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ACROSS THE GREAT DIVIDE: ANISHINAABEK LEGAL TRADITIONS, TREATY 9, AND HONOURABLE CONSENT

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CONTENTS

I INTRODUCTION

The July 2018 Ontario Superior Court judgment in *Eabametoong First Nation v Minister of Northern Development and Mines*[1] involved an Ojibwa First Nation[2] challenging an exploratory mining permit issued by the Ontario government to Landore Resource Canada Inc (Landore Canada). The judgment ultimately held that the Crown acted dishonourably in

* I would like to acknowledge the influence that Romola Thumbadoo has had in inspiring the completion of this paper. Her guidance and support has been invaluable in researching, presenting, and writing this paper. Furthermore, I sincerely appreciate every panelist and scholar with whom I have presented this work over several months in community discussions. As a non-Indigenous person, I wish to sincerely thank Indigenous writers, activists, and remarkable colleagues as well as the histories and traditions passed down to them. Engaging with their work has been hugely influential in my desire to learn more about the awe-inspiring complexity on which Indigenous legal traditions are based. The research and writing of this article have been completed as a PhD candidate at Carleton University in the Department of Law & Legal Studies.

1. *Eabametoong First Nation v Minister of Northern Development and Mines*, 2018 ONSC 4316 [*Eabametoong*].

2. The Eabametoong First Nation reserve is located 300 kilometres northeast of Thunder Bay. It is accessible only by territory.

abruptly closing consultation with the Eabametoong First Nation (Eabametoong). Moreover, it ruled that Eabametoong being given two weeks to include conditions in the already completed permit undermined the Crown's obligation to engage in ongoing consultations that addressed any potential grievances brought to light by Eabametoong. The judgment entrenched the Crown's reconciliatory obligation to adequately consult with any aggrieved First Nation community prior to making declarations that their traditional lands are open to investment. Nevertheless, this paper argues that in the judgment, reconciliatory obligations were highlighted at the expense of unresolved treaty claims. Acknowledging these unresolved claims could have potentially shifted the Crown's consultative obligation to a much higher threshold than was ultimately held in the judgment.

Reconciling Crown and First Nations interests involves preserving Indigenous and treaty rights as equal to substantive public interest. Judgments like *Eabametoong* reverse the dynamic by holding that reconciliation depends on how well Indigenous and treaty rights can be aligned with public well-being. This was observed in *Eabametoong* when Justice Sachs recognized any substantive Indigenous and treaty claim depended on the extent to which the Eabametoong First Nation could claim title in their territory. Upon judging any title claim to be weak, Justice Sachs held that the Crown did not owe a duty of substantial consultation to Eabametoong. Reconciliatory obligation was purely predicated on upholding Eabametoong's procedural right to adequate consultative engagements that respected their cultural well-being, while substantive rights claims remained unresolved in the judgment. Leaving potential claims unheard ignores long-held treaty obligations and major Supreme Court of Canada jurisprudence that deals with how agreements between the Crown and First Nations are to be upheld.

This paper begins with an analysis of the concepts underlying the Crown's duty to consult as developed in key Supreme Court judgments. It then explains how both the prior Liberal and current Conservative Ontario provincial governments have sought to advance mineral extraction in the northern Ring of Fire region. It also highlights how the Eabametoong First Nation was greatly impacted by these governmental priorities. The paper then analyzes the *Eabametoong* judgment and how it deals with underlying title and reconciliation. Key jurisprudence on treaty interpretation is taken up to highlight the judgment's problematic reliance on reconciliation at the expense of unresolved treaty claims.[3] Generational treaty partnerships developed in relevant agreements like Treaty 9 are noted to show that the Crown's consultative obligation was likely more substantive than initially held in the judgment.[4] Finally, the paper concludes by explaining that, while reconciliation was held as a major priority in the judgment, leaving treaty rights unresolved potentially creates greater enmity between the Crown and aggrieved First Nations communities.

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3. See Janna Promislow, "Treaties in History and Law" (2014) 47 UBC L Rev 1085 at 1098: "In the jurisprudential context, the Supreme Court uses this language to assert both the legally binding nature of these agreements as well as their permanence. Permanence is a necessary part of the characterization of treaties as constitutional, since constitutions, by their very nature, are built to last."

4. In regards to resource development in treaty territory, it is equally critical to point out that these interpretive requirements impose a more substantive engagement protocol, in which customary landed interests upheld by the First Nation community need to be respected at every stage of negotiation well beyond being regarded as a mere procedural hurdle.

II THE DUTY TO CONSULT

The duty to consult serves a major role in upholding Indigenous and treaty rights by establishing key conditions on which Crown activity can be constitutionally approved. For example, the duty stipulates that any Crown-led project that impacts a First Nation's ability to exercise their rights must have the Crown (or a delegated third party) carry out engagements with the aggrieved community. In the event that the potential limit greatly impacts these rights, then the duty to consult and accommodate will be invoked. Conversely, if the harm is judged to be relatively minimal, then engagements of a less substantive nature will be called upon.[5]

In many judgments, the Supreme Court has typically held that consultative requirements depend on the extent to which a proposed project negatively impacts a First Nation's continued potential to preserve their Indigenous and treaty rights as well as rights to title. In judgments like *Haida Nation*, Chief Justice McLachlin points out that evaluations on how the Crown proceeds with the duty take place along a *spectrum*. Chief Justice McLachlin writes "at one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice."[6] Conversely, when the potential impacts to Indigenous and treaty rights are judged to be substantial, the Crown may be obligated to take part in more engaged and ongoing consultative processes, in which accommodation remedies may be in order.

Consultation requirements are more pronounced in judgments when the claim to title or the potential impact to Indigenous and treaty rights is more substantial. When potential impacts are judged to greatly undermine an aggrieved First Nation's rights, the Crown is honourably bound to preserve Indigenous rights[7] as constitutionally upheld in section 35.[8] When the potential to impact the claimed right is judged to be substantive, greater remedies will be required to mitigate the harms. Remedies (including accommodation) may be required to ensure the reconciliatory goals underlying the duty to consult will be adequately met. Reconciliatory objectives require the Crown to adequately weigh and balance the underlying interests observed in the Indigenous and treaty rights claim and the overall substantive public interest.

In the Supreme Court's judgment in *Taku River*, Chief Justice McLachlin writes:

> As discussed in Haida, the process of consultation may lead to a duty to accommodate Aboriginal concerns by policies in response. The purpose of Section 35 (1) of the *Constitution Act 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty.

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5. See Grace Nosek, "Re-imagining Indigenous Peoples' Role in Natural Resource Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50 UBC L Rev 90.

6. *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 43 [*Haida Nation*].

7. Brenda Gunn "Beyond *Van Der Peet*: Bringing Together International, Indigenous and Constitutional Law" in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) at 139.

8. *Constitution Act*, 1982, s 35(1) being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11: "The existing Aboriginal and treaty rights of the Aboriginal people in Canada are hereby recognized and affirmed."

> Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.[9]

While the conceptual core inherent in the duty to consult has been clearly established in many judgments, it is constantly debated during conflicts between resource-interested governments and First Nations communities.

III "UNLOCKING" THE RING OF FIRE

Both the prior and the current Ontario provincial governments have undertaken many attempts to "unlock" the Ring of Fire's[10] development potential. At the same time, many First Nations communities situated near the Ring of Fire have demanded the province engage in adequate consultative processes that respect the long-standing political, cultural, and economic aspects of Indigenous rights and treaty claims. Ontario's amended *Mining Act*[11] established new protocols that prospectors and corporations had to comply with when staking a free entry claim to lands and mineral resources.[12] The amended legislation held that an appropriate exploration plan must be included in any staking claim presented to the province. Upon receiving an exploration plan, the relevant minister must provide a copy to aggrieved First Nations communities who, in turn, have three weeks to respond to the plans by submitting written concerns related to their Indigenous and treaty rights. Prior to approval, Karen Drake points out, "the Director may direct the proponent to consult with the Aboriginal community. Before issuing an exploration permit, the Director must be 'satisfied that appropriate Aboriginal consultation has been carried out.'"[13] The prior Liberal government (2003–2018) built on changes to the *Mining Act* by implementing the *Far North Act*[14] to protect culturally significant areas on reserve lands in the Ring of Fire region.

The *Far North Act* was initially passed into law in 2010, and it served to both respond to First Nations' concerns related to development while also encouraging corporate investment in the region. In a 2019 *Globe and Mail* piece, Dayna Scott points out the Liberal government also implemented the *Far North Act* to "manage the increasing volume and credibility of claims to Indigenous governance and authority in the region."[15] These claims were managed by creating requisite conditions on which Indigenous communities in the region could highlight

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9. *Taku River Tlinglit First Nation v British Columbia (Project Assessment Director)*, 2004 3 SCC 74 at 42.

10. The Ring of Fire is a large chromite mining development project near the James Bay lowlands in Northern Ontario. Nine Ojibwa First Nations are situated on or near these Treaty 9 lands.

11. *Mining Act*, RSO 1990, c M14.

12. Rachel Ariss with the collaboration of John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inniuwug, Reconciliation and Canadian Law* (Halifax: Fernwood Publishing, 2012) at 37 [Ariss and Cutfeet].

13. Karen Drake, "The Trials and Tribulations of Ontario's *Mining Act*: The Duty to Consult and Anishinaabek Law" (2015) 11:2 JSDLP at 194–195 [Drake].

14. *Far North Act*, 2010, SO 2010, c 18.

15. Dayna Scott, "Doug Ford's Repeal of the *Far North Act* Won't Gain the Respect of Indigenous Communities" (25 March 2019), online: *Globe and Mail* <www.theglobeandmail.com/opinion/article-doug-fords-repeal-of-the-far-north-act-wont-gain-the-respectof>.

key cultural and burial sites that would be protected in any consultative engagement with the provincial government or concerned corporation.

First Nations communities like Eabametoong and Neskantaga have argued that the amended *Far North Act* merely placated First Nations in Northern Ontario by providing them incremental gains while ensuring substantial benefits would be procured by the province and whichever corporation staked a claim to the region. Under the *Far North Act*, consultative engagements between the province and the impacted First Nation would preserve culturally valuable sites including "burial sites, fishing areas or traplines, and may designate areas as open for—or closed to—mineral exploration."[16] Ultimately, however, the exploration plan (including the culturally valuable areas) had to be approved by the relevant minister, who could decide that the selected areas need not be preserved.

Both the Eabametoong and Neskantaga First Nations have also argued that amendments to the provincial *Mining Act* have not adequately addressed their long-held grievances related to consultative engagement. Writing on the *Mining Act*, Drake points out that any claimholder could "engage in any non-prescribed exploration activities—which include low impact activities such as pitting and trenching below a prescribed threshold—without acquiring permission from the Crown and hence without consultation occurring."[17] Moreover, an overarching concern that brought added publicity to the *Eabametoong* judgment lay in the jurisdictional authority the Ontario government claimed to exert throughout the Ring of Fire region. This leaves consultative engagement with First Nations a mere procedural hurdle to be adequately met, rather than an ongoing reconciliatory process between the Crown and Indigenous communities.

During the campaign leading up to the 2018 Ontario provincial election, Progressive Conservative (PC) leader (and current Premier) Doug Ford claimed that upon being elected "he would jumpstart mining the mineral-rich James Bay Lowlands about 500 kilometres northeast of Thunder Bay—even if it meant driving the bulldozer himself."[18] The announcement sparked concern among several First Nations situated throughout Treaty 9 territory in northeastern Ontario. These groups argued that increased mining activity would incur major resource depletion while also threatening interdependent communal well-being on reserves throughout the region.[19] In addressing these concerns, several regional Chiefs throughout Ontario countered the province's assertion of jurisdictional authority in the region. Lucy Scholey, writing in a column for the Aboriginal People's Television Network, points out "in a post-election letter to Ford, Ontario Regional Chief Isadore Day said the province's First Nations have the 'ultimate authority when it comes to resource development.'"[20]

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16. *Ibid* at para 4.

17. Drake, *supra* note 12 at 196.

18. Lucy Scholey, "Doug Ford Can't Bulldoze through First Nations to Ring of Fire, Say Indigenous Leaders" (15 June 2018), online: *APTN National News* <aptnnews.ca/2018/06/15/doug-ford-cant-bulldoze-through-first-nations-to-ring-of-fire-say-indigenous-leaders/>.

19. Concerns surrounding resource development in Treaty 9 areas are especially acute given that many First Nations Chiefs and political leaders have argued that there has been a major lack of transparency on the part of the Ontario government and its proposed plans for extraction in the Ring of Fire region. See Angela Gemmill, "NDP Mining Critic Concerned Ford Government Stalling on Ring of Fire Development" (1 November 2018), online: *CBC News* <www.cbc.ca/news/canada/sudbury/mantha-ring-of-fire-first-nations-1.4886598>.

20. Scholey, *supra* note 17 at para 6.

The incoming PC majority government subsequently scrapped the *Far North Act* and guaranteed that mining the abundant resources lying in the James Bay Lowlands would ensure economic prosperity among First Nations communities in the region. They pointed out that rather than being overburdened with bureaucratic dead ends,[21] they would be creating coalition-based, revenue-sharing partnerships with First Nations communities interested in building winter roads near mining areas. In a 2019 column for *Northern Ontario Business*, Ian Ross writes that "(Indigenous Affairs and Energy Minister) Greg Rickford talked about forming a 'coalition' of willing partners among First Nation communities and municipalities who support the construction of an access road as a 'practical and pragmatic exercise' that will create jobs, generate revenue, incentivize business and connect isolated Northern reserves."[22] The Marten Falls First Nation and the Webequie First Nation have long pledged to build access roads linking their reserve lands to the Ring of Fire area.[23] Ross points out that "[Rickford] praised Marten Falls and Webequie First Nations, which have shown 'extraordinary leadership' in leading the environmental assessment for the proposed North-South road."[24] Amending the *Far North Act* may remove bureaucratic red tape, but it hardly assuages aggrieved communities like the Eabametoong and Neskantaga First Nations who have long held that both the prior Liberal and current PC governments are "playing favourites" with interested communities like Marten Falls and Webequie while ignoring those who do not see any immediate benefits in revenue sharing.

Concerns about the prior Liberal government's *Far North Act* remain salient given current PC policy in the Ring of Fire region. This is especially the case given both governments' readiness to engage with interested First Nations alone, while summarily ignoring the demands advanced by communities not deemed "development ready." In a report on consultative engagement in the region, Matt Prokopchuk pointed out "they [Eabametoong and Neskantaga] slammed the Wynne [Liberal] government for how the regional talks were moving ahead, calling them unreasonable and unfair and accusing the province of engaging with 'closed-door' processes with respect to environmental assessments undertaken by other communities."[25] Building on allegations that the newly elected PC government was playing favourites with development-ready communities, Bob Rae, a lead negotiator for the First Nations in the region, said in a memo that "the new government would likely favour striking deals with individual member First Nations to get a road built into the chromite, gold and vanadium-rich region that has an estimated value of about $60 billion."[26] The *Eabametoong* judgment thus had a major

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21. *Haida Nation, supra* note 6.

22. Ian Ross "Rickford Promises Progress in the Ring of Fire" (24 January 2019), online: *Northern Ontario Business* <https://www.northernontariobusiness.com/industry-news/mining/rickford-promises-progress-in-the-ring-of-fire-1211033>.

