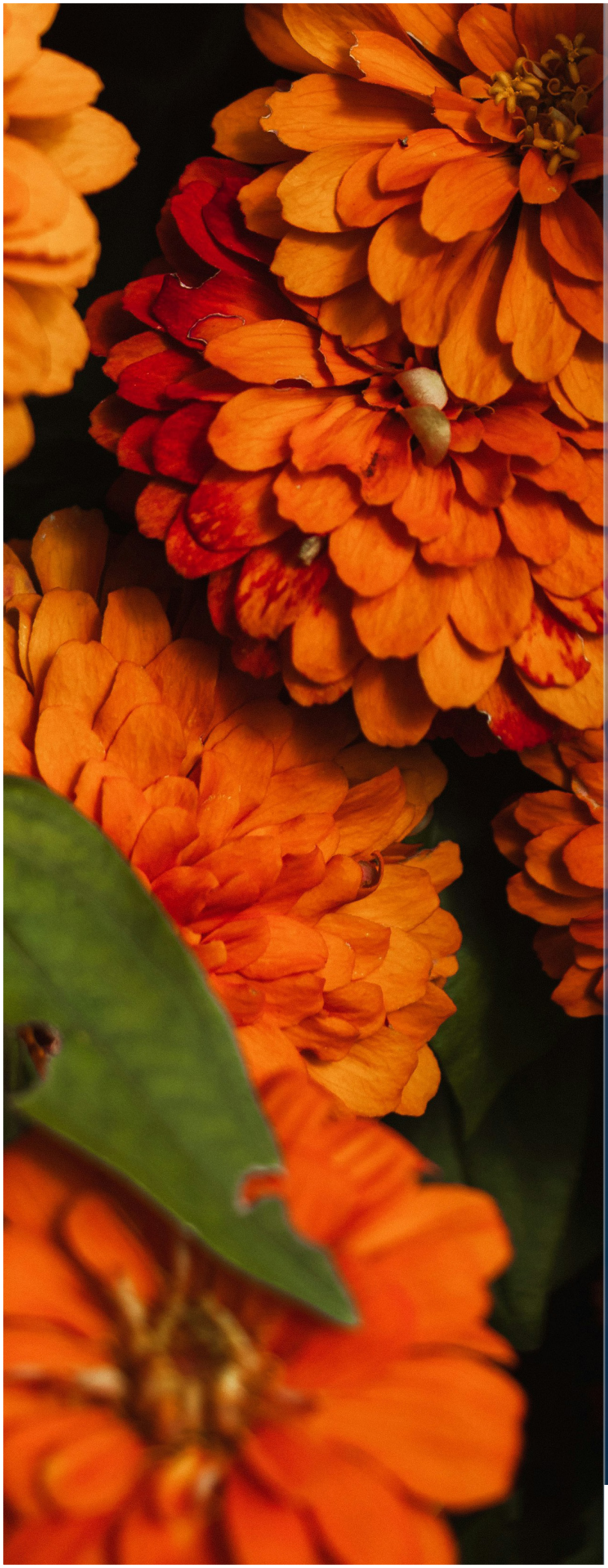

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Determining Indigenous Identity for the Purposes of *Gladue* Sentencing Considerations

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DETERMINING INDIGENOUS IDENTITY FOR THE PURPOSES OF *GLADUE* SENTENCING CONSIDERATIONS

Adam Schenk[*]

CONTENTS

Abstract

Indigenous identity fraud is a growing concern in Canadian society as the Indigenous heritage of several prominent Canadians has been called into question in recent years. Individuals may falsely assert Indigenous ancestry in the hope of garnering some type of benefit or advantage, including advantages in a legal context. While it is important that the legal system is on guard against Indigenous identity fraud, it also must be cognizant of the dangers inherent in creating overly onerous evidentiary burdens to establishing one's Indigenous heritage for the satisfaction of the courts given the separation that Indigenous persons may have from their ancestry as a direct result of colonialism. This article explores the issue of Indigenous identity in the specific context of *Gladue* sentencing considerations, surveying the relevant jurisprudence to identify the various approaches to Indigenous identity in the context of *Gladue* and the outstanding issues in this challenging area of the law.

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I INTRODUCTION

Since the Supreme Court's seminal decision in *R v Gladue*,[1] it is unquestionably incumbent on sentencing judges to consider factors unique to Indigenous offenders in the determination of an appropriate sentence. What is less clear is the applicable evidentiary burden on an offender to establish their Indigenous identity to justify the application of *Gladue* sentencing principles. Compelling considerations may pull the evidentiary standard in opposite directions. Placing a heavy burden on offenders to prove their Indigenous background may result in excluding individuals from *Gladue* considerations who, as a direct result of the negative impact of colonialism, have been distanced from their Indigenous roots and the family members, documents, or histories that could help establish their heritage. A low standard of proof, however, may open the door to fraudulent assertions of Indigenous identity. Indigenous identity fraud has become a growing concern in Canadian society. A number of Canadians with significant profiles in literary,[2] film,[3] academic,[4] and even legal[5] circles have been scrutinized in recent years for having possibly improperly presented themselves as Indigenous.[6] Concerns regarding the possible inclusion of identity fraudsters, and the possible exclusion of Indigenous offenders if the evidentiary hurdle is set too high, are not the only challenging issues pertaining to identifying who is and is not included in *Gladue* considerations. Other issues include whether *Gladue* is applicable to Indigenous peoples from states other than Canada and whether *Gladue* can ever apply to individuals who do not have any Indigenous ancestry but, as a result of their personal circumstances, self-identify as Indigenous. In light of these challenges, creating a consistent "one-size-fits-all" test for establishing Indigenous identity in the *Gladue* context is a difficult, and perhaps impossible, task. It raises delicate questions relating to identity, belonging, community, and exploitation.

This article surveys existing jurisprudence to identify the outstanding issues in this area of the law and outline the approaches taken by courts in determining whether or not an offender is Indigenous for the purposes of *Gladue*. While it is difficult to identify overarching, consistent themes among diverse, and sometimes contradictory, decisions, there does appear to be a discernible preference for a lower evidentiary standard for establishing Indigenous

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1. *R v Gladue*, [1999] 1 SCR 688, 1999 CarswellBC 778 [*Gladue*].

2. The heritage of Canadian author Joseph Boyden, who has identified as Indigenous and whose works frequently address Indigenous issues and culture, came under intense scrutiny beginning in 2016: Jorge Barrera, "Author Joseph Boyden's Shape-Shifting Indigenous Identity," *Aboriginal Peoples Television Network News* (December 23, 2016), online: <https://www.aptnnews.ca/national-news/author-joseph-boydens-shape-shifting-indigenous-identity>.

3. The heritage of Canadian filmmaker Michelle Latimer, who has identified as Indigenous and whose works frequently address Indigenous issues and culture, came under intense scrutiny beginning in 2020: Ka'nhehsí:io Deer and Jorge Barrera, "Award-Winning Filmmaker Michelle Latimer's Indigenous Identity under Scrutiny," *CBC News* (December 17, 2020), online: <https://www.cbc.ca/news/indigenous/michelle-latimer-kitigan-zibi-indigenous-identity-1.5845310>.

4. Geoff Leo, "Indigenous or Pretender?" *CBC News* (October 27, 2021), online: <https://www.cbc.ca/newsinteractives/features/carrie-bourassa-indigenous>.

5. The heritage of Canadian academic and former judge Mary Ellen Turpel-Lafond, who identifies as Indigenous and whose identity was frequently cited in association with her professional successes, came under intense scrutiny beginning in 2022: Geoff Leo, "Disputed History," *CBC News* (October 12 2022), online: <https://www.cbc.ca/newsinteractives/features/mary-ellen-turpel-lafond-indigenous-cree-claims>.

6. The author is unaware of any legal decisions that conclusively accepted or rejected allegations of Indigenous identity fraud that have been made in the public sphere against specific individuals.

identity in the sentencing context at present. Circumstances in which an offender lacks any Indigenous ancestry but nevertheless claims *Gladue* considerations present a unique challenge for sentencing judges, and there remains a lack of clear guidance on this particular issue from appellate courts. The hope is that this article's identification and exploration of the existing legal landscape in this area will be of use to those tasked with future refinement and clarification of who qualifies as Indigenous for the purposes of *Gladue* and the manner in which the courts should address this issue.

