society of Alberta v Willier* recognized that *Gladue* principles could apply to lawyer discipline, though it declined to apply them on the basis of insufficient evidence.[73] What distinguishes *Willier* from *LSUC v Robinson* is that *Gladue* principles were recognized as potentially applying not only to the penalty but

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68. See, for example, *Law Society of Upper Canada v Landry*, 2008 ONLSAP 15 at para 23, [2008] LSDD No 140:

> The Appellant invited the Appeal Panel to give consideration to the specific nature of the practice (family law) and the clients (members of the Francophone community) in assessing the hardship and the balance of convenience. It is the view of the Panel that clients are naturally inconvenienced when lawyers are found to have engaged in professional misconduct and face suspensions and/or revocation of their licences. The need to regulate the profession in the public interest necessitates this inconvenience. This is addressed by ensuring orderly transitions or temporary strategies to minimize the impact on clients. It is not, however, to be considered as a factor meriting the reduction of a properly determined penalty.

See also *Law Society of Ontario v Nguyen*, 2018 ONLSTH 157 at para 84, [2018] LSDD No 236: "The fact that the Lawyer is one of a very few fluent Vietnamese-speaking lawyers currently practising law in his community, and that his clients will be deprived of his services if his licence is revoked, cannot affect our decision in the case of a presumptive penalty of revocation."

69. *Nadeau*, *supra* note 42.

70. *Batstone*, *supra* note 42 at paras 10–14.

71. *Ibid* at paras 10–11.

72. *Ibid* at para 13: "She serves a community that is in particular need of her services in a circumstance where there is a particular need for First Nations lawyers to serve them."

73. *Willier*, *supra* note 42 at paras 31 and 35: "we have not been provided with any evidence respecting Mr. Willier's personal or family circumstances that would explain, mitigate, or otherwise affect Mr. Willier's responsibility for the costs of these proceedings."

also to costs.[74] Like in *LSUC v Robinson* and *Batstone*, the lawyer's service to Indigenous clients, "a traditionally underserviced area of the public," was cited as a mitigating factor.[75]

Although not a discipline decision, *Gladue* principles were also argued on the judicial review of the admissions decisions of the Credentials Committee in *Moore v Law Society of British Columbia*.[76] However, Watchuk J held that the failure to consider *Gladue* principles did not compromise the reasonableness of the challenged decisions—although noting that the Law Society could have been more responsive to the applicant.[77] Moreover, the reasons in *Moore* do not indicate how *Gladue* factors might have affected the analysis.

In order to determine whether *LSUC v Robinson* and *Batstone* were correctly decided—that is, whether *Gladue* principles are applicable in lawyer discipline proceedings—it is necessary to examine the appellate case law to identify and establish the criteria for the extension of *Gladue* principles beyond criminal sentencing. It is to this case law that I turn now.

## II FOUR APPROACHES TO THE EXTENSION OF *GLADUE* PRINCIPLES BEYOND CRIMINAL SENTENCING

As Judge Mary Ellen Turpel-Lafond noted extra-judicially in 2000, "the reasoning in the *Gladue* decision is not of the sort that is narrowly confined to one specific component of the administration of justice."[78] But despite the spread of *Gladue* principles, there are no settled legal criteria or legal tests for when *Gladue* principles should be extended beyond the context of criminal sentencing. Likewise, while there is some literature on the application of *Gladue* principles to individual contexts outside criminal sentencing, there appears to be little consideration of, and no clear test proposed for, when those extensions beyond sentencing are appropriate.[79] Jonathan Rudin's observation in 2008 remains applicable today: "One of the live questions arising from the [*Gladue*] decision was the extent to which the decision

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74. *Ibid* at para 35.

75. *Ibid* at para 15.

76. *Moore*, *supra* note 43.

77. *Ibid* at para 96.

78. Judge ME Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (2000) 43 Crim LQ 34:1 at 47–48.

79. See, for example, Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325; Jonathan Rudin, "The Application of *Gladue* Principles to Ontario Review Board Hearings in Theory and Practice" (2012) 33:3 For the Defence 31; Shaunna Kelly, "Application of *Gladue* Principles Beyond Sentencing Hearings" (2012) 33:3 For the Defence 34 [on bail only]; Erin Dann, "*United States of America v Leonard*: Why *Gladue* Principles Matter in Extradition" (2013) 34:3 For the Defence F3. See also Stephanie Ben-Ishai & Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 Manitoba LJ 207, arguing that *Gladue* principles should apply to victim surcharges (at 231-232) and fines (at 233); *R v Boudreault*, 2018 SCC 58 at paras 83, 94. But see Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 Crim LQ 470 at 499–503. Roach describes several extensions of *Gladue* but does not take the next step in his analysis as I do here.

could be extended to other areas involving the treatment of Aboriginal offenders by the justice system."[80]

Thus, to determine whether *Gladue* principles properly apply to lawyer discipline, I must first establish a legal test for the extension of *Gladue* principles to new contexts. In this part, I trace the extension of *Gladue* principles beyond criminal sentencing by appellate courts to identify approaches to the extension of *Gladue* principles. These approaches are candidate tests, or candidate components of a test, for such extension.

I argue that the case law demonstrates four approaches to when *Gladue* principles will apply. The first is an *overlapping considerations* approach, where the applicable legal test includes considerations, purposes, or factors that overlap with criminal law sentencing. The second is an *alienation contextual* approach, where the alienation of Canada's Indigenous peoples from the justice system, and particularly the criminal justice system, is relevant to the proceeding or the legal test to be applied.[81] The third is a *liberty interest* approach, where the liberty interest of an Indigenous person is at stake in the proceedings. These three approaches are expressly evident in the case law I will discuss below, with different ones predominating in different cases. That is, these first three approaches are ones that the judges appear to be expressly applying (without stating these are the only or complete approaches, or even identifying or articulating them as approaches). They apply to categories of cases involving Indigenous persons, such as all extradition decisions or all bail decisions.

The fourth approach is a *criminal conduct* approach, where the conduct at issue constitutes or nears criminal conduct. While this approach is not invoked in the case law, I identify it from the cases. That is, this fourth approach is a set of commonalities I have identified from these cases that the court does not seem to explicitly recognize. Outside of proceedings under the *Criminal Code*, this fourth approach applies not to entire categories of cases, but on a case-by-case basis depending on the particular facts.

As I will demonstrate from the appellate decisions, these four approaches are partially overlapping and are not necessarily mutually exclusive.