23. See "Marten Falls, Webequie Deny 'Closed Door' Approach in All-Weather Road Agreements" (4 June 2018), online: *CBC News* <https://www.cbc.ca/news/canada/thunder-bay/marten-falls-webequie-ring-of-fire-1.4687794>.

24. *Far North Act, supra* note 13 at para 9.

25. Matt Prokopchuk, "First Nations Near Ring of Fire Press Indigenous Affairs Minister over Consultation" (25 November 2018), online: *CBC News* <https://www.cbc.ca/news/canada/thunder-bay/chiefs-of-ontario-assembly-ring-of-fire-1.4916764>.

26. Jorge Barrera, "Ontario Playing Favourites with First Nations on Ring of Fire, Say Chiefs" (23 November 2018), online: *CBC News* <https://www.cbc.ca/news/indigenous/ontario-ring-of-fire-mining-matawa-first-nations-1.4917040>.

residual impact on how government action (especially relating to Ontario's duty to consult) would be carried out in the Ring of Fire region in the coming years.

IV *EABAMETOONG FIRST NATION V MINISTER OF NORTHERN DEVELOPMENT AND MINES*

Eabametoong First Nation was a 2018 Ontario Superior Court judgment that involved a Northern Ontario Ojibwa First Nation challenging an exploration permit that the former provincial minister of Northern Development and Mines granted to the corporation Landore Resource Canada. The permit granted Landore Canada the ability to engage in exploratory drilling in the traditional territory of the Eabametoong First Nation. The permit was challenged on the grounds that the Crown improperly upheld its obligation to consult the aggrieved First Nation. In the judgments, Justice Sachs points out "the parties agree that the Crown had a constitutional duty to consult Eabametoong but disagree as to whether it was discharged. The parties [also] disagree as to the remedy that should be imposed if this court were to find that the [Minister's] decision that the duty was properly discharged is an unreasonable one."[27] While the judgment obviously held great impact in relation to the parties directly involved, it was especially prescient given the newly elected PC government's desire to mine the rich mineral deposits held in the Ring of Fire located in Treaty 9 territory (the treaty that also governs Crown activity in traditional Eabametoong territory).

Treaty 9 (along with many other numbered treaties) contain "Take Up clauses." The Treaty 9 clause reads as follows:

> First Nations communities surrender certain lands, subject to the right to "pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered," subject further to the government's right to take up certain tracts of the surrendered lands for certain purposes, one of which is mining. Thus the lands in question are surrendered lands that the government has the right to 'take up.'[28]

The Take Up clause implies that underlying Crown title is predicated on two conditional factors. The initial condition stipulates that in exchanging their jurisdictional title, the impacted First Nations communities can preserve rights to cultural and subsistence-related activity. The second condition upholds that these rights can be curtailed whenever the Crown requires the land to advance certain purposes. A key purpose on which governments curtail these rights is typically related to resource extraction and development. Shin Imai adds that "provinces have relied on the 'tracts taken up' clause, coupled with the 'surrender' of the lands in the documents to exploit natural resources in the traditional territory of First Nations."[29] Justice Sachs immediately shows that the judgment does not deal with any jurisdictional disputes between the Ontario government and the Eabametoong First Nation. The judgment instead deals with whether or not the Crown discharged its underlying jurisdictional authority honourably when

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27. *Eabametoong, supra* note 1 at para 2.

28. *Ibid* at para 5

29. Shin Imai, "Treaty Lands and Crown Obligations: The Tracts Taken Up Provision" (2001) 27:1 Queens LJ at 5 [Imai].

it took part in consultative engagements with Eabametoong prior to granting an exploration permit to Landore Canada.

A. Underlying Title And Treaty Rights

Underlying Crown sovereignty is a title that regards any claim to territory as being acquired by a settling nation. Establishing title through consistent occupation is presumed to serve as the bedrock on which the settler nation can gain sovereign authority in "undiscovered" territory. For instance, in the *Guerin* judgment Chief Justice Dickson holds:

> The principle of Discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remain unaffected.[30]

Kent McNeil argues that throughout Canada, Crown title "is presumed to have been acquired by settlement, which is the British imperial law equivalent of effective occupation in international law."[31] With the Crown believed to have properly established sovereignty through "discovery," Indigenous communities were able only to retain the right to occupy and take up territory so as to preserve their cultural and physical well-being. These rights to usage were extinguished when lands were sold to the settling country alone.[32]

While it became impossible to extinguish Indigenous and treaty rights after the repatriation of the *Constitution Act* in 1982, underlying title is additionally consequential when evaluating what remains among First Nations' legal traditions and governing systems. John Borrows points out that establishing sovereignty through "discovery" and occupation only "heralds the diminishment of another's possessions."[33] These concerns were (and remain) especially prescient in situations where Indigenous rights and title were held in a relatively subordinate position to underlying Crown title. Treaty agreements, while not being predicated on discovery alone, can potentially allocate an underlying authority to the Crown in claiming title to lands. Conversely, Indigenous communities are typically left only to exercise a right to preserve their physical and cultural well-being in these agreements.

Agreements like Treaty 9 were negotiated to have the Crown serve a protectorate role in relation to the signatory First Nations communities.[34] Conversely, the First Nations that agreed to the treaties ensured that their rights to preserve their cultural and physical well-being would remain intact. The Crown serving a protectorate and trusteeship role implies that it must strive to preserve Indigenous rights in relation to matters like hunting, fishing, and trapping. In exchange for preserving these rights, it is typically believed that provinces can uphold

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30. *Guerin v The Queen*, 1984 2 SCC 335 at p 378.

31. Kent McNeil, "The Doctrine of Discovery Reconsidered: Reflecting on Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies" (2016) 53:2 Osgoode Hall LJ at 715.

32. See Robert J Miller & Micheline D'Angelis, "Brazil, Indigenous Peoples, and the International Law of Discovery" (2011) 37:1 Brook J Intl L at 7.

33. John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ at 562.

34. See James Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58:3 Sask L Rev at 246 [Henderson, "Empowering"].

jurisdictional authority over the treaty lands at issue because the conditions on which lands are taken up lie within their constitutional purview. Imai points out that provinces usually advance two arguments in relation to their underlying authority to take up treaty lands: "The first is that the treaties themselves give the provinces authority to 'take up' lands. The second is the opposite, namely that the treaties do not give provinces power, but rather describe the geographical extent of hunting, trapping and fishing rights *after* the province has chosen to 'take up' lands."[35] These are the conceptual foundations on which Justice Sachs held the dispute in *Eabametoong* to rest on.

B. The Judgment

The judgment in *Eabametoong* ultimately held that the Crown inadequately discharged its duty to consult because it summarily closed avenues to consultative engagement between the Eabametoong First Nation and Landore Canada. While parties representing Eabametoong and Landore Canada took part in two meetings between 2014 and 2015, the First Nation's requests to continue consultation went unheard by the province by early 2016. By February of that year the province issued a letter to Eabametoong indicating that a judgment on whether or not to award a permit would be reached by the end of the month.[36]

Upon receiving the advisory letter, Eabametoong immediately notified Landore Canada representatives and requested a meeting. Landore Canada replied "that it had waited long enough, had held two meetings and was not prepared to have another one. No reason was given for the sudden urgency."[37] A month later, the ministry wrote an additional letter to Eabametoong stating that it would award the permit to Landore Canada and they would be given a week to respond to the proposed conditions it had set in the permit.[38] A week later "Eabametoong's legal counsel responded, indicating how and why the proposed permit conditions did not address most of the concerns raised by the Eabametoong in relation to the permit; registering its view that a deadline of five business days to respond to proposed conditions was unreasonable."[39] The province did not respond to Eabametoong and awarded Landore Canada the permit on March 31, 2016.[40] Eabametoong quickly sought judicial review after the permit was granted.

Eabametoong counsel argued the Crown and Landore Canada engaged in sharp dealing (i.e., unethical negotiation) throughout the consultation process. According to Eabametoong, the Crown acted dishonourably by abruptly ignoring requests to take part in later consultation without providing a clear and adequate reasons why. The Crown additionally placed unrealistic and sudden demands on Eabametoong by giving them a week to add new conditions to a permit that was already approved.[41] These procedural oversights are believed to undermine the Crown's honour in relation to First Nations. This is because in discharging its duty to consult, the Crown is always obligated to engage First Nations' concerns on an equitable basis. James

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35. Imai, *supra* note 28 at 20.

36. *Eabametoong*, *supra* note 1 at para 65.

37. *Ibid* at para 67.

38. *Ibid* at para 70.

39. *Ibid* at para 71.

40. *Ibid* at paras 72–73.

41. *Ibid* at para 78.

Youngblood Henderson points out "in construing the intent of the Crown, the courts have prohibited any attribution of sharp dealing or dishonourable conduct by the Crown, acting under the aegis of ministers of the Crown, toward Aboriginal nations."[42] This guarantees that consultation serves a reconciliatory purpose where the Crown and the concerned First Nation both participate in an ongoing dialogue where each parties' underlying interests are respected. Acting honourably implies that certain procedural requirements are upheld when engaging in any consultative endeavour with an Indigenous community.

Ultimately, Justice Sachs held the reconciliatory imperative inherent in consultation was undermined given that both the Crown and Landore Canada dishonourably engaged in sharp dealing during its negotiations with Eabametoong. Justice Sachs added that by denying any later consultations it was "clear that from Eabametoong's perspective it is reasonable for them to have felt that their expectations regarding the consultation processes that they understood was going to take place were abruptly terminated."[43] It was held that the Crown and Landore Canada ignored this imperative as soon as they believed their consultative requirements were adequately met. Abruptly ending any opportunity to engage in additional consultation subsequently dismissed any later grievances Eabametoong may have had. Justice Sachs points out that adequate consultation deals with the mutual interests shared by both parties through ongoing relations.[44] The reconciliatory goals underlying consultation imply that engagements need to adequately take into account ongoing concerns that the aggrieved community has brought up throughout the negotiations. Justice Sachs held that by denying any additional requests for consultation, the Crown and Landore Canada summarily ignored these crucial requirements.

Justice Sachs additionally held the reconciliatory goals inherent in any consultative engagement require one party to immediately notify another of any changes in the process. It was pointed out that while the Crown and Landore Canada may have had plausible reasons as to why they abruptly closed any later attempts at consultation, the obligation to explain why the cancellations took place remained unmet.[45] Moreover, it was ruled that not quickly notifying Eabametoong on the permit undermined the Crown's honourable obligation to not engage in sharp dealing. This is observed in how Landore Canada was granted the permit, while Eabametoong was given a limited amount of time to add any new conditions to it. Justice Sachs added this does "not reflect a genuine desire to engage in real, straightforward and honest consultation. Rather, they appear to be notifications that a decision had basically been made and if Eabametoong has anything to say they should do so within a very short time frame."[46] It was ultimately concluded that the permit would be set aside and another permit would be granted only when adequate consultation had taken place with Eabametoong.[47]

The judgment in *Eabametoong* was hailed as a victory against the newly elected PC government and its attempts to "unlock" the development potential in the Ring of Fire. Any attempts to do so would require adequate and ongoing consultation at every step. In a 2018

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42. James Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36:1 Alta L Rev at 80 [Henderson, "Interpreting"].

43. *Eabametoong, supra* note 1 at para 109.

44. *Ibid* at para 92.

45. *Ibid* at para 111.

46. *Ibid* at para 120.

47. *Ibid* at para 128.

CBC News report released shortly after the judgment, Jorge Barrera writes "[former] Eabametoong First Nation Chief Elizabeth Atlookan said the ruling makes clear the Ontario government needs to change the way it deals with First Nations on resource development and consultation."[48] In a later 2019 *Northern Ontario Business* report, Ian Ross points out that the (current) Eabametoong Chief Harvey Yesno held that Eabametoong does not have a vested interest in ensuring that access roads to the Ring of Fire are built. This is especially evident when considering that while the community was not deemed "developer ready," area projects were still being proposed by corporations.[49] More specifically, "whereas Webequie and Marten Falls now have a vested interest in seeing the Ring of Fire become reality, Yesno would rather focus on the needs and priorities of his community."[50] Initially threatening to appeal the judgment, the provincial government ultimately chose not to do so.

The *Eabametoong* judgment created hope that the Ontario government would adequately respond to First Nations' grievances prior to engaging in any resource extraction. Nevertheless, a major conceptual shortcoming is observed in Justice Sachs' judgment, especially in evaluating the appropriate scope at which consultation is believed to be adequately discharged in the region. This is a case where the reconciliatory imperative was highlighted *in spite of* Justice Sachs writing that the Crown's obligations to Eabametoong were on the lower end of the consultative spectrum.

Justice Sachs concluded that the Crown's consultative duty lay on the lower end of the spectrum because traditional Eabametoong territory was summarily "surrendered" in Treaty 9. As mentioned above, the agreement stipulated that the Crown reserves the right to take up surrendered territories for the purposes of mineral exploration. It was then held that any claim to title on Eabametoong territory would be a weak one.[51] Moreover, while the proposed project may have had some residual impacts on Eabametoong's cultural and physical well-being, it was held that "the effect on the lands was considerably less than other mining activities."[52] It was ultimately held that, while the consultative demand was relatively minor, the Crown's reconciliatory imperative to respect Eabametoong's procedural right to adequate consultation was left unmet. This judgment is problematic given that it appears Justice Sachs needlessly exaggerates Eabametoong's title claim and, upon dismissing it, promptly advances the reconciliatory imperative that balances First Nations' concerns with underlying public interests. This approach is problematic because, in dealing with reconciliatory concerns, it does not give due credence to potential Indigenous rights and treaty claims that can shift the Crown's consultative obligation toward the higher end of the spectrum.

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48. Jorge Barrera, "Ontario Court Quashes Gold Mining Permit over Lack of Meaningful Consultation with First Nation" (17 July 2018), online: *CBC News* <www.cbc.ca/news/indigenous/eabametoong-ring-of-fire-landore-permit-1.4750681>.

49. Ian Ross, "First Nations Need to Take the Lead on Far North Development: Yesno" (12 September 2019), online: *Northern Ontario Business* at para 20 <www.northernontariobusiness.com/industry-news/aboriginal-businesses/first-nations-need-to-take-the-lead-on-far-north-development-yesno-1688888>.

50. *Ibid* at para 31.

51. *Eabametoong, supra* note 1 at para 91.

52. *Ibid* at para 91.

V RECONCILIATION AND UNRESOLVED TREATY RIGHTS

Upholding reconciliatory obligations while ignoring underlying Indigenous and treaty rights is troublesome because it places too much focus on placating public interests while leaving potential rights claims unresolved. This approach also advances problematic assertions that First Nations' concerns are always amenable to substantive public interests. Constance MacIntosh argues that accepting this approach "would mean that reconciliation is premised on requiring Aboriginal peoples to accept diminished rights from the start, unless it is somehow 'critical' that their true legal entitlements be recognized. It is hard to see how this is a practice of reconciliation."[53] In the *Eabametoong* judgment, the opportunity to advance a reconciliatory objective was evident as soon as the Eabametoong title claim was judged to be weak. Narrowly restricting the analysis to the title claim summarily set aside any potential arguments that Indigenous and treaty rights were unduly impacted by Landore Canada's proposed project.

