THE CONTINUING APPLICATION OF *GLADUE* PRINCIPLES IN THE PROFESSIONAL DISCIPLINE OF INDIGENOUS LAWYERS: A COMMENT ON *LAW SOCIETY OF ONTARIO V McCULLOUGH*

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CONTENTS

Abstract

While *Gladue* principles have previously been applied in the professional discipline of Indigenous lawyers, the recent decision by the Law Society Tribunal in *Law Society of Ontario v McCullough* affirms and applies those precedents in new and powerful ways. In this case comment, I explain the ways in which *McCullough* is important in its application of *Gladue* principles and consider what questions remain to be settled in future decisions. In particular, *McCullough* affirms the limited case law holding that *Gladue* principles are applicable to the professional discipline of Indigenous lawyers; demonstrates the potential power of *Gladue* principles in affecting penalty determination, and more specifically displacing powerful presumptions as to penalty; includes in the penalty order an unprecedented condition intended to assist the lawyer; relies on a *Gladue* report commissioned specifically for the disciplinary proceedings; and softens the application of the presumption of revocation for misconduct involving dishonesty.

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I INTRODUCTION

It has been almost a decade since *Gladue* principles were first applied to the professional discipline of Indigenous lawyers in *Law Society of Upper Canada v Terence John Robinson*.[1] The recent matter of *Law Society of Ontario v McCullough* demonstrates the development and maturation of *Gladue* principles, in both power and nuance, in that context.[2] While *Gladue* principles have been applied by both legislatures and judges to many different areas of law beyond their statutory basis in criminal law sentencing,[3] professional discipline of Indigenous lawyers is one of the contexts in which they have been most commonly applied by administrative decision makers.[4] *McCullough* constitutes a milestone in, and potentially even the culmination of, *Gladue* principles in this context. In this case comment I revisit my analysis of the application of *Gladue* principles to the professional discipline of Indigenous lawyers.[5]

While there is no widely adopted definition of *Gladue* principles, I have previously defined them as "a recognition of the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions."[6] In the absence of competing definitions, I use that same definition here.

In this case comment, I identify and discuss the facts and reasoning in *McCullough* and consider their potential impact on the application of *Gladue* principles moving forward. I emphasize that *McCullough* comprises the most powerful reported application of *Gladue* principles in lawyer discipline to date: displacing the presumptive penalty of revocation for misappropriation in favour of a mere suspension. I further argue that the reasons in *McCullough* indicate that both the Law Society Tribunal and the Law Society of Ontario disciplinary counsel recognize an acceptance of *Gladue* principles—and indeed

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1. *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*]; *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSAP 18, [2013] 4 CNLR 129 [*Robinson*], var'g 2012 ONLSHP 115, [2012] LSDD No 130.

2. *Law Society of Ontario v McCullough*, 2022 ONLSTH 63 [*McCullough*].

3. See e.g. Andrew Flavelle Martin, "Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law" (2020) 66:2 McGill LJ 337 at 342 (citations omitted) [Martin, "Creative"]: "decisions of courts in contexts ranging from extradition to civil contempt, the exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* . . . the stay of charges under section 24(1) of the *Charter*, the voluntariness of admissions to police, the withdrawal of a guilty plea, and relief from notice periods in tort claims." See also *ibid* at 341 footnotes 13 (sentencing under the *Code of Service Discipline*, being Part III of the *National Defence Act*, RSC 1985, c N-5), 14 (bail), and 15–16 (parole).

4. See generally Martin, "Creative," *ibid,* especially at 360. As to the more recent application of *Gladue* principles in administrative law, contrast *Decision No: 2022-0556*, 2023 CanLII 2952 (AB WCAC) at paras 92–93, where the Appeals Commission for the Workers Compensation Board of Alberta declined to apply *Gladue* principles both because of their origin in criminal law and because they are absent from the relevant statute that sets out the jurisdiction of the commission—despite recognizing that *Gladue* principles are part of the common law. See also, on the application of *Gladue* principles by provincial review boards under Part XX.I of the *Criminal Code*, RSC 1985, c C-46, Michael Michel, "The Application of *Gladue* Principles During NCRMD and Fitness Disposition Hearings" (2022) 45:5 Manitoba LJ 138.

5. Andrew Flavelle Martin, "*Gladue* at Twenty: *Gladue* Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 [Martin, "*Gladue*"]. For further background on *Gladue* principles and professional discipline, see *ibid* at 24–33.