Taking a definitive position on what the appropriate evidentiary standard should be or suggesting a universal test that should be utilized to determine whether or not an individual offender is Indigenous for the purposes of *Gladue* is intentionally avoided in this article. Questions of identity and belonging should ultimately be driven by those who comprise a particular ethnic or cultural group, and as a non-Indigenous person writing from a non-Indigenous perspective I believe there is something problematic with taking anything resembling a definitive position here on who should or should not be considered Indigenous in a sentencing context. As stated by Professor Robert Hamilton in his analysis of writing on Indigenous rights from a non-Indigenous perspective, it is important that critiques of Canadian law pertaining directly to Indigenous peoples are guided by Indigenous peoples and knowledge.[7] There exists a rich and ever-growing body of scholarship regarding Indigenous identity from outstanding Indigenous academics such as Professor Pamela D. Palmater.[8] Some scholars, such as Professor Kimberly TallBear, challenge and unpack the term "identity" itself,[9] and Professor TallBear has also written compellingly regarding the tumultuous relationship between DNA testing and Indigenous identity.[10] There is also scholarship relevant to the issue of controversial claims of Indigeneity, such as Professor Darryl Leroux's excellent book *Distorted Descent: White Claims to Indigenous Identity*,[11] which explains the harm caused when Indigenous identity is falsely claimed, insights that may help inform legislative measures to combat its occurrence.

Questions of Indigenous identity are better addressed outside the context of judicial interpretation, which is where one hopes that clarity in regards to Indigenous identity as it pertains to *Gladue*, informed by Indigenous knowledge and relevant existing scholarship, will be forthcoming. A critical review of a boilerplate definition of the term "Indigenous," which appears in several sentencing decisions such as *R v AF*,[12] supports the position that issues of Indigenous identity should be addressed outside of the judicial system wherever possible:

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7. Robert Hamilton, "Writing on Indigenous Rights from a Non-Indigenous Perspective" in John Borrows and Kent McNeil, eds, *Voicing Identity: Cultural Appropriation and Indigenous Issues* (Toronto: University of Toronto Press, 2022) at 171, 181–182. Professor Hamilton also stresses the importance of acknowledging the plurality of Indigenous voices and opinions on some issues and cautions against amplification of particular Indigenous perspective(s) simply because they align more easily with some non-Indigenous perspectives.

8. Pamela D. Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon, SK: Purich Publishing, 2011).

9. Sam Spady, "Reflections on Late Identity: In Conversation with Melanie J Newton, Nirmala Erevelles, Kim TallBear, Rinaldo Walcott, & Dean Itsuji Saranillio" (2017) 3:1 Crit Ethnic Stud 90 at 100–102.

10. Kimberly TallBear, *Native American DNA: Tribal Belonging and the False Promise of Genetic Science* (Minneapolis: University of Minnesota Press, 2013).

11. (Winnipeg: University of Manitoba Press, 2019).

12. 2021 BCPC 204.

> I use the word "Indigenous" as, to me, it is inclusive of what the case law often refers to as "Aboriginal" and in an effort to be inclusive of anyone who self-identifies as Aboriginal, Metis, Inuit, First Nations, status or non-status Indian under the *Indian Act* and with respect to all individuals whether on reserve or off reserve and whether or not they have a close connection to their Indigenous culture.[13]

The definition above does not suggest that the bench is disinterested in issues of Indigenous identity, and in fact the definition reflects an intention to be precise when addressing issues of Indigenous identity. Indigenous persons in Canada may certainly include those with Métis, Inuit, or First Nations ancestry, regardless of their place of residence or engagement with Indigenous culture. Some of the law-specific language in the definition, however, such as the specific references to status and the *Indian Act*, highlights that the definition is one crafted by judicial minds rather than driven by Indigenous knowledge. The definition's emphasis on self-identification is also problematic, as identity fraudsters may be very willing to self-identify as Indigenous for personal gain. Although Professor Sébastien Grammond[14] is certainly correct that courts are better informed and more capable of appreciating the complexity of issues pertaining to Indigenous identity than they were decades ago,[15] the importance that he highlights in empowering the autonomy of Indigenous peoples to determine issues of membership, belonging, and identity themselves[16] is more readily accomplished outside of the courtroom than within it. It would be unrealistic to expect that judicial interpretation could be eliminated from this area of the law entirely, but it is certainly preferable for issues of Indigenous identity—even when it is considered explicitly in a legal context such as in regards to *Gladue* sentencing principles—to be resolved outside of the judicial arena, such as via legislative definitions regarding identity that have been informed and driven by Indigenous knowledge, scholarship, and understanding.[17] This article endeavours to lay out the relevant issues and approaches to addressing Indigenous identity in the *Gladue* sentencing context as they appear in the case law to date, providing the jurisprudential background ahead of improved, and better-informed, definitional and conceptual clarity in this area, which one hopes will be forthcoming.

II FOUNDATIONAL PRINCIPLES AND THE PROPER APPLICATION OF *GLADUE* CONSIDERATIONS

While a belaboured overview of well-known maxims is unnecessary, it is helpful to at the very least identify the landmark statutory and jurisprudential sources and the most crucial principles they contribute to the unique sentencing of Indigenous offenders. The starting point must be the amendments to the *Criminal Code* that introduced a requirement for sentencing judges to take into consideration the unique circumstances of Indigenous offenders:

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13. *Ibid* at para 2.

14. Now Justice Grammond of Canada's Federal Court.

15. Sébastien Grammond, *Identity Captured by Law: Membership in Canada's Indigenous Peoples and Linguistic Minorities* (Montreal: McGill-Queen's University Press, 2009) at 191.

16. *Ibid* at 189.

17. This comment is not to suggest that the legislative process is a perfect forum for addressing questions of Indigenous identity, but simply that it is preferable to heavy reliance on judicial interpretation.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> [. . .]
> (e) all available sanctions, other than imprisonment, 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.[18]

The Supreme Court provided interpretive substance for this provision in their decision in *Gladue*. The court interprets section 718.2(e) as requiring sentencing judges to take into consideration the "unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts" as well as "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her [A]boriginal heritage or connection."[19] Sentencing judges must take note of the historic mistreatment of Indigenous peoples as well as Indigenous perspectives on appropriate responses to wrongdoing.[20] While section 718.2(e) does not operate to provide an *automatic* reduction to the length or manner of sentence simply because an offender is Indigenous, this may be the ultimate result in some instances.[21] This is logical given that the purpose behind the new provision was to address the overrepresentation of Indigenous peoples in Canadian correctional facilities.[22]

The Supreme Court expanded on *Gladue* in their decision in *R v Ipeelee*.[23] In *Ipeelee*, the Court reiterates that sentencing judges must take judicial notice of the historic mistreatment of Indigenous peoples via the legacy of colonialism and institutions such as the residential school system,[24] and clarifies that an Indigenous offender does not need to show a direct causal link between the offence for which they are being sentenced and their circumstances as an Indigenous person.[25] A failure by a sentencing judge to observe their statutorily mandated duty to consider the circumstances of an Indigenous offender is an "error justifying appellate intervention."[26] There may be instances where an offender technically falls under the auspices of *Gladue* but a sentencing judge determines that the offender's Indigenous heritage and personal circumstances do not warrant a different sentence than a non-Indigenous offender would receive in a similar context. This does not mean that *Gladue* factors are not technically *applicable*, but rather that after careful judicial consideration a sentencing judge may find that they ultimately do not have a significant bearing on the determination of the appropriate sentence. *Ipeelee* makes it clear that a sentencing judge has no discretion to disregard *Gladue*

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18. *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], s 718.2
19. *Gladue*, *supra* note 1 at para 93.
20. *Ibid*.
21. *Ibid*.
22. *Ibid* at para 50.
23. *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].
24. *Ibid* at para 60.
25. *Ibid* at para 83.
26. *Ibid* at para 87.

considerations when sentencing an Indigenous offender, even if the offence in question may be perceived to be particularly "serious."[27]

As *Gladue* made clear, simply self-identifying as Indigenous, with absolutely no other background information or explanation regarding the interaction of Indigeneity and the sentencing process that is underway, should not result in a reduced sentence. As Professor Jonathan Rudin explains in his oft-cited text, courts have repeatedly said that "*Gladue* is not a get-out-of-jail-free card. It is not enough to say at sentencing, 'Your Honour, my client is an Indigenous person; *Gladue* and *Ipeelee* therefore apply' and then sit down and let nature and the Supreme Court of Canada's decisions take their course [references omitted]."[28] Decisions such as *R v Nicholas*[29] help to make this point. Mr. Nicholas was an Indigenous offender who pled guilty to second degree murder.[30] In his consideration of how *Gladue* principles should impact the sentence to be imposed, Justice George states that the purpose of *Gladue* is not to determine how a non-Indigenous offender would be sentenced in identical circumstances and then reduce the sentence by some amount on account of the offender's Indigeneity; "*Gladue* is not a [*sic*] raced based remission."[31] Justice George also notes, however, that the general impact of *Gladue* is, when appropriate, to lessen the severity of the sentence of an Indigenous offender:

> What becomes apparent to me is that, even though there is no race-based discount, for *Gladue* to have any meaning at all it must, in most cases, lead to a less severe sanction. A critic might say this is six of one and half dozen of another; a distinction without a difference. But there is, and it has to do with whether and to what extent what I will call Gladue factors have touched this particular offender's life. And to not just identify someone as Indigenous and automatically knock some time off.[32]

Where appropriate, *Gladue* considerations may lessen the severity of incarceration, or result in a non-custodial sentence entirely in circumstances where, but for *Gladue* factors, a custodial sentence may be warranted. While the overrepresentation of Indigenous peoples in Canadian correctional institutions remains an ongoing issue requiring a meaningful response from both within and outside of the Canadian justice system, the proper consideration of *Gladue* factors can, and has had, an impact in numerous sentencing decisions. In *R v TLC*,[33] for instance, the court notes that although *Gladue* factors do not create an automatic sentencing discount, a study from the Legal Services Society (LSS), the legal aid organization in British Columbia, found that LSS clients that received *Gladue* reports had significantly shorter average periods of incarceration as compared to non-*Gladue* LSS clients.[34] This is not to suggest that *Gladue* considerations are adequately considered in every sentencing decision in which they may be relevant, or that they have significantly curtailed the overrepresentation

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27. *Ibid* at para 86.