Justice Sachs problematically bound together treaty rights and underlying rights to title by holding that the low-level consultative obligation was strongly based on the "weak" title claim. Irrespective of any title claims on treaty lands, acknowledging treaty rights may imply a more substantive consultative obligation than a "clear and timely notice of the project under consideration in sufficient form and detail."[54] This is especially true because, while treaty rights create a legal outlet on which the Crown can settle on Indigenous territory, it also creates an enduring Crown obligation to respect the cultural, political, and economic values preserved by the Indigenous and treaty rights held in these agreements.

The Crown has an honourable obligation to work toward reconciliatory goals and ensure that consultative engagements are not done dishonourably. Honour must be established in all its relationships with Indigenous communities. That includes the substantive priority that upholding treaties is equal to any residual public interest. Henderson argues that treaty relationships "produced a distinctive Federalism that protects the worldview, languages and political autonomy of the Aboriginal nations."[55] Upholding treaties guarantees that rights or promises inherent in these agreements will be adequately dealt with in any attempt to reconcile them with public interests. In a paper on Treaty 8, Rachel Gutman argues that evaluating treaty agreements through Henderson's shared jurisdictional approach implies that treaties "have simply affirmed the continuation of the existing Aboriginal rights of First Nations signatories in the light of assertions of Crown sovereignty."[56] This is especially the case when evaluating agreements like Treaty 9.

Dismissing the apparently weak title claim in *Eabametoong* does not in any way imply that additional treaty rights can be ignored altogether. Nevertheless, reconciliatory objectives may weigh heavily on judges looking to turn Indigenous communities and the Crown toward negotiation rather than protracted court disputes. For instance, MacIntosh argues that in

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53. Constance MacIntosh, "*Tsilhqot'In Nation v BC*: Reconfiguring Aboriginal Title in the Name of Reconciliation" (2014) 47:2 UBCL Rev at 208 [MacIntosh].

54. *Eabametoong, supra* note 1 at para 80.

55. Henderson, "Empowering," *supra* note 33 at 50.

56. Rachel Gutman, "The Stories We Tell: Site-C, Treaty 8, and the Duty to Consult and Accommodate" (2018) 23:3 Appeal at 67 [Gutman].

the BC Supreme Court judgment of *Tsilhqot'in Nation*,[57] Justice Vickers only made a non-binding title judgment largely because "it forced him to choose between applying the rule of law and enabling reconciliation, and he chose reconciliation."[58] With the *Eabametoong* title argument judged as weak, Justice Sachs similarly looked to reconcile substantive public interest in holding that the Crown only had a low-level obligation to ensure a procedural right to appropriate consultation. Advancing reconciliation is a laudable objective, especially given its prominent role in consultative engagement. Nevertheless, treaty rights extend well beyond bare procedural guarantees established in consultative engagement. These rights preserve long-held community values and governing traditions.

A. Treaty Interpretation

As mentioned above, Justice Sachs held in the *Eabametoong* judgment that the Eabametoong title claim was weak. This is because the "Take Up" clause in Treaty 9 stipulated underlying title was only to be held by the Crown. In exchange, the Eabametoong community was entitled to preserve customary rights to cultural activities and also to retain traditional hunting, trapping, and fishing rights. These rights are not absolute because the Crown could declare at any time that certain land tracts could be taken up for many purposes, including mining. A key Treaty 9 provision stipulates the following:

> And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.[59]

Singularly relying on written stipulations in Treaty 9 greatly diminished the consultative obligation the Crown owed to Eabametoong. This is because binding together potential Indigenous and treaty rights in the title claim (then promptly dismissing the title claim altogether) only left Justice Sachs to reconcile procedural consultative rights with the underlying Crown title established in Treaty 9.

Many judgments have typically held that treaties are to be *liberally* interpreted. This implies that any ambiguities in the treaty text are to be resolved in favour of the aggrieved First Nation community in a dispute. This is largely done to remedy potential imbalances between First Nations communities and the Crown. These imbalances reflect inequality in the original

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57. *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700.

58. MacIntosh, *supra* note 52 at 177.

59. The James Bay Treaty—Treaty No. 9 (made in 1905 and 1906 and adhesions made in 1929 and 1930), online: *Government of Canada* <www.aadnc-aandc.gc.ca/eng/1100100028863/1100100028864> [Treaty 9] at 2.

treaty negotiation.[60] For instance, the numbered treaties (including Treaty 9) were agreements that were orally negotiated with the drafted treaty texts already prepared by the Crown prior to negotiation.[61] These written treaty texts are problematic because they do not adequately reflect the collective dynamics that went into the oral negotiations. Henderson adds, "when a court discovers that a government official drafted the written treaty prior to concluding the treaty meeting and ceremonies with the Aboriginal nation, the court is particularly wary. In such situations, courts have found the text of the treaty be irrelevant."[62] Courts also bring up the Crown's honour when looking into the oral negotiations and related contexts that come with the written treaty text.[63] This obligation is alluded to in the *Marshall* judgment, where Justice Binnie writes:

> If the law is prepared to supply the deficiencies of written contracts prepared by sophisticated parties and their legal advisors in order to produce a sensible result that accords with the intent of both parties, though unexpressed, the law cannot ask less of the honour and dignity of the Crown in its dealings with First Nations.[64]

Treaty rights are also impacted by the Crown's consultative obligation. In the Supreme Court's *Mikisew Cree* judgment, it was held that the Crown's consultative obligation reflects the extent to which governmental activity impacts treaty rights. Treaty texts clearly specify obligations the Crown owes to the relevant First Nation community. In the judgment, Justice Binnie adds "in the case of a treaty, the Crown, as a party, will always have notice of its contents. The question in each case will therefore be to determine the degree to which conduct contemplated by the Crown would adversely affect those rights so as to trigger the duty to consult."[65] As explained below, the long-held treaty values upheld by the Eabametoong First Nation imply that the consultative obligation owed was more substantial than originally held in the judgment.

B. Treaty Values

Literal treaty interpretation is deeply problematic given it potentially ignores the prominent role First Nations communities played in negotiating the agreements. Specifically, restricting

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60. Concerns surrounding contrasting approaches to treaty interpretation have been mentioned as well. Gwen Westerman, in writing on treaty agreements between the Dakota and the United States government, points out the consequences that emerge in privileging a singular Crown or government viewpoint on treaty obligation, especially given the power dynamics at work in treaty negotiations. She writes: "A look at (Missionary Stephen) Riggs' translation of the treaty into Dakota raises the question of whether the Dakota, hearing the treaty read out loud at Traverse des Sioux, could have fully understood that they would be forced from the land of their creation, given the expression of deep kinship with the land found in our (Dakota) language" (at 308–309).

61. *Supra* note 4.

62. Henderson, "Interpreting," *supra* note 41 at 86.

63. The disjuncture between oral negotiation and the written Treaty 9 text was prevalent because many Anishinaabek and Cree envoys were never actually given the opportunity to read the written agreement and were only told that the guarantees in the oral negotiations were subsequently upheld in the written treaty. On many occasions, Chiefs were only told to mark an X on the written agreement.

64. *R v Marshall*, [1999] 3 SCR 456 at para 43.

65. *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] SCR 388 at para 34.

analysis to the written treaties undermines the Crown's protectorate obligation to respect the relevant First Nations' cultural, political, and economic jurisdiction. Gutman highlights these obligations by arguing "the Crown's treaty right to take up land is constrained by treaty promises to First Nations signatories guaranteeing the continuity of their culture and way of life. The Crown cannot take up lands if doing so will undermine the ability of a Treaty Nation to hunt, fish and trap."[66] These treaty rights are not relevant merely because they are written in a treaty agreement. Their relevance is predicated on the values that make common activities like hunting, fishing, and trapping crucial enough to be included in the agreement to begin with.[67] Russel Barsh points out that the cultural and political value First Nations communities vest in their traditional activities is observed in "songs, stories, dances, symbols, and ecological knowledge, [which] are all indispensable for the maintenance of appropriate human relationships with place and its non human inhabitants."[68] Many Ojibwa and Cree communities who have lived throughout the centuries on Treaty 9 territory certainly regard their treaty rights as being predicated on the continued well-being of their customary territories.

The Crown's protectorate obligation requires it to substantially evaluate how its conduct not only impacts hunting, fishing, and trapping as a subsistence activity, but also how these activities preserve cultural and political vitality in First Nations communities.[69] The importance of the rights to hunting, fishing, and trapping build upon the values attached to these practices throughout the generations. Joe Sheridan and Haudenosaunne Elder Dan Longboat point out these values reflect "an epistemology embedded in the wisdom of cultural practice and familial relationships to Creation."[70] The First Nations communities who have inhabited the Ring of Fire region throughout the centuries also exist in constant interrelationships with non-human and spiritual existence. Rachel Ariss and John Cutfeet add "the land provides because of how it *is*—as a holistic, interconnected system in which every part plays a vital role towards the survival of the people. This is why maintaining a good relationship with the land and all its inhabitants is so important."[71] It is especially crucial to uphold the treaty rights to hunt, fish, and trap through these lenses.

Ojibwa and Cree peoples traditionally residing in Treaty 9 territory throughout the millennia have upheld their rights to hunting, fishing, and trapping as co-extensive with

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66. Gutman, *supra* note 55 at 22.

67. This challenges the idea that treaty rights usually emanate through the Crown willingly bestowing rights on First Nations' signatories with the caveat that rights can be abrogated when Crown interest is judged to be more important than upholding rights.

68. Russel L. Barsh, "Grounded Visions: Native American Conceptions of Landscapes and Ceremony" (2000) 13:1 St Thomas L Rev 127 at 131.

69. For more see John Borrows, "Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education" (2016) 61:4 McGill LJ 795; Aaron Mills, "Driving the Gift Home" (2016) 33:1 Windsor YB Access Just 167; Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847; Lindsay Borrows, "*Dabaadendiziwin*: Practices of Humility in a Multi-Juridical Landscape" (2016) 33:1 Windsor YB Access Just 149; Heidi Kiiwetinepinesiik Stark, "Nenabozho's Smart Berries: Rethinking Tribal Sovereignty and Accountability" (2013) 2013:2 Mich St L Rev 339.

70. Joe Sheridan and Roronhiakewen "He Clears the Sky" Dan Longboat, "Walking Back into Creation: Environmental Apartheid and the Eternal—Initiating an Indigenous Mind Claim" (2014) 17:3 Space and Culture 308 at 310.

71. Ariss and Cutfeet, *supra* note 11 at 45.

their larger relationships with non-human and spiritual existence.[72] Preserving appropriate relationships between human, non-human, and spiritual existence ensures all creation is to be valued. Proper relationships preserve an appropriate balance throughout existence and ensure well-being throughout the generations. Anishinaabek Elder Bessie Mainville points out these relationships are observed through listening to all existence. This is because "listening is calming and opens your heart. Be kind, do not talk about or make fun of your friends or relatives, because you do not know what you are going to be like."[73] Relationships across existence show that one's relatives include non-human and spiritual existence. These underlying relationships are what remain at stake when treaty rights are held in the balance in conflicts with the Crown.

Upholding treaty rights preserves underlying values that uphold relationships across existence. Preserving them means more than merely allowing the aggrieved First Nation community some semblance of customary activity or bare procedural rights while the Crown takes up territory at will. Regarding traditional fishing rights, for example, John Borrows recounted a teaching shared by Anishinaabek Elder Basil Johnston in which "he spoke about how whitefish had been central to our society for generations. He referred to these fish by their Anishinaabek name, *adigmeg*, which translated means 'caribou of the sea.'"[74] Relational values like these were especially observed in the oral negotiations that culminated in the Treaty 9 agreement:

> This oral agreement continues to shape the community's understanding of the relationship between the [Anishinaabek] and Canada—a relationship of sharing between equal partners, neither an extinguishment of their title, nor an ending of their relationship of protection and responsibility to the land. The treaty was to last as long as the sun shines, the grass grows and the rivers flow.[75]

Diminishing treaty rights and these underlying relational values hugely impacts collective well-being between human, non-human, and spiritual existence.[76]

VI RECONCILIATORY TREATY OBLIGATION

The imperative to satisfy both Crown and First Nations' concerns in treaty judgments builds on the reconciliatory imperative. Nevertheless, this obligation does not uphold reconciliation as somehow above treaty rights. Reconciliatory obligations preserve treaty rights in accordance with the Crown's underlying obligations. These rights develop and specify the reconciliatory demand. Rachel Ariss, Clara Fraser, and Diba Somani have pointed out that

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72. See Patrick Macklem "The Impact of Treaty 9 on Natural Resource Development in Northern Ontario" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997).

73. Bessie Mainville, "Traditional Native Culture and Spirituality: A Way of Life That Governs Us" (2010) 8:1 Indigenous LJ at 4.

74. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 31.

75. Ariss and Cutfeet, *supra* note 11 at 45.

76. See Aaron Mills (Wapshkaa Ma'Iingan), "Aki, Anishinaabek, Kay Tahsh Crown" (2010) 9:1 Indigenous LJ at 16.

taking up reconciliatory obligations in a way that undermines Indigenous and treaty rights ensures that "reconciliation emphasizes ideas of 'balance' and the needs of Canadian society, rather than upholding Aboriginal rights and supporting a nation-to-nation relationship."[77] The approach privileges substantive public interests and diminishes the true strength to which these rights claims can be developed. This is because reconciliation stipulates that treaty claims are only to be evaluated by the extent to which they can be reconciled with substantive public interests.

Diminishing treaty rights by placing them beneath reconciliatory obligations ironically undermines adequate relationships between the Crown and First Nations. As mentioned above, upholding proper relations between the Crown and First Nations communities depends on respectfully attending to both parties' interests in any dispute. The reconciliatory obligation was undermined in the *Eabametoong* judgment when Justice Sachs held together any potential treaty rights as linked to the underlying title claim. The title claim was judged to be "weak" simply because a literal analysis of Treaty 9 dictated that underlying title was "surrendered" to the Crown through the "Take Up" clause. The values inherent in the Treaty 9 oral negotiations were not believed to be substantive enough to impact the Crown's consultative obligation beyond a minimal level. Reconciliatory obligations diminished Indigenous and treaty rights to keep them aligned with public interests by limiting them to bare procedural rights to consultation.

Reconciliatory engagement implies that disputing interests, values, and concerns voiced by the Crown and the relevant First Nation community in a dispute must be respectfully attended to. Reconciliation is believed to go a long way in responding to the centuries-long power discrepancy between the Crown and First Nations. Relationships are created and preserved through the Crown's honourable obligation to adequately respect the First Nations' interests inherent in any underlying Indigenous and treaty right claim. Ariss, Fraser, and Somani write that reconciliation "is not about exercising absolute Crown sovereignty over Indigenous peoples, but rebuilding the kinds of relationships envisaged in the Royal Proclamation of 1763 and in the post-Confederation treaties."[78] The *Eabametoong* judgment hardly preserved the relational values that animated these agreements. This is because, upon judging the title claim to be weak, Indigenous and treaty rights only then existed to *accommodate* substantive public interests by being reconciled unto them.