6. Martin, "Creative," *supra* note 3 at 346.

of reconciliation itself—by the general public. While I focus on professional discipline of Indigenous lawyers, these developments may also be applied to the discipline of Indigenous members of other professions.

Before proceeding, however, I emphasize that the panel reached the result in *McCullough* by applying both *Gladue* principles and the expressed commitment to reconciliation by the Law Society of Ontario.[7] It is unclear from the reasons of the panel in *McCullough* whether *Gladue* principles would have had the same impact on penalty in the absence of such an explicit commitment.

II *LAW SOCIETY OF ONTARIO V McCULLOUGH*

In this part, I canvass the facts and reasoning in *McCullough*.

The misconduct at issue in *McCullough* was quite serious but by no means unique in the sense of being unprecedented. The lawyer in *McCullough* cumulatively misappropriated $116,902, across 99 separate withdrawals, from her firm's trust account to meet the firm's financial obligations.[8] She returned the money to the trust account in each instance, "typically within days or weeks of the withdrawal."[9] The firm's records, including trust reconciliations as well as client identification, billing, fees, and disbursements records, were not properly kept and updated.[10] Moreover, bank fees were paid out of the trust account.[11] The lawyer was honest throughout the initial spot audit and, by the time of the hearing, had remedied the records issues.[12]

What was "unique"—indeed, "truly extraordinary and compelling," in the view of the panel—in *McCullough* were the circumstances and background of the lawyer, leading to the unusual penalty of a suspension instead of the presumptive penalty of revocation for misappropriation.[13] These circumstances included "cultural displacement,"[14] "experiences of hardship, disadvantage, and violence,"[15] her adoption of four nieces and nephews (who would otherwise have went into child protection),[16] the "significant stress"—financial and otherwise—of supporting family members,[17] and her largely Indigenous clientele.[18] Indeed, the

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7. *McCullough*, *supra* note 2 at paras 29-31.

8. *Ibid* at para 12.

9. *Ibid*.

10. *Ibid* at para 13.

11. *Ibid*.

12. *Ibid* at para 14.

13. *Ibid* at para 75. On the presumption, see e.g. *Law Society of Upper Canada v Mucha*, 2008 ONLSAP 5 at para 23, as discussed in *McCullough*, especially at paras 19–20.

14. *Ibid* at para 74. See also paras 40, 42 (born and initially raised in Australia with little connection to Indigenous heritage; loss of status due to marriage).

15. *Ibid*. See also paras 44, 52, 56 (drug history, violence; murder of the lawyers' daughter and subsequent trial; depression).

16. *Ibid*. See also para 54 (raising her infant grandchild because of her daughter's addiction).

17. *Ibid*.

18. *Ibid*. See also Martin, "*Gladue*," *supra* note 5 at 30–32.

panel held that "supporting Indigenous licensees is an important aspect of reconciliation" and that "the Lawyer's ongoing role serving a client base made up in part of Indigenous persons, with a documented history of being ignored and belittled by the justice system, is relevant to our determination of the appropriate penalty."[19] Importantly, both parties recognized that a suspension was appropriate, although they disagreed on the duration of that suspension.[20]

The panel emphasized that *Gladue* principles alone will not displace the presumption of revocation where there has been misappropriation or other dishonesty by an Indigenous lawyer. In other words, while *Gladue* principles may make it possible to rebut the presumption of revocation, specific evidence ("remarkable, extraordinary personal circumstances of the wrongdoer") will be required for that possibility to be engaged.[21] More specifically, those circumstances must "rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying circumstances of this individual clearly obviate the need to provide reassurance to them of the integrity of the profession."[22] The panel characterized the displacement of the presumptive penalty of revocation as an exercise of "compassion and mercy."[23] The panel also emphasized the importance of the lawyer's remorse and restitution. Restitution was considered in that all the funds were returned, often soon after they were misappropriated. The panel noted that "no client actually lost money and nor was tangibly deprived of any money."[24] Concerning remorse, it is worth repeating the words of the panel: "[s]he is deeply remorseful and admits that after 30 years of "an unblemished practice" she misused her trust account instead of applying for a line of credit. Each day she regrets those actions . . . [T]he Lawyer spoke briefly at the hearing, apologized for her misconduct and expressed remorse."[25] At the same time, the panel noted that those factors of restitution and remorse do not constitute exceptional circumstances in themselves.[26]

While the panel emphasized the role of *Gladue* principles in themselves, it also linked them to "institutional commitments to reconciliation for Indigenous people."[27] With respect, however, the specific nature of that link is unclear from the panel's reasons.[28] In other words, while it seems clear that *Gladue* principles are closely connected to a commitment to reconciliation, it is unclear whether *Gladue* principles would have the same impact in the absence of such institutional commitments to reconciliation.[29] Neither is it obvious from the panel's reasons that *Gladue* principles are required by, or necessarily follow from, such an

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19. *Ibid* at para 36.

