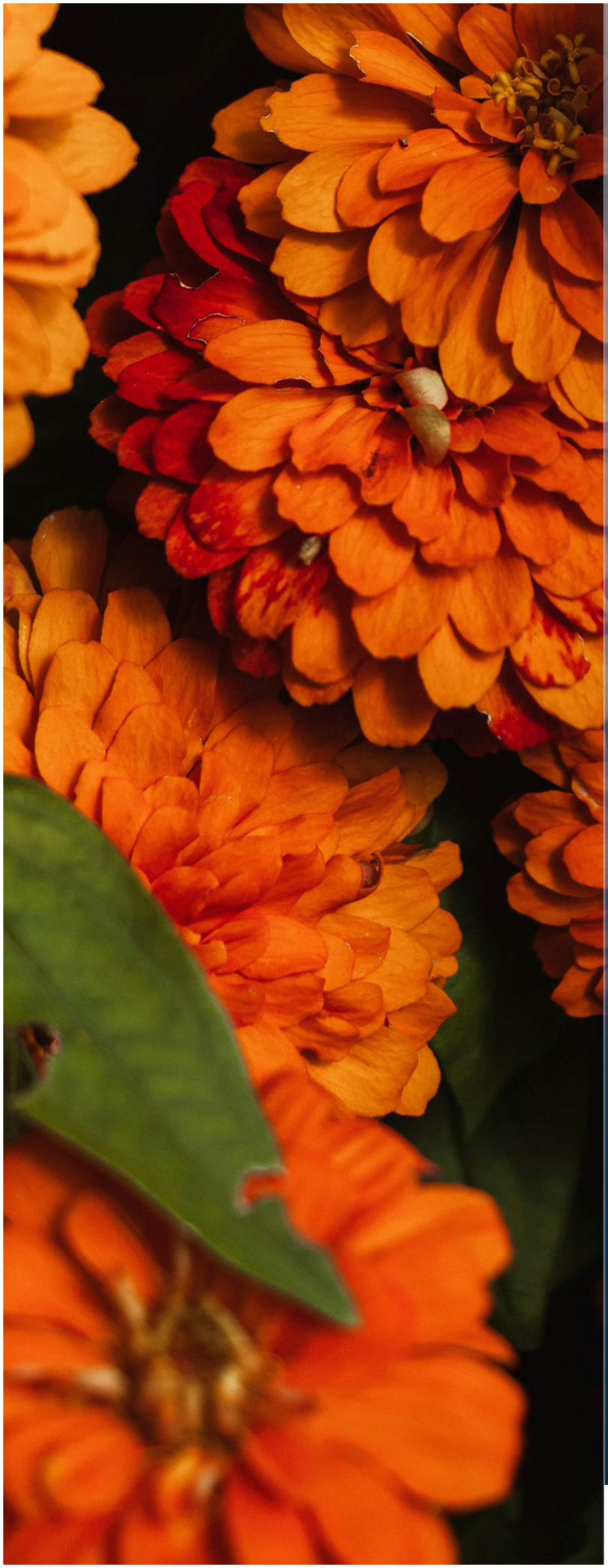

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DETERMINING INDIGENOUS IDENTITY FOR THE PURPOSES OF *GLADUE* SENTENCING CONSIDERATIONS

Adam Schenk[*]

CONTENTS

Abstract

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

[*] External Adjunct Professor, Department of Political Science, Lakehead University.
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I INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. 2021 BCPC 204.

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

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

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

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

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13. *Ibid* at para 2.

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

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

16. *Ibid* at 189.

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

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> [. . .]
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[18]

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

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

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

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

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

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

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

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27. *Ibid* at para 86.

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

29. 2018 ONSC 678.

30. *Ibid* at paras 1–2.

31. *Ibid* at para 24.

32. *Ibid* at para 25.

33. 2019 BCPC 314.

34. *Ibid* at paras 48–50.

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

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

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

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

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

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

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

37. *Ibid* at para 125.

38. *Ibid* at para 124.

39. *Ibid* at para 128.

40. 2019 ONCJ 207.

41. *Ibid* at para 35.

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

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

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

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

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

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

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

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

43. *Ibid* at para 49.

44. 2022 ONSC 5223 [*Husband*].

45. *Ibid* at paras 25–26.

46. *Ibid* at para 45.

47. *Ibid* at para 48.

48. *Ibid* at para 50.

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

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

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

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

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

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

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

51. 2015 ONCJ 120 at para 14.

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

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

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

52. *Ibid* at paras 14–15.

53. *Ibid* at paras 16–19.

54. 2019 ONCJ 280 at para 35.

55. 2020 ONSC 5608 at paras 50–51.

56. 2018 BCSC 1319.

57. *Ibid* at paras 17–18.

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

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

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

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

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

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

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

60. 2021 BCCA 297.

61. *Ibid* at para 117.

62. 2022 ONCJ 9.

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

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

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

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

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

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63. *Ibid* at paras 28–29.

64. *Ibid* at para 29.

65. 2020 ONCA 657 [*Brown*].

66. *Ibid* at paras 17–22.

67. *Ibid* at para 42.

68. 2020 ONCA 786 [*Reddick*].

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

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

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

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

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

72. 2021 ONCA 239 at paras 7 and 12.

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

74. 2022 NSSC 200.

75. *Ibid* at para 12.

76. *Ibid*.

77. *Ibid* at para 19.

78. *Ibid* at para 20.

79. 2020 ONCJ 54 [*Lemieux*].

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

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

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

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

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

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

82. *Ibid* at para 19.

83. *Ibid* at paras 20–21.

84. *Ibid* at para 22.

85. 2016 BCSC 2555 [*Vangrootheest*].

86. *Ibid* at para 27.

87. *Ibid*.

88. *Ibid* at para 30.

89. 2003 SCC 43 [*Powley*].

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

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

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

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

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

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

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

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

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

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

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

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

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95. 2019 SKPC 27.

96. *Ibid* at paras 57–58.

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

98. *Ibid* at para 86.

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

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

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

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

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

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

103. 2019 NBCA 37.

104. *Ibid* at paras 26–30.

105. *Ibid* at para 30.

106. 2017 ABCA 132.

107. *Ibid* at para 4.

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

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

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

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

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

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

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

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

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

113. *Ibid* at 116–117.