This was achieved by leaving the Eabametoong with bare procedural rights to decent consultative engagement. MacIntosh aptly points out "this reflects a failure to acknowledge that the cooperative process of Aboriginal peoples and state parties working through how Aboriginal legal entitlements will be exercised, and addressing how conflicting interests may or may not be accommodated, is itself part of the reconciliation process."[79] In *Eabametoong*, substantive public interests were not adequately reconciled with Indigenous and treaty rights because not enough was done to highlight their relevance to potential engagements with the Crown.

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77. Rachel Ariss, Clara MacCallum Fraser & Diba Nazneen Somani, "Crown Policies on the Duty to Consult and Accommodate: Towards Reconciliation?" (2017) 13:1 McGill J Sust Dev L at 14.

78. *Ibid* at 16.

79. MacIntosh, *supra* note 52 at 209.

It is beyond this case analysis to adequately evaluate the consultative obligation owed to Eabametoong in the event that treaty rights were observed in the judgment. Nevertheless, it is appropriate to believe that the consultative obligation would extend well beyond providing mere notice that a project would take place. Entrenched relationships in agreements like Treaty 9 guarantee that the Crown is always obligated to respect and protect Indigenous and treaty rights. Treaty partnerships imply that the Crown also needs to respect and protect the underlying values that preserve treaty rights. Upholding these values also goes well beyond engaging in occasional and delegated consultative engagements with aggrieved First Nations communities. Treaty obligations to preserve Indigenous well-being at the very least imply engaged and ongoing consultation that builds upon the values that brought the Crown and the relevant First Nations communities together to negotiate agreements to begin with. Consultative obligations guarantee that treaty rights are to be respected whenever they are unduly engaged in any Crown activity. Reconciliatory objectives cannot be invoked in ways that undermine these relational priorities.

Reconciliation implies that Indigenous and treaty rights will be viewed as equal to any substantive public interest that may be invoked when justifying Crown activity. In judgments like *Eabametoong*, Crown authority may be slightly limited, but it is only limited to the extent that First Nations' grievances are dealt with through "appropriate" consultation. Robert Hamilton and Joshua Nichols write that approaches like these are "not built to support the existence of equal partners in a diverse Federalism, but to extinguish Aboriginal rights to secure legal certainty in accessing lands and resources."[80] The *Eabametoong* judgment is problematic because while it may supposedly reconcile Crown and First Nation interests, it leaves open the potential to place treaty rights beneath those interests.

VII CONCLUSION

The *Eabametoong First Nation v Minister of Northern Development and Mines* judgment greatly impacts how the Ontario government is to engage in consultation with concerned First Nations communities whenever their well-being remains at stake in any dispute. The judgment ensures that reconciling the Crown's and First Nations' well-being implies engaging in ongoing consultation where both parties' underlying interests are respected. Nevertheless, Justice Sachs' judgment does not adequately evaluate the extent to which treaty rights are inherent in the Crown's consultative obligation. Justice Sachs held that the Crown's consultative duty to Eabametoong was minimal because the proposed project was judged to have a relatively limited impact on the disputed territory. It was also held that underlying title and authority to the territory was ceded to the Crown in the Treaty 9 agreement. Judging the Indigenous title claim to be weak also undermined the extent to which the Eabametoong First Nation could assert how long-held treaty values in relation to their territories were impacted by the proposed activity. Justice Sachs bracketed these concerns to advance reconciliatory objectives between Eabametoong and the Crown. This left Eabametoong with only a simple procedural right to consultation. This approach is problematic because it situates First Nations' concerns as subordinate to the public interest and leaves potential Indigenous and treaty rights claims

80. Robert Hamilton and Joshua Nichols, "The Tin Ear of the Court: *Ktunaxa Nation* and the Foundation of the Duty to Consult" (2019) 56:3 Alta L Rev at 756.

unresolved. Moreover, adequately engaging with treaty rights in the judgment would likely move the Crown's consultative obligation to a higher threshold.

This paper argues that dealing with treaty rights moves well beyond Justice Sachs' literalist Treaty 9 reading. It resolves ambiguities in favour of First Nations' interests by attending to the substantive oral negotiations and cultural values that were brought to bear in treaty agreements. Treaties ensured the Crown could settle on Indigenous territory while honourably obligating it to respect and protect Indigenous and treaty rights throughout the generations. Henderson writes that "from the beginning of treaties . . . the European Crowns recognized the sovereignty of the First Nations; however, from a First Nations' perspective, the European Crowns recognized the inherent self-determination of Aboriginal peoples."[81] With these principles at work, the reconciliatory obligation implies that substantive public interests be reconciled with unresolved Indigenous and treaty rights. Judgments like *Eabametoong* only reconcile Indigenous and treaty rights to the public interest, leaving them completely malleable to public well-being. While claiming to promote reconciliation, the judgment actually undermines it by creating added enmity between the Crown and communities like the Eabametoong First Nation.

81. Henderson, "Empowering," *supra* note 33.

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

*Andrew Flavelle Martin**

CONTENTS

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> *Gladue* directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.[15]

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

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

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

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

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

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

I INDIGENOUS LAWYERS, LAWYER DISCIPLINE AND *GLADUE* PRINCIPLES

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

A. Indigenous Lawyers in Canada

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. *Ibid* at 14, 15.

34. *Ibid* at 54.

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

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

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

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

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

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

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

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

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

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

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

B. Law Society Discipline: Purpose and Penalty

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

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

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

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

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

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

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

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

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

C. *Gladue* in Lawyer Discipline

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

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

49. See below note 62 and accompanying text.

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

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

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

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

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

55. *Ibid* at paras 17, 48.

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

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

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

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

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

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

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

59. *Ibid* at para 73.

60. *Ibid* at para 74.

61. *Ibid* at paras 72–73.

62. *Ibid* at para 55.

63. *Ibid* at para 75.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

71. *Ibid* at paras 10–11.

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

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

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

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

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

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

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

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74. *Ibid* at para 35.

75. *Ibid* at para 15.

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

77. *Ibid* at para 96.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

89. *Ibid* at paras 16–19

90. *Ibid* at para 15.

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

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

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

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

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

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

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

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

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

C. *R v Robinson*: Bail

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

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

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

96. *Ibid* at para 37.

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

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

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

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

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

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

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

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

D. *United States v Leonard*: Extradition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113. *Ibid* at paras 135–144.

114. *Ibid* at paras 233–277.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125. Falconer, *supra* note 123.

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

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

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

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126. *Ibid.*

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

128. *Ibid* at para 25.

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

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

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

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

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

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

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

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

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

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

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

135. Manikis, *supra* note 17.

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Application to Lawyer Discipline

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

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

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

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

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

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

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

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

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

I acknowledge here the concern that *Gladue* principles may have inadvertent negative impacts in the criminal context where victims of violence are particularly vulnerable, and thus I leave open the possibility that in some specific circumstances of professional misconduct or conduct unbecoming by Indigenous lawyers, *Gladue* principles should not be applied or should be applied cautiously. The National Inquiry into Missing and Murdered Indigenous Women and Girls "call[ed] upon federal, provincial, and territorial governments to thoroughly evaluate the impacts of Gladue principles and section 718.2(e) of the *Criminal Code* on sentencing equity as it relates to violence against Indigenous women, girls and 2SLGBTQQIA people."[146] In parallel, where an Indigenous lawyer's conduct has harmed Indigenous persons and especially Indigenous women and LGBTQ+ persons, and the future ability of the lawyer to practise poses danger to Indigenous persons and especially Indigenous women and LGBTQ+

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV CONCLUSION

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

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

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

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

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

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

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

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

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

THE SECTION 87 TAX EXEMPTION AS A TAX EXPENDITURE

*Cheyenne Neszo**

CONTENTS

* Member of the Lheidli T'enneh Nation. Thompson Rivers University, Faculty of Law alumna. I would like to thank Professor Samuel Singer for his invaluable guidance, his helpful critiques and comments on this paper, and his recommendation to submit it for publication. I would also like to thank Professor Allison Christians for allowing me to speak on these important issues in her class. Please note that this paper was written on ne Secwepemcúl'ecw, in unceded Secwepemc territory. I would also like to highlight the fact that land acknowledgments are meaningless until concrete action is taken toward real and true reconciliation, designed and implemented by Indigenous peoples, for Indigenous peoples.

I INTRODUCTION

The myth that "Indians[1] don't pay taxes" is relatively pervasive among the non-Indigenous population of Canada.[2] While stemming from ignorance and a lack of education on the matter, this myth has potentially disastrous effects for Indigenous communities and their peoples.[3] It perpetuates negative stereotypes that can lead to discrimination, both in policy-making that affect Indigenous nations and in the daily lives of Indigenous peoples. This paper hopes to become part of the academic literature that denounces this myth by shedding light on the realities of the limited application of the tax exemption contained in section 87 of the *Indian Act*[4] (the "section 87 exemption").[5]

This paper will explore this issue by putting the section 87 exemption through the tax expenditure analysis[6] to determine to what extent the expenditure is functioning to benefit First Nations and Indigenous peoples.[7] As will be discussed at the outset, there is no clear, government-stated objective for the expenditure. This alone makes the section 87 exemption difficult to apply, track, and determine its effectiveness. As the tax expenditure analysis will reveal, without a Parliamentary objective or appropriate tax expenditure reporting and data gathering, and in light of the millions of dollars spent bringing the issue of the application of the section 87 exemption to court, there is no way to be sure that the exemption is a worthwhile expenditure. This is particularly true to the extent that it fosters negative stereotypes about Indigenous peoples in Canada.

This paper will begin by discussing the difficulty of viewing the section 87 exemption as a tax expenditure, as well as arguments in support of this view. It will then delve into the tax expenditure analysis, outline the common law objective, and discuss how this objective has stunted economic development on reserve land. It will then discuss the academically argued view that the section 87 exemption amounts to a nation-to-nation tax treaty and the implications this has for Aboriginal rights. The paper will then move on to the distributional fairness of the expenditure, its distorting effects, the administrative and compliance costs associated with it, and its implementation. Finally, it will look at another vehicle for delivering the subsidy.

II THE SECTION 87 EXEMPTION AS A TAX EXPENDITURE

Section 87 of the *Indian Act* reads as follows:

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1. In keeping with Myra J Tait's article, cited below, it is important to note that the term "Indian" is used in a legal sense here only, as defined in the *Indian Act*, s 2(1) and s 6, and meant to convey a group separate from Inuit, Métis, and persons of Indigenous descent who are not registered with the federal government as Indians and thus are not governed by the *Indian Act*. Further clarification on the issue of terminology can be found at Indigenous Foundations, "The Indian Act" (2009), online: <indigenousfoundations.web.arts.ubc.ca/the_indian_act/>. When the word "Indian" is not required, First Nation, Aboriginal, or Indigenous will be used in its place, with awareness on the part of the author regarding the different meanings of these terms. Please note that the appropriate term is "Indigenous". "Aboriginal" is used when Canadian law is being applied to Indigenous peoples. "First Nation" is used when speaking of a collective Indigenous nation.

> **87(1)** Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*,[8] the following property is exempt from taxation:
>
> (**a**) the interest of an Indian or a band in reserve lands or surrendered lands; and
>
> (**b**) the personal property of an Indian or a band situated on a reserve.
>
> **(2)** No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph 1(a) or (b) or is otherwise subject to taxation in respect of any such property.
>
> **(3)** No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs 1(a) or (b) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*,[9] chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian.

It is unclear on its face whether section 87 of the *Indian Act* can be characterized as a tax expenditure because it is not derived from the *Income Tax Act* (ITA)[10] nor from a federal budget. Neil Brooks argues that there are two methods for classifying a tax provision as a tax expenditure: (1) Either all deviations from the ITA are considered tax expenditures, or (2) they are labelled as such because they are justified according to a government-spending objective (i.e., alternatives to direct spending government programs).[11]

For the section 87 exemption to be considered a tax expenditure, then, the first method must be applied. However, looking at the language used by Brooks, there is still the underlying assumption that the exemption derives from a provision in the ITA, which is not the case here. Additionally, case law and academic articles that discuss the section 87 exemption do not explicitly refer to it as a "tax expenditure."[12] The section 87 exemption does, however, appear in the government of Canada's (GOC) *Report on Federal Tax Expenditures*[13] and will thus be treated as such for the purposes of this paper.

This paper takes the position that section 87 of the *Indian Act* is a tax expenditure. It is designed to provide tax relief to a segment of the Canadian population, which Parliament has exempted from paying personal and business income tax to achieve a social objective. Brooks argues that the objective of a tax expenditure is generally to correct a market failure

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8. *First Nations Fiscal Management Act*, SC 2005, c 9.
9. *Dominion Succession Duty Act*, RSC 1952, c 89.
10. *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA].
11. Brooks, *supra* note 6 at 72.
12. This insight was made on review of the leading case law and scholarly articles, all of which will be discussed below.
13. Department of Finance Canada, "Non-Taxation of Personal Property of Status Indians and Indian Bands Situated on Reserve" in *Report on Federal Tax Expenditures* (2018) at 200, online (pdf): *Government of Canada* <www.fin.gc.ca/taxexp-depfisc/2018/taxexp18-eng.asp> [*Report on Federal Tax Expenditures*].

with a tax exemption (or credit, deduction, etc.), but that the objective can be for the furtherance of social justice in some instances.[14] The section 87 exemption can arguably be seen as furthering social justice by allowing First Nation members to retain more of their income for their own personal use and benefit and in so doing prevent the erosion of their property via taxation. This is in fact the common law objective of the exemption, which is discussed further below. Given their disadvantaged position in society,[15] this is certainly a small but potentially beneficial means by which to accomplish this objective.

III OBJECTIVES OF THE SECTION 87 EXEMPTION

As iterated above, Parliament has not provided a definitive objective of the section 87 exemption. It has thus been left to the courts to decide its purpose. Scholars also theorize about potential objectives and the exemption's benefit in relation to various aspects of economic development[16] and self-determination[17] for First Nations peoples. For the purposes of this paper, the common law objective will be used in the tax expenditure analysis.

A. The Courts and Section 87

One of the first cases to deal with the section 87 exemption was *Nowegijick v R*.[18] This case found that salaries and wages were personal property of an Indian, and that the *situs*[19] of the wages or salaries were the location of where the debtor was to be found, as that is the place where the debt can be enforced. However, it was not until the *Mitchell*[20] case that the common law objective underlying section 87 was discussed in detail.

In *Mitchell*, LaForest J stated that the purpose of the section 87 exemption is to protect Indian property on reserve land from erosion and dispossession by shielding it from taxation by the Crown and capture by creditors.[21] The GOC reiterated this interpretation from *Mitchell*

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14. Brooks, *supra* note 6 at 73.

15. Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, United Nations International Covenant on Civil and Political Rights, 114, UN Doc CCPR/C/CAN/CO/6 (2015).

16. See Joseph A Gill, Judith Charbonneau Kaplan & Nicole Watson, "First Nations Tax Issues with a Business Focus" (paper delivered at the 2018 Prairie Provinces Tax Conference, Saskatoon, 28 May 2018) [Gill, Kaplan & Watson] for the section 87 exemption use in economic development.

17. See Tait, *supra* note 2, where she argues that the section 87 exemption can in fact be used as an aid to treaty implementation.