28. Jonathan Rudin, *Indigenous People and the Criminal Justice System*, 2nd ed (Toronto: Emond Montgomery, 2022) at 112.

29. 2018 ONSC 678.

30. *Ibid* at paras 1–2.

31. *Ibid* at para 24.

32. *Ibid* at para 25.

33. 2019 BCPC 314.

34. *Ibid* at paras 48–50.

of Indigenous peoples in correctional facilities, which continues to be a significant issue nationwide,[35] but simply that they have had their intended impact in a not insignificant number of individual cases.

The general purpose of *Gladue*—to possibly result in a lessened period of custody or eliminate the imposition of a custodial sentence altogether where appropriate during the process of individualized sentencing of an Indigenous offender—is no doubt recognized by some offenders facing sentencing, creating a real possibility that a non-Indigenous offender may fraudulently identify as Indigenous in the hopes of obtaining a reduced sentence. This issue is noted in the *R v Young*[36] decision, a case dealing with an offender who identified as Indigenous at sentencing despite having no Indigenous ancestry,[37] which is discussed more fully later. While also identifying that *Gladue* does not provide an automatic reduction in sentencing,[38] Justice Patterson notes that courts must nevertheless be alert to fraudulent assertions of Indigenous identity by non-Indigenous offenders seeking a reduction in sentence:

> I note from the onset that the *Criminal Code* does not provide a definition for the term "[A]boriginal offender." But given the admonition from the Supreme Court of Canada that sentencing judges must pay particular attention to the circumstances of "[A]boriginal offenders," the danger for the courts is that more and more non-Indigenous offenders will self-identify as Indigenous in order to get what they may perceive as a better chance of avoiding incarceration.[39]

Concerns regarding fraudulent assertions of Indigenous identity in the criminal sentencing process are echoed in other legal contexts, where courts have noted the possibility of abuse of legal processes via bad-faith assertions of Indigenous heritage. One of these contexts is child welfare proceedings. In *Catholic Children's Aid Society of Toronto v ST*,[40] Justice Sherr describes the harm caused by fraudulent assertions of Indigenous identity in the child welfare context:

> To just say that anyone, no matter how incredulous their claim may be, can put their hand up and have this claim accepted without question would be an open invitation to persons to abuse the administration of justice. It could cause considerable harm to children by delaying decisions affecting them and would be disrespectful to the First Nations, Inuit and Métis persons the Act is intended to include. The underpinning of any self-identification right is that it must be made in good faith.[41]

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35. Jane Dickson and Kory Smith, "Exploring the Canadian Judiciary's Experiences with and Perceptions of *Gladue*" (2021) 63:3-4 Can J Crim & Crim J 23 at 24; Statistics Canada, "Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021" *The Daily* (July 12, 2023), online: <https://www150.statcan.gc.ca/n1/daily-quotidien/230712/dq230712a-eng.htm>.

36. 2021 BCPC 6 at para 116, 141 [*Young*].

37. *Ibid* at para 125.

38. *Ibid* at para 124.

39. *Ibid* at para 128.

40. 2019 ONCJ 207.

41. *Ibid* at para 35.

Justice Sherr's comments were echoed by Justice Bale in her decision in *CCAS v MP et al.*[42] After citing Justice Sherr, Justice Bale expands on his statement, stating that:

> [i]t would be offensive to Indigenous people to permit non-Indigenous persons to appropriate the considerations and safeguards under the [*Child, Youth, and Family Services Act*] that are intended to acknowledge historic injustices and redress present-day disadvantages that they do not share. Surely, something more than a simple self-declaration of identity is needed.[43]

Canadian courts must clearly be cognizant of the possibility of Indigenous identity fraud given the offensive and problematic impact of such actions if they are not prevented.

Given that *Gladue* considerations are not intended to be an automatic reduction in sentence for Indigenous offenders, the proper application of *Gladue* should, in theory, remove the tantalizing option for an offender to falsely assert that they are Indigenous in an attempt to avail themselves of the general trend of *Gladue* to lessen the severity of sentences. It is unfortunately possible, however, to find decisions where it appears that the sentencing judge has simply applied a race-based reduction in sentence. In *R v Husband*,[44] the self-represented offender identified as Indigenous but refused to participate in the preparation of a *Gladue* report. He stated that his mother was half Indigenous but that she "did not attend a residential school and the family did not live on a reservation."[45] No other evidence was provided to explain how Mr. Husband's Indigenous heritage had any connection with the offences in question. Yet Justice McKelvey states explicitly that Mr. Husband's sentence is "subject to reduction based on . . . consideration of Mr. Husband's Indigenous status."[46] He concludes that *Gladue* considerations are relevant despite the only evidence related to the offender's Indigenous heritage being the self-identification of Mr. Husband:

> I also consider that *Gladue* factors need to be taken into account in this case. Mr. Husband acknowledged in his submissions that his Aboriginal status did not have any direct impact on the charges he was convicted of. Nevertheless, I accept that his Aboriginal status is a significant consideration to take into account.[47]

Justice McKelvey ultimately concluded that an 18-month reduction to Mr. Husband's overall sentence was appropriate, in part due to *Gladue* factors.[48]

This critique should not be taken as suggesting that the self-representing Mr. Husband was in fact falsely identifying as Indigenous in an attempt to obtain sentencing leniency, but the cursory *Gladue* analysis in this case and its seemingly bald reliance on Mr. Husband's self-identification provides hope for non-Indigenous offenders that they may receive some degree of leniency in sentencing if they falsely identify as Indigenous. Without any evidence

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42. 2021 ONSC 6788 [*MP et all*].

43. *Ibid* at para 49.

44. 2022 ONSC 5223 [*Husband*].

45. *Ibid* at paras 25–26.

46. *Ibid* at para 45.

47. *Ibid* at para 48.

48. *Ibid* at para 50.

beyond the offender's self-identification, Justice McKelvey reduced what would have ordinarily been an appropriate sentence at least in part due to *Gladue* considerations without any information regarding Mr. Husband's Indigenous background other than his self-identification as Indigenous. The reasoning in this decision may embolden some non-Indigenous offenders to simply self-identify as Indigenous, eschew the preparation of a *Gladue* report and the possible scrutiny of their background that may come with this process, and potentially come away with a reduction to their sentence. While Professor Rudin is certainly correct that it *should* not be enough to simply identify as Indigenous and expect a reduction in sentence, the *Husband* decision, and several appellate decisions where sentencing judges have been criticized for applying *Gladue* considerations as an automatic reduction in sentencing,[49] unfortunately demonstrates that this may be what happens in some cases.

III DEFINING INDIGENOUS IDENTITY FOR *GLADUE* PURPOSES: ISSUES AND TRENDS

While *Gladue* did partly address who qualified for consideration pursuant to section 718.2(e), it did not provide a comprehensive test for determining whether an individual offender qualifies as Indigenous for sentencing purposes. At issue in *Gladue* in regards to Indigenous identity was whether or not section 718.2(e) applied only to Indigenous persons residing on reserve. The court definitively states that the application of this provision is broader and applies to all Indigenous persons in Canada wherever they may reside,[50] but it does not provide a test or list of criteria for determining who qualifies as an "[A]boriginal offender" under section 718.2(e). Subsequent cases have also not produced a definitive test. While an offender's Indigenous identity will not be at issue in the vast majority of cases where *Gladue* considerations are claimed, the issues raised by the jurisprudence and the growing awareness of identity fraud and the harm it causes in Canadian society underscore the importance of clarity on how Indigenous identity is considered and determined in the context of sentencing. An examination of the existing jurisprudence reveals both some consistencies, but also some incongruities, in reasoning on this issue.