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

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

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

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

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115. 2017 BCPC 333 [*Antoine*].

116. *Ibid* at para 5.

117. *Ibid* at para 12.

118. *Ibid* at para 7.

119. *Ibid* at para 16.

120. *Ibid* at para 13.

121. *Ibid* at para 35.

122. *Ibid* at paras 14–15.

123. *Ibid* at paras 1–2.

124. *Ibid* at paras 11–12.

125. *Ibid* at para 32.

126. *Ibid* at para 46.

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

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

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

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127. *Ibid* at para 52.

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

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

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

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

132. *Ibid* at para 7.

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

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

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

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

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133. *Ibid* at paras 21–29.

134. *Ibid* at para 36.

135. *Ibid* at paras 37–38.

136. *Ibid* at para 40.

137. *Ibid* at para 41.

138. *Ibid* at para 42.

139. *Ibid* at para 43.

140. *Ibid* at para 125.

141. *Ibid.*

142. *Ibid* at para 139.

143. 2016 ONCA 367.

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

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

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

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

145. *Ibid* at paras 139–140.

146. *Ibid* at para 142

147. *Ibid*.

148. *Ibid* at para 141.

149. *Ibid* at para 147.

150. *Ibid* at paras 145–146.

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

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

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

IV INDIGENOUS IDENTITY AND *GLADUE* GOING FORWARD

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

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

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

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

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

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

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

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

154. 2019 ONCJ 612.

155. *Ibid* at para 11.

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

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

INDIGENIZATION OF CIVIL LITIGATION: BARRIERS AND OPPORTUNITIES

*David Rosenberg**

CONTENTS

Abstract:

This paper considers the Indigenization of civil litigation as a means to promote decolonization and reconciliation within the Canadian legal framework. In light of the growing proximity of Indigenous to non-Indigenous communities, the task of Indigenization has taken on a new urgency. However, there are many obstacles to the goal of Indigenization. Two barriers that are examined in this paper are the secrecy and confidentiality that surrounds civil litigation under Canadian law, and a related issue, the seemingly esoteric nature of Indigenous laws—that is, laws that are not well known or easily

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knowable outside of Indigenous communities. As part of that examination, this paper points to a decision of the Ontario Superior Court of Justice that gives us an early indication of how we might achieve the objective of Indigenizing civil litigation and overcome the obstacles identified. It then briefly discusses the Indigenization of civil disputes in the context of self-governance regimes, followed by a discussion of various other initiatives that promote the settlement of disputes. Settlement is promoted because it is seen as being more aligned with Indigenous legal traditions than litigation. Finally, this paper discusses a key consequence of settlement, being that settlement can cloak the manner and terms of resolution under a veil of secrecy.

I INTRODUCTION

The Final Report of the Truth and Reconciliation Commission of Canada (the TRC Report)[1] recognizes that "Indigenous law, like so many other aspects of Aboriginal peoples' lives, has been impacted by colonization."[2] This is now well accepted as historical fact. To address this reality, the TRC Report dedicated an entire chapter to traditional legal orders[3] and articulated 94 Calls to Action, three of which focused specifically on Indigenous law:

> 45) We call upon the Government of Canada to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown . . . [which] would include [a commitment] to [reconciliation in the form of] the recognition and integration of Indigenous laws and legal traditions.[4]
>
> 47) We call upon federal, provincial, territorial, and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands . . . and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.[5]
>
> 50) [W]e call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[6]

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1. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 2, 1939 to 2000: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1 (Montreal: McGill-Queen's University Press, 2015), online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_1_History_Part_2_English_Web.pdf> [TRC Report].

2. TRC Report, *ibid* at 52.

3. Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada,* vol 6 (Montreal: McGill-Queen's University Press, 2015), see generally 45–81, online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Volume_6_Reconciliation_English_Web.pdf>.

4. Truth and Reconciliation Commission of Canada, Calls to Action (2015) at 4, online: *National Center for Truth and Reconciliation* <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf>.

5. *Ibid* at 5.

6. *Ibid* at 5–6.

Unfortunately, regardless of the methodology used to assess progress, the general consensus is that implementation of the Calls to Action has been sorely lacking. According to the federal government, they have completed seventeen of the Calls to Action.[7] But according to the Yellowhead Institute,[8] which meets with experts annually around the country to discuss and analyze reconciliation progress (or lack thereof), only thirteen of them have been completed.[9] Other organizations have also delivered their own perspectives on how the Calls to Action are advancing, but their assessments are, for the most part, similarly disheartening. According to the CBC, for example, only eight of the Calls to Action have been completed to date.[10] According to the May 1, 2024 update from the "Indigenous Watchdog," a federally registered non-profit organization, only 14 have been completed, and 36 per cent have not been started or have stalled.[11]

However, there have been high points, too. These include the significant progress that has been made toward funding the establishment of Indigenous law institutes[12] and toward the recognition and revitalization of Indigenous law as it applies within Indigenous communities.[13] There have also been many cases brought in Canadian courts that have, together, developed common law principles that enhance the prospects for Indigenous law to develop within the

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7. The federal government is directly or jointly accountable for 76 of the 94 Calls to Action and provides detailed explanations of actions they are delivering to advance each one. See Crown-Indigenous Relations and Northern Affairs Canada, "Delivering on Truth and Reconciliation Commission Calls to Action," (last modified 10 July 2023), online: *Government of Canada* <https://www.rcaanc-cirnac.gc.ca/eng/1524494530110/1557511412801>.

8. The Yellowhead Institute is an Indigenous-led research and education centre based in the Faculty of Arts at Toronto Metropolitan University. See online: *Yellowhead Institute* <https://yellowheadinstitute.org/>.

9. Eva Jewell and Ian Mosby, "Calls to Action Accountability: A 2021 Status Update on Reconciliation" (December 2021) at 6, online: *Yellowhead Institute* <https://yellowheadinstitute.org/resources/calls-to-action-accountability-a-2021-status-update-on-reconciliation/>.

10. In March 2018, *CBC News* launched Beyond 94, a website that monitors progress on the Truth and Reconciliation Commission's 94 Calls to Action. *CBC News*, "Beyond 94: Truth and Reconciliation in Canada" (last updated 2 April 2024) online: <https://www.cbc.ca/newsinteractives/beyond-94?=&cta=1>.