18. *Nowegijick v R*, [1983] DTC 5041 (SCC) [*Nowegijick*].

19. Bryan A. Garner, *Black's Law Dictionary*, 10th ed (St. Paul, MN: Westlaw, 2014) sub verbo "situs."

20. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 [*Mitchell*].

21. Bill Maclagan, "An Update on Tax Exemptions for First Nations and Related Matters" in *2016 British Columbia Tax Conference* (Toronto: Canadian Tax Foundation, 2016), 3:1-69 at 3 [Maclagan].

in online materials.[22] This judicially stated objective has also been used approvingly in later court decisions.

The court in *Mitchell* stated that since the signing of the *Royal Proclamation of 1763*,[23] "the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and the chattels on that land base."[24] Bill Maclagan notes that the consequence of this judicial statement has generally meant that the courts interpret the exemption narrowly.[25]

This objective was reiterated in *Williams v The Queen*,[26] in which Gonthier J created the Connecting Factors Test (CFT). This case amended the principles laid out in *Nowegijicki* as they relate to the situs of the income.[27] The court in this case, instead, looked to determine if the income of a Status Indian was sufficiently connected to section 87's purpose and therefore exempt from taxation.[28] To do so, one must first determine the purpose of the section 87 exemption, which required one to keep in mind the nature of the benefits in question as well as the manner in which the taxation applied to these benefits.[29]

The CFT, as set out by Gonthier J and which remains good law, is as follows:

[layout as quote, with 1, 2, a,b,c bullets]

> 1. Identify the various connecting factors which are potentially relevant, and
> 2. Analyze these factors to determine what weight they should be given in identifying the location of the property, in light of three considerations:
>   a) The purpose of the exemption under the *Indian Act*;
>   b) The type of property in question; and
>   c) The nature of the taxation of that property.
>
> The question with regard to each connection factor is therefore what weight should be given that factor in answering the question whether to tax that form of property in that manner would amount to the erosion of the entitlement of the Indian *qua* Indian on a reserve.[30]

Gonthier J then set out a "conceptual framework" with relevant factors in determining the *situs* of the section 87 exemption: "the place of residence of the employer; the place of residence of the employee; the location of the employment income which gave rise to the

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22. Government of Canada, "Information on the Tax Exemption under Section 87 of the Indian Act" (10 May 2019), online: *Government of Canada* <www.canada.ca/en/revenue-agency/services/aboriginal-peoples/information-indians.html#hdng2> [GOC Information on s 87].
23. George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.
24. *Supra* note 20 at para 87.
25. *Supra* note 21 at 3.
26. *Williams v Canada*, [1992] 1 SCR 877, 92 DTC 6320.
27. *Ibid* at 888.
28. *Supra* note 21 at 10.
29. *Ibid* at 11.
30. *Supra* note 26 at 878.

benefits; and the place where the income is to be paid to the employee."[31] It was noted that this is not an exhaustive list of factors.

The CFT provides the Canada Revenue Agency (CRA) and judiciary broad discretion in determining the weight to be given to each of the factors at issue and in determining whether or not it would lead to the erosion of Indian property on reserve. As Tait notes, the CFT "reinforced the already disadvantaged social and economic positions of Indians, by putting their culture and experience of colonization at the centre of the courts' assessment."[32] Indeed, Leslie Pinder has pointed out that the test gives the CRA the mandate to assess the factors "according to [their] fancy"[33] and that it allows prejudice to favour denying the application of the exemption.[34]

Martha O'Brien has observed that "the courts have shown a marked tendency to apply the exemption restrictively and to require that the source of income have a demonstrably 'Indian character,'"[35] namely focusing on the ways in which judges view "Native life" prior to contact and how these can be applied using the CFT. Ultimately, the CFT has been criticized as being too vague and subjective to be much use as a precedent for subsequent cases,[36] though courts have indeed attempted to do this. Tait also argues that in determining which factors are the most critical and where the weight should be accorded, judges simply determine this based on what "makes the most sense" to them.[37] The potential for bias and discrimination based on negative stereotypes here is high.

While the CFT has been upheld in subsequent court decisions, premised on the objective of the section 87 exemption being avoiding erosion of Indian property on Indian reserves by taxation via the government, it has not necessarily resolved the uncertainty surrounding the objective specifically as it informs and is the basis of this test. In *Robertson*,[38] Evans J stated: "It is easier to say what the purpose of section 87 is not, than to state positively what it is."[39] In a concurring opinion, Pelletier J agreed, noting that the section 87 exemption is far from clear.[40]

This lack of guidance by the federal government as to the objective of the section 87 exemption is compounded by the highly political nature of the *Indian Act* as well as the current and historical treatment of First Nations and their members by the different levels of the Crown and its agencies.[41] In light of this, it is imperative that the highly technical discourse

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31. *Williams*, *supra* note 26; Maclagan, *supra* note 21 at 11.

32. Tait, *supra* note 2 at 38.

33. Leslie J Pinder, "The Indian Act Taxation Exemption—Beguiling Simplicity: *Shilling v The Queen*" (2000) 48:5 Can Tax J 1496 at 1497 [Pinder].

34. *Ibid* at 1497.

35. Martha O'Brien, "Income Tax, Investment Income, and the Indian Act: Getting Back on Track" (2002) 50:5 Can Tax J at 1571 [O'Brien].

36. *Ibid*.

37. *Recalma v Canada*, [1998] 3 CNLR 279 (FCA) [*Recalma*].

38. *Canada v Robertson*, 2012 FCA 94 at paras 45 and 51 [*Robertson*].

39. *Ibid* at para 45.

40. *Ibid* at paras 91 and 92.

41. For a brief history on these issues, please see The Royal Canadian Geographical Society/ Canadian Geographic, *Indigenous Peoples Atlas of Canada* (Ottawa: Canadian Geographic, 2018).

surrounding tax expenditures not overshadow the serious implications that section 87 has, both in practice and at a scholarly level. Section 87 may well be a window of sorts into how the government and its agencies view and treat Indigenous peoples and the nature of Crown–Indigenous relations. It may also have consequences in other areas, such as self-government agreements, treaty negotiations, the implementation of own-source revenue on reserves (including property taxation), among numerous other issues.[42] Clarifying the objective and creating certainty in section 87's interpretation and application would also help dispel the idea that "Indians don't pay taxes" and that the exemption is akin to a government handout.

1. Implications for On-reserve Economic Development

LaForest J in *Mitchell* made it clear that while the objective of section 87 was to protect Indian property on reserve, it was "not [meant] to remedy the economically disadvantaged position of Indians by ensuring that Indians may acquire, hold and deal with property in the commercial mainstream on different terms than their fellow citizens."[43] This was cited with approval in *Williams* and subsequent cases that used the CFT in an attempt to ensure that the business engaged in was integral to life on the reserve and outside of the commercial mainstream.[44]

One of these cases was *Recalma*, which reiterated the four connecting factors set out in *Williams* and applied them to investment income. Restated somewhat, the CFT as applied to investment income is to test (1) the investment income's connection to the reserve, (2) the benefit of the investment to the "traditional Native way of life", (3) the potential danger of the erosion of Aboriginal property, and (4) the extent to which the investment income may be considered as being derived from mainstream economic activity.[45] The commercial mainstream test became the determining factor in assessing the *situs* of intangible property.[46]

For thirteen years it was held that intangible property was not tax exempt because it did not directly relate to the "traditional Native way of life" and that income generated would only be tax exempt if it related to an "integral part" of reserve life.[47] While this test was largely rejected in *Bastien*,[48] which saw that factor as only one, non-determinative factor to consider as it relates to intangible property, *Recalma* narrowed the utility of the section 87 exemption to such an extent that it stunted economic development on reserve by making the pursuit of economic gains less attractive. When one looks at the incentives for mining companies, for example, via the Mineral Exploration Tax Credit for flow-through share investors (which is meant to attract investment), it is evident that such tax subsidies are, in fact, useful and beneficial to economic development.[49] It appears to be the case that First Nations communities

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42. Morry and Ranson, *supra* note 3.

43. *Mitchell*, *supra* note 20 at 131.

44. *Southwind v The Queen*, [1998] DTC 6084 (FCA).

45. *Recalma*, *supra* note 37 at para 9.

46. Tait, *supra* note 2 at 63.

47. *Recalma*, *supra* note 39 at para 9.

48. *Bastien v The Queen*, 2011 SCC 38 [*Bastien*].

49. *Report on Federal Tax Expenditures*, *supra* note 13 at 172. See also KMPG, "Guide to Oil and Gas Taxation in Canada" (2018), online (pdf): <assets.kpmg.com/content/dam/kpmg/ca/pdf/2018/05/oil-gas-guide.pdf>.

are being excluded from something akin to a tax subsidy that, in another form, is being used to the great benefit of other segments of the population.

The underlying premise of this interpretation is arguably the discriminatory and stereotypical view the courts have taken in relation to "Native ways of life". As Tait argues, this interpretation in *Recalma* "perpetuated the normalization of the 'poor Indian stereotype'"[50] and, in particular, fostered the view that Indigenous ways of life are frozen, never meant (or allowed) to change or evolve over time.

B. Academic Views of the Objectives of Section 87

There is an argument on the part of some scholars that the acknowledgement of Indian property on Indian land being exempt from Canadian taxation was in fact an indication of a tax treaty between two independent nations—the Indigenous Nation and the Dominion of Canada.[51] This was a point of issue in *Benoit v Canada*.[52] The Federal Court of Appeal found that there was no general exemption from tax found in Treaty 8 by virtue of section 87 being considered a tax treaty, based on the evidence presented. Modern treaties have made this exemption explicit, to remedy this evidentiary gap in the future,[53] but the question remains whether the exemption rises to the level of a tax treaty between two nations.

If treaties were intended to be a protection of sorts of First Nation sovereignty over their lands, then an argument also exists that tax exemption on reserve or treaty lands is part of an inherent Aboriginal right to self-government.[54] This may mean that the exemption is constitutionally protected under section 35 of the *Constitution Act, 1982*.[55] This argument has been academically debated at length, but it presents an interesting argument that courts will perhaps have the opportunity to consider in the future.

IV EVALUATING THE SECTION 87 EXEMPTION

A. Fairness of Distribution

Only Indians registered with the Canadian government (i.e., Status Indians) are eligible for the section 87 tax exemption, pursuant to the definition of "Indian" in the *Indian Act*.[56] The CRA has stated that despite the 2016 Supreme Court of Canada (SCC) decision in

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50. Tait, *supra* note 2 at 64.

51. Tait, *supra* note 2.

52. *Benoit v Canada*, 2003 FCA 236, leave to appeal denied 2004 CarswellNat 1209 (SCC).

53. Morry and Ranson, *supra* note 3 at 8.

54. Morry and Ranson, *supra* note 3 at 7. See also *Campbell v British Columbia*, (2000) 189 DLR (4th) 333.

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

56. *Indian Act*, *supra* note 4, s 2(1) "Indian."

Daniels,[57] which declared that Métis and non-Status Indians[58] are "Indians" for the purposes of Parliamentary law-making under subsection 91(24) of the *Constitution Act, 1867*,[59] the ruling had no bearing on the *Indian Act* definition. First Nations bands can also access the section 87 tax exemption.[60]

When discussing issues of fairness as it relates to personal property, two concepts must be defined: vertical and horizontal equity. *Vertical equity* in the tax system refers to "ethical treatment that unequals be treated appropriately differently."[61] *Horizontal equity*, on the other hand, refers to the view that "people who are 'similarly situated' should pay the same amount of tax."[62] On the horizontal level, where two individuals are considered Status Indians, only those living or working on reserve and who are being paid by their employer on reserve, among other connecting factors, are able to apply the section 87 exemption to their income.[63] This does comply with the common law objective of the tax expenditure, as it protects Indian property on Indian land from erosion via taxation. However, the reality is that reserve land does not often provide economic or other opportunities for Status Indians living on them, which forces them to move off reserve to find employment and financial stability.[64] As the latest census data indicate, Indigenous peoples are moving away from reserves to urban centres at increasing rates, thus shrinking the pool of those potentially eligible for the tax exemption.[65]

On the vertical level, Inuit, Métis, or are non-Status First Nations members are excluded from receiving the exemption because they are not considered Status Indians.[66] Of the 1,673,785 Aboriginals in Canada (including First Nations, Métis, and Inuit), only 744,855 are Status Indians and thus eligible for the expenditure.[67] This excludes an enormous number of Indigenous peoples in Canada from accessing the exemption at first instance, all based on definitions and criteria set out by the federal government.

Another issue with respect to fairness of distribution is the *situs* of the Indian property. The exemption can only be accessed when the Indian property is on reserve land (or earned on reserve).[68] This is certainly in keeping with the judicially stated purpose of the section 87 exemption—to prevent economically induced dispossession of Indian property on Indian

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57. *Daniels v Canada*, 2016 SCC 12.

58. *Reference Re Eskimos* [1939] SCR 104 determined that "Inuit" are considered "Indian" for the purposes of s 91(24) of the *Constitution Act, 1867*.

59. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

60. *Indian Act*, *supra* note 4, s 2(1) "band."

61. Brooks, *supra* note 6 at 66.

62. *Ibid* at 65.

63. GOC Information on s 87 Tax Exemption, *supra* note 22.

64. James Hopkins, "Bridging the Gap: Taxation and First Nations Governance" (2008), research paper for the National Centre of First Nations Governance.

65. Statistics Canada, "Aboriginal Peoples in Canada: Key Results from the 2016 Census" (25 October 2017), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.htm> [Stats Can].

66. Gill, Kaplan & Watson, *supra* note 16 at 3.

67. Stats Can, *supra* note 65.

68. Gill, Kaplan & Watson, *supra* note 16 at 4.

lands.[69] However, not only does the exemption only apply to a subset of Indigenous peoples,[70] it also requires that the Status Indian live or work on reserve to qualify for the exemption (in addition to the other numerous criteria that must be met).

Whether looking at the horizontal or vertical equity levels, there is a problem with the distribution of the section 87 exemption in the broader scope of fairness. Indeed, Tait argues that the stated purpose of section 87 in *Mitchell* was built on two premises: protecting Indians and their property while also limiting the application of the section 87 exemption, apparently to ensure fairness to non-Indians.[71] However, it is the case that the section 87 exemption's common law objective is being upheld in this regard. By limiting its scope and application, the exemption is ensuring that it is protecting Indian property, which can only be owned by Status Indians in a legal capacity on Indian reserve land.

B. Distortion

Distortion speaks to the need for an individual or business to change their behaviour to take advantage of the tax expenditure.[72] The section 87 exemption certainly requires such behaviour to happen. As has been discussed, the criteria that must be met to access the exemption are broad, complex, and highly discretionary and subjective as it relates to the entity that is determining the application of the exemption. This section will discuss the section 87 exemption of both employment income and business income.