Prior to *LSUC v Robinson*, *Gladue* principles had been applied by appellate courts in review board dispositions of accused found to be not criminally responsible (NCR),[82] civil contempt,[83] bail,[84] and extradition.[85] In this part I examine these decisions to establish my four

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80. Jonathan Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR (2d) 687 at 699.

81. I acknowledge that following *Gladue*, addressing this alienation is a purpose of criminal sentencing. I separate it out for my analysis.

82. *R v Sim* (2005), 78 OR (3d) 183, 201 CCC (3d) 482 (CA), Sharpe JA [*Sim*]. *Sim* is discussed in Roach, *supra* note 79 at 502–503.

83. *Frontenac Ventures Co v Ardoch Algonquin First Nation*, 2008 ONCA 534, 91 OR (3d) 1 [*Frontenac Ventures*]. *Frontenac Ventures* is discussed in Roach, *supra* note 79 at 500–501.

84. *R v Robinson*, 2009 ONCA 205, 95 OR (3d) 309 [*R v Robinson*]. (*R v Robinson* was recently codified in *Criminal Code*, *supra* note 8, s 493.2: *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 210.)

85. *United States v Leonard*, 2012 ONCA 622, 112 OR (3d) 496, [2012] 4 CNLR 305, Sharpe JA (Doherty JA dissenting on remedy only) [*Leonard*].

approaches.[86] I then consider the impact of two decisions following *LSUC v Robinson* in which the Supreme Court of Canada has declined to apply *Gladue* principles to jury roll composition and to prosecutorial discretion.[87]

## A. *R v Sim*: Review Board NCR Decisions

The first major extension of *Gladue* principles beyond criminal law sentencing by an appellate court was *R v Sim*, in which the Ontario Court of Appeal extended *Gladue* principles to review board dispositions of accused found to be NCR. Justice Sharpe, writing for the court, considered the statutory criteria for the disposition and concluded that Indigeneity was relevant to these criteria: "proper consideration of appropriate placement of the accused, reintegration into society and the other needs of the accused will call, where the circumstances warrant, for the [review board] to advert to the unique circumstances and background of aboriginal NCR accused."[88] In doing so, Sharpe JA emphasized the alienation aspects of *Gladue*.[89] He noted that the Supreme Court of Canada in *Gladue* "suggested that the principles motivating its decision could have wider ramifications,"[90] quoting the Supreme Court's observation that alienation from the criminal justice system went beyond sentencing: "It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system…There are many aspects of this sad situation which cannot be addressed in these reasons."[91] Thus, Sharpe JA concluded that "I do not think that the principles underlying *Gladue* should be limited to the sentencing process and I can see no reason to disregard the *Gladue* principles when assessing the criminal justice system's treatment of NCR accused."[92]

The reasons of Sharpe JA in *Sim* explicitly demonstrate the alienation contextual approach. The liberty interest and criminal conduct approaches, implicit in his reasoning, apply because the liberty interest of an Indigenous person is engaged and the conduct at issue is criminal conduct, albeit primarily future criminal conduct. The overlapping purposes approach applies,

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86. I do not consider appellate decisions regarding other aspects of sentencing: parole ineligibility (*R v Jensen* (2005), 74 OR (3d) 561, 195 CCC (3d) 14 (CA)), dangerous offender and long-term offender designations (*R v Ladue*, 2011 BCCA 101, 271 CCC (3d) 90, [2011] 2 CNLR 277), or the correct court in which to try a young person (*R v MN*, 2004 NUCA 2, 354 AR 243). (*Jensen* and *MN* are discussed in Roach, *supra* note 79 at 500–501.) Neither do I consider trial-level judicial reviews of administrative decision makers: see, for example, parole hearings (*Twins v Canada (AG)*, 2016 FC 537, [2016] 3 CNLR 342 [*Twins*]) and prisoner segregation decisions (*Hamm v Canada (AG)*, 2016 ABQB 440, 41 Alta LR (6th) 29). (Thanks to Benjamin Ralston for bringing *Twins* and *Hamm* to my attention.) See also David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 107, n 117: "the Correctional Service of Canada [in 2008] has directed that all CSC staff should consider all decisions affecting Aboriginal persons in custody in accordance with 'Gladue principles'" [citation omitted].

87. *Kokopenace* SCC, *supra* note 14; *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 [*Anderson*].

88. *Sim*, *supra* note 82 at para 19.

89. *Ibid* at paras 16–19

90. *Ibid* at para 15.

91. *Gladue*, *supra* note 1 at para 65, quoted in *Sim*, *supra* note 82 at para 15.

92. *Sim*, *supra* note 82 at para 16.

although not evident from the reasoning, insofar as factors relevant to criminal sentencing (in particular public safety) are relevant to the legal test being applied.[93]

## B. *Frontenac Ventures Co v Ardoch Algonquin First Nation: Civil Contempt*

The Ontario Court of Appeal in *Frontenac Ventures Co v Ardoch Algonquin First Nation* extended *Gladue* principles to sentencing for civil contempt. Justice MacPherson for the court noted that the broader themes of *Gladue*, particularly alienation from the justice system, were especially relevant in the context of this civil contempt for a blockade of lawful drilling:

> Although Gladue was focused primarily on the serious problem of excessive imprisonment of aboriginal peoples, the case in a broader sense draws attention to the state of the justice system's engagement with Canada's First Nations. I note three factors in particular that were highlighted in Gladue: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation and whether imprisonment would be meaningful to the community of which the offender is a member. Those factors were all at stake in this case.[94]

Justice MacPherson recognized the distinct purposes of civil and criminal contempt, specifically that "the purpose of a sentence for criminal contempt is punishment, whereas the purpose of a sentence for civil contempt is coercive or persuasive, designed to enforce the rights of a private party."[95] However, this distinction had little impact because "the nature of the appellants' conduct in repeatedly disobeying the interim and interlocutory injunctions came extremely close to criminal contempt."[96]

Thus, *Frontenac Ventures* most explicitly demonstrates the alienation contextual approach, but also qualifies for the liberty interest approach. In contrast, the overlapping considerations approach is downplayed by the distinction between the purposes of civil and criminal contempt.

*Frontenac Ventures* also demonstrates the criminal conduct approach in its emphasis on the fact that the conduct at issue was very close to criminal contempt. Under this approach, *Frontenac Ventures* does not necessarily hold that *Gladue* principles apply to every sentencing of an Indigenous person for civil contempt—they might apply only where the particular civil contempt is close to criminal contempt.