11. Indigenous Watchdog, "TRC Calls to Action Status: March 1, 2024," online: *Indigenous Watchdog* <https://www.indigenouswatchdog.org/2022/04/05/trc-calls-to-action-status-may-13-2022>.

12. These include the Mino-Waabandan Inaakonigewinan Law & Justice Institute at the Bora Laskin Faculty of Law at Lakehead University, the Indigenous Law Centre at the University of Saskatchewan, the Indigenous Law Research Unit at the University of Victoria, the Wahkohtowin Law & Governance Lodge at the University of Alberta, and the Indigenous Legal Orders Institute at the Faculty Law, University of Windsor, as well as a host of community-based initiatives.

13. The revitalization of Indigenous law *within* particular communities (by the communities themselves) has received considerable attention, as has the development of administrative law principles that emphasize judicial deference to tribunal decisions involving the application of Indigenous laws. However, neither focuses on the integration of Indigenous law into Canadian law. Considerable attention has also been paid to the disproportionate representation of Indigenous peoples in the criminal justice system. This has created the impetus for a host of initiatives across the country that have attempted to address the problem, including the creation of a number of Indigenous courts. In addition, there are mechanisms available under various statutory regimes across the country now that allow for the introduction of Indigenous traditions as a valid consideration when sentencing for federal, provincial, and territorial offences. But none of these initiatives deals with civil matters.

Canadian legal system. These include cases regarding the judicial review of tribunal decisions[14] and treaty interpretation,[15] and many cases in the area of Aboriginal law, including cases articulating the criteria for establishing Aboriginal title[16] and the circumstances where there is a duty to consult.[17] They also include modifications made in some cases to the rules of evidence to permit the oral testimony of Elders[18] and the application of policies that have attempted to ameliorate some of the difficulties with litigation by encouraging settlement as an alternative to litigation.[19] However, apart from these things, most cases involving Indigenous persons focus on interpreting and articulating the rights and obligations of Indigenous persons under Canadian law, as opposed to applying Indigenous law, with the result that little progress has been made toward integration of the two legal systems.

There are notable academic discussions of civil disputes between Indigenous and non-Indigenous persons that have dealt with the integration of Indigenous law into Canadian law, which is founded in the common law and civil law traditions. These include John Borrows' work on Aboriginal title issues[20] and Sebastien Grammond's work on developing a conceptual framework for Indigenous law.[21] However, most of this discourse is fairly abstract, and few of these discussions are based on reported case law involving actual disputes that have been adjudicated by Canadian courts or tribunals. One exception that provides some visibility into Indigenous law is the *Jacob v Beamish* case,[22] which is discussed in more detail below. Otherwise, such cases are rare[23] .

An example of how such issues can manifest but remain relatively opaque to the application of Indigenous law is the *Slawsky v Isitt* decision,[24] in which there was a dispute

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14. Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45:2 UBC L Rev 595. See also *Pastion v Dene Tha' First Nation*, 2018 FC 648, as well as the cases of the Federal Court and Federal Court of Appeal that followed *Pastion* such as *Porter v Boucher-Chicago*, 2021 FCA 102 and *Whitstone v Onion Lake Cree Nation*, 2022 FC 399.

15. There is considerable academic literature and jurisprudence on the principles of treaty interpretation under Canadian law. For two excellent works on this topic, see Aimée Craft, *Breathing Life into the Stone Fort Treaty: An Anishinabe Understanding of Treaty One* (Saskatoon: Purich Publishing, 2013), and Leonard I Rotman, "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 UNB LJ 11.

16. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

17. *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73.

18. A recent example of this is *Restoule v Canada (Attorney General),* 2018 ONSC 7701 [*Restoule*], where the court ordered the use of a special protocol to address issues regarding the introduction of evidence from Elders.

19. See, for example, Department of Justice Canada, "The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples" (2018) at 11 [Indigenous Civil Litigation].

20. John Borrows "Aboriginal Title and Private Property" (2015) 71:2 Sup Ct L Rev 91.

21. Sébastien Grammond, "Recognizing Indigenous Law: A Conceptual Framework" (2022) 100:1 Can Bar Rev 1.

22. *Webequie First Nation Indian Band v Beamish,* 2008 CanLII 54316, 2008 OJ No 4175 (Ont Sup Ct J) [*Beamish*].

23. See the following two labour cases: *Re WSANEC School Board v BC Government and Service Employees' Union* [2016] CIRBD No 38 and *Gitxsan Health Society v Hospital Employees' Union* [2008] BCCAAA No 4.

24. *Slawsky v Isitt*, [2014] BCSC 1917.

between a private landowner and an Indigenous community that claimed title rights in lands that were subject to the Douglas Treaty. The case did not make it to court; instead, the conflict was resolved when the Government of British Columbia intervened to purchase the lands at issue from the plaintiff for $5.45 million. Concurrently with the purchase, the claim was withdrawn. So, the parties did not have an opportunity to argue the case. The *Slawsky v Isitt* case study is indicative of a generalized problem, which is the dearth of judicial consideration of the intersection of Canadian law with Indigenous law.

This paper takes up this gap to consider the Indigenization of civil litigation as a means to promote decolonization and reconciliation within the Canadian legal framework. The word "Indigenization" as used in this paper refers to the process of incorporating or integrating Indigenous elements, cultures, practices, and perspectives into various aspects of society, institutions, or systems. Indigenization aims to promote the recognition, preservation, and empowerment of Indigenous communities, their knowledge, and their traditional ways of life.[25] The Indigenization of civil litigation refers to the incorporation of Indigenous law into civil litigation as is practised under Canadian law.

There are many obstacles to the goal of Indigenization of our legal system. Two barriers that are examined in this paper are the secrecy and confidentiality that surrounds civil litigation under Canadian law, and a related issue, the seemingly esoteric nature of Indigenous laws—that is, laws that are not well known or easily knowable outside of Indigenous communities. This paper takes the position that, although the intersection between Indigenous law and civil litigation remains deeply unexamined, the cases that have considered this intersection show that there exist systemic challenges that Indigenous litigants encounter when accessing the Canadian justice system for civil matters. Nonetheless, considering the area of civil litigation, a private law area, through the lens of reconciliation, decolonization, and Indigenization is a significant step toward repairing legal frameworks that are colonial in nature and unresponsive to Indigenous law.