A. Definitive Rulings on an Offender's Identity Cannot, and Should Not, Always Be Sidestepped

It may be argued that definitive findings as to whether an offender is Indigenous can be avoided by sentencing courts in some instances. When the option of avoiding a definitive ruling on identity that has no impact on the ultimate sentence presents itself, a sentencing judge may be keen to take this route. This option becomes available in cases where the background information regarding the circumstances of the offender related to their purported Indigeneity is nominal, and even if *Gladue* is technically applicable it would not support a different sentence than that which would be given to a non-Indigenous offender in similar circumstances. In *R v Boyd*,[51] the accused self-identified as Indigenous but provided

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49. See for example *R v Stimson,* 2011 ABCA 59 at para 27; *R v Bear,* 2022 SKCA 69 at para 112; *R v Jimmy,* 2023 SKCA 28 at para 30.

50. *Gladue, supra* note 1 at paras 90–91.

51. 2015 ONCJ 120 at para 14.

no information as to how this was related to their personal circumstances. The cursory explanation of the Indigenous peoples that Mr. Boyd said he was associated with, the "Oneida Band of the Blackfoot Tribe," was confusing, and Justice George alludes to having difficulty comprehending the Indigenous associations that Mr. Boyd claims.[52] Nevertheless, citing the impact of displacement of Indigenous peoples and asserting that the court should not be playing a gatekeeping role regarding who is Indigenous and who is not, Justice George does not make a definitive ruling on identity, instead relying on the lack of explanation of how Mr. Boyd's alleged Indigenous background impacted his personal circumstances to find that *Gladue* considerations did not have any impact on his sentencing in any event.[53] In both *R v Middleton*[54] and *R v LC*,[55] the offenders self-identified as Indigenous but presented virtually no evidence to confirm their identification, and in both cases the sentencing judge found that *Gladue* considerations had no impact on the ultimate sentence without making an express ruling on the offender's Indigenous identity. In *R v Lawrence*,[56] the offender did not even self-identify as Indigenous but speculated that he may have had Indigenous heritage via both his father and mother. Even though this was absolutely refuted by family members of the offender and the First Nation to which the offender claimed his father had membership, there was still no explicit statement regarding the offender's alleged heritage, but instead a nondescript finding that there are "no *Gladue* considerations to take into account in this case."[57]

Although it may be appropriate to avoid definitive statements regarding identity where possible, sidestepping the issue of identity in all cases is problematic. In his review of several cases where the Indigenous identity of the offender was questionable, Professor Rudin states that these cases demonstrate that it is "the information that was provided about the circumstances of the individual as an Indigenous person [that] matters. Arguments about whether someone is or is not an Indigenous person are beside the point."[58] With all due respect to the venerable Professor Rudin, there are two reasons why a court may have to address such arguments. First, Professor Rudin's position rests on the presumption that *Gladue* considerations will not be applied simply based on an offender's self-identification as Indigenous, which the *Husband* case demonstrates may unfortunately not always be the case. Second, when a court declines to definitively comment in instances where evidence suggests that an assertion of Indigenous identity has been made in bad faith, it misses an opportunity to speak out against what is tantamount to ongoing exploitation of Indigenous peoples in Canada. Although speaking in the child welfare context, Justice Bale's comments in *MP et al* describe the general harm caused by bad-faith assertions of Indigenous identity in all legal contexts:

> Societal harm would arise from a dilution of the special considerations and safeguards intended to apply only to First Nations, Inuit and Métis children and their families: Overinclusion through questionable self-identification would dishonour those who have suffered past trauma under the child welfare

52. *Ibid* at paras 14–15.

53. *Ibid* at paras 16–19.

54. 2019 ONCJ 280 at para 35.

55. 2020 ONSC 5608 at paras 50–51.

56. 2018 BCSC 1319.

57. *Ibid* at paras 17–18.

58. Rudin, *supra* note 28 at 114.

> system, might desensitize the courts to the sanctity and uniqueness of the First Nations, Inuit and Métis identity and culture, and could potentially serve to reduce availability of services and benefits to those Indigenous children that the special provisions of the [*Child, Youth and Family Services Act*] are intended to protect.[59]

While comments such as those of Justice Bennett, writing for the British Columbia Court of Appeal in *R v Hamer*,[60] that the courts do not play a gatekeeper role for who is or is not considered Indigenous,[61] demonstrate an awareness of the appropriate limitations on the courts' involvement in broader political or social questions and issues, the courts *must* play a gatekeeping role, at least to some extent, to ensure that non-Indigenous offenders are not fraudulently asserting Indigenous identity to avail themselves of legal benefits provided specifically for Indigenous peoples. While this may not require definitive rulings of whether an offender is or is not Indigenous in all cases where *Gladue* considerations are sought, and a finding of the court regarding Indigenous identity will of course only be specific to the context of criminal sentencing, courts cannot avoid questions of Indigenous identity entirely.

B. Judicial Preference for a Lower Evidentiary Requirement to Establish Indigenous Identity

Speaking very generally, judicial preference appears to be for a lower evidentiary burden for an offender to establish Indigenous identity for the purposes of *Gladue* rather than a more onerous burden. While there are real concerns about the dangers of leaving the evidentiary bar too low and thereby possibly allowing non-Indigenous offenders to successfully dupe the court into believing they are Indigenous, there are strong countervailing concerns that putting too high an evidentiary burden on offenders to prove Indigeneity may result in offenders being excluded from *Gladue* considerations because they are unable to present much evidence establishing their Indigenous identity specifically as a result of the negative impact of colonialism on Indigenous peoples. If such an offender were excluded from *Gladue* considerations in these circumstances it would mean that an Indigenous person was denied the benefit of remedial statutory considerations implemented to respond to the horrific legacy of colonialism in Canada as a result of a by-product of the colonial project itself. This situation is demonstrated in the circumstances of *R v Mandino*.[62] Justice Faria described the conundrum presented in this case as follows:

> Mr. Mandino before me raises a challenging situation. On the one hand, he informs Aboriginal Legal Services ["ALS"] that he has just learned of his Indigenous ancestry, and they are unable to either confirm the assertion or how Indigenous ancestry has affected Mr. Mandino's life circumstances. As such the court's ability to consider Mr. Mandino as a person of Indigenous ancestry is curtailed.

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59. *MP et al*, *supra* note 42 at para 62.

60. 2021 BCCA 297.

61. *Ibid* at para 117.

62. 2022 ONCJ 9.

> On the other hand, Mr. Jaksa's inquiries into Mr. Mandino's background and conversations with his closest family could be said to demonstrate why Mr. Mandino's Indigenous ancestry is undocumented—the non-Indigenous side of his family did not accept their Indigenous connection and in fact propagated its annihilation. The very storyline of Mr. Mandino's mother's experience and his own experience speak to how his Indigenous ancestry and the history of anti-Indigenous racism affected his identity, how he was parented, his early challenges and his way of coping with the effect of that history.[63]

If Justice Faria applied a more rigorous evidentiary standard for Mr. Mandino to demonstrate his Indigenous identity, or demanded some type of concrete proof of his heritage, it is likely that Mr. Mandino would not have garnered *Gladue* considerations. It may have been virtually impossible for Mr. Mandino, and other similarly situated offenders, to provide definitive evidence or a long-standing appreciation and understanding of their Indigenous identity specifically because of the displacement of Indigenous peoples from their families and culture. Ultimately, Justice Faria concluded that *Gladue* considerations were applicable to Mr. Mandino's sentencing.[64]

Perhaps the clearest statement by an appellate court regarding the evidentiary standard for establishing Indigenous identity for the purposes of *Gladue* is the Ontario Court of Appeal's decision in *R v Brown*.[65] The evidence surrounding the offender's Indigenous heritage, which was primarily claimed via the offender's purported biological father whom he did not meet until he was 18, was challenged by the Crown.[66] The court of appeal noted that although the sentencing judge should have made an explicit conclusion regarding Mr. Brown's Indigenous heritage, they agreed with the following excerpt from the sentencing judge's decision using a low evidentiary bar for an offender to establish their Indigenous identity:

> The jurist has to take a practical approach to ensure that the *Gladue* principles are honoured. The inconsistent evidence as to the parentage of Mr. Brown, and his lack of [A]boriginal documentation, may very well be a function of his obviously chaotic childhood flowing from having an alcoholic mother with several partners. It also may be due to inconsistent recording of lineage, since a big component of [A]boriginal history is oral. To compel Mr. Brown to provide direct documentary evidence, even to establish on a balance of probabilities his parentage, simply may not be realistic or doable.[67]

A number of other cases reflect a willingness to accept the Indigenous identity of the accused even where the evidence of the offender's Indigenous background was questionable or where a *Gladue* writer informs the court that they are unable to corroborate the offender's Indigenous identity and therefore cannot prepare a *Gladue* report or letter. In *R v Reddick*,[68]

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63. *Ibid* at paras 28–29.