1. Employment Income

Because of the uncertainty in the application of the CFT, for tax planning purposes it is incumbent on someone to ensure that their employment or business is set up to have as many of the factors as possible connect their income to a reserve. Such factors to consider include the residence of the debtor, the residence of the person receiving the income (creditor), the place where the income is paid, the location of the employment/business giving rise to income, the nature of the services rendered, the special circumstances of performance, and anything else the CRA may view as a strong connecting factor between the individual or band and the reserve.[73]

The issue of whether one is tax planning or attempting tax avoidance is highlighted in the *OI Group* and *Native Leasing Services* (*NLS*) cases.[74] Premised on a pre-*Williams* interpretation of the application of the section 87 exemption, *NLS*, which was located on reserve land, hired Status Indians as employees, who would then go off reserve to work and perform their employment duties.[75] Post-*Williams*, Revenue Canada (now the CRA) demanded the payment of back taxes on income that had been claimed as exempt under section 87

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69. Morry and Ranson, *supra* note 3 at 6.

70. That is, it only applies to those who meet the government of Canada's criteria for being deemed an "Indian" pursuant to the flawed *Indian Act*, which, as *Daniels* notes, has severely disadvantaged Indigenous women by virtue of its sexist provisions.

71. Tait, *supra* note 2 at 38.

72. Brooks, *supra* note 6.

73. *Williams*, *supra* note 26.

74. For a history and review of these cases, please see Tait, *supra* note 2 at 47.

75. Tait, *supra* note 2 at 48.

because they found there were few, if any, connecting factors between the employment income and the reserve, per the CFT, particularly in that their employment duties were performed off reserve.[76] *Shilling*[77] was one of the test cases for the debacle. This case, along with numerous others that have occurred post-*Bastien*,[78] which rejected the commercial mainstream test, stated that there were insufficient connections between the income earned and where that income was earned.

These cases highlight the lack of clarity with respect to how one can ensure that the section 87 exemption will apply to their earned income. The fact that the majority of the individuals that the CRA targeted for payment of arrears were low-income individuals, and their employment, though off reserve, was namely in the service and interests of Indigenous peoples, has not been lost on academics in this field.[79]

2. Business Income

Dickie[80] set out a list of non-exhaustive factors for the application of the section 87 exemption in the context of business income, and it highlights the discretionary nature of the CFT. The factors the CRA considers for allowing business income exemptions include the type of business and the location of the business activities, the location of the customers (debtors) of the business and where payment was made, the residence of the business owners, where decisions affecting the business are made, the location where the books are kept, the nature of the work and the commercial mainstream, among other factors.[81] *Dickie* namely dealt with the issue of business income earned from a proprietorship operated on reserve but where the customers and the physical labour of the business were off reserve.[82]

Case law since *Williams* has clarified, to an extent, the weight to be given to these various factors by the CRA and the courts as it relates to the applicability of the section 87 exemption. Gill, Kaplan, and Watson note that there are at least three broad "practical principles" that the case law has laid out to help somewhat with tax planning and tax advice relating to this exemption by making business activities more attractive for the application of section 87.[83] First, the majority of business-making decisions must be conducted on reserve, as the factors in *Dickie* set out. Second, the business activities in question should be economically significant to a particular reserve.[84] For a Status Indian business owner, this will include the number of employees of the business who are also members of the First Nation who live on the reserve and whether that number is a material percentage of the total number of reserve members. Additionally, the percentage of total business activity revenues on reserve that the business generates will also be a factor. Third, the business activities should be linked to the traditional

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76. Tait, *supra* note 2 at 50.

77. *Shilling v MNR*, [2001] 4 FCR 178, leave to appeal refused 2002 CarswellNat 502 SCC.

78. See *Zoccole v The Queen*, 2015 FCA 258; *Baldwin v The Queen*, 2014 TCC 284.

79. See Tait, *supra* note 2; Pinder, *supra* note 33; O'Brien, *supra* note 35.

80. *Dickie v The Queen*, 2012 TCC 242, aff'd 2014 FCA 40 [*Dickie*].

81. *Ibid*.

82. Maclagan, *supra* note 21 at 34, in discussing the *Dickie* case.

83. Gill, Kaplan & Watson, *supra* note 16 at 6.

84. *Ibid* at 6.

or historical way of life of that particular reserve, namely fishing and hunting activity.[85] All of these will require that the business owner structure their business and its activities meticulously in the hopes of having sufficient connection to the reserve to be eligible for the section 87 exemption. This necessarily leads to distortion in how they may normally wish to conduct their business.

It must be remembered that the CRA, in determining applicability of the section 87 exemption, still assesses deductions pursuant to section 67 of the ITA, which sets out the general reasonableness standard. Gill, Kaplan, and Watson note that it is important for Indians and bands to create and retain records that support the reasonableness of a particular expenditure.[86] It is apparent on these factors that an Indian or band attempting to access section 87 must structure their income-earning activity to appear attractive enough to the CRA to qualify for the exemption. Individuals will have to make decisions that affect where they live, where they work, and how they conduct their business in an attempt to qualify for the section 87 exemption.

The courts in both *Bastien* and *Robertson* make reference to the potential for abuse of the CFT, arguably in reference to the *OI Group* and *NLS* cases.[87] Both cases make the argument that where Indian taxpayers manipulate the system to avoid paying taxes, they may well be found to be liable.[88] While this potential exists for both Indigenous and non-Indigenous peoples, because of the uncertainty surrounding the section 87 exemption, what may be an attempt to qualify for the exemption could be seen as potential tax avoidance. This is incredibly troublesome and requires the GOC and its agencies to set firm guidelines and rules for them and the judiciary to follow when applying the section 87 exemption.

C. Administration and Compliance Costs

There is no indication in the *Report on Federal Tax Expenditures* as to how much administering and complying with section 87 is costing the government.[89] The section 87 exemption, in light of the CFT, is difficult to understand and apply to one's income, assuming First Nations are even aware of its existence, which is not clear given the lack of data. While administering the exemption does not seem to be too cumbersome, as it appears incumbent upon the individual or band to seek the exemption when they file their taxes,[90] the compliance costs since *Williams* have likely been extraordinary. Since the creation of the CFT, the CRA and taxpayers have had to clarify the connecting factors in court numerous times, appearing before the SCC on this issue on several occasions. Additionally, the number of audits the CRA has likely undertaken (though exact figures are unavailable) is another indication that it has cost the Canadian taxpayers a tremendous amount of money to ensure that First

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85. Gill, Kaplan & Watson, *supra* note 16 at 6.

86. *Ibid* at 7.

87. Tait, *supra* note 2 at 55.

88. *Bastien*, *supra* note 48 at para 62; *Robertson*, *supra* note 38 at para 41–42.

89. *Report on Federal Tax Expenditures*, *supra* note 13.

90. The form one must fill out to request the exemption is TD1-IN, "Determination of Exemption of an Indian's Employment Income." It is also one of the numbered boxes one fills out when filing taxes. Please see <www.canada.ca/en/revenue-agency/services/forms-publications/forms/td1-in.html> for further information.

Nations are exempted from tax only within the narrow confines created by the Canadian judiciary and the CRA.

Even if the GOC had adequately reported the loss in tax revenue from the application of the section 87 exemption, it is not clear that this information would spur change in the law. It could conceivably lead to further dissatisfaction on the part of non-Indigenous Canadians who do not believe First Nations and Indigenous peoples should receive any tax breaks, especially if they want to be participating members of Canadian society and thus should receive the same benefits as the rest of the tax base. However, beyond this potential, it would appear that the only way in which these figures would help spur change would be by making it glaringly obvious how much it is costing taxpayers to ensure that the section 87 exemption is applied appropriately, which is a herculean task in light of the CFT and case law post-*Williams*.

D. Government Accountability

There is no accountability on the part of the government concerning the section 87 exemption because there are no data reported that are made available to the public. One can only guess at the reason behind this lack of reporting, but the reality is that without these figures the only indication of the use and application of the section 87 exemption comes from the position taken by the CRA.[91] Despite this, however, there are no data for the number of people granted or denied the exemption or the reasons behind the decisions when made. Additionally, litigation is not always an option for individuals, where those who may qualify cannot prove this to the CRA in court. The *OI Group* and *NLS* cases, discussed above, highlight the fact that the CRA appears willing to use taxpayer dollars to demand the payment of back taxes from individuals who are living near the poverty line to ensure appropriate, though ill-defined, application of the section 87 tax exemption.[92]

It could be argued that because the section 87 exemption is not often seen by the courts or the CRA as an expenditure in the traditional sense, and because it does not appear in the ITA, the need to report on its usage rates and tax revenue losses is not as glaring as with other such expenditures. However, because the exemption appears in the *Report on Federal Tax Expenditures*, it would logically appear necessary to report such data. The lack of reporting leads to a lack of GOC accountability with respect to the lost tax revenue from the section 87 exemption, as well as proof as to whether this exemption is fulfilling its elusive objective.

E. Program Implementation

There is information available to First Nations members, both for personal and business income, regarding the section 87 exemption. The GOC website now provides guides, forms, and basic information related to the exemption, which may be helpful for Status Indians who wish to access the program.[93] However, with respect to planning one's affairs to gain access

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91. See GOC Information on s 87, *supra* note 22.

92. Tait, *supra* note 2 at 52.

93. Government of Canada, "Individuals—Aboriginal Peoples" (2011), online: *Canada Revenue Agency* <www.canada.ca/en/revenue-agency/services/forms-publications/forms-publications-listed-client-group/other-aboriginals.html>.

to the exemption, there is still significant uncertainty as to whether the First Nation or their people will qualify.

With the amount of resources that go into auditing individuals who claim the section 87 exemption (though, again, this information is not available), program implementation is failing on at least two counts. First, the individual or band is not able to access the exemption in the first place. Second, the subsidy is not justified because it costs enormous amounts of tax dollars to implement the program, given the potential number of audits undertaken to ensure the exemption is applied appropriately.

If the common law objective of the section 87 exemption is to protect Indian property on Indian reserve from erosion via taxation, without adequate reporting there is no certainty as to whether or not the implementation of this objective is being borne out. As argued above, the narrow applicability of the exemption to any individual or band may well ensure that the objective is in fact being met, but there is no evidence to argue this issue one way or the other. There must be reporting and data available to the public, at the very least to ensure that the section 87 exemption is fulfilling its common law objective.

F. Another Vehicle to Deliver the Subsidy

One possible alternative delivery method of the section 87 exemption may be simply giving every First Nations member a credit on their income tax return. It may be fashioned as reparations, for example. However, there is a risk with this approach, as it may only serve to foster the view by non-Indigenous Canadians that Indigenous peoples are incapable of supporting themselves and could conceivably lend credence to the view that Indigenous peoples are not able to order their affairs appropriately for long-term financial stability.

V CONCLUSION

The section 87 exemption can be considered a tax expenditure because it provides tax relief to a segment of the population in Canada that has been historically and is currently disadvantaged. While there is no Parliamentary-stated objective, the common law objective has been accepted as being the prevention of economically induced erosion of Indian property on Indian lands via government taxation. This is supported by CRA and GOC online materials, and thus is likely the objective according to which the federal Crown operates.

It could be argued that the narrow application of this expenditure allows this objective to be borne out by the GOC by ensuring that it goes exclusively to the protection of Indian property on Indian reserve land. However, the approach taken by the courts has done incalculable harm to the potential for economic development of First Nations,[94] not to mention the daily lives of First Nations and Indigenous peoples, namely because of the uncertainty in its interpretation and its subjective application.

The reality is that the tax provisions of the *Indian Act* have been used to limit the scope and power of Indigenous economic development on the parcels of land provided to them by the Crown. It ensures that First Nations peoples, their rights and their cultures, are kept frozen and stuck in the past, never allowed to progress and move forward because their

94. Tait, *supra* note 2 at 62.

"traditional Native way of life" is the connection they require to access the Western, colonial laws imposed upon them. While *Bastien* and *Dickie* certainly helped alleviate this particular issue by making such a connection to a traditional way of life a non-determinative, though still potentially relevant, factor in the application of section 87, this provision has still gone a long way in stunting economic development on reserve lands, ultimately negatively impacting Indigenous peoples.

This is reflected in the laissez-faire approach the Crown has taken to even reporting on the section 87 exemption. With so little information regarding its access, use, and the amount of lost tax revenue to ensure its "appropriate" application, there is no accountability on the part of the government. This leaves the door open for others to draw discriminatory and stereotypical views of First Nations via the exemption, as reflected in both CRA and judicial decisions.

When there is a lack of information and education on such a serious topic, in particular where there already exists biased and discriminatory undertones to the issue, it is imperative that Parliament step up to clarify the section 87 exemption, both with respect to its objective and its application. What is ultimately required is greater certainty for Indigenous peoples in Canada as they embark on economic development for themselves, whether as communities or individually.[95]

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95. H Michael Dolson, "Daniels: Tax Changes for Non-Status Aboriginals?" in Vivien Morgan, ed, *Canadian Tax Highlights* (Toronto: Canadian Tax Foundation, 2016) 24:5.

REFORMING SECTION 89 OF THE *INDIAN ACT*: TINKER, WAIVER, SOLDIER (ON), SIGH?

*Adrian Pel**

CONTENTS

I INTRODUCTION

Section 89 of the *Indian Act* is a unique exception to the application of provincial property and civil rights law on reserves.[1] This provision establishes that the property of an Indian or Indian band (as defined in the *Act*[2]) that is "situated on a reserve" is exempt from seizure or the attachment of a security interest by anyone other than an Indian or Indian band. The (ostensible) rationale behind section 89 is to protect the reserve land base and personal property of Indians and Indian bands. In practice, however, this provision also has the effect of severely curtailing access to secured loans, both because of the inability of lending institutions to seize collateral and uncertainty as to whether property is "situated on a reserve."

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1. *Indian Act,* RSC 1985, c I-5, s 89 [*Indian Act*].

2. *Ibid*, s 2.

Unsurprisingly, the economic impacts of section 89 consistently (but not universally[3]) attract vociferous criticism and calls for its reform or abolition.[4] In this article, I consider several possible reforms. I begin by surveying section 89's purpose, as well as the problems it creates in the context of secured lending. Having highlighted these problems, I draw from the Supreme Court of Canada's judgment in *McDiarmid Lumber Ltd v God's Lake First Nation* (*God's Lake*)[5] to further furnish the case for reform. I then examine three possible reforms: (1) abolishing section 89; (2) amending section 89 to rely on a residence-based test; and (3) codifying the ability to waive section 89. I contend that, among these three options, codifying the ability to waive section 89 is preferable because this approach is incremental, respects economic autonomy, and is simple to apply.

I conclude with critical reflections about relying on codifying the ability to waive section 89 as a solution. I concede that while legislatively ensconcing a waiver-based system is a positive step, such minor tinkering with section 89 leaves problems such as discrimination in credit markets unaddressed, risks adopting a misguided "silver-bullet" approach, and overlooks the possibility of pursuing bolder self-government arrangements respecting on-reserve property rights. I contend, however, that there is a pragmatic case for codifying a waiver-based system immediately while concurrently pursuing other measures and thinking of novel ways of governing property rights on reserves.