This paper will first discuss why the Indigenization of civil litigation matters as a means to promote decolonization and reconciliation, and why, given the growing proximity of Indigenous to non-Indigenous communities, the task of Indigenization has taken on a new urgency. As part of that discussion, this paper points to a decision of the Ontario Superior Court of Justice that gives us an early indication of how we might achieve the objective of Indigenizing civil litigation and overcome the obstacles identified. This paper will then briefly discuss the Indigenization of civil disputes in the context of self-governance regimes, followed by a discussion of various other initiatives that promote the settlement of disputes. Settlement is promoted because it is seen as being more aligned with Indigenous legal traditions than litigation. Finally, this paper will discuss a key consequence of settlement, being that settlement can cloak the manner and terms of resolution under a veil of secrecy.

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25. There is no clear definition of Indigenization. For more reading on the subject, see Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Eve Tuck and K Wayne Yang, "Decolonization Is Not a Metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1; Jeffery G Hewitt, "Decolonizing and Indigenizing: Some Considerations for Law Schools" (2016) 33:1 Windsor YB Access Just 65.

II A PEAK BEHIND THE VEIL: *WEBEQUIE FIRST NATION INDIAN BAND V BEAMISH*

The current Canadian civil justice system has the means to create windows of visibility for Indigenous laws by making best use of the civil law system while at the same time limiting its own involvement in civil law matters. The case of *Jacob v Beamish*[26] is one such case. *Beamish* provides a rare peek behind the veil of civil law disputes, which are often marked by confidentiality between the parties, to see an Indigenous-law-styled mechanism that the parties created contractually for resolving disputes.

In *Beamish*, the plaintiff, the Webequie First Nation, a band of 491 members, sued the defendants, the Wasaya First Nations, who were seven First Nations Bands. The dispute related to control of a regional airline. The defendant brought a motion seeking to stay the lawsuit, arguing that the dispute should be arbitrated in accordance with an arbitration provision contained in the main agreement between the parties. The arbitration provision read as follows:

- *Negotiations:* The Wasaya First Nations will endeavour to resolve any differences between them on any matter in this Agreement by negotiation between themselves, and, unless there is an emergency, no party will initiate any other procedure until negotiations have exhausted all reasonable possibilities of resolution;
- *Use of Elders:* The Wasaya First Nations may choose to facilitate their negotiations by the use of Elders. If negotiations are conducted with the assistance of Elders and no agreement is reached, then the matter shall be arbitrated by an arbitrator;
- *Arbitration:* Any arbitration will be conducted according to the rules for the conduct of arbitration of the Arbitration Institute of Canada Inc., in effect at the date of commencement of the arbitration, by one arbitrator appointed in accordance with the Institute's rules. The arbitration will be final and binding on the parties.

The defendant was successful on the motion, and the matter went to arbitration based on the court's interpretation of the dispute resolution provisions, which involved applying fairly straightforward common law principles of contractual interpretation, together with the court's interpretation of section 7 of the *Arbitration Act* (Ontario).[27]

In the course of the decision, which required the parties to return to the arbitration process they had agreed to use, the judge took the opportunity to incorporate into her reasons portions of the agreement made between the parties. Thus, we are able to see those parts of the agreement where the parties agreed to be guided by Indigenous legal principles and values in their business dealings. The following guiding principles were agreed to:

a) The Aboriginal value of sharing what one can contribute;

b) The spirit of self-reliance by use of one's own knowledge, capabilities and whatever other resources one has;

c) The spirit of working together, acknowledging each other's humanness;

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26. *Beamish, supra* note 22.

27. *Arbitration Act,* SO 1991, c 17.

> d) Respect for one's peers, supervisors, clients, and individual First Nations members;
>
> e) Respect for the Air, Land and Waters by controlling the environmental impacts of one's activities;
>
> f) Respect for the elected Chiefs and Councils of the Wasaya First Nations and other First Nations;
>
> g) Respect for the Elders of the community and depending on their wisdom for guidance;
>
> . . .
>
> k) Working cooperatively to maximize the profitability of Wasaya businesses for the collective benefit of the Wasaya First Nations people.[28]

The inclusion of these principles into the reasons serves to shed some light on the intentions of the parties. Though none of the above-noted terms were critical to the interpretation of the arbitration clause in the contract, they were set out in the decision of the court nonetheless.

The terms of the arbitration clause clearly show the parties to the agreement mixing Indigenous legal principles with Canadian law. Essentially, they used a Western-European legal mechanism, the contract, to reflect the Indigenous traditions and values of the parties to the agreement. Because the court upheld the arbitration clause, only parties to the dispute and their counsel will ever know the outcome.[29] However, the case report provides a rare glimpse into a situation where Indigenous legal traditions were combined with Canadian law. It is also important to note what the court does not do: The judge does not interpret or apply the principles contained in the contractual agreement. Thus, the court avoids stepping into the role of arbiter of Indigenous law, but instead uses the ruling to make the principles visible and affirms their legal significance.

III CIVIL DISPUTES AND SELF-GOVERNANCE

There are a number of self-governance regimes currently in place across Canada that have created frameworks for civil dispute resolution. These self-governance agreements represent a significant departure from the norms of civil law disputes that would otherwise be available to parties under the Canadian legal system. The statutes that created these self-governance regimes include agreements such as the *Nunavut Land Claims Agreement Act*,[30] the *Métis Settlements Act* (MSA),[31] and the *Nisga'a Final Agreement Act*.[32] Through these self-governance regimes, Indigenous communities determine the processes and principles of substantive law

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28. *Beamish, supra* note 22 at para 12.

29. Had the matter proceeded through the civil litigation regime available under Canadian law (instead of going to arbitration), where the proceedings are public, the likelihood of the public ever knowing the outcome would have been small. This is because most court cases will settle on a confidential basis before trial.

30. *Nunavut Land Claims Agreement Act,* SC 1993, c 29.

31. *Métis Settlements Act,* RSA 2000, c M-14 [MSA].

32. *Nisga'a Final Agreement Act,* SC 2000, c 7.

that apply to civil disputes involving community members. Creating frameworks, rules, and processes surrounding civil law matters is an essential part of self-governance, and it takes back control over aspects of law for communities.