64. *Ibid* at para 29.

65. 2020 ONCA 657 [*Brown*].

66. *Ibid* at paras 17–22.

67. *Ibid* at para 42.

68. 2020 ONCA 786 [*Reddick*].

the Ontario Court of Appeal upheld the original sentencing decision,[69] where the sentencing judge imposed a sentence on the "low-end" in light of *Gladue* considerations despite the fact that ALS did not provide a *Gladue* report due to the offender and his family lacking information regarding his Indigenous heritage or evidence regarding how his Indigenous heritage impacted the offence and the offender's circumstances.[70] The offender's Indigenous identity was also accepted, and *Gladue* considerations factored into the ultimate sentence imposed, in both *R v Crowe*[71] and *R v Pearce*[72] despite ALS in both instances being unable to confirm the offender's Indigenous identity.[73] In *R v Cox*,[74] the offender was accepted as being Indigenous despite a genealogical report finding no evidence of Indigenous heritage.[75] Justice Campbell accepted that the accused was Indigenous and *Gladue* considerations were applicable, citing the *Gladue* report concluding that the offender was Indigenous despite the genealogical report based on, *inter alia*, the family's oral history,[76] the offender's appearance,[77] and the offender's difficult life experiences, which mirrored the tragic circumstances reflected in many other Indigenous offenders' backgrounds.[78]

Several decisions do demonstrate sentencing judges scrutinizing claims of Indigenous heritage more keenly. In *R v Lemieux*,[79] a decision of the Ontario Court of Justice released prior to the Ontario Court of Appeal's decision in *Brown*,[80] the offender claimed some months

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69. This decision does not appear to have been reported.

70. *Reddick, supra* note 68 at para 9. This case and several others raise questions regarding the congruity of evidentiary standards between ALS and other organizations that provide *Gladue* writing services on the one hand and courts on the other. If a *Gladue* writer is unable to confirm that an offender is Indigenous or discover evidence demonstrating that an offender's Indigenous background impacted their circumstances, it is reasonable to at least question why and how a sentencing judge then subsequently accepts that an offender is Indigenous and that their Indigenous background is a factor that results in a reduced sentence. If *Gladue* writers are using an evidentiary standard akin to a balance of probabilities when they conduct their investigations, but courts are using a lower standard when they engage in a *Gladue* analysis, then this lack of congruity merits judicial comment.

71. 2021 ONCA 208 at paras 7–11, 18, and 25.

72. 2021 ONCA 239 at paras 7 and 12.

73. *Gladue* writers are often careful to note when they are unable to confirm an individual's Indigenous identity, and therefore cannot provide a *Gladue* report or letter, that this is not a positive assertion that the individual is not Indigenous nor that *Gladue* considerations are inapplicable; see also *R v Crystal*, 2021 ONCJ 178 at para 53. This does not mean, though, that significant and concerted efforts are not generally made to gather any information that is available by *Gladue* writers regarding the Indigenous heritage of a particular offender. Regarding the exceptional contributions of *Gladue* writers, see Carmela Murdocca, "Understanding *Gladue* from the Perspective of Indigenous People" (2021) 69 Crim LQ 377 at Part 4(b). For a thorough examination of the processes used by ALS when they receive a request for a *Gladue* report, see Justice Lebovich's decision in *R v Parent*, 2021 ONSC 3701.

74. 2022 NSSC 200.

75. *Ibid* at para 12.

76. *Ibid*.

77. *Ibid* at para 19.

78. *Ibid* at para 20.

79. 2020 ONCJ 54 [*Lemieux*].

80. The comments in *Brown, supra* note 65, regarding establishing Indigenous identity have not received explicit consideration in any Ontario decisions at the time of writing, so the precedential effect of *Brown* on the standard to be met to prove Indigenous identity for the purposes of *Gladue* considerations remains to be seen.

after entering a guilty plea that he was Indigenous.[81] Mr. Lemieux had not indicated he was Indigenous during his sexual behaviours assessment and had explicitly indicated that he was not Indigenous in response to both written and oral questions during the preparation of his pre-sentence report.[82] Mr. Lemieux had been adopted by a non-Indigenous family as a child and claimed Indigenous ethnicity via his birth parents but without any substantive evidence as to their heritage.[83] Although acknowledging the option of sidestepping the issue of identity without there being any impact in the ultimate sentence imposed, Justice Berg felt it necessary to explicitly address the claim of Indigenous heritage, perhaps sensing that this was a fraudulent claim in pursuit of sentencing leniency:

> Were I to assume that both or one of his birth parents were Indigenous, I would still not be able to identify any systemic or historical *Gladue* factors relevant to the problems in Mr. Lemieux's life based on the evidentiary record before me. As Mr. Lemieux noted to Dr. Fedoroff, he never lived with his birth parents, was placed in care at birth and then adopted at six months of age. However, I wish to be clear. I do not believe Mr. Lemieux's late, uncorroborated, and inconsistent claim that he is a person of First Nations heritage.[84]

Justice Watchuk also did not deem the offender to have sufficiently established their Indigenous identity in *R v Vangrootheest*.[85] Mr. Vangrootheest eventually conceded that *Gladue* was not applicable, and following completion of the pre-sentence report said that he did not consider himself to be Indigenous.[86] Justice Watchuk states that she would not have found Mr. Vangrootheest to be an Indigenous offender coming within the contemplation of section 718.2(e) in any event, as the offender's self-identification and evidence that his mother had "some connections"[87] to Indigenous groups was not enough to attract *Gladue* considerations.[88]

Justice Watchuk makes passing reference to the Supreme Court's decision in *R v Powley*,[89] which addressed the criteria necessary to be considered Métis and thereby entitled to a particular Aboriginal right protected by section 35 of the *Constitution Act, 1982*.[90] The Powleys had shot a moose without valid hunting licences or a moose harvesting tag and were subsequently charged with having violated regulatory offences associated with these hunting practices. The Powleys argued that their sustenance-driven moose hunting was done in accordance with a constitutionally protected Aboriginal right, which the Powleys claimed as Métis persons, and that their hunting was therefore exempt from the provincial regulatory restrictions they had allegedly violated.[91] In their decision in *Powley*, the Supreme

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81. *Lemieux*, supra note 79 at para 17.

82. *Ibid* at para 19.

83. *Ibid* at paras 20–21.

84. *Ibid* at para 22.

85. 2016 BCSC 2555 [*Vangrootheest*].

86. *Ibid* at para 27.

87. *Ibid*.

88. *Ibid* at para 30.

89. 2003 SCC 43 [*Powley*].

90. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

91. *Powley, supra* note 89 at paras 1–6.

Court explained that three identity-related criteria had to be satisfied by the Powleys to be entitled to the rights they claimed by virtue of their identification as Métis: (1) that they individually self-identified as a Métis community member and that this self-identification was not a recent revelation, (2) that they could demonstrate some type of ancestry associated with the Métis community in question, and finally (3) that they are accepted by the modern Métis community.[92]

Although addressing Indigenous identity outside the context of sentencing, the Court's framework merits some form of consideration by those who may be tasked with clarifying the criteria to attract *Gladue* sentencing principles in the future. *Powley* is not cited in *Lemieux*, but some of the elements of the *Powley* test, particularly Justice Berg's concern over the last-minute nature of the offender's self-identification, are observable. Some of the issues identified by the Court in *Powley* as it grapples with formulating its test may also be confronted when courts address Indigenous identity for the purposes of *Gladue*. One such issue is the degree of Indigenous ancestry that must be demonstrated by a party claiming Indigeneity. The Court in *Powley* explained that satisfying the ancestral connection criteria did not require a rights claimant to satisfy a "minimum 'blood quantum'," but rather that the claimant must provide "some proof that the claimant's ancestors belong to the historic Métis community by birth, adoption, or other means."[93] In his argument in favour of ethnicity as a guiding concept for determining identity as opposed to race, Professor Grammond succinctly defines the controversial blood quantum criteria as "the calculation of the proportion of a person's [I] ndigenous ancestry, expressed in terms of percentage or a fraction."[94] While not referencing or endorsing any sort of blood quantum criteria, the cases discussed in the immediately following sections highlight a noticeable emphasis in the existing jurisprudence on offenders' ancestries when determining Indigenous identity for the purposes of *Gladue*. As will be demonstrated, absent receipt by the court of an explicit and informed waiver of these considerations, an offender with Indigenous ancestry will garner *Gladue* considerations even if the specific offender does not generally identify as Indigenous, but an offender who may self-identify as Indigenous but cannot demonstrate any personal ancestry within the Indigenous peoples of Canada will not qualify as an Indigenous offender for the purposes of section 718.2(e) of the *Criminal Code*.