## C. *R v Robinson*: Bail

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93. *Criminal Code*, *supra* note 8, s 672.54: "When a court or Review Board makes a disposition…it shall, taking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is necessary and appropriate in the circumstances."

94. *Frontenac Ventures*, *supra* note 83 at para 57.

95. *Ibid* at para 37 [citation omitted].

96. *Ibid* at para 37.

Bail is arguably the easiest extension of *Gladue* principles, given that the Supreme Court of Canada in *Gladue* explicitly identified bail as a reason for overincarceration of Indigenous persons: "The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources.…It arises also from bias against aboriginal people and from an unfortunate institutional approach that *is more inclined to refuse bail* and to impose more and longer prison terms for aboriginal offenders."[97] In *R v Robinson*, Winkler CJO explicitly approved the extension of *Gladue* principles to bail.[98] His reasoning is relatively conclusory and does not reveal which of my approaches he applied: "It is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R v Gladue*…have application to the question of bail."[99] While other appellate courts have followed *R v Robinson* implicitly or explicitly, they have not provided an analysis explaining why it was correctly decided.[100]

However, the context of bail demonstrates all four approaches that I have identified. Two of these approaches obviously apply: the liberty interest approach, as the liberty interest of an Indigenous person is engaged, and the criminal conduct approach, as the conduct at issue is, by definition, criminal. The alienation contextual approach seems as applicable as in criminal sentencing,[101] although Winkler CJO did not explicitly invoke alienation or estrangement. As for the overlapping considerations approach, the three grounds for refusing bail in the *Criminal Code* overlap with the factors in criminal sentencing, particularly public safety under the secondary ground.[102]

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97. *Gladue*, *supra* note 1 at para 65 [emphasis added]. See also Rogin, *supra* note 79 at 354: "Gladue mandates a return to first principles of the law of bail in recognition of the crisis facing the bail system in Canada and the ways it might impact Aboriginal people."

98. *R v Robinson*, *supra* note 84, Winkler CJO. See also Rogin, *supra* note 79 at 333 (criticizing the reasoning in *R v Robinson* at 332 and 334) and 332: "Courts have found that the above [*Gladue*] principles are applicable to bail hearings in a number of disparate and contradictory ways, presenting a piecemeal approach to the application of *Gladue* to bail that lacks cohesion." But see also Rogin at 336: "The fact that *R v Gladue and Ipeelee* have been found to apply outside of sentencing should not mean that sentencing principles are to be applied inappropriately without regard to the different legal contexts."

99. *R v Robinson*, *supra* note 84 at para 13. For stronger language criticizing the reasons in *R v Robinson*, see *R v Heathen*, 2018 SKPC 29 at para 12: "there is literally no analysis at all. There is simply the bald statement that *Gladue* applies."

100. *R v Oakes*, 2015 ABCA 178 at para 11 explicitly follows *R v Robinson*, as does *R v Hope*, 2016 ONCA 648 at paras 8–12, 133 OR (3d) 154 (see Rogin, *supra* note 79 at 333) and *R v Louie*, 2019 BCCA 257 at para 35. *R v Whitebear*, 2018 ABCA 300 at para 7, while not mentioning *R v Robinson*, does accept that *Gladue* principles apply to bail but without providing an analysis.

101. See, for example, *Rich v Her Majesty the Queen*, 2009 NLTD 69 at para 18, 286 Nfld & PEIR 346 [*Rich*]: "*Gladue* focused on sentencing principles, but it talked about other issues that are relevant to bail: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, whether imprisonment would be meaningful to the community of which the offender is a member, over-representation of members of the aboriginal community in prisons, overuse of incarceration and other concerns unique to aboriginal communities. These types [of] factors are all relevant to bail hearings." See also *R v Magill*, 2013 YKTC 8 at para 46, [2013] YJ No 127 (QL): "In terms of how *Gladue* should inform a bail court's consideration of the tertiary ground, I think that the hypothetical reasonable person whose views we are considering is also one that is apprised of the backdrop against which Aboriginal people come to appear before criminal courts. This means an awareness of the history of colonialism, dislocation and residential schools that *Gladue* and *Ipeelee* describe. This also means a recognition of the responsibility that the Canadian government must assume in addressing the harm that has been occasioned."

102. *Criminal Code*, *supra* note 8, s 515(10)(b): "where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years."

## D. *United States v Leonard*: Extradition

In *United States v Leonard*, the Ontario Court of Appeal extended *Gladue* principles to the extradition context. Justice Sharpe for the court noted that *Gladue* principles were relevant to one criterion in the legal test for extradition, "the severity of the sentence the accused is likely to receive in each jurisdiction."[103] This demonstrates the overlapping considerations approach—the result of the criteria for criminal sentencing is itself a consideration. The criminal conduct approach also clearly applies, as the conduct for which extradition is sought is also, by definition, criminal. Justice Sharpe also quoted with approval the alienation language from *Gladue*.[104] However, Sharpe JA emphasized what I have described as the liberty interest approach, holding that *Gladue* applied whenever a liberty interest was engaged in criminal or "related proceedings":

> The jurisprudence that I have already reviewed indicates that the *Gladue* factors are not limited to criminal sentencing but that they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" (*Gladue*, at para 65) *whenever an Aboriginal person's liberty is at stake in criminal and related proceedings*.[105]

Indeed, the panel in *LSUC v Robinson* acknowledged that the engagement of a liberty interest is one unifying factor of previous extensions of *Gladue* principles.[106] *Leonard* leaves open, however, the scope of "related proceedings" and whether engagement of the liberty interest is necessary, not just sufficient, for the application of *Gladue* principles.

This liberty interest approach is also supported by the work of L Jane McMillan, who suggests that "*Gladue* principles should be applied to all areas of the criminal justice system in which an Aboriginal offender's liberty is at stake."[107] Similarly, Kelsey L. Sitar states that "the *Gladue* principles are relevant and worthy of consideration any time an Aboriginal offender risks losing his or her liberty and/or comes into contact with the justice system."[108] (Sitar's

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103. *Leonard*, *supra* note 85 at para 84, quoting from *United States of America v Cotroni; United States of America v El Zein*, [1989] 1 SCR 1469 at 1498–1499, 48 CCC (3d) 193.

104. *Leonard*, *supra* note 85 at para 51, quoting *Gladue*, *supra* note 1 at para 88.

105. *Leonard*, *supra* note 85 at para 85, quoted in *LSUC v Robinson* AP, *supra* note 42 at para 71 [emphasis added].