II SECTION 89: PURPOSE AND PROBLEMS

Section 89 of the *Indian Act* reads as follows:

> **89 (1)** Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.
>
> 1. Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.
>
> **(2)** A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his

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3. See e.g. Terry Lynn Fox (Poucette), *Effective First Nations Governance: Navigating the Legacy of Colonization* (PhD Thesis, University of Victoria School of Public Administration, 2017) [unpublished] at 180–184, online: <dspace.library.uvic.ca/handle/1828/7995>; Thomas McMorrow, "Why New Laws Alone Won't Yield Indigenous Economic Autonomy" in Roderick A Macdonald & Véronique Fortin, eds, *Dimensions of Indigenous Economic Autonomy* (Montreal: Éditions Thémis, 2015) 59 at 62 [McMorrow]; Pamela D Palmater, "Opportunity or Temptation?" Book Review of *Beyond the Indian Act: Restoring Aboriginal Property Rights* by Tom Flanagan, Christopher Alcantara & André Le Dressay, *Literary Review of Canada* (April 2010), online: <reviewcanada.ca>.

4. See e.g. Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2010) at 69–70; Scott Hitchings, "Real Property Security Interests on First Nations Reserved Lands" (2017) 80:1 Sask L Rev 125 at 126–127 [Hitchings]; Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the *Indian Act*" (2014) 39:2 Queen's LJ 511 at 535 [Sanderson, "Consensus"]

5. 2006 SCC 58, [2006] 2 SCR 846 [*God's Lake*].

> rights under the agreement notwithstanding that the chattel is situated on a reserve.

According to the Supreme Court of Canada, the purpose of section 89 is "not to confer a general economic benefit" upon Indians and Indian bands.[6] Rather, it is intended to "insulate the property interests of Indians in their reserve lands from the intrusions and interference of the larger society so as to ensure that Indians are not dispossessed of their entitlements."[7] Although section 89 is patently paternalistic, the Supreme Court has stated that its prophylactic nature is an extension of Canada's treaty promises "to protect what the Indian band[s were] 'given' in return for the surrender of Indian lands."[8]

A. Negative Effects on Access to Credit

While section 89's purpose may ostensibly be noble, it has the effect of severely limiting the ability of Indians and Indian bands to access credit. This is because section 89 creates unique legal risks to creditors' security interests.[9] As Douglas Sanderson notes, "secured transactions like loans are impossible when the assets of a person or business are located on reserve."[10] This restriction has contributed, alongside other factors, to significant economic development issues for Indians living on reserves.[11]

Section 89 does admit some exceptions. It is possible to secure or seize the property of an Indian or Indian band that is situated on a reserve where the creditor is an Indian or an Indian band,[12] the debtor is a corporation,[13] a leasehold is charged,[14] or a transaction involving personal property takes the form of a conditional sale.[15] However, these exceptions are of somewhat limited utility. In particular, while it is possible to mortgage a leasehold, this is far from ideal because the process is onerous—the land must be properly "designated" under the *Indian Act*—and borrowers do not obtain terms as favourable as freehold mortgages because leaseholds are far less valuable.[16]

As leaseholds are of limited use as collateral in secured transactions, what about using personal property as collateral? Unfortunately, the "situated on a reserve" element of section

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6. *Williams v Canada*, [1992] 1 SCR 877 at 885, 90 DLR (4th) 129 [*Williams*].
7. *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 133, 71 DLR (4th) 193 [*Mitchell*].
8. *God's Lake*, *supra* note 5 at para 27.
9. See Anna Lund, "Judgment Enforcement Law in Indigenous Communities: Reflections on the *Indian Act* and Crown Immunity from Execution" in Dwight Newman, ed, *Business Implications of Aboriginal Law* (Toronto: LexisNexis, 2018) 279 at 279 [Lund, "Reflections"].
10. Sanderson, "Consensus," *supra* note 4 at 546.
11. See e.g. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol 2, (Ottawa: RCAP, 1996) at 913 [RCAP, "Volume 2"].
12. See *Mitchell*, *supra* note 7 at 133–134.
13. See *Robertson v Canada,* 2017 FCA 168 at para 56 [*Robertson* FCA]; *Reference re Stony Plain Indian Reserve No 135* (1981), 130 DLR (3d) 636 at 656–657.
14. *Indian Act*, *supra* note 1, s 89(1.1).
15. *Ibid*, s 89(2).
16. See Fraser Milner Casgrain, "Federal Security Interests Research Study and Report 2000" [2000] Unif L Conf Proc 1 at 64–65; Hitchings, *supra* note 4 at 144.

89 creates uncertainty for lenders seeking to secure personal property. For tangible personal property it is difficult to know *ex ante* whether property is "situated on a reserve" under the applicable "paramount location" test. This test examines the "pattern of use and safekeeping of the property" to determine whether there is a "discernable nexus" with a reserve.[17] Lenders dislike this test because it puts them in the "impossible position of having to evaluate the purchaser's circumstances and intentions in relation to the property" at the time security is granted.[18] While due diligence and ongoing supervision by a lender can increase certainty, such costs are liable to be passed on to Indians and Indian bands through higher interest rates.

The uncertainty of whether property is "situated on a reserve" is even more marked for intangible property.[19] In *Williams v Canada*, the Supreme Court rejected a "single strict rule" as to the location of intangible property for the purposes of the related section 87 of the *Indian Act*.[20] Instead, the court endorsed a "fact-specific analysis" that "requires a court to evaluate various connecting factors which tie the property to one location or another" and then determine how these factors should be weighed in the circumstances.[21] Such factual specificity, coupled with the "artificial"[22] judicial discretion to weigh factors, creates uncertainty for creditors, causing them to either refrain from providing credit or to do so on more onerous terms. Indeed, the Federal Court of Appeal has expressed dissatisfaction with the test, noting that "absent a clearer sense of legislative objective, the juggling of multiple connecting factors is apt to result in arbitrary results."[23] While it is true that in *God's Lake* the Supreme Court rejected the application of this multi-factor test to determine the *situs* of a bank account, instead relying on the "well-settled" common law rule,[24] uncertainty still abounds. In *God's Lake*, the Supreme Court did not repudiate the applicability of the *Williams* approach to section 89, only doing so where the *situs* of property is "objectively easy to determine."[25] Moreover, in its subsequent decision in *Bastien*, the Supreme Court referred to section 89 and emphasized that the term "situated on a reserve . . . should be given the same construction wherever it is used throughout the *Indian Act*," heading off any argument that the connecting factors approach only applies under section 87 of the *Act* (a provision respecting taxation).[26]

B. Signalling From the Supreme Court: *God's* Will?

In addition to the reasons for reform described above, the Supreme Court has itself signalled that the "package" of *Indian Act* provisions that includes section 89 requires revision. In *God's Lake*, the Supreme Court observed that these provisions are plagued with

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17. See *Mitchell*, *supra* note 7 at 132–133.

18. See Martha O'Brien, "Income Tax, Investment Income, and the *Indian Act*: Getting Back on Track" (2002) 50:5 Can Tax J 1571 at 1575.

19. See Lund, "Reflections," *supra* note 9 at 288.

20. *Williams*, *supra* note 6 at 891–893. See also *Bastien Estate v Canada*, 2011 SCC 38 at para 17 [*Bastien*].

21. *Williams*, *supra* note 6 at 899; *Bastien*, *supra* note 20 at para 15.

22. *Bastien, supra* note 20 at para 89. See also MH Oglivie, "How Not to Situate Investment Income on a Reserve: *Bastien Estate v Canada* and *Dubé v Canada*" (2012) 28:1 BFLR 127 at 131–132.

23. *Canada v Robertson*, 2012 FCA 94 at para 51.

24. *God's Lake*, *supra* note 5 at paras 13–15.

25. *Ibid* at para 18.

26. *Bastien*, *supra* note 20 at para 14.

"tension" between paternalism and the autonomy of Indians and Indian bands, albeit a form of autonomy conceptualized in individual, economic terms (as opposed to collective autonomy).[27] Citing acute access to credit problems, the majority, led by McLachlin CJ, adopted a strict construction of the economic provisions in the *Indian Act* to promote access to credit, something described as "an important part of economic life in Canada."[28] In doing so, the majority rejected a liberal and generous interpretation of such provisions as *rights-protecting* measures and instead treated them as measures that effectively compromise economic rights.[29]

The Supreme Court's signalling for reform in *God's Lake* is also evident in *obiter* comments. In expressing concerns about limits on access to credit, the majority noted that while the courts cannot "abolish the *Indian Act* restrictions," it is "open to [Parliament] to amend the *Indian Act*."[30] Moreover, the majority underscored that although "in the case of a credit regime, courts have a responsibility to ensure a degree of certainty and predictability in the law," the interaction of the *Indian Act* and provincial personal property regimes is ultimately a Parliamentary "policy choice."[31]

III POSSIBLE RESPONSES TO THE PROBLEMS OF SECTION 89

There are a number of possible legislative reforms that Parliament could pursue to to remedy the problems with section 89 mentioned above. In this Part, I examine three such remedial measures.

A. Repeal Section 89

One response to the aforementioned problems is to simply abolish section 89. This would placate creditors and hopefully incentivize them to extend greater credit secured by on-reserve property. A fundamental problem with this proposal, however, is that abolishing section 89 would disregard the desires of Indians and Indian bands themselves. The package of provisions that includes section 89 remain "generally valued by Indian people, who see them as a bulwark against erosion of the reserve land base."[32] In fact, Indigenous groups not subject to the *Indian Act*—such as Métis peoples and Indigenous groups subject to legislative regimes other than the *Indian Act*—have "all insisted on legislation that offers protection against the loss of land, even at the cost of increased difficulty in obtaining capital."[33] This might, in part, be understood in light of the fact that some Indigenous peoples conceptualize land as a form of collective

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27. *God's Lake*, *supra* note 5 at paras 55, 66.

28. *Ibid* at paras 38, 40, 42, 68.

29. See e.g. *Mitchell*, *supra* note 7 at 142; *Houston v Standingready*, [1991] 1 WWR 744, 1990 CarswellSask 194 (CA) ("given the beneficial nature of s 89(1) it obviously falls to be interpreted liberally" at para 12) [*Houston*].

30. *God's Lake*, *supra* note 5 at paras 42, 63.

31. *Ibid* at para 41.

32. Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol 1 (Ottawa: RCAP, 1996) at 248, 256 [RCAP, "Volume 1"].

33. RCAP, "Volume 2," *supra* note 11 at 889.

identity and symbol of sovereignty, rather than as a form of readily alienable property that can be situated in the broader market economy.[34]

A subsidiary concern is that abolishing section 89 would not simply expose on-reserve property and land to seizure by secured creditors that Indians and Indian bands have consented to. Rather, it would also expose such property to judgment creditors. A further, perhaps more fundamental concern is that repealing section 89 without a broad consensus would be an unsolicited move not unlike the infamous 1969 White Paper that proposed abolishing the *Indian Act* under a (warped) logic of liberalism and equality.[35]

B. Amend Section 89 to Employ a Residence-Based Test

Another possible response is to amend section 89 to rely on a "residence of the debtor" test. Under such a test, the application of section 89 to an Indian debtor's property would depend on whether they reside on a reserve. This simple, single-factor test would reduce uncertainty compared to a test based on the *situs* of property, thereby encouraging lending. However, several reasons weigh against this approach.

First, a residence-based test would arguably confer a unique economic privilege by protecting all property belonging to Indians who live on a reserve. This could incentivize manipulation and "miss the purpose of the *Indian Act* exemption"[36] by ignoring the Supreme Court's dictum in *Mitchell* that section 89 "[is] not intended to confer privileges on Indians in respect of any property they may acquire and possess, *wherever situated*."[37]

Second, a residence-based test would be conceptually difficult to apply to Indian bands. While Indian bands have certain rights and obligations (e.g., they may enter into contracts and be a party to litigation),[38] their status as legal entities remains unclear.[39] This creates undesirable uncertainty for prospective lenders. For instance, if bands are not legal entities with a residence distinct from their members, how is their residence to be determined? Moreover, how would a band even adopt residence off reserve to avoid an amended section 89 application (itself an almost absurd idea)?

Third, a residence-based test would pose practical difficulties. Some Indians may lack the financial means to move off reserve. This creates a catch-22. Some Indians may only be able to obtain a secured loan *if* they live off reserve. However, as a practical matter, they may need a secured loan *in order to* finance their move off reserve. This perverse scenario would mirror that which Justice Binnie highlighted in his dissent in *God's Lake*. While the bank accounts of wealthier Indian bands were protected by section 89—their wealth had attracted bank branches to their reserves (thus locating their accounts on-reserve)—this protection was not

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34. See Roderick A MacDonald & Thomas McMorrow, "Rabbits, Ravens, Snakes, Turtles: Analyzing the Political Economy of Aboriginal Communities from the Inside Out" in Pierre Noreau, ed, *Gouvernance Autochtone: reconfiguration d'un avenir collectif* (Montreal: Éditions Thémis, 2010) 213 at 220–221.

35. See RCAP, "Volume 1," *supra* note 32 at 238.

36. See *Bastien*, *supra* note 20 at para 17; *Williams*, *supra* note 6 at 892.

37. *Mitchell*, *supra* note 7 at 133 [emphasis added].

38. See *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (AG)*, 2012 BCCA 193 at para 75.

39. See *ibid* at para 76; *Blueberry River Indian Band v Canada (Indian Affairs and Northern Development)*, 2001 FCA 67 at paras 15–16.

available to the appellant band, which was "too poor . . . and too remote to attract a branch of a deposit-taking financial institution."[40] Furthermore, requiring Indians to move off-reserve to gain improved access to credit markets is a demanding expectation, one arguably so onerous that a so-amended section 89 might violate section 15 of the *Canadian Charter of Rights and Freedoms* on the basis of the (putative) analogous ground of "residence on a reserve," whose existence was left open in the Supreme Court's decision in *Kahkewistahaw First Nation v Taypotat*.[41]

C. Relying on A Waiver-Based System

A third approach is to allow Indians and Indian bands to waive the application of section 89. Through such a waiver-based system, Indians and Indian bands could choose whether or not to expose their on-reserve property to creditors on a case by case basis.[42]

For one thing, this approach is consistent with the *consensual* nature of section 89. In *Williams*, the Supreme Court observed that Indians have "a *choice* with regard to [their] personal property": They may "situate this property on the reserve, in which case it is within the protected area and free from seizure," or alternatively they may "situate this property off the reserve, in which case it is outside the protected area, and more fully available for ordinary commercial purposes in society."[43] A waiver-based system is a natural extension of this architecture of choice and avoids *situs*-based litigation that can "seem at times to be more the stuff of metaphysics than of law."[44]

One key advantage of a waiver-based system is that it removes the need for convoluted workarounds. Currently, lenders are incentivized to structure transactions as tripartite conditional sales to fit into the conditional sale exception provided for under section 89(2).[45] Excessive reliance on this technicality has led courts to reject some transactions as unenforceable "shams."[46] By affirming the permissibility of waiving section 89, Parliament can both enhance commercial certainty and eliminate section 89's unjustifiable favouring of the *form* over *substance*, something that is contrary to secured transactions law's modern tenor.[47]

Permitting section 89 to be waived is also a favourable solution because it respects Indians' individual autonomy by bringing Indians and Indian bands into the decision-making process

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40. *God's Lake*, *supra* note 5 at para 90.

41. *Kahkewistahaw First Nation v Taypotat,* 2015 SCC 30 at para 26 (criticizing the Federal Court of Appeal for recognizing "residence on a reserve" as an analogous ground on appeal due to a lack of evidence at first instance and refusing to decide the matter, but not rejecting this analogous ground outright).