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92. *Ibid* at paras 31–33. The Court does qualify its limited purpose in setting down the test and indicates the importance of establishing settled membership tests outside of the litigation context at para 30: "We therefore limit ourselves to indicating the important components of a future definition, while affirming that the creation of appropriate membership tests *before* disputes arise is an urgent priority." The call to action in the latter part of this statement is equally applicable to the needed clarification of how Indigenous identity should be assessed in the *Gladue* context.

93. *Powley, supra* note 89 at para 32.

94. Sébastien Grammond, "Disentangling 'Race' and Indigenous Status: The Role of Ethnicity" (2008) 33:2 Queen's LJ 487 at 514.

C. An Offender Self-identifying as Non-indigenous Despite Having Indigenous Heritage May Still Attract *Gladue* Considerations

The duty of a sentencing judge to consider the unique circumstances of Indigenous offenders in sentencing may not be dispensed with simply because an offender with Indigenous heritage generally identifies as non-Indigenous. Although ultimately finding that the offender's background circumstances did not result in any modification to the sentence, *Gladue* considerations were deemed applicable in *R v Adamko*[95] despite the accused stating that he generally identified as non-Indigenous. Justice Stang noted that Mr. Adamko's family members had had experiences where they were made to feel "unjustly ashamed" of their Indigenous heritage and therefore tried to hide this part of their background.[96] Justice Sidhu also found *Gladue* to be applicable in similar circumstances in *R v Green*.[97] Mr. Green's non-identification as Indigenous did not negate the applicability of *Gladue*:

> Although Mr. Green does not identify as Indigenous, I am mindful of the unique and systemic background factors that have negatively affected Indigenous communities generally. Specifically, I also take into consideration that those factors likely may have had an impact on his mother and his grandmother. Even though Mr. Green is not aware of how these systemic factors such as the effects of Indian residential schools, colonialism and displacement may have affected him or his family, I recognize that intergenerational trauma continues to impact Indigenous people.[98]

A sentencing judge's duty to take into consideration the unique circumstances of Indigenous offenders may persist even if the accused generally identifies as non-Indigenous. If this were not so, then a sentence may be imposed without adequate consideration of the "unique systemic or background factors which may have played a part in bringing the particular [A]boriginal offender before the courts,"[99] as required by *Gladue*. The approach in *Adamko* is somewhat in tension with the application of tests for establishing Indigenous identity in other legal contexts, such as *Powley*, where self-identification as Indigenous is a threshold requirement.

The proper handling of an express waiver of *Gladue* considerations may not be an issue in cases such as *Adamko*, where despite the offender's identification as non-Indigenous there was no express waiver of *Gladue*, but may be an issue in cases such as *Green*. The court was aware that Mr. Green had Métis ancestry, but the preparation of a *Gladue* report had been expressly waived, with Mr. Green expressing a lack of interest and connection with his Métis heritage.[100] The Supreme Court addressed waivers in both *Gladue* and *Ipeelee*. In *Gladue,* the Court noted that although judges "must take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to [A]boriginal offenders . . . [w]here a particular offender does not wish such evidence to be adduced, the right to have particular attention

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95. 2019 SKPC 27.

96. *Ibid* at paras 57–58.

97. 2022 BCPC 255 at para 86 [*Green*].

98. *Ibid* at para 86.

99. *Gladue*, *supra* note 1 at para 93.

100. *Green*, *supra* note 97 at para 30.

paid to his or her circumstances as an [A]boriginal offender may be waived."[101] In *Ipeelee*, the majority noted that "[c]ounsel have a duty to bring that individualized information [relevant to *Gladue* sentencing considerations] in every case, unless the offender expressly waives his right to have it considered."[102] In a small number of cases, courts seem to have struggled with how to approach a waiver of *Gladue* considerations and whether, despite an offender having expressly waived these considerations or refused to engage with the preparation of a *Gladue* report, there nevertheless remains a duty to attempt to somehow take into consideration an offender's Indigenous heritage in sentencing. In *Jackson v R*,[103] the initial sentencing judge, having learned that the offender was Indigenous, insisted on the preparation of a *Gladue* report despite the offender, who was represented by counsel, unequivocally waiving the preparation of said report.[104] Although noting that the sentencing judge was attempting to be cautious and alert to her duties to make proper inquiries and properly implement *Gladue*, the New Brunswick Court of Appeal suggested that it "may be preferable to accept the waiver, provided it is informed, unequivocal, and made on the record."[105]

In *R v Schneider*,[106] the Alberta Court of Appeal suggested that it was an open question as to whether the receipt of an express waiver of a *Gladue* report, "if made out, relieves a sentencing judge of the obligation to take account of *Gladue* factors otherwise ascertainable."[107] As part of the process of confirming how Indigenous identity is determined for the purposes of *Gladue* considerations, it may be beneficial to provide sentencing judges with even clearer direction regarding the appropriate approach to an offender's autonomy in waiving *Gladue* considerations and how this relates to a judge's *Gladue*-related duties once an unequivocal and informed waiver has been received. It may also be worth emphasizing the difference between an express waiver of the preparation of a *Gladue* report and an express waiver of the consideration of *Gladue* factors *entirely*, as the former may well exist in the absence of the latter.[108] An express waiver of the preparation of a *Gladue* report does not constitute waiver of *Gladue* considerations in their entirety, but *Gladue* itself does appear to indicate that an express waiver of *Gladue* considerations entirely is possible and should be respected.

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101. *Gladue*, *supra* note 1 at para 83.

102. *Ipeelee*, *supra* note 23 at para 60.

103. 2019 NBCA 37.

104. *Ibid* at paras 26–30.

105. *Ibid* at para 30.

106. 2017 ABCA 132.

107. *Ibid* at para 4.

108. Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence—Executive Summary for Judges* (Westbank, BC: BC First Nations Justice Council, 2021) at 14–15.

D. *Gladue* Considerations Are Available Only for the Indigenous Peoples of Canada

While the negative impact of colonialism on Indigenous peoples is not unique to Canada, the Ontario Court of Appeal's decision in *R v JN*[109] suggests that *Gladue* considerations may only apply to offenders that are Indigenous to Canada, or at the very least trace their heritage to Indigenous peoples whose territory straddled the border between Canada and the United States.[110] Although the Crown had conceded that the offender was Indigenous for the purposes of *Gladue*, the court expressed skepticism that *Gladue* was applicable given that the offender's Indigenous heritage was associated entirely with Indigenous peoples whose traditional territories were in the southern United States. The Court stated that *Gladue* specifically intended to respond to the legacy of colonialism in Canada, not elsewhere.[111] This aspect of the decision has not been explicitly adopted in other decisions to date and was the subject of a critique by Professor Rudin, who argued that *Gladue* places an onus on Canadian courts to take into consideration the legacy of colonialism in a liberal fashion as compared to the more narrow, Canadian-centric focus suggested by the Court in *JN*.[112] Professor Rudin specifically cited the similarities in the horrific treatment of Indigenous peoples in Australia, Canada, and the United States as support for the broader application of *Gladue* considerations by Canadian sentencing courts for Indigenous offenders from these other nations.[113] This argument is very persuasive, but this hypothetical broader application of *Gladue* may need to be given clear parameters about how far the umbrella of *Gladue* ultimately reaches given that colonial projects wreaked devastation on the Indigenous peoples of many different countries in many different forms. A possible impetus for the court of appeal's *obiter* comments regarding the application of *Gladue* in *JN* may have been concerns that an overextension of *Gladue* considerations may lead to a loss of perspective on the unique circumstances of Indigenous Canadian offenders and the specific attention they merit in the sentencing process.[114]

E. Offenders Claiming *Gladue* Considerations Who Lack Any Indigenous Ancestry

Offenders who have no Indigenous ancestry and are forthright about their heritage, but have significant connection or immersion in Indigenous communities or families and therefore claim that *Gladue* considerations are applicable to their sentencing, present a unique challenge for sentencing courts. The issues that their cases raise differ from individuals who present tenuous, questionable, or uncertain Indigenous heritage, although it may be argued that this is a distinction without any meaningful difference from the perspective of *Gladue*. This is another context in which courts, whether they like it or not, are forced to explicitly address arguments regarding Indigenous identity. An offender who self-identifies as Indigenous may have had negative experiences that are in some way linked to the historic mistreatment of

109. 2013 ONCA 251 at para 46 [*JN*].

110. Rudin, *supra* note 28 at 115.

111. *JN, supra* note 109 at paras 45–46.

112. Rudin, *supra* note 28 at 115–118.

113. *Ibid* at 116–117.

114. Similar concerns animate the Ontario Court of Appeal's decision in *R v Morris*, 2021 ONCA 680, where the Court declined an invitation to extend *Gladue* considerations to the sentencing of Black offenders.