106. *LSUC v Robinson* AP, *supra* note 42 at para 71. See also Dann, *supra* note 79: "[*Leonard*] confirms that the application of *Gladue* principles extends beyond sentencing and should be considered whenever an Aboriginal person's liberty is at stake in criminal and related proceedings." See also Manikis, *supra* note 17 at 183, defining *Gladue* as "the principle that requires public agencies to take into account the status of Aboriginal people and their backgrounds when making decisions that can affect their liberty interests." See, for example, Roach, *supra* note 79 at 474: "The Ontario Court of Appeal has emerged as the leader among courts of appeal in extending the reach of *Gladue* and in being sensitive to the need to apply its principles *to all detention decisions regarding Aboriginal offenders*" [emphasis added].

107. See, for example L Jane McMillan, "Living Legal Traditions: Mi'kmaw Justice in Nova Scotia" (2016) 67 UNB LJ 187 at 201, n 38. This approach is also demonstrated in Marie Manikis's argument that *Gladue* principles are a principle of fundamental justice under section 7 of the *Charter*: Manikis, *supra* note 17.

108. Kelsey L Sitar, "*Gladue* as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial" (2016) 20 Can Crim L Rev 247 at 253, citing *LSUC v Robinson* AP, *supra* note 42, as well as three of the appellate decisions I have discussed here.

addition of "comes into contact with the justice system" arguably transcends the engagement of the liberty interest.)

Subsequent to *LSUC v Robinson*, LaForme JA in *Kokopenace* explained *Leonard*, alongside *Sim* and *Frontenac Ventures*, by applying what I have described as an alienation contextual approach:

> In recent years, this court has come to the recognition that the *Gladue* principles properly extend beyond sentencing for criminal offences, and that *Gladue*'s underlying philosophy bears on other aspects of the interaction between Aboriginal peoples and the justice system.…This extension was implicit in the recognition in *Gladue*, at para 65, and *Ipeelee*, at para 61, that sentencing innovation alone would not solve the greater alienation of aboriginal people from the criminal justice system.[109]

This emphasis of the alienation contextual approach is, of course, not necessarily contradictory to the liberty interest approach. It merely reflects a difference in emphasis.

Thus, of these four approaches, the most recently and explicitly emphasized are the liberty interest approach in *Leonard* and the alienation contextual approach in the reasons of LaForme JA in *Kokopenace*.

## E. *R v Kokopenace and R v Anderson*: Has the Supreme Court of Canada Restricted these Approaches?

A test for the extension of *Gladue* principles to contexts beyond criminal sentencing must also account for the decisions of the Supreme Court of Canada in *R v Kokopenace* and *R v Anderson*. As Alexandra Hebert has noted, "the Supreme Court has been reluctant to apply *Gladue* principles beyond the sentencing stage."[110]

The decision in *R v Kokopenace* appears to qualify or pull back both from the proposition that *Gladue* principles apply wherever Indigenous alienation from the justice system is relevant and from the proposition that they apply wherever the liberty interest of an Indigenous person is engaged. The Supreme Court in *Kokopenace* reversed the Ontario Court of Appeal's holding that the process by which jury rolls were generated inexcusably minimized the opportunities for Indigenous people to serve as jurors, constituting a violation of the accused's rights under sections 11(d) and 11(f) of the *Canadian Charter of Rights and Freedoms*.[111] While all three judges on the Court of Appeal panel wrote separate reasons, even the dissenting

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109. *Kokopenace* CA, *supra* note 14 at paras 142–143. See also *Twins*, *supra* note 86 at para 57: "The common thread underlying all these decisions [*Gladue*, *supra* note 1, *Ipeelee*, *supra* note 14, *Sim*, *supra* note 82, and *Rich*, *supra* note 101] is a recognition of the systemic and background factors that have contributed to the over-incarceration of Aboriginal peoples in Canada and to what has been described as the estrangement of Aboriginal peoples from the Canadian justice system."

110. Alexandra Hebert, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 173.

111. The Crown did not attempt to establish justification of the infringement under section 1 of the *Charter*: *Kokopenace* CA, *supra* note 14 at para 18.

judge held that sections 11(d) and 11(f) were engaged, merely disagreeing that they were violated on the facts.[112]

At the Court of Appeal, LaForme JA had emphasized the failure of *Gladue*, and *Gladue* principles, in solving Indigenous overincarceration and alienation from the criminal justice system.[113] (While Goudge JA provided concurring reasons, these reasons neither adopted nor rejected the observations by LaForme JA on Indigenous alienation from the justice system.[114]) Implicit in this emphasis was the imperative for courts to use all available tools to remedy that alienation.

Nonetheless, faced with this *cri-de-coeur* from the country's most senior Indigenous judge, the majority at the Supreme Court of Canada adopted, with only conclusory reasoning, a minimalist and fixed interpretation of the rights at issue. Justice Moldaver, writing for the majority, held that "the right to a representative jury is an entitlement held by the accused that promotes the fairness of his or her trial, in appearance and in reality. It is not a mechanism for repairing the damaged relationship between particular societal groups and our criminal justice system more generally—and it should not be tasked with that responsibility."[115] Indeed, the majority specifically asserted, virtually without explanation, that "the honour of the Crown and *Gladue* principles should not have been considered because neither is relevant to the state's obligation to make reasonable efforts to compile the jury roll using random selection from lists that draw from a broad cross-section of society and deliver jury notices to those who have been randomly selected."[116] Thus, the majority asserted that "by relying on the honour of the Crown and *Gladue* principles, the majority transformed the accused's s 11 *Charter* rights into a vehicle for repairing the long-standing rupture between Aboriginal groups and Canada's justice system"—without explaining why section 11 is not and should not be transformed into such a vehicle.[117] Similarly, Karakatsanis J's concurring reasons stated that section 11 was not the "correct constitutional tool.…It is beyond the scope of an accused's fair trial rights as protected by s 11(d) and (f) of the *Charter* to require the state to address issues that may cause segments of the population to disengage from the justice system.…Other tools must be brought to bear to resolve these problems."[118]

To his credit, Cromwell J, writing in dissent for himself and McLachlin CJ, observed that "while there are many deeply seated causes which contribute to Aboriginal under-representation on jury rolls, the *Charter* in my view ought to be read as providing an impetus for change, not an excuse for saying that the remedy lies elsewhere."[119] More importantly, he explicitly held that the majority's approach was contrary to *Gladue*, although framing the issue as discrimination as opposed to alienation more broadly: "To ignore racial discrimination against Aboriginal people in the context of assembling a jury roll would be in marked contrast

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112. *Ibid* at para 334, Rouleau JA.