42. See Anna Lund et al, "Reconciliation in the Corporate Commercial Classroom" (2016) 2:1 Lakehead LJ 49 at 51 [Lund et al].

43. *Williams*, *supra* note 6 at 887 [emphasis added].

44. *Bastien*, *supra* note 20 at para 16.

45. See Ronald CC Cuming, Catherine Walsh & Roderick J Wood, *Personal Property Security Law*, 2nd ed (Toronto: Irwin Law, 2012) at 178.

46. See *Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80 at para 28.

47. See James I Reynolds, "Taking and Enforcing Security under the *Indian Act* and Self-Government Legislation" (2002) 18:1 BFLR 49 at 54 [Reynolds]; Anita G Wandzura, "The Enforcement of Security Interests against the Personal Property of First Nations Persons on a Reserve" (2007) 39:1 Ottawa L Rev 1 at 9–10 [Wandzura].

about a paternalistic protection and does not impose a "one-size-fits-all" approach that is inappropriate to the significant economic variation between reserves.[48]

A final benefit of using a waiver-based system is that it is practical: Section 89's application can be waived through a simple contractual provision. While an Indian or Indian band can ask the Minister of Indigenous Services to declare section 89 inapplicable under section 4(2) of the *Indian Act*, as noted by Justice Binnie in *God's Lake*,[49] the minister has a long-standing policy of refusing all such requests.[50] Thus, although an alternative exists under section 4(2), a waiver by contract between parties is far simpler.

While the Supreme Court has not directly addressed the validity of waiving section 89, there is substantial jurisprudence—much of it following *God's Lake*—supporting this position.[51] Further support can be gleaned from the ability to circumvent section 89 through the use of an incorporated entity,[52] as well as the Court of Appeal of Alberta's suggestion (albeit in *obiter*) that parties may, in some circumstances, be able to deem the *situs* of property, thereby opting out of section 89's application.[53]

If Parliament believes a waiver-based system is the best solution, it could either leave the common law to continue developing in this direction or amend section 89 to expressly permit the waiving of section 89. It is submitted, though, that the latter is preferable. Although amending section 89 may be politically difficult,[54] it is a worthwhile endeavour. At least three reasons support codifying the ability to waive section 89.

First, codification would provide certainty that section 89 can indeed be waived. This would help to immediately reduce the incidence of litigation, a key goal of provincial personal property security acts,[55] and avoid an adverse ruling by the Supreme Court. While there are appellate authorities establishing that section 89 may be waived, it has been argued that there is a "serious question" as to whether these cases were rightly decided,[56] and suggested that

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48. See Lund, "Reflections," *supra* note 9 at 281; Douglas Sanderson, "Commercial Law and Indigenous Sovereignty: It's a Nice Idea, But How Do You Build It In Canada?" (2012) 53:1 Can Bus LJ 94 at 112 [Sanderson, "Commercial Law"].

49. *God's Lake*, *supra* note 5 at paras 68, 90, 107, 148.

50. See Casgrain, *supra* note 16 at 70; Canada, Royal Commission on Aboriginal Peoples, "The *Indian Act*: Evolution, Overview and Options for Amendment and Transition" by John Giokas (Ottawa: RCAP, 1995) at 255.

51. See e.g. *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson*, 2009 MBCA 72aff'g 2009 MBQB 32; *Tobique Indian Band v Canada*, 2010 FC 67; *Robertson* FCA, *supra* note 13; *Corporation de développement* économique *Montagnaise v Robertson*, 2017 QCCS 2736 [*Robertson* QCCS]; *Kingsclear First Nation v JE Brooks & Associates Ltd*, 118 NBR (2d) 290, [1991] NBJ No 816 (QL); *Shubenacadie Band v Francis* (1995), 144 NSR (2d) 241, 1995 CanLII 4259 (CA).

52. See *Robertson v The Queen*, 2011 TCC 83 at paras 49, 53, 73 [*Robertson*].

53. See *Alberta (Workers' Compensation Board) v Enoch Band* (1993), 106 DLR (4th) 279 at 284–85, 290–91.

54. See John Provart, "Reforming the *Indian Act*: First Nations Governance and Aboriginal Policy in Canada" (2003) 2:1 Indigenous LJ 117 at 121.

55. See Thomas GW Telfer, "Preliminary Paper on the Law of Personal Exemptions from Seizure: A Report for the Uniform Law Conference of Canada" [2004] Unif L Conf Proc 1 at 5.

56. See Reynolds, *supra* note 47 at 56; Murray Teitel, "Contracting Out of the *Indian Act*: Traditional Protections v 21st Century Commercial Forces" (14 November 2016) in Bernd Christmas, chair, *Indigenous Law Issues 2016* (Toronto: Law Society of Upper Canada, 2016) at 8–9 to 8-10.

they could yet be overturned by the Supreme Court.[57] Three reasons appear to undergird these concerns. First, the most explicit appellate decision, *Tribal Wi-Chi-Way-Win Capital Corp v Stevenson,*[58] is thinly reasoned and relies heavily on remarks by McLachlin CJ in *God's Lake* that addressed the construction of related exemptions explicitly enumerated in the *Indian Act* rather than the validity of waiving the application of the *Act*'s provisions.[59] In fact, the only mention of a waiver in *God's Lake* was Justice Binnie's passing mention of ministerial waivers.[60] Second, the Supreme Court's emphasis on section 89 as a unique "protection" could be dispositive.[61] The Supreme Court has recognized that there is a "long standing principle that parties cannot contract out of statutory provisions enacted in the public interest."[62] In this vein, it has been suggested that, because section 89 was enacted pursuant to what the Supreme Court described in *Mitchell* as the Crown's "honour-bound" duty to protect Indians' land base and chattels,[63] the provision is "deserving of special regard."[64] Indeed, the purpose of section 89—creating an insulated economic sphere for Indian bands and their members—is at least arguably undermined by allowing the piece-meal stripping away of the provision's protection through individuals waiving its application. A third reason is also based on language found in the Supreme Court's decision in *Mitchell*. Writing for a plurality of Justices, Justice La Forest used rather categorical language when discussing the applicability of section 89:

> [I]f an Indian band concluded a purely commercial business agreement with a private concern the protections of ss. 87 and 89 would have no application . . . except, of course, if the property was situated on a reserve. *It must be remembered that the protections of ss. 87 and 89 will always apply to property situated on a reserve*.[65]

While Justice La Forest did not explicitly address a waiver-based system, his strict application of section 89 to commercial transactions is consistent with section 89's irrevocability. Moreover, the Supreme Court cited this passage with approval in *Bastien*, a case decided after *Tribal Wi-Chi-Way-Win Capital Corp*.[66]

A second reason to codify a waiver-based system is that Parliament could enact policy choices that courts may not implement. For instance, Parliament could amend section 89 to require that the waiving party receive independent legal advice for a waiver to be effective,[67]

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57. See Lund, "Reflections," *supra* note 9 at 307.

58. Reynolds, *supra* note 47.

59. *God*'s *Lake*, *supra* note 5 at paras 38–41.

60. *Ibid* at paras 107, 148.

61. See *Bastien*, *supra* note 20 at para 4; *Mitchell*, *supra* note 7 at para 131.

62. *Potash v Royal Trust Co*, [1986] 2 SCR 351 at 371. See also *Parlee v. College of Psychologists of New Brunswick*, 2004 NBCA 42 ("The legal maxim *quilibet potest renunciare juri pro se inducto* stands for the proposition that Ms. Parlee could waive the provision of a law made for her own benefit. However, the opposite is also true: if the provision one seeks to waive has been enacted for the purpose of protecting or benefiting others, (i.e., the public), it cannot be waived" at para 35).

63. *God's Lake, supra* note 5 at 131.

64. O'Brien, *supra* note 18 at 1582.

65. *Mitchell*, *supra* note 7 at 139 [emphasis added].

66. *Bastien*, *supra* note 20 at paras 22, 54.

67. See Casgrain, *supra* note 16 at 67.

prohibit waiving interests in reserve land while allowing it for personal property, or require a band council to approve an Indian's waiving of section 89 over an interest in reserve land—with the latter two points addressing concerns about the erosion of the land bases of reserves. Alternatively, Parliament could permit a waiver only in the context of commercial activity, thereby providing a form of consumer protection.[68] Crucially, such changes should only follow careful consultation. It is true that the Supreme Court recently held in *Mikisew Cree First Nation v Canada (Governor General in Council)*[69] that no such consultation can be *required* by the duty to consult—in effect confirming the Court of Appeal for Alberta's previous holding that "it cannot be suggested there are any limits on Parliament's right to amend the *Indian Act*."[70] At the same time, amending section 89 without meaningful consultation is highly objectionable because it would both perpetuate paternalism and continue to effectively preclude many Indians and Indian bands from ordinary consumer transactions such as mortgages or secured lines of credit. Consultation would also bring the voices of Indians and Indian bands to the drafting table, a place they have long been conspicuously absent from despite being the parties most affected by section 89. At the same time, because amending section 89 of the *Indian Act* would impact all Indians and Indian bands, rather than simply those that wish to obtain greater access to credit, thoughtful deliberation must be given to the design, process, and composition of consultation.

Third and finally, focusing on a waiver-based system is sensible because parties seizing property on a reserve generally seek to obtain a related variety of waiver already: the agreement of the band council that enforcement proceedings will not be "frustrated".[71] Indians and Indian bands have several means that could be employed to inhibit enforcement efforts, such as the *Indian Act*'s trespass provisions and the enactment of bylaws or resolutions.[72] It bears noting that waiving section 89 and granting permission to enter a reserve are not co-extensive. Notably, an individual member of a band can waive the application of section 89 over their property, but they cannot grant the creditor permission to enter the reserve.[73] Accordingly, codifying a waiver-based system will not prevent Indian bands from employing measures to "frustrate" enforcement. However, if a waiver-based system is codified through a meaningful consultation process, Indian bands may be less inclined to "frustrate" enforcement because they view the waiver of section 89 as a legitimate, fair policy measure whose applicability has been opted into on a case-by-case basis.[74]

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68. See Teitel, *supra* note 56 at 8-8.

69. *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

70. *R v Lefthand*, 2007 ABCA 206 at para 38.

71. See Catherine Walsh, "Section 89 of the *Indian Act*: Personal Property Financing and Creditors' Rights" (paper prepared for the Centre for Property Studies, Faculty of Law, University of New Brunswick, 1999) at 14 [unpublished].

72. See Wandzura, *supra* note 47 at 15.

73. *Ibid*.

74. For a discussion of finding common ground between Indian bands and governments in reforms to the *Indian Act*, see Sanderson, "Consensus," *supra* note 4 at 549–550.

IV PROBLEMATIZING A SILVER-BULLET SOLUTION

Despite the advantages of a waiver-based system, it must be conceded in closing that this solution only addresses *one* of the numerous sociopolitical factors affecting reserve economies, that it may not achieve its goal, and that it is somewhat normatively dissatisfying. Despite these concerns, a pragmatic defence can be made to support codifying a waiver-based system.

One major concern is that focusing reform efforts on waiving section 89 alone risks obfuscating the complex reality that section 89 is but one causal factor of economic disadvantages faced by Indigenous peoples. In fact, "access to credit is really just the tip of the iceberg" of the economic issues that Indigenous peoples in Canada face.[75] This complex reality is one that Justice Binnie dourly described in *God's Lake*. In his powerful dissent, Justice Binnie drew a stark line between the promise of greater access to credit and the reality that many reserve economies are socially and geographically isolated.[76] Justice Binnie's wry response to Chief Justice McLachlin's liberal interpretation of the *Indian Act*'s economic provisions applies equally forcefully to relying on a waiver-based system of section 89 as a stand-alone, silver-bullet solution: "There is the attractive concept, but then there is the reality."[77]

Another objection to a waiver-based system is that it is a facile solution. Even when Indians and Indian bands waive section 89, they only achieve theoretical equality in credit markets. Despite the removal of a legal impediment (section 89), factors such as the "latent, subconscious, or even overt racism and stereotyping that informs the credit granting decisions"[78] will continue to limit access to credit. Moreover, unsophisticated lenders, security holders, and creditors that are not Indians and who are owed small sums of money—a recurring type of party in section 89 cases[79]—may take time to learn about this change, continue to harbour suspicion that this alleged "loop-hole"[80] has been closed, or be unwilling to spend money consulting a lawyer to ensure that a waiver is properly obtained.

A final objection is that leaving section 89 in place and relying on a waiver-based system to overcome its deleterious effects is an unprincipled, timid approach. Rather than rejecting this much-maligned provision, Parliament would instead affirm it while concurrently inviting the "circumvention of a statutory scheme aimed, ostensibly, at protecting reserve property and resources."[81] Beyond the subtle hypocrisy of this approach, a question arises: Why tinker with the status quo when bolder approaches could be pursued, such as abolishing section 88 of the *Indian Act*—which applies provincial property and civil rights laws to reserves—and

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75. McMorrow, *supra* note 3 at 62, 78–89.

76. *God's Lake*, *supra* note 5 at paras 82, 89, 107.

77. *Ibid* at para 82.

78. Lund et al, *supra* note 42 at 52.

79. See e.g. *Taylor's Towing v Intact Insurance Company*, 2017 ONCA 992 (towing company with a statutory repair lien of less than $25,000); *Houston*, *supra* note 29 (dismissed employee owed arrears of $3,052); *David Electrical Contractor v Garden River First Nation* (2004), 73 OR (3d) 28, [2005] 1 CNLR 31 (SC) (contractor owed arrears of $7,200); *Dykstra v Monture* (1999), 47 OR (3d) 129, [2000] 3 CNLR 59 (SC) (creditor loaned Indian debtor $10,269).

80. See e.g. Tanis Fiss, "The Lost Century: Moving Aboriginal Policy From the 19th Century to the 21st Century" (2002), online (pdf): *Centre for Aboriginal Policy Change, Canadian Taxpayers Federation* <www.taxpayer.com/media/26.pdf>.

81. Lund et al, *supra* note 42 at 51.

empowering Indian bands to enact their own rules governing security interests and seizure of on-reserve property, as exists in the United States?[82] Indeed, it has even been argued that reforms to the *Indian Act* are unlikely to be an effective means of promoting self-government because the *Act* is itself "wholly inconsistent with the inherent nature of Indian self-government."[83]

Clearly, even the proposal I have advanced in this article is not without practical and normative concerns. Nonetheless, a qualified defence can be made on the basis of pragmatism. Codifying a waiver-based system can be done expeditiously and may be understood as a stop-gap measure that provides an immediate degree of certainty without suddenly undermining the status quo protection that section 89 affords. Crucially, there is nothing to prevent (and nothing inconsistent about) codifying the validity of waiving section 89 in the interim while actively pursuing other important projects, such as addressing credit market discrimination and thinking about bolder, more comprehensive reforms to property law.

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82. See John Borrows, "Canada's Colonial Constitution" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historic Treaties* (Toronto: University of Toronto Press, 2017) 17 at 25–27; Sanderson, "Commercial Law," *supra* note 48 at 94–96; Peter Scott Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013) 58:3 McGill LJ 607 at 631–635.

83. Frankie Young, "A Trojan Horse Can Indian Self-Government Be Promoted Through The *Indian Act*?" (2019) 97:3 Can Bar Rev 697 at 720.