Indigenous peoples, which would no doubt be relevant *Gladue* considerations for an offender with Indigenous ancestry, but this may not mean that these experiences must automatically be viewed through the lens of *Gladue*. Addressing the application of *Gladue* considerations in such circumstances requires sentencing judges to make definitive statements on whether the party before them is or is not an Indigenous offender for the purposes of sentencing.

The issue of whether *Gladue* factors could be applied to an offender with no Indigenous ancestry was robustly considered in *R v Antoine*.[115] Ms. Antoine did not claim to have any Indigenous ancestry but had numerous and significant Indigenous connections. Her husband of 34 years was Indigenous, and Ms. Antoine closely associated with his culture throughout their marriage.[116] Mr. Antoine was victimized during his forced attendance at the Kamloops Indian Residential School[117] and struggled with alcohol abuse later in life.[118] He was physically and mentally abusive toward Ms. Antoine during his struggles with alcohol before eventually achieving sobriety.[119] Ms. Antoine acquired status via marriage[120] and lived with Mr. Antoine on the reserve of Bonaparte Indian Band.[121] She became extremely involved in the community, volunteering at events and assisting others during difficult times.[122] Ms. Antoine eventually became employed by Bonaparte Indian Band, ostensibly in an administrative role. It was via this role that she stole over $166,000, taking band money to fuel a gambling addiction.[123] While acknowledging frustration with her employment experience with the band, where she felt she had been mistreated because she lacked Indigenous ancestry, Ms. Antoine was ultimately extremely remorseful for the damage her actions caused to the community and was desirous of addressing her misdeeds against the community via a restorative justice process.[124] In light of Ms. Antoine's personal circumstances, it was argued that *Gladue* factors should be considered in sentencing.[125]

Justice Frame ultimately ruled that *Gladue* considerations were not applicable to Ms. Antoine's sentencing. This is the correct conclusion, Justice Frame explained, based on the proper interpretation of the cumulative guidance provided by *Gladue* and *Ipeelee*. While acknowledging that Ms. Antoine was an "active member of the reserve" and suffered abuse stemming from alcoholism associated with the effects of residential school attendance, Justice Frame also identified that Ms. Antoine had not experienced the traumas brought about by colonialism, which *Gladue* sentencing considerations were intended to address.[126] Justice Frame notes that:

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115. 2017 BCPC 333 [*Antoine*].

116. *Ibid* at para 5.

117. *Ibid* at para 12.

118. *Ibid* at para 7.

119. *Ibid* at para 16.

120. *Ibid* at para 13.

121. *Ibid* at para 35.

122. *Ibid* at paras 14–15.

123. *Ibid* at paras 1–2.

124. *Ibid* at paras 11–12.

125. *Ibid* at para 32.

126. *Ibid* at para 46.

> *Gladue*, *Ipeelee* and s. 718.2(e) of the *Criminal Code* serve to expand the sentencing considerations to a person who has acquired status as an [A] boriginal person by way of marriage. The systemic factors are absent in such a person as Ms. Antoine. Certainly all of her other factors both mitigating and aggravating are to be considered. This would include the circumstances in which she has found herself these last few decades. However, these considerations can be factored into sentencing without extending the very specific and purposeful *Gladue* and *Ipeelee* principles meant to be encompassed specifically in s. 718.2(e).[127]

It is difficult to harmonize the first sentence with the rest of the quoted paragraph given that the explanation of the non-consideration of *Gladue* principles, and the ultimate effect of Justice Frame's conclusion on this issue, does not in any way appear to expand *Gladue* sentencing considerations to a person that acquires status via marriage. Ms. Antoine had previously acquired status via marriage and yet was denied *Gladue* considerations in her sentencing. Justice Frame's analysis suggests that an individual lacking Indigenous heritage may not be considered an Indigenous offender for the purposes of *Gladue* regardless of their personal, social, or even legal associations with Indigenous persons, culture, or communities. Ms. Antoine had, at least in her own estimation, made meaningful connections with an Indigenous community and could draw connections between the abuse she had suffered and the horrific legacy of the residential school system, but this did not bring her within the auspices of section 718.2(e).[128] Summarizing the general conclusion of *Antoine* as it pertains to *Gladue,* Professor Benjamin A Ralston explains that although unique personal circumstances may still certainly be considered in the individualized sentencing of a particular offender, "[n]on-Indigenous people are not intended targets of either s 718.2(e)'s reference to the circumstances of Indigenous people or the *Gladue* principles articulated by the Supreme Court of Canada."[129, 130]

The decision in *R v Young* also dealt with an offender without any Indigenous ancestry claiming *Gladue* considerations, but in a different set of circumstances than those in *Antoine*. Mr. Young resided in the Haida community of Skidegate.[131] He pled guilty to a charge of possession of cocaine for the purpose of trafficking[132] after police surveilled his home, received information from buyers that Mr. Young and his wife were dealing drugs out of their home, and subsequently searched the Youngs' home pursuant to a warrant and recovered numerous

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127. *Ibid* at para 52.

128. The decision in *Antoine, supra* note 115, was cited at para 27 of *R v Deveau,* 2020 BCPC 44. With all due respect to Justice Mrozinski, her observation that Ms. Antoine received *Gladue* considerations in her sentencing is incorrect and entirely at odds with the clear explanation of the non-application of *Gladue* in *Antoine*.

129. Ralston, *supra* note 108 at 13–14.

130. Ms. Antoine was interested in engaging in a restorative justice process with the Bonaparte Indian Band community, and at para 12 it is noted that a healing circle had in fact been planned but was cancelled when Elder Diane Sandy, the facilitator of the healing circle, fell ill. At para 25 Justice Frame notes that although Ms. Antoine was still desirous of engaging in the healing circle process, and that "she does not intend to use that healing circle as a means to escape jail, but to engage in the restorative process," there were individuals in the community who were unwilling to engage in this process with her.

131. *Young*, *supra* note 36 at para 21.

132. *Ibid* at para 7.

items associated with drug trafficking along with illicit substances themselves.[133] Mr. Young was born to non-Indigenous parents. His father was a Canadian soldier and his mother was German, meeting while Mr. Young's father was stationed in what was then West Germany.[134] His biological father left his mother prior to Mr. Young's birth, and Mr. Young had in fact never met him. Mr. Young's mother began a relationship with another Canadian soldier, Danny Young, when Mr. Young was only three years old. Danny Young was an Indigenous man hailing from Skidegate. Although no formal adoption ever took place, Mr. Young viewed Danny as a father. Danny subsequently had two biological children with Mr. Young's mother. When Danny was reassigned back to Canada the family moved with him, subsequently settling in Skidegate when he retired from the Armed Forces in 1972, when Mr. Young would have been twelve. Mr. Young lived in Skidegate permanently from that time.[135] He described his childhood as "normal,"[136] although noting that Danny drank "quite a bit" while Mr. Young was a child and that he would be in the children's lives "half the time."[137] Mr. Young began drinking when he was thirteen and drank more frequently as he became older.[138] In adulthood he developed an addiction to cocaine in addition to heavy alcohol use.[139] Although acknowledging that he did not have Indigenous ancestry, Mr. Young identified as being Haida and argued that *Gladue* considerations were applicable to his sentencing.[140]

In ruling that *Gladue* considerations were not applicable to Mr. Young, Justice Patterson identified two related issues that had to be addressed:

> 1. If an offender self-identifies as an Indigenous person, is that sufficient to bring the offender within s. 718.2(e)'s "with particular attention to the circumstances of Aboriginal offenders" and the *Gladue* analysis?
> 2. If no, is there both a subjective and objective component to determining if an offender is an Indigenous person for purposes of s. 718.2(e) and the *Gladue* analysis? There will be no requirement for a sentencing judge to consider this second issue if the answer to the first issue is "yes."[141]

After reviewing the decision in *Antoine,* Justice Patterson concluded that the first issue must be answered in the negative. A person without any Indigenous ancestry who self-identifies as Indigenous is not automatically deemed an Indigenous person, Justice Patterson concluded, for the purposes of *Gladue*.[142] Justice Patterson juxtaposed Mr. Young's circumstances with those of cases such as *R v Kreko*,[143] where an Indigenous child was adopted by non-Indigenous parents, was unaware of their Indigenous heritage and identified as non-Indigenous as a

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133. *Ibid* at paras 21–29.

134. *Ibid* at para 36.

135. *Ibid* at paras 37–38.

136. *Ibid* at para 40.

137. *Ibid* at para 41.

138. *Ibid* at para 42.

139. *Ibid* at para 43.

140. *Ibid* at para 125.

141. *Ibid.*

142. *Ibid* at para 139.