Yet, at the same time, self-governance regimes are created within the parameters of Canadian civil law, and give Canadian provincial/territorial and federal laws paramountcy. These include laws governing the judicial review of decisions based on administrative law principles, and the *Canadian Charter of Rights and Freedom*. This means that Western-based norms, ideals, and values are afforded primacy over the norms, ideals, and values embedded in the dispute resolution mechanisms adopted under these regimes. As long as this hierarchy of values remains the standard framework governing civil dispute resolution under self-governance regimes, the prospects for integration of Indigenous legal traditions into Canadian law are limited.

Moreover, very few of the decisions made by Indigenous tribunals under self-governing regimes are reported and, of the decisions that are reported, very few reference specific Indigenous laws or traditions. Of course, the very fact that they provide mechanisms for taking back ownership and responsibility for decisions by Indigenous communities could itself be viewed as an application of Indigenous law and legal traditions. But this is a small step, and not enough to effect changes in Canadian law to make it more responsive to Indigenous law.

The Métis Settlements Appeal Tribunal (MSAT) is the appeals tribunal created under the MSA and is one of the few Indigenous appeals tribunals that publishes its decisions. Of the published MSAT decisions, so far none offer visibility into specific Métis traditions or laws. Instead, the few published decisions include consideration of issues such as interpretation of the MSA concerning membership, which has been affirmed as being within the control of the Métis community, providing the right to decide for themselves how Métis membership will be determined.

Donald McCargar v Kikino Metis Settlement is one such case.[33] When examining the scope of MSAT's jurisdiction under the MSA to make decisions regarding Métis membership, this decision makes reference to section 187.1 of the MSA, which reads as follows:

> The Appeal Tribunal shall exercise its powers and carry out its duties with a view to **preserving and enhancing Métis culture and identity**.[34] [emphasis added]

The decision also referred to the object of the MSA as being the "[promotion of] Métis identity."[35] However, apart from these general references, the decision does not provide specific details about Métis law, traditions, or legal orders. This decision—and others like it—represents a small step toward clarifying the role of the MSAT, but it does not improve visibility into Indigenous legal traditions and laws, and it is too vague and ill-defined to have any real impact on Canadian law.

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33. *Donald McCargar v Kikino Metis Settlement,* MSAT Order 372 [Order 372], aff'd 2019 ABCA 199; leave to appeal to the SCC refused 38756 (7 November 2019).

34. MSA, *supra* note 31.

35. Order 372, *supra* note 33 at para 110, citing *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37 at para 3.

Theoretically, all cases before the MSAT have the potential to provide visibility into Indigenous legal traditions and laws. Cases involving disputes between Indigenous and non-Indigenous persons (versus cases involving only Indigenous persons) have more potential for offering visibility into Indigenous legal traditions and laws than disputes involving only Indigenous persons.[36] This is because the expectations of the parties, including how they had envisaged disputes being resolved, are more likely to be different in cases involving non-Indigenous persons. However, such cases represent only a tiny percentage of the decisions made by the MSAT in any given year,[37] making their usefulness in providing the needed visibility exceedingly small.

IV INITIATIVES ENCOURAGING SETTLEMENT

Since litigation is the primary catalyst under Canadian law for stimulating changes in the common law (the other is the passage of legislation[38]), to achieve better integration, substantive (versus procedural or evidentiary) principles of Indigenous law would need to be integrated into Canadian law by the courts over time as matters are litigated. As stated above, there already exist a number of cases where procedural or evidentiary-related Indigenous traditions have been accepted as part of the litigation process, including modifications to the rules of evidence in certain cases to permit the oral testimony of Elders and the development of policies that encourage settlement as an alternative to litigation based on the premise that negotiated settlements are more consistent with Indigenous traditions than litigation.

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36. There is also a reported case of the Alberta Court of Queen's Bench from 2018 involving a non-member of the Métis Settlement Agreements, *Paramount Resources Ltd v Metis Settlement Appeal Tribunal*, [1998] AJ No 1453. In *Paramount,* the jurisdiction of the MSAT to adjudicate a dispute, and the interpretation of statutory and contractual arbitration clauses, were the main issues. However, once the decision of the court had been made affirming the jurisdiction of the MSAT, the matter went to arbitration and the public record went dark.

37. For example, of the 42 orders made in 2020 (being the last year that orders were reported), only four (order no's 372, 373, 409, and 431) involve non-members.

38. The other obvious path toward integration would be through the implementation of the *United Nations Declaration on the Rights of Indigenous People* (UNDRIP). The recently adopted federal legislation, *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c14, is an attempt by the federal government to make headway in this area. The *Act* requires the Government of Canada to create a framework for implementation of the UNDRIP. However, until the federal government rolls out its action plan for implementation of the *Act*, it is not clear what the plan is or what impact it will have. It remains to be seen as well how many provincial and territorial governments will take similar steps. British Columbia has taken the lead on this by enacting the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (the *BC Act*). Like its federal equivalent, the *BC Act* provides for a framework for implementation to be rolled out at a later date. Section 4 of the *BC Act* requires British Columbia to develop and implement an action plan to meet the objectives of the UNDRIP, and section 3 of the *BC Act* requires British Columbia to align its laws with the UNDRIP and to do so in consultation and cooperation with Indigenous peoples. The work to align laws with the UNDRIP has resulted in several legislative reforms with, presumably, more to come. However, unlike its federal counterpart, the BC government has acted quickly in rolling out their action plan. BC's Declaration Act Action Plan was released on 30 March 2022. It includes collectively identified goals and outcomes that form the long-term vision for implementing the UNDRIP in British Columbia. It also has 89 priority actions, which will purportedly advance this work in key areas over the next five years. See "Declaration Act Action Plan" (22 January2024) online: *Government of British Columbia* <https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/implementation>.