20. *Ibid* at paras 7–8 ("we take some comfort from the fact that the regulator accepts that the circumstances of this licensee are so extraordinary as to justify a disposition that is short of termination of licence" at para 8).

21. *Ibid* at para 75.

22. *Ibid*.

23. *Ibid* at para 76.

24. *Ibid*.

25. *Ibid* at paras 70, 72.

26. *Ibid* at para 24. When this paragraph is read in combination with para 76, it would appear that remorse and restitution are necessary but not sufficient to displace the presumption of revocation.

27. *Ibid* at para 1. See also paras 5, 29–37.

28. *Ibid* at paras 29–37.

29. *Ibid* at para 1.

institutional commitment. In contrast, the panel was explicit that service of an Indigenous clientele as a mitigating factor follows directly from a commitment to reconciliation.[30]

III DISCUSSION

Against this backdrop, I now consider the importance and potential impact of *McCullough* in future discipline of Indigenous lawyers. *McCullough* is important in at least five respects: (1) the applicability of *Gladue* principles to lawyer discipline; (2) the potential impact of *Gladue* principles on penalty determination in lawyer discipline; (3) the potential impact of *Gladue* principles in creative orders alongside penalty; (4) the pioneering use of *Gladue* reports in lawyer discipline matters; and (5) a broader potential for mercy and compassion tempering the presumption of revocation in misappropriation in lawyer discipline matters.

First, *McCullough* is important because it reaffirms the limited case law holding that *Gladue* principles are applicable to the professional discipline of Indigenous lawyers. Before *McCullough*, there were only two lawyer disciplinary decisions post-*Robinson* in which *Gladue* principles were applied: *Law Society of Upper Canada v Batstone (No 1)* and *Law Society of Upper Canada v Batstone (No 2)*.[31] While the hearing panel in *McCullough* was bound by the holding of the appeal panel in *Robinson*, what is important is that the hearing panel in *McCullough* did not attempt to distinguish or narrow *Robinson* or even express concerns about *Robinson* so as to suggest that the appeal panel should reconsider it. Nor did disciplinary counsel argue that the panel should do any of these things.

I have argued elsewhere that two post-*Robinson* decisions by the Supreme Court of Canada, *R v Kokopenace* and *R v Anderson*, can potentially be read as implicitly questioning *Gladue* principles as an aspect of Canadian common law—or at least suggesting a reticence to expand *Gladue* principles to aspects of the criminal justice system other than sentencing.[32] These two decisions can also be read narrowly as to the application of *Gladue* principles on the specific reasoning of the individual decisions.[33] In my view, *Kokopenace* and *Anderson* provided a plausible basis for disciplinary counsel to argue that the precedential value of *Robinson* and the *Batstone* cases has been weakened such that *Gladue* principles do not necessarily apply to

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30. *Ibid* at paras 30, 36.

31. *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214, [2015] LSDD No 263 [*Batstone (No 1)*]; *Law Society of Upper Canada v Batstone*, 2017 ONLSTH 34, [2017] LSDD No 39 [*Batstone (No 2)*]. Note that the panel in *Law Society of Ontario v Loder*, 2021 ONLSTH 66 at para 56, held that while *Gladue* principles could apply, there was insufficient evidence to do so in that case. See similarly *Law Society of Alberta v Willier*, 2018 ABLS 22 at para 35, [2018] LSDD No 244 [*Willier*].

32. *R v Kokopenace*, 2015 SCC 28; *R v Anderson*, 2014 SCC 41; cited in Martin, "*Gladue*," *supra* note 5 at 39–43. See also 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 ("the Supreme Court has been reluctant to apply *Gladue* principles beyond the sentencing stage"), cited in Martin, "*Gladue*," *supra* note 5 at 39. On Kokopenace specifically, see more recently Jon Peters, "Beyond *Gladue*: Addressing Indigenous Alienation from the Justice System in Civil Litigation" (2023) 28 Appeal 119 at 141-143.