143. 2016 ONCA 367.

result, and only learned of their heritage much later in life. Justice Patterson explains that in cases such as *Kreko* the application of *Gladue* considerations, notwithstanding the offender's identification as non-Indigenous for the vast majority of their life, is appropriate and responds to issues of Indigenous dislocation and identity loss that *Gladue* considerations attempt to address.[144] Self-identification on its own is not enough; there is both a subjective *and* an objective component that must be met to be considered an Indigenous person for *Gladue* purposes.[145] While the facts in *Young* clearly make the objective component the contentious issue, one may question whether it is appropriate to include a subjective component in the analysis in light of decisions such as *Adamko* and *Green*, where the offenders generally identified as non-Indigenous. These cases would seemingly not meet the subjective criteria insofar as the offenders subjectively perceived themselves to be non-Indigenous, yet non-consideration of *Gladue* factors on this basis would result in a court failing to consider the unique circumstances of an offender with Indigenous ancestry.

Justice Patterson then proceeds to determining whether Mr. Young could satisfy the objective component to establish that he is an Indigenous person for the purposes of *Gladue*. While Justice Patterson sets out a number of factors to be considered in this analysis,[146] his focus appears to be specifically on considering the personal characteristics of the offender that may indicate they are Indigenous as well as any systemic or background factors that would qualify as *Gladue* considerations were *Gladue* to be applied. Justice Patterson first noted that Mr. Young "is not biologically related to the Haida, does not belong to a Haida clan, is not a citizen of the Haida Nation, is not a member of the Skidegate Band, and does not possess a status number";[147] these factors would presumably weigh in favour of *Gladue* being applicable to an offender with Indigenous ancestry were they present, but their absence does not automatically exclude the offender from *Gladue* considerations in Justice Patterson's analysis. Consideration is also given to a variety of background factors and systemically driven negative experiences commonly addressed in *Gladue* considerations.[148] When these factors and experiences are compared to Mr. Young's circumstances, however, Justice Patterson found that he "does not come within the group of peoples entitled to the benefit of [*Gladue* considerations]."[149] This conclusion is based on factors including a lack of evidence regarding immersion in Haida culture, the non-attendance of Mr. Young's stepfather, Danny, or his parents at residential schools, and the non-existence of other negative experiences in Mr. Young's life that are commonplace in the lives of offenders when *Gladue* factors are commonly considered.[150]

Although *Antoine* is cited extensively in *Young*, the two decisions are analytically divergent. The approach regarding whether an offender is Indigenous for the purposes of *Gladue* that appears in *Young* is quite different than that in *Antoine*. In *Antoine*, Indigenous heritage is a prerequisite to the application of *Gladue* considerations, but it is not in the analytical framework used in *Young*. Had the same analysis used in *Young* been applied in

144. *Young*, *supra* note 36 at para 138.

145. *Ibid* at paras 139–140.

146. *Ibid* at para 142

147. *Ibid*.

148. *Ibid* at para 141.

149. *Ibid* at para 147.

150. *Ibid* at paras 145–146.

Antoine, Ms. Antoine's argument that she was deserving of *Gladue* considerations carried a higher probability of success. As compared to Mr. Young, Ms. Antoine identified far more strongly with her Indigenous community and culture, had obtained status via marriage, was married to a survivor of the residential school system who struggled with substance abuse as a result of this experience, and was ultimately a victim of physical and emotional abuse resulting from substance abuse brought about by her husband's residential school experiences. However, the approach in *Young* opens the door to individuals without any Indigenous ancestry potentially accessing *Gladue* considerations, which may be deemed improper and inappropriate by Indigenous persons, communities, or scholars.

Another qualm with the analytical structure offered in *Young* is that it potentially conflates the basic applicability of *Gladue* considerations with the ultimate impact that *Gladue* factors may or may not have on the eventual sentence. Justice Patterson looks to see how many *Gladue* considerations are observable in the circumstances of Mr. Young and, finding few if any, concludes that Mr. Young is not a person for whom section 718.2(e) of the *Criminal Code* was intended to include. A clearer analytical structure is preferable for all offenders claiming *Gladue* considerations: The first threshold question is whether or not the offender is Indigenous, and then the analysis proceeds to determining the impact of the accused's circumstances on the ultimate sentence.[151]

Overall, the jurisprudence in this area demonstrates that there is undoubtedly a need for clarification regarding how to appropriately and consistently deal with offenders without any Indigenous ancestry requesting *Gladue* considerations. In addition to analytical clarity, these cases must be handled with the utmost sensitivity, especially in circumstances like *Antoine* and *Young*, where the offences were committed on reserve and the victims were Indigenous persons and communities.[152] These victims may feel aggrieved if individuals lacking any Indigenous ancestry, who they may not accept as being Indigenous, commit crimes on reserve at the expense of Indigenous peoples and then subsequently receive Indigenous-specific sentencing considerations. Their perception may be that applying *Gladue* considerations in these circumstances has the practical effect of lessening the response to the ongoing exploitation of Indigenous peoples.

IV INDIGENOUS IDENTITY AND *GLADUE* GOING FORWARD

There are clearly unresolved issues within the law pertaining to Indigenous identity and *Gladue* considerations, some of which will undoubtedly demand judicial attention in coming years. If, for instance, one of the high-profile Canadians whose Indigenous identification has recently been scrutinized, such as Joseph Boyden or Carrie Bourassa, pled guilty to a crime and argued that *Gladue* principles were applicable to their sentencing, the outstanding questions and inconsistencies within the relevant jurisprudence means that there is no clear legal roadmap to address this controversial hypothetical at present. What type and quality of

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151. Dallas Mack, "Sentence: Section 718.2(e)" (2013) Mack Crim LB at 3.

152. At paras 52–54 of *Young*, *supra* note 36, the statement of Trent Moraes, deputy chief councillor for the Skidegate Band Council, is summarized. Mr. Moraes provided that Mr. Young was known to sell drugs to high school–aged youth and described Mr. Young as "the patriarch of one of the major trafficking families in Skidegate."

evidence of their ancestry will be required? Does modern acceptance of their Indigeneity by a particular Indigenous community or Indigenous leaders have any bearing on determining Indigenous identity for the purposes of *Gladue*? Further thought and clarification regarding the applicability—or inapplicability—of analytical frameworks that address Indigenous identity in other legal contexts to sentencing considerations is needed. While cases have been cited in this paper that have had to address Indigenous identity as it pertains to child welfare and Aboriginal rights, there are many other contexts where Indigenous identity is a relevant consideration, and the principles used to address this issue in other circumstances and statutory contexts may or may not have utility in the sentencing setting. There may also be guidance to be taken from inquiries into Indigenous identity fraud in non-judicial settings, such as the comprehensive and informative report authored by Jean Teillet for the University of Saskatchewan in the wake of the controversy surrounding the aforementioned Bourassa.[153]

The task of judges to address challenging questions of Indigenous identity in their reasons is a formidable one. In *R v Ceballo*,[154] Justice Rondinelli, in accepting that the offender was Indigenous despite ALS being unable to confirm the offender's heritage, stated that "inviting this court to determine if Ms. Ceballo is indeed an Indigenous person is fraught with concern."[155] In some circumstances it may be appropriate for a court to sidestep the issue if it makes no difference in sentencing, and surely a sentencing court's determination regarding Indigenous identity only pertains to how this should be defined for the purposes of section 718.2(e). Yet there is also a need to take notice of the harm caused by Indigenous identity fraud. Although speaking in the context of fraud in the academic context, the comments about the harm caused by Indigenous identity fraud in the Teillet report are applicable to fraud that occurs in other contexts as well:

> Indigenous identity fraud causes harm. This is uncontested. Every expert from the academy spoke about the harm it causes. Every expert insisted that misrepresentation matters, a lot.[156]

Guidance must be sought from Indigenous leaders and scholars. Reference to Indigenous knowledge and understanding in cases addressing Indigenous identity in the *Gladue* context is exceedingly minimal, and this needs to change. If remedial legislation is intended to respond to the injustices experienced by Indigenous peoples, then the interpretation and application of this legislation should be informed by Indigenous peoples. This may not simplify these difficult analyses; Indigenous identity is not homogenously understood among Canada's diverse Indigenous peoples. Colonialism has also significantly disrupted the identities of Indigenous peoples, with Damien Lee noting that "[b]elonging, for First Nations in Canada, is a site fraught with tension, contradiction, and a messiness resultant from nearly 170 years of colonial interference."[157] But the inclusion of Indigenous concepts of identity and belonging will ensure that *Gladue* operates in a way that is responsive to those it is supposed to serve: Canada's Indigenous peoples.

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153. Jean Teillet, "Indigenous Identity Fraud—A Report for the University of Saskatchewan" (October 17, 2022) online (report): <https://leadership.usask.ca/documents/about/reporting/jean-teillet-report.pdf>.

154. 2019 ONCJ 612.

155. *Ibid* at para 11.

156. Teillet, *supra* note 153 at 36.

157. "Adoption Constitutionalism: Anishinaabe Citizenship Law at Fort William First Nation" (2019) 56:3 Alta Law Rev 786 at 787.