113. *Ibid* at paras 135–144.

114. *Ibid* at paras 233–277.

115. *Kokopenace* SCC, *supra* note 14 at para 1, Moldaver J for the majority.

116. *Ibid* at para 98, Moldaver J for the majority. The honour of the Crown is an important legal concept but is beyond the scope of this article.

117. *Ibid* 14 at para 101, Moldaver J for the majority

118. *Ibid* at paras 171, 172, 188, Karakatsanis J, concurring.

119. *Ibid* at para 196, Cromwell J, dissenting.

to the approach that this Court has taken to racial discrimination against Aboriginal people in relation to sentencing Aboriginal offenders."[120] (Indeed, Tim Quigley has noted that "the disproportional incarceration rate of Aboriginal people dealt with in *Gladue* and *Ipeelee* is at least as, if not more, intractable than the unrepresentativeness of the jury roll in this case."[121])

This minimalist and fixed interpretation of rights by Moldaver J has rightfully attracted criticism elsewhere. As Quigley has argued, the majority ignored the social and legal context and the government's role in its creation and perpetuation:

> The majority position is a weak and timid response to serious constitutional claims.…the majority in *Kokopenace* adamantly refused to consider the sad legacy of colonialism and estrangement that the Aboriginal population of Canada has suffered and how this might have had a bearing on the disillusionment with and disengagement from the criminal justice system by this segment of our population. Instead, Moldaver J has absolved the state for any responsibility for this state of affairs. In the majority view, the unwillingness of Aboriginal on-reserve residents to respond to jury questionnaires and become available for jury duty is *their* responsibility alone.[122]

Similarly, Julian Falconer states that "the more troubling message sent by the majority opinion is that the alienation of First Nations peoples from the justice system is not actually a *legal* problem."[123]

In contrast, the dissent has garnered praise. Quigley concludes that "it is commendable, therefore, that at least the dissenting justices drew a comparison with their own jurisprudence in *R v Gladue* and *R v Ipeelee* and conducted a lengthy analysis of the role of the state in the underrepresentation of Aboriginal residents in this case."[124] Similarly, Falconer writes that "the dissent recognized that failure to consider the state's historical relationship with Aboriginal peoples, including the distressing social issues that many First Nations communities now face as a result, detracts significantly from any analysis of Aboriginal rights in the justice system."[125]

*Kokopenace* is jarringly inconsistent with previous jurisprudence from the Supreme Court of Canada. As Falconer puts it, "we can only hope that the *Kokopenace* judgment becomes an anomaly in the context of a Court which, in recent years, has a well-earned reputation for

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120. *Ibid* at para 284, Cromwell J, dissenting.

121. Tim Quigley, "*Kokopenace*: *Charter* Rights to Jury Representation for Aboriginal Accused Are Obliterated for Expediency" (2015) 20 CR (7th) 99 at 103.

122. Quigley, *ibid* at 99, 103 [emphasis in original].

123. Julian N Falconer, "The *Kokopenace* Judgment: A Case of Mistaken Identity" (2015) 36:2 For The Defence F3 [emphasis in original].

124. Quigley, *supra* note 121 at 103 [citations omitted]. See also Rosemary Cairns Way, "An Opportunity for Equality: *Kokopenace* and *Nur* at the Supreme Court of Canada" (2014) 61:4 CLQ 465, writing before the Supreme Court of Canada decision (though specifically addressing the section 15 claim): "It would be ironic…if the Court, having repeatedly named the discrimination experienced by Aboriginal peoples in the criminal justice system, is unprepared to at least countenance a claim that a particular state process is discriminatory and thus equality-denying."

125. Falconer, *supra* note 123.

adjudicating Aboriginal rights claims in a sensitive and respectful fashion."[126] *Kokopenace* is especially jarring in its rejection of *Gladue* principles, particularly because three of the four approaches I have identified would seem to apply. While the overlapping considerations approach would not seem to apply, the liberty interest and criminal conduct approaches apply, as the defendant's liberty interest is engaged by the composition of the jury roll and the conduct at issue is criminal. More fundamentally, the alienation contextual approach is dominant: Indigenous underrepresentation on jury rolls constitutes both a symptom and an exacerbation of Indigenous alienation from the Canadian justice system. The holding that section 11 of the *Charter* cannot address alienation, and thus *Gladue* principles cannot apply, seems to be entirely *sui generis* and reveals no connection to existing case law on the extension of *Gladue*. The most that can be drawn from *Kokopenace* is that *Gladue* principles do not apply to jury roll composition, albeit for poorly articulated and essentially assumed reasons about the nature of section 11 of the *Charter*.

Following *Kokopenace*, the Supreme Court of Canada in *R v Anderson* declined to apply *Gladue* principles to the exercise of prosecutorial discretion. Justice Moldaver for the court held that *Gladue* principles do not apply to a Crown prosecutor's decision to tender a notice in impaired driving cases, which notice serves to increase the mandatory minimum sentence, and that that decision falls within prosecutorial discretion.[127] In doing so, Moldaver J held that *Gladue* principles apply to the judge but not to the prosecutor.[128] (Justice Moldaver clarified that, while the minister's surrender decision in *Leonard* would appear to constitute prosecutorial discretion, *Gladue* principles applied in *Leonard* only because the surrender decision "requires the Minister of Justice to compare the likely sentence that would be imposed in a foreign state *with the likely sentence that would be imposed in Canada*—a task which is impossible to do without reference to the *Gladue* principles."[129])

*Anderson* is perhaps more understandable—or at least predictable—than *Kokopenace* given how strictly Canadian courts protect prosecutorial discretion. As Marie Manikis has noted, "the conclusion in *Anderson* is not surprising given the larger Canadian trend towards protecting prosecutorial power and decision-making from judicial oversight."[130] *Anderson* is nonetheless unfortunate. Prosecutorial decision making obviously plays a major role in Indigenous overincarceration, and to rule that whole realm of decisions off limits (absent abuse of process) is to limit, as in *Kokopenace*, the tools by which Indigenous alienation from the justice system can be addressed.[131] Given that all four of my approaches apply to *Anderson*, *Anderson* is perhaps best understood as stating that *Gladue* principles will not apply to prosecutorial discretion.[132]

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126. *Ibid.*

127. *Anderson*, *supra* note 87 at paras 1–5.