33. While the decision in *Anderson* can be understood as merely applying the broad protection of prosecutorial discretion—although several commentators have taken issue with that decision (see Martin, "*Gladue*," *supra* note 5 at 42)—the rejection of *Gladue* principles in *Kokopenace* was more conclusory and lacked a similarly identifiable and justifiable basis (see Martin, "*Gladue*," *supra* note 5 at 40–41). See also *Peters*, *ibid* at 142.

the discipline of Indigenous lawyers (or, for that matter, to other administrative law contexts). On this basis, disciplinary counsel could have argued that the panel in *McCullough* should have determined for itself whether *Gladue* principles properly applied or should have expressed unease or doubt as to whether *Robinson* remained good law. It is thus noteworthy that both disciplinary counsel and the panel in *McCullough* did not interpret *Kokopenace* or *Anderson* as weakening the applicability of *Gladue* principles in the context of professional discipline of Indigenous lawyers. Instead, the *McCullough* panel applied *Gladue* principles as they had been applied prior to those cases.

Given that Law Society disciplinary counsel in *McCullough* accepted that *Gladue* principles apply to the discipline of Indigenous lawyers, it seems unlikely that this same question of law will come before an appeal panel of the Law Society Tribunal or before the Divisional Court on judicial review in the future. Indeed, it is comforting and encouraging that my concern about the potential impact of *Anderson* and *Kokopenace* may have been overstated. In fairness, however, it is in jurisdictions where *Robinson* is merely persuasive and not binding that *Anderson* and *Kokopenace* might influence decision makers to question *Robinson* or even reject it outright.

Second, *McCullough* demonstrates the potential power of *Gladue* principles in affecting penalty determination, and more specifically displacing powerful presumptions as to penalty. While the specific impact of *Gladue* principles will depend on the circumstances of the individual matter, the impact of those principles in *McCullough* is greater than in any of the three previous Law Society discipline decisions applying *Gladue* principles. In other words, *McCullough* reveals that *Gladue* principles *can*—though not always *will*—have a larger impact on penalty determination than has previously been demonstrated.[34] In *Robinson*, where the lawyer had asked a client to assist in assaulting a non-client who was harassing the lawyer, the appeal panel halved the suspension imposed by the hearing panel, from two years to one.[35] In the first *Batstone* matter, the panel imposed a reprimand for practising while suspended, although the "typical" penalty for such misconduct is a further suspension.[36] In the second *Batstone* matter, the panel imposed a fine of $3,500 for the serious failure to maintain proper records, but would have instead imposed a suspension in the absence of both *Gladue* principles and information about the lawyer's medical history.[37] *McCullough* demonstrates arguably the most powerful impact yet of *Gladue* principles in displacing the presumption of revocation for misappropriation in favour of a suspension—revocation being the most serious penalty

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34. I note that this greater impact of *Gladue* principles in a misappropriation matter (being one of the most serious kinds of lawyer misconduct) contrasts with the observation in *Gladue*, *supra* note 1 at para 79 that "the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing"—although this observation was de-emphasized and reinterpreted by the Supreme Court of Canada in *R v Ipeelee*, 2012 SCC 13 at paras 84–87, as discussed e.g. in *R v Hansen*, 2019 SKCA 60 at para 13; *R v Moyan*, 2017 BCCA 227 at paras 19–21.

35. *Robinson*, *supra* note 1 at paras 1, 80. See also paras 50–51 on the seriousness of the misconduct: "The conduct here was very serious . . . 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 . . . In some circumstances, this kind of conduct might well compel the revocation of a lawyer's licence. However, there is much to be said in mitigation."

36. *Batstone (No 1)*, *supra* note 31 at paras 10–14.

37. *Batstone (No 2)*, *supra* note 31 at paras 23–24, 26. The panel does not elaborate on this medical history. The panel in *Batstone (No 1)* referred vaguely to "disabilities": *Batstone (No 1)*, *supra* note 31 at para 2.

that can be imposed, and misappropriation being one of the most serious kinds of misconduct, hence the presumption.[38] As the panel emphasized, while the presumption of revocation has sometimes been displaced in favour of permission to surrender, *McCullough* is the only reported decision in which the presumption of revocation has been displaced—in the words of the panel, "dislodged"[39]—in favour of a suspension.[40]

Third, the panel in *McCullough* invoked *Gladue* principles not only to reduce the penalty, but also to impose a condition that, to my knowledge, has never before been imposed in a reported lawyer discipline decision: that the lawyer meet with "an Elder or Traditional Knowledge Holder."[41] The Law Society would have limited involvement in how this condition was implemented: the Elder or other person was to be selected not by the panel or the Law Society, but by Aboriginal Legal Services; the Elder or other person would determine the parameters and requirements of those meetings; and the lawyer would not be required to disclose information about these meetings to the Law Society (other than the name of the Elder or other person).[42] These particulars support the panel's statement that these meetings were meant to "assis[t]" the lawyer.[43] Thus *McCullough* demonstrates that *Gladue* principles are not limited to reduction in penalty, but can also catalyze additional creative orders that further the purposes of lawyer discipline.

Fourth, in *McCullough* a *Gladue* report was filed by the lawyer and relied on by the panel. Of the previous decisions in which *Gladue* principles were invoked, the closest thing to reliance on a *Gladue* report was an abandoned ground of appeal by the lawyer in *Robinson* that the hearing panel should have ordered a *Gladue* report.[44] Indeed, the appeal panel in *Robinson* explicitly declined to address the obligations of a hearing panel to do so.[45] The use of a *Gladue* report prepared specifically for lawyer disciplinary proceedings, as opposed to merely reusing a *Gladue* report if one had been prepared for prior criminal proceedings regarding the same underlying conduct, is a significant development.[46] Given the panel's reliance on the discipline-specific *Gladue* report, this innovation may serve as a precedent for counsel in

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38. *McCullough*, *supra* note 2 at paras 76–93. See especially para 76: "The presumption of revocation as the appropriate penalty for dishonesty is strong. It will not be dislodged easily."

39. *Ibid* at para 76.

40. *Ibid* at para 4. See also paras 26–28. See also *Law Society of Ontario v Suzor*, 2022 ONLSTH 18 at para 58 [*Suzor*]: "permission to surrender, which terminates a licensee's right to practice, is very different from all other penalties down the ladder from revocation."

41. *Ibid* at paras 83, 85.

42. *Ibid* at para 85: "The Licensee is not required to share any details regarding their meetings with the Elder or Traditional Knowledge Holder with Regulatory Compliance."

43. *Ibid* ("in keeping with *Gladue* principles, we believe that the Lawyer would be assisted by consultation with an Elder or Traditional Teacher during the term of her suspension" at para 83).

44. *Robinson*, *supra* note 1 at para 74, note 8: "In oral submissions, counsel for the appellant conceded that all relevant information was before the hearing panel. He abandoned the ground of appeal that the hearing panel erred in not ordering a *Gladue* report."

45. *Ibid* at para 74, note 8: "We do not intend to address whether a hearing panel has the same obligation as a sentencing judge to proactively seek information about a licensee's Aboriginal background and circumstances."

46. For an example of the re-use of a *Gladue* report prepared for criminal proceedings, see *Ontario College of Teachers v Lamure*, 2022 ONOCT 71 at para 16 (although note that the panel did not make any substantive reference to the *Gladue* report and did not invoke *Gladue* principles).

disciplinary proceedings involving Indigenous lawyers—although the panel in *McCullough*, like the appeal panel in *Robinson*, did not specify whether a *Gladue* report *must* be ordered in such proceedings.

Finally, and more broadly, *McCullough* is the second decision of the Law Society Tribunal in 2022 in which a hearing panel appeared to soften the application of the presumption of revocation for misconduct involving dishonesty. While the appeal panel in *Law Society of Ontario v Wilkins* held that that presumption "is inherently unforgiving,"[47] the hearing panel in *McCullough* quoted with approval from the reasons of the hearing panel in *Suzor* that the presumption "is not devoid of mercy."[48] This invocation of mercy, alongside compassion,[49] suggests that the Law Society Tribunal may be more willing to displace the presumption of revocation in future decisions.