With the assimilative pressures resulting from increasing proximity of non-Indigenous to Indigenous communities, the task of Indigenization of civil litigation has taken on a new urgency. The shifting by colonial administrations of Indigenous peoples onto reserves has worked to keep Indigenous peoples separate from their non-Indigenous neighbours. Indigenous peoples have had their own version of separateness, too. The original two-row wampum treaty speaks to this. It recorded the agreement that the Haudenosaunee had with the Dutch settlers to live parallel to each other, in mutual respect and recognition, without interfering in each other's ways, laws, or governance. It had two parallel rows of purple wampum running along a field of white beads. The purple rows symbolized two paths or two vessels—a Haudenosaunee canoe and a European ship—travelling down the river of life together, parallel but separate.[39] Today, few reserves exist in isolation. There are likely many reasons for this, including the expansion of cities across Canada since the reserve system was first adopted under the *Indian Act*[40] in 1876. However, in 1867, the population of Canada was only 3.4 million people. Today, it has grown to more than eleven times that number.[41] Increasing proximity is also in part a consequence of the connectivity that now exists in Canada (and globally). This appears to be partially as a result of the rapid growth in cyber commerce, social media, and other internet-based communications. The pace of technological innovation we are experiencing today is nothing short of spectacular, and it brings with it increasing "virtual" proximity between Indigenous and non-Indigenous persons. As the level of interaction increases, civil disputes are also likely to increase.[42]

V PACE OF CHANGE

The lack of case law advancing the integration of Indigenous law into Canadian law, including under self-governing regimes, reflects the barriers to access to justice for Indigenous litigants. An extensive access to justice literature documenting and analyzing the Canadian justice system shows that litigation in the courts is neither accessible nor responsive to Indigenous litigants. Anyone—Indigenous and non-Indigenous persons alike—who wishes to access justice through litigation in Canada will encounter a system that is slow, often unpredictable, costly, time consuming, impersonal, complex, and incredibly stressful.

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39. The white beads between the rows represent peace, friendship, and respect. See Karine Duhamel, "Peace, Friendship and Respect: The Meaning of the Two Row Wampum," (14 November 2018) online: *The Canadian Museum for Human Rights* <https://humanrights.ca/story/peace-friendship-and-respect>.

40. *Indian Act,* RSC 1985, c. I-5.

41. Laurent Martel and Jonathan Chagnon, "Population Growth in Canada: From 1851 to 2061," Statistics Canada (February 2012), online: *Ministry of Industry* <https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-310-x/98-310-x2011003_1-eng.cfm>.

42. Evelyn Peters and Chris Anderson, eds, *In the City: Contemporary Identities and Cultural Innovation* (Vancouver: UBC Press, 2013) and Ryan Walker et al, "Public Attitudes Towards Indigeneity in Canadian Prairie Urbanism" (2017) 61:2 Can Geographer 212.

Indigenous litigants face additional hurdles, and the integration of Indigenous laws certainly has a place in improving access to justice for Indigenous peoples.[43]

To the extent that the Canadian legal system has paid special attention to Indigenous peoples before the courts, it has done so in very particularized contexts, including the sentencing of Indigenous offenders,[44] on-reserve governance,[45] and the self-governance agreements discussed above. These mechanisms are of limited application and do not respond to the reality that Indigenous and non-Indigenous persons relate to one another in legally relevant ways in all spaces where they interact, and these interactions are not limited to specialized areas of the law. For an Indigenous person, the complexity of relationships manifests uniquely. Relationships are a product of their individual relationship with the Indigenous community to which they belong and of their relationship to the non-Indigenous community with which they typically interact. To be effective, then, Indigenization of civil litigation must be responsive to these complex relationships.

In this context, it is important to acknowledge the additional complicating factor that there is considerable variability across the country between Indigenous legal traditions, and that those traditions are themselves not static—they are constantly evolving. It is often thought to be a strength of the common law to be able to draw on multiple sources of law and do so flexibly and responsively. In that sense, the Canadian legal system is well equipped to take on these related challenges.

For the reasons discussed above, the adversarial, drawn-out, and often culturally insensitive nature of civil litigation has negative impacts on Indigenous litigants that go beyond those experienced by other litigants. For a person considering litigation, a negotiated settlement is often seen as being preferable to litigation since litigation can be time consuming and expensive and the outcome can be unpredictable. So it is often avoided, or even used as a tactical tool to gain leverage in settlement negotiations. Resolving disputes through settling rather than going to trial is also good for the governmental bodies responsible for administering the courts, since judicial and courtroom resources are expensive and are usually in high demand but spread thin.

However, for Indigenous litigants, alternative modes of dispute resolution that encourage settlement are not necessarily better than litigation. Alternatives to litigation that are considered to ameliorate the difficulties of accessing justice through litigation, such as monetary expense, extended timeframes, and the harm caused by revisiting trauma, can be reinforced by encouraging settlement or can even aggravate them. These concerns with the

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43. Sam Stevens, "Access to Civil Justice for Aboriginal Peoples" in Allan Hutchison, ed, *Access to Civil Justice* (Toronto: Carswell, 1990) at 203–212; Carlo Osi, "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation" (2008) 10:1 Cardozo J Confl Resolution 163; Peter R Grose "An Indigenous Imperative: The Rationale for the Recognition of Aboriginal Dispute Resolution Mechanisms" (1995) 12:4 Mediation Q 327; Grammond, *supra* note 21; Roderick A Macdonald, "Access to Justice in Canada Today: Scope, Scale, Ambitions" in Julia H Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Ontario, 2005) at 19.

44. A reference to *Gladue* reports, which is a "form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders," *R v Ipeelee*, 2022 SCC 13 at para 60.

45. As might be established through the adoption of a land code on the basis of the *First Nations Land Management Act*, SC 1999, c 24, as repealed by the *Framework Agreement on First Nation Land Management Act*, SC 2022, c 19, s 121.

push toward settlement as an alternative to litigation have been considered by Owen M Fiss in his article "Against Settlement."[46] Fiss argues that settlement is no more than a "forced plea deal,"[47] the details of which will depend on the power balances between the parties (including access to financial resources) and ultimately removes the remedial power of the court. Writing more recently and in the Canadian context, Nayha Acharya reflects on the increase in mandated mediation as "problematically interfering with procedural rights."[48] For an Indigenous person, settlement strategies may also often feel like revisiting a prior trauma. Trevor Farrow describes the experience aptly when writing about the experience of Indigenous litigants who brought civil claims relating to their residential school experiences. Despite the federal government having implemented an alternative dispute resolution framework that was designed to be fair, efficient, healing, and reconciling, many claimants experienced the approach taken by the government and church participants as adversarial and culturally insensitive, even humiliating.[49]

Despite the concerns around alternatives to litigation, processes leading to settlement still warrant special attention for two different reasons. First, they offer opportunities for the parties to structure the settlement procedure, which in turn opens the door to incorporating Indigenous law into the process. Second, settlement procedures promote confidentiality of process and outcome, which interferes with the development of jurisprudence that expressly incorporates Indigenous law. In short, settlement procedures offer potential for alternate mechanisms for achieving justice aims, but the implications of these processes for Indigenous persons and the development of Indigenous laws must be considered.