128. *Ibid* at para 25.

129. *Ibid* at para 27 [emphasis in original].

130. Manikis, *supra* note 17 at 186.

131. See, for example, Manikis, *ibid* at 174–175, 193.

132. In the alternative, *Anderson* could also be read as stating that *Gladue* principles apply only to judicial decision making—but that would extend beyond the *ratio* itself in *Anderson*.

It remains unclear how these interpretations in *Kokopenace* and *Anderson* will impact the extension of *Gladue* principles going forward.[133] While all of my four approaches applied to *Anderson* and three to *Kokopenace*, the court in those cases rejected the extension of *Gladue* principles. Thus, these four approaches cannot be universally sufficient even in combination for the extension of *Gladue* principles—and, if they are potentially sufficient in combination, there will be as-yet-unarticulated exceptions, like prosecutorial discretion. Indeed, the Supreme Court of Canada has stunted and implicitly questioned this line of cases without providing guidance to appellate and trial courts.

## III A LEGAL TEST FOR THE EXTENSION OF *GLADUE* PRINCIPLES BEYOND CRIMINAL SENTENCING

In this section I consider whether these four approaches, alone or in combination, constitute a test for the extension of *Gladue* principles. I then apply them to the context of lawyer discipline.

As I noted above, the appellate case law demonstrates that these four approaches may be overlapping and not mutually exclusive, but the Supreme Court of Canada decisions mean that they are not sufficient in combination. The analytical question remains: *Should* each of the four approaches be necessary or sufficient for *Gladue* principles to apply? Does one predominate? Most important to evaluating whether *LSUC v Robinson* was and remains correctly decided is whether the liberty interest approach is overriding, such that an Indigenous person's liberty interest must be engaged for *Gladue* principles to apply. Furthermore, the criminal conduct approach suggests that the scope of *LSUC v Robinson* may be narrow, applying only to criminal conduct or near-criminal conduct. I also consider, following the possibility acknowledged in *Willier*, whether *Gladue* principles apply to costs awards in disciplinary proceedings.

As I have described, one approach to the application of *Gladue* principles is the liberty interest approach, which holds that *Gladue* principles apply where an Indigenous person's liberty interest is engaged. This approach is clearest in the reasoning of Sharpe JA in *Leonard*: "*Gladue* factors are not limited to criminal sentencing…they should be considered…whenever an Aboriginal person's liberty is at stake in criminal and related proceedings."[134] This language raises the question of whether a liberty interest is necessary for *Gladue* principles to apply—that is, whether *Gladue* principles apply if *and only if* a liberty interest is engaged. Similarly, Manikis's argument that *Gladue* principles are a principle of fundamental justice[135] prompts

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133. I note, however, that the Yukon Court of Appeal has explicitly relied on *Anderson*, *supra* note 87, and its restrictive interpretation of *Leonard*, *supra* note 85, to decline to require judges to consider *Gladue* factors in the calculation of enhanced credit under s 719(3.1) of the *Criminal Code*, *supra* note 8, and in rejecting the sentencing judge's conclusion that "penal legislation that disallows any consideration of an individual's Aboriginal status is constitutionally flawed, offends the principles of fundamental justice and can only be considered to have a grossly disproportionate impact on Aboriginal offenders": *R v Chambers*, 2014 YKCA 13 at paras 81–87, 89 [quotation is from 89], 316 CCC (3d) 44. (This is despite the fact that *Anderson* distinguished the role of the prosecutor from the role of the judge.)

134. *Leonard*, *supra* note 85 at para 85.

135. Manikis, *supra* note 17.

the question of whether they are, for the purposes of constitutional law, *only* a principle of fundamental justice.

The liberty interest approach is appealing but inherently flawed as a test for the extension of *Gladue* principles. Admittedly, the liberty interest approach neatly collects and simply explains the leading appellate decisions, other than *Kokopenace* and *Anderson*. It is explicit in the language of Sharpe JA and in some of the literature,[136] and it is explicitly acknowledged in *LSUC v Robinson*.[137] *Kokopenace* and *Anderson* can perhaps be distinguished as outliers or exceptional cases on the particular strength of prosecutorial discretion and the particular (and peculiar) narrowness of jury composition rights under the *Charter*. Moreover, the liberty interest approach is simple and clear in its application. However, there is nothing in the reasoning of Sharpe JA in *Leonard* to suggest that *Gladue* principles cannot apply where the liberty interest is not engaged, or that that was his intention. Indeed, if he had purported to decide that *Gladue* principles apply only where the liberty interest is engaged, that holding would have been *obiter*, as that question was not at issue on the facts of the case.[138] That is, while the liberty interest is descriptive of the past appellate case law on *Gladue*, it should not be considered proscriptive of future extensions of *Gladue*.

Moreover, to recognize the liberty interest as controlling unduly narrows the scope and potential of *Gladue*. The Supreme Court of Canada in *Gladue* was concerned about Indigenous overincarceration not only in itself but also as a symptom of the broader alienation of Indigenous persons from the justice system: "The excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned."[139] Thus, the alienation contextual approach is the most purposive. Moreover, it is the one most evident in the appellate case law discussed above, especially in the reasoning of LaForme JA in *Kokopenace* grouping *Sim*, *Frontenac Ventures*, and *Leonard*. It is in this respect that the Supreme Court of Canada's decision in *Kokopenace* is most jarring and, indeed, inconsistent with a purposive reading of *Gladue* that recognizes that all possible tools must be used to address all aspects of this crisis. An alienation contextual approach to the extension of *Gladue* principles to lawyer discipline in *LSUC v Robinson* reflects the fact that Indigenous lawyers are both Indigenous people who are alienated from the justice system and the people whose work mitigates the alienation of Indigenous peoples more generally. Under this alienation contextual approach, *LSUC v Robinson* correctly stands for the proposition that *Gladue* principles apply to any discipline of Indigenous lawyers.

As with the liberty interest approach, to recognize the criminal conduct approach as controlling would unduly narrow the scope and potential of *Gladue*, as well as being inconsistent with the reasoning in *LSUC v Robinson*. Any professional misconduct or conduct unbecoming, even if it does not constitute criminal or near-criminal conduct, engages to some extent the alienation of Indigenous lawyers from the justice system.

From a black-letter-law perspective, the overlapping considerations approach seems most appropriate. It fulfils doctrinal consistency, a major ambition of the common law. But the

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136. See above notes 107 and 108 and accompanying text.