IV REFLECTIONS AND CONCLUSION

Integral to an understanding of the result in *McCullough* is an appreciation of the severity of the specific circumstances facing the lawyer, as well as the lawyer's restitution and remorse. As the panel emphasized, *McCullough* does not hold that the penalty for any Indigenous lawyer who misappropriated client funds will be less than revocation.[50] *Gladue* principles make a lesser penalty possible, but "extraordinary" circumstances specific to the lawyer are required for such a lesser penalty to be imposed. The panel in *McCullough* put this more eloquently:

> *Gladue* principles may unlock the door to considering the possibility of departing from presumptive penalty of revocation/surrender—allowing for suspension as an appropriate penalty. However, it is only remarkable, extraordinary personal circumstances of the wrongdoer that can elicit compassion and mercy which may allow them to walk through the now unlocked door and achieve a departure from the standard.[51]

Indeed, the panel's characterization of the lawyer's circumstances as "unique and . . . truly extraordinary and compelling,"[52] in combination with its emphasis that *Gladue* principles do not necessarily displace the presumption of revocation in misappropriation and other cases of dishonesty, suggests that the precedential value and impact of *McCullough* will vary from case to case depending on how closely the facts mirror those in *McCullough*. Moreover, the panel's characterization of these facts as "unique" and "truly extraordinary" suggests that such facts have not commonly arisen in previous cases and will presumably not commonly arise in future cases.[53]

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47. *Law Society of Ontario v Wilkins*, 2021 ONLSTA 15 at para 179.

48. *Suzor*, *supra* note 40 at para 58, quoted in *McCullough*, *supra* note 2 at para 22. See also in 2021 *Law Society of Ontario v Manilla*, 2021 ONLSTA 25 at para 62: "False representation [in documents] alone is not sufficient to trigger presumptive revocation." Thanks to a reviewer for bringing *Manilla* to my attention.

49. *McCullough*, *supra* note 2 at para 76.

50. *Ibid* at para 75.

51. *Ibid* at para 76.

52. *Ibid* at para 75.

53. *Ibid*.

At the same time, *McCullough* suggests a maturation of both the manner in which the Law Society of Ontario exercises its disciplinary powers and the Law Society's understanding of an apparent public consensus on reconciliation. Here I draw on Harry Arthurs' concept of "ethical economy": "[T]he profession's treatment of discipline reflects a tendency to allocate its scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems whose resolution provides the highest returns to the profession with the least risk of adverse consequences," with returns and risk measured in terms of "public goodwill or professional solidarity."[54] Arthurs uses this model to explain that the vast majority of disbarments are imposed for "misappropriation of clients' funds or other financial wrongdoing" because such violations exhibit "a high degree of consensus over ethical standards, and little risk of political repercussions."[55] This model explains the precedents prior to *McCullough* establishing the presumptive penalty of revocation for misappropriation.

However, Arthurs' model can also explain why that presumptive penalty was not imposed in *McCullough*. The panel recognized both that "[a] fundamental purpose of discipline penalty orders at the Tribunal is maintaining public confidence in the legal profession" and that "[t]his purpose can be informed and enriched by reconciliation."[56] Thus, while "[g]eneral deterrence requires a significant sanction to anyone found to have committed misappropriation" and "[p]ublic confidence in the profession demands it,"[57] the panel in *McCullough* determined that the penalty imposed would not decrease—and indeed would increase—the confidence in the legal profession of the general public. Presumably, the penalty would be sufficient to maintain the confidence of the wronged clients, as members of the general public, in the profession.[58]

Thus, while reconciliation generally and *Gladue* principles more specifically may remain controversial in some corners of the public and the media,[59] the disposition suggests that the Law Society Tribunal and Law Society disciplinary counsel believe that those principles should be, and indeed are, now accepted by the public at large, as is the importance and appropriateness of "compassion and mercy":[60]

> A fundamental purpose of discipline penalty orders at the Tribunal is maintaining public confidence in the legal profession. This purpose can be informed and enriched by reconciliation . . . Most importantly, they [the factors related to *Gladue* principles] rise to the level where it would be obvious to other members of the profession, and to the public, that the underlying

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54. Harry Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 112 [Arthurs in Economides], as quoted and discussed e.g. in Alice Woolley, "Regulation in Practice: The 'Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance" (2012) 15:2 Legal Ethics 243 at 243 [Woolley] (now Justice Woolley of the Alberta Court of King's Bench). Thank you to Adam Dodek for commending Arthurs' work to me.

55. Arthurs in Economides, *Ibid* at 113.

56. *McCullough*, *supra* note 2 at para 36.

57. *Ibid* at para 80.

58. See *ibid* at para 75.

59. See recently e.g. Jamie Sarkonak, "Court Attacks Racial Fairness" *National Post* (8 October 2022) A18.

60. *McCullough*, *supra* note 2 at para 76.