VI REGULATORY INITIATIVES THAT ENCOURAGE SETTLEMENT

To encourage settlement, several regulatory initiatives have been implemented that are not particular to the background of any specific litigant—that is, they apply to non-Indigenous and Indigenous persons alike. The various Rules of Civil Procedure that have been adopted in every province and territory of Canada[50] to promote settlement are examples of this. In Ontario, for example, Rule 21.01 of the *Rules of Civil Procedure* promotes the early determination of issues before trial, as a way of avoiding the matter advancing to trial altogether.[51] Rule 49 imposes a cost consequence upon an offeree who rejects a settlement offer that turns out to be as favourable, or more favourable, than the judgment awarded at trial.[52] Similarly, Rule 57 compensates the successful party at trial for some of the legal expenses they have incurred

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46. Owen M Fiss, "Against Settlement" (1984) 93:6 Yale LJ 1073.

47. *Ibid* at 1075.

48. Nayha Acharya, "Exploring the Role of Mandatory Mediation in Civil Justice" (2023) 60:3 Alberta LJ 719 at 720.

49. Trevor CW Farrow, "Truth, Reconciliation, and the Cost of Adversarial Justice" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: the Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 131 at 132.

50. In Ontario, they are the *Rules of Civil Procedure*, RRO 1990, Reg 194, promulgated under the *Courts of Justice Act*, RSO 1990, c C.43.

51. *Ibid,* r 21.01.

52. *Ibid,* r 49.10.

as a way to encourage settlement.[53] Rule 50 authorizes the court or any of the parties to schedule a pre-trial conference for the purpose of exploring opportunities for settling all or part of an action.[54]

Regulatory initiatives that encourage settlement also include the rules of professional conduct that apply to lawyers in every jurisdiction across the country.[55] Rule 3.2-4 of the *Model Code of Professional Conduct* from the Federation of Law Societies of Canada reflects this. It provides that:

> A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

Other initiatives that encourage settlement are specific to Indigenous persons and are discussed below.

A. Contractual Arrangements Containing Standard Form Dispute Resolution Clauses That Steer the Parties Toward Settlement

Often, the parties involved in a project or undertaking anticipate the potential for future conflicts. Therefore, in an effort to stave off the prospect of future litigation (and also sometimes to facilitate obtaining regulatory approvals), they may enter into agreements that contain dispute resolution provisions. A common, project-related form of agreement between Indigenous and non-Indigenous participants containing provisions of this kind is an impact benefit agreement,[56] but many commercial agreements contain provisions of a similar nature. Almost invariably, such arrangements involve tiers of negotiation conducted on a confidential basis, starting with negotiations by frontline representatives of each party, escalating to negotiations by senior management if the frontline negotiations are unsuccessful, and if all else fails, advancing to resolution in private by binding arbitration.

B. British Columbia Civil Resolution Tribunal

The British Columbia Civil Resolution Tribunal (BCCRT) is one of the more recent and interesting innovations for facilitating access to justice and the settlement of civil disputes.[57] It

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53. *Ibid,* r 57.01.

54. *Ibid,* r 50.02.

55. Federation of Law Societies of Canada, "Interactive Model Code of Professional Conduct" online: *FLSC* </flsc.ca/what-we-do/model-code-of-professional-conduct/interactive-model-code-of-professional-conduct/>.

56. Norah Keilland, "Supporting Aboriginal Participation in Resource Development: The Role of Impact Benefit Agreements," Parliamentary Information and Research Service, Publication No 2015-29-E (Ottawa: Library of Parliament, 2015).

57. The legislation creating this framework was the *Civil Resolution Tribunal Act,* SBC 2012, c. 25 (CRTA). The CRTA was amended in 2015 and brought into force, in part, on 13 July 2016, by BC Reg 171/2016. Aspects of the CRTA have faced constitutional challenge based on section 96 of the *Constitution Act, 1867*, which reserves the power to appoint judges at the appellate level to the governor general. I am not aware of any challenges that would affect the components of the framework that are designed to specifically address better access to civil dispute resolution for Indigenous persons per se. See *Trial Lawyers' Association of British Columbia v British Columbia (Attorney General)*, 2021 BCSC 348.

offers civil dispute resolution of low-dollar value claims through a streamlined, internet-based system. Initially, the parties involved in a case before the BCCRT are steered toward mediation, but if mediation fails the process moves to "facilitation." Both are presented as dialogue-based forms of resolution that are more consistent with Indigenous traditions. After that, claims are adjudicated before the Civil Resolution Tribunal, where the process and law that is applied, although streamlined, is similar to what is available in most Canadian jurisdictions in small claims courts.

The BCCRT has also adopted a detailed "Reconcili(action) Plan" to reflect its commitment to reconciliation with Indigenous peoples.[58] The plan represents a commitment to making it easier for Indigenous persons to access the speedier streamlined services provided by the BCCRT, and a commitment to make dealing with the BCCRT a better, more user-friendly experience for Indigenous persons compared to the experience of dealing with the courts. For example, it removes barriers for Indigenous persons accessing the BCCRT, and provides sensitivity training for all tribunal members on the impacts of colonization and the content and importance of treaty and Indigenous rights.[59]Other aspects of the plan that reflect this include prioritizing hiring Indigenous tribunal members, in recognition of the importance of providing equitable opportunities for Indigenous peoples within the administrative justice sector, especially as decision makers;[60] a commitment to addressing barriers that Indigenous peoples may face when accessing the BCCRT process and forms;[61] educating staff and tribunal members on the importance of flexibility and cultural sensitivity and creating space within its processes for staff and tribunal members to accommodate Indigenous worldviews;[62] training staff and members about the diverse nature of Indigenous cultures, the history of Indigenous peoples in Canada, the impacts of colonization, treaty rights, and Indigenous rights;[63] and decolonizing the language on its website and forms to ensure it is inclusive and accessible for Indigenous participants.[64]