137. *LSUC v Robinson* AP, *supra* note 42 at para 73.

138. I make this point with respect and recognize the possibility that Justice Sharpe might agree.

139. *Gladue*, *supra* note 1 at para 61, quoted in *Sim*, *supra* note 82 at para 13.

approach that is most purposive and true to the text and spirit of *Gladue* is the alienation contextual approach. Under both of these approaches, *Gladue* principles properly apply to the discipline of Indigenous lawyers generally.

However, since none of these four approaches explain *Kokopenace* and *Anderson*, there would need to be exceptions—although it is not yet clear what the criteria for those exceptions are. I have suggested that the ardent protection of prosecutorial discretion and the narrowness of section 11 of the *Charter* are the best explanations at present.

An alternative is a multifactorial test: That is, *Gladue* principles are more likely to apply where the applicable legal test includes considerations that overlap with criminal law sentencing, where the alienation of Canada's Indigenous peoples from the justice system is relevant, where the liberty interest of an Indigenous person is engaged, and where the conduct at issue constitutes criminal or near-criminal conduct. The more approaches that apply, the more likely it is that *Gladue* principles are relevant, but none of the four are determinative in themselves. This test is versatile but is precarious (indeed, one might say meaningless) and provides unpredictable results.

There is a pressing need for appellate direction specifying which of these approaches should apply and clarifying the nature of the exceptions applicable in *Kokopenace* and *Anderson*. Indeed, the Supreme Court of Canada (with respect) has left appellate and trial courts with little to no indication of when *Gladue* principles are properly extended beyond criminal sentencing. It is thus incumbent on that court to clarify the situation, and it falls to appellate courts to proceed as best they can until such clarification is provided. The alienation contextual approach is most consistent with *Gladue* and the existing appellate case law and should be explicitly adopted by appellate courts and followed, in the meantime, by lower courts and tribunals.

## A. Application to Lawyer Discipline

Having identified approaches that appellate courts have applied to the extension of *Gladue* principles beyond the criminal sentencing context, and having considered those approaches as candidate tests or elements of a test for the extension of *Gladue* principles, I now apply these approaches and tests to the specific context of lawyer discipline.

*Gladue* principles would apply to the professional discipline of Indigenous lawyers generally under the overlapping considerations approach or the alienation contextual approach. *Gladue* principles are applicable under the overlapping considerations approach because the relevant considerations in professional discipline overlap with those of criminal sentencing. Recall from Part I that, while law society discipline does not share the criminal law purpose of punishment, it does share the purpose of the protection of the public.[140] Moreover, many factors are common to both criminal sentencing and disciplinary penalties, including the severity of the conduct, the impact on the victim, and general and specific deterrence.[141] *Gladue* principles are also applicable under the alienation contextual approach because the alienation

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140. See above notes 45 to 48 and accompanying text; *Criminal Code*, *supra* note 8, s 718, esp s 718(e).

141. See above notes 45 to 48 and accompanying text; *Criminal Code*, *supra* note 8, ss 718 to 718.2, esp s 718(b) [deterrence].

of Indigenous peoples from the justice system, including the alienation of Indigenous lawyers, is relevant to the discipline of Indigenous lawyers.

Under these two approaches, *LSUC v Robinson* and *Batstone* were correctly decided. Most explicit in the reasons in *LSUC v Robinson* is the overlapping considerations approach: the applicable legal test includes considerations that overlap with criminal law sentencing, specifically culpability, character, and mitigating and aggravating factors. Although alienation is not emphasized as expressly in the reasons, *LSUC v Robinson* also demonstrates the alienation contextual approach: the lawyer felt unable to turn to the police for assistance.[142] The reasons of the panel in *Batstone* were brief on the application of *Gladue*, but their reference to "the history of Aboriginal people in Canada and the ongoing effects of colonialism and racism" demonstrates the alienation contextual approach.[143]

In contrast, under the liberty interest approach *Gladue* principles would not apply because, as the appeal panel explicitly recognized in *LSUC v Robinson*, the lawyer's liberty interest was not engaged.[144] Under this approach, *LSUC v Robinson* and *Batstone* were incorrectly decided.

Under the criminal conduct approach, *Gladue* principles would apply to lawyer discipline only where the misconduct at issue constituted or approached criminal conduct. Under this approach, *LSUC v Robinson* was correctly decided—assault is a criminal offence, for which the lawyer was convicted—but should not have been followed in *Batstone*, as practising while suspended is not a criminal offence or near-criminal offence (although it is a provincial offence, albeit one for which imprisonment is not an available penalty).[145]

Under the multifactorial test, which combines all four approaches, it is possible but not obvious that *Gladue* principles apply to professional discipline of Indigenous lawyers, and thus that *LSUC v Robinson* or *Batstone*, or both, were correctly decided.

I acknowledge here the concern that *Gladue* principles may have inadvertent negative impacts in the criminal context where victims of violence are particularly vulnerable, and thus I leave open the possibility that in some specific circumstances of professional misconduct or conduct unbecoming by Indigenous lawyers, *Gladue* principles should not be applied or should be applied cautiously. The National Inquiry into Missing and Murdered Indigenous Women and Girls "call[ed] 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."[146] In parallel, where an Indigenous lawyer's conduct has harmed Indigenous persons and especially Indigenous women and LGBTQ+ persons, and the future ability of the lawyer to practise poses danger to Indigenous persons and especially Indigenous women and LGBTQ+

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142. *LSUC v Robinson* AP, *supra* note 42 at paras 45–46, 57.

143. *Batstone*, *supra* note 42 at para 12.

144. *LSUC v Robinson* AP, *supra* note 42 at para 71, quoting *Leonard*, *supra* note 85 at paras 53 and 85, citing *Sim*, *supra* note 82 and *Frontenac Ventures*, *supra* note 83.

145. *Law Society Act*, *supra* note 44, ss 26.1, 26.2.

146. See National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Vancouver: The Inquiry, 2019), online: <https://www.mmiwg-ffada.ca/final-report/>, vol 1b at 185, Call to Justice 5.17.

persons' confidence in the legal profession, *Gladue* principles should not be applied or should be applied cautiously.