> circumstances of this individual clearly obviate the need to provide reassurance to them of the integrity of the profession.[61]

While the panel did not provide any specific evidence of public opinion on reconciliation and *Gladue* principles, what is important is the understanding by the Law Society Tribunal, disciplinary counsel, and the Law Society itself about such public opinion. I do not mean to suggest that disciplinary counsel or the panel would not have had the courage to pursue this lesser penalty in the face of public opposition—instead, I recognize the importance of potential public support for such a penalty. That is, even if the panel in *McCullough* was mistaken that the public would accept the importance of reconciliation and *Gladue* principles as applied in *McCullough*, the panel and disciplinary counsel recognize that the public *should* accept that importance and that the panel should decide as if the public did accept it. In this respect, I also observe that this case is not one in which, as Alice Woolley has suggested may occur, "the ethical economy undermines effective regulation."[62] Instead, given the panel's attention to public trust and confidence, ethical economy here reinforces that effectiveness.

While *McCullough* reaffirms and develops the application of *Gladue* principles in the professional discipline of Indigenous lawyers, at least two questions remain to be answered in future decisions.

First, can *Gladue* principles apply to reduce or eliminate costs orders against Indigenous lawyers? The panel in *McCullough* accepted the costs order agreed to by the parties and did not specify the role if any for *Gladue* principles in accepting that proposal.[63] Insofar as costs are purportedly non-punitive, the answer would presumably be no.[64] However, the Law Society of Alberta in *Willier* explicitly recognized this as a future possibility.[65] Moreover, I have previously argued (in my analysis of the role of *Gladue* principles in administrative law) that those principles should apply to costs orders.[66]

Second, will the application of *Gladue* principles—either in its initial sense in *Robinson* or in its more recent fuller sense in *McCullough*—be adopted as persuasive by law society panels in other jurisdictions? Outside of Ontario, the only reported consideration of *Gladue* principles in the professional discipline of Indigenous lawyers is *Willier*, a 2018 decision which did not apply *Gladue* principles on the facts but explicitly did not rule out that application in future cases.[67]

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61. *Ibid* at paras 36, 75 (citation omitted).

62. Woolley, *supra* note 54 at 246.

63. *McCullough*, *supra* note 2 at para 84.

64. For more detail, see Martin, "*Gladue*," *supra* note 5 at 47.

65. *Willier*, *supra* note 31 at para 35 ("we would not rule out the possibility that its principles could be of assistance to both the sanctions and costs aspects of LSA disciplinary proceedings in a future case"), as discussed in Martin, "*Gladue*," *supra* note 5 at 47.

66. Martin, "Creative," *supra* note 3 at 368.

67. *Willier*, *supra* note 31 at para 35.

Beyond these questions about lawyer discipline, it also remains to be seen whether *McCullough* will promote the application *Gladue* principles in the discipline of Indigenous members of professions other than law.[68]

68. There appears to have been only one matter to date in which *Gladue* principles were explicitly applied in professional discipline of a non-lawyer: *Alana Grace Nahdee, RMT* (26 October 2015), Ottawa (Discipline Committee of the College of Massage Therapists of Ontario), as discussed in Martin, "Creative," *supra* note 3 at 47. But see *Ontario College of Teachers v Fox*, 2021 ONOCT 34 at para 48, a disciplinary decision that did not invoke *Gladue* principles by name but nonetheless applied a similar analysis: "While College Counsel is correct in his submission that the evidence of the Member's Indigenous identity and whether he attended residential school is lacking in detail, the Panel nevertheless finds that it is relevant in its determination of the appropriate penalty. The history of Indigenous people in Canada, and particularly in education, is fraught with colonial violence. As such, it would be inappropriate for the Panel not to consider this history in the case of an Indigenous man who worked as a teacher in an Indigenous community." For a post-*McCullough* decision involving misconduct by a justice of the peace (which is analogous to a professional discipline matter) in which there was a dissent on the impact of *Gladue* principles, see *Concerning A Complaint about the Conduct of Justice of the Peace Anna Gibbon* (25 August 2022) (Ont Justices of the Peace Review Council), Charyna JP dissenting, online: <https://www.ontariocourts.ca/ocj/files/jprc/decisions/2022-gibbon-disposition-EN.pdf>, stay pending judicial review granted, 2022 ONSC 5735 (Div Ct, single judge). *Gibbon* cited *Robinson*, *supra* note 1 at paras 26–27, but did not cite *McCullough*.