However, despite the Indigenization content of the plan, decisions of the BCCRT at the adjudication stage are based entirely on Canadian law. The plan includes aspirational statements indicating a desire to change that. For example, the plan states that the tribunal "will support the recognition, development, and use of Indigenous laws, legal traditions and languages in the broader legal and justice systems"[65] and it recognizes "that the [BCCRT] is part of the colonial legal system."[66] However, how and when those statements will translate into the adoption of Indigenous law remains unclear. For the time being, until the aspirations reflected in such statements are realized, for cases adjudicated by the BCCRT "accessing justice" still means accessing justice as understood under Canadian law. For cases that are settled at an earlier stage in the proceedings through negotiation or facilitation, it may involve

58. Civil Resolution Tribunal, "Reconcili(action) Plan: 2021–2024" (2020), online: *Civil Resolution Tribunal* <https://civilresolutionbc.ca/wp-content/uploads/CRT-Reconciliaction-Plan-2021-2024.pdf>.

59. *Ibid*.

60. *Ibid* at 9.

61. *Ibid* at 10.

62. *Ibid*.

63. *Ibid* at 12.

64. *Ibid* at 13.

65. *Ibid* at 14.

66. *Ibid* at 15.

the application of Indigenous legal traditions, but as the details of earlier-stage proceedings and outcomes are not made available to the public it is impossible to say if this is happening.[67]

C. Federal Directive on Civil Litigation Involving Indigenous Peoples

The challenges of litigation as a model of civil dispute resolution for advancing reconciliation also served as the impetus for the decision made by Canada's first federal Attorney General of Indigenous background, Jodi Wilson-Raybould, to adopt a protocol for federal litigation involving Indigenous persons (the Federal Directive).[68] Although, only specific to litigation involving the federal government, the Federal Directive provides valuable insights into the difficulty that litigation poses as an agent of change for Indigenous peoples. Key tenets of the Federal Directive are as follows:

- Counsel's primary goal must be to resolve the issues, using the court process as a last resort and in the narrowest way possible. This is consistent with a counsel's ongoing obligation to consider means of avoiding or resolving litigation throughout a file's lifespan.[69]
- Litigation is by its nature an adversarial process and cannot be the primary forum for broad reconciliation and the renewal of the Crown–Indigenous relationship. One of the goals of reconciliation in legal matters is to make conflict and litigation the exception, by promoting respectful and meaningful dialogue outside of the courts.[70]
- Early and continuous engagement with legal services counsel and client departments is necessary to seek to avoid litigation. Where appropriate, counsel must consider whether the issues can be resolved through Indigenous legal traditions or other traditional Indigenous approaches.[71]

The extent to which there has been implementation of the Federal Directive remains unclear, and certainly its broader impact is not known. However, even if the Federal Directive proves to be effective, since the protocol only applies to litigation involving the federal government, its potential to impact private civil litigation is limited.

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67. Shortly after the BCCRT was established, the COVID-19 pandemic resulted in other courts across the country also conducting hearings virtually. Virtual access to the courts, at all levels, became a reality across the country overnight. For Indigenous litigants, this meant easier access to the courts. However, as with the BCCRT, there is a trade-off: In return for easier access, claimants submit to a process of dispute resolution where the trial or adjudication process itself is fundamentally modelled on Western-European systems of justice and where the law that ultimately applies is Canadian law. Post-pandemic, it remains to be seen whether, and to what extent, these initiatives will remain in place, but there is the potential to incorporate features of Indigenization similar to those adopted by the BCCRT as they are developed.

68. Indigenous Civil Litigation, *supra* note 19.

69. *Ibid* at 10.

70. *Ibid* at 11.

71. *Ibid* at 10–11.

D. Federal Court's Practice Guidelines for Aboriginal Law Proceedings

Another significant initiative that encourages settlement is the Federal Court's Practice Guidelines for Aboriginal Law Proceedings.[72] These guidelines were developed in consultation with Elders and reflect a preference for dispute resolution by talking things out and resolving disputes by agreement, as opposed to judicial adjudication.

The Federal Court's process starts with an initial assessment ("triage") by a member of the court. In appropriate cases, the court may then informally invite the parties to consider alternative means of proceeding, including mediation away from the court or judicially assisted dispute resolution. Other key features of the guidelines include:

- the appointment of a neutral adviser to the court called an "assessor" in cases where issues of Indigenous law or tradition have arisen or are likely to arise; and
- the establishment of an Indigenous Law Advisory Committee comprising persons who are knowledgeable in Indigenous law to assist the court in cases where the court is considering the appointment of an assessor as a neutral adviser to the court. Among other things, such assistance might relate to the reception, interpretation, or application of Indigenous law or traditions.

As part of its efforts to encourage settlement, the court has also made it clear that it is prepared to award costs in matters that settle. This may seem odd, as costs are customarily awarded to the successful party after adjudication at trial, but in appropriate cases there is precedent for it.[73]

E. *Ad Hoc* Adoption of Modified Federal Court Guidelines

There are also examples of the courts taking the lead by developing *ad hoc* protocols in individual cases for taking Elder evidence, particularly in treaty interpretation cases. A recent example of this is *Restoule v Canada (Attorney General)*,[74] where the court adopted an *ad hoc* stand-alone protocol for dealing with evidentiary issues largely based on the Federal Court's guidelines referred to above.[75] The *Procedure for Taking Elder Evidence* (the Order) seeks to "balance appropriate reception of Elder testimony and oral history evidence with the practical needs of a justice system."[76] The Order requires consideration of the way in which evidence is gathered, language needs, and provides that "Elders' evidence may be presented in a demonstrative manner: songs, dances, culturally significant objects or activities on the land."[77] This Order is a positive development, but one that was adopted for the specific purposes of the *Restoule* case. Whether other courts across the country will adopt these protocols is unclear.

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72. See Federal Court, "Practice Guidelines for Aboriginal Law Proceedings," 4th ed, September 2021, online: Federal Court <www.fct-cf.gc.ca/Content/assets/pdf/base/Aboriginal