What about costs? The panel in *Willier* recognized that *Gladue* principles could potentially apply to costs awards in lawyer discipline. As with disciplinary penalties themselves, the lawyer's liberty interest is not engaged, such that *Gladue* principles do not apply under the liberty interest approach. Unlike disciplinary penalties, it is unclear if *Gladue* principles apply under the overlapping purposes approach, as there is disagreement in the case law about the purpose of costs in disciplinary proceedings.[147] In Ontario, "the general purpose and governing principle of the consideration of costs and who should bear them is that the financial burden of an investigation should not rest on the Society, generally, and its members,"[148] which would suggest that the factors in assessing costs are different than the factors in assessing penalty. However, there is case law from British Columbia suggesting that costs share the purpose of deterrence.[149] As for the alienation contextual approach, costs awards appear to have less to do with alienation from the justice system than do disciplinary penalties themselves.[150]

While the impact of *Gladue* principles in *LSUC v Robinson* and *Batstone* was to reduce the length of a suspension (*LSUC v Robinson*) and to substitute a reprimand for a suspension (*Batstone*), and as contemplated in *Willier* was to reduce the amount of a costs order, the emphasis in *Gladue* on "alternative sanctions" may lead panels to more often consider remedies such as restitution, where permitted by their enabling legislation.[151]

I ultimately conclude that the alienation contextual approach is most appropriate. Thus, *LSUC v Robinson* and *Batstone* were correctly decided. The applicability of *Gladue* principles to costs orders, as contemplated in *Willier*, is less clear.

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147. MacKenzie does not address this question: MacKenzie, *supra* note 13 at Ch 26, 26.18.1, pp 26-57 to 26-59.

148. *Law Society of Upper Canada v Wise*, 2008 ONLSHP 126 at para 3, [2008] LSDD No 121.

149. See *Law Society of British Columbia v Albas*, 2016 LSBC 36 at para 30, [2016] LSDD No 252: "The Panel has concluded that, for general deterrence purposes, costs…be awarded to the Law Society." See also *Law Society of British Columbia v Jeletzky*, 2005 LSBC 2 at paras 11–12, [2005] LSDD No 114.

150. But see *Law Society of Ontario v Bogue*, 2018 ONLSTH 159 at para 5, [2018] LSDD No 233, where the lawyer (unsuccessfully) argued "that costs are not allowed under Indigenous laws."

151. See *Law Society of Upper Canada v Farmani*, 2016 ONLSTH 39 at paras 5–8, [2016] LSDD No 39, applying *Law Society Act*, *supra* note 44, s 35(1), para 13.

# IV CONCLUSION

In this article, I have argued that *Gladue* principles properly apply to lawyer discipline. I have done so by analyzing the leading appellate decisions extending *Gladue* principles beyond criminal sentencing and separating out four potential approaches:

1. The *overlapping considerations* approach, where the applicable legal test includes considerations or purposes or factors that overlap with criminal law sentencing
2. The *alienation contextual* approach, where the alienation of Canada's Indigenous peoples from the justice system, and particularly the criminal justice system, is relevant
3. The *liberty interest* approach, where the liberty interest of an Indigenous person is engaged
4. The *criminal conduct* approach, where the conduct at issue constitutes criminal or near-criminal conduct.

I concluded that the approach most true to *Gladue* is alienation contextual: *Gladue* principles apply whenever the alienation of Indigenous persons from the justice system is relevant, with as-yet-unspecified exceptions to account for *Kokopenace* and *Anderson*. Under this approach, or the overlapping considerations approach, *Gladue* principles would generally apply to professional discipline of Indigenous lawyers.

The legal community would benefit greatly from appellate direction specifying which of these approaches should apply, whether alone or in combination, and clarifying the nature of the exceptions applicable in *Kokopenace* and *Anderson*. Pending such direction, *Gladue* principles properly apply to lawyer discipline: *LSUC v Robinson* is binding for hearing panels in Ontario and persuasive in the other Canadian jurisdictions. While it can be read narrowly to apply only where the conduct at issues constitutes criminal or near-criminal conduct, a broader reading that applies it to all discipline of Indigenous lawyers is more consistent with *Gladue* itself.

The extension of *Gladue* principles to the professional discipline of Indigenous lawyers is consistent with the case law as it has developed since *Gladue*. More fundamentally, this extension is consistent with the rallying cry in *Gladue* and *Ipeelee*, echoed by LaForme JA in *Kokopenace*, to address the alienation of Canada's Indigenous people from the justice system.

In the meantime, and in the face of this doctrinal uncertainty in the case law, there are other steps that can be taken to ensure or promote the use of *Gladue* principles in the discipline of Indigenous lawyers. Given that codes of conduct and legislation on the legal profession both say little about disciplinary penalty determination (in contrast, for example, to the sentencing provisions in the *Criminal Code*), it would be inconsistent and incongruous to add provisions on *Gladue* principles to those—although the law societies and the legislatures are free to do so. Likewise, purporting to issue binding directives to law society disciplinary panels (and in Ontario the Law Society Tribunal) could raise independence concerns. The most appropriate solution would be for law societies to adopt policies requiring or guidelines encouraging their disciplinary prosecutors to take the position that *Gladue* principles are applicable.

Discipline is not the determinative or even predominating component of professional regulation. Nonetheless, it cannot be overlooked as law societies, the legal profession, and the legal academy work toward reconciliation. The extension of *Gladue* principles to lawyer discipline is an appropriate step and an important component in re-evaluating the relationship

between law societies and Indigenous lawyers. While this is not to say that other steps will not be necessary,[152] this extension is a moderate and incremental one. The alienation of Indigenous peoples from the Canadian legal system includes the alienation of Indigenous lawyers from the legal system and specifically from its regulators. Indigenous lawyers will be central to addressing alienation, and that centrality cannot be ignored if reconciliation is to be attainable or successful. Indeed, discipline in individual cases can have higher visibility and thus a greater impact on public perception of the regulation of the legal profession than deliberate public outreach.

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152. Consider, for example, the inclusion of Indigenous members on discipline panels for Indigenous lawyers. Here, see *Coutlee (Re)*, 2018 LSBC 33, [2018] LSDD No 227, reconstituting a hearing panel to include an Indigenous person. Contrast *Law Society of Upper Canada v Bogue*, 2018 ONLSTH 38, [2018] LSDD No 55, an unsuccessful motion for recusal of two of three non-Indigenous panel members, and *Law Society of Upper Canada v Bogue*, 2018 ONLSTH 46, [2018] LSDD No 63, an unsuccessful motion seeking "an Order appointing an Indigenous Chair to oversee an Indigenous Tribunal comprised of members of the Indigenous community" (at para 3). Consider also the use of sentencing circles in penalty determination: *Law Society of Upper Canada v Robinson*, 2012 ONLSHP 200, [2012] LSDD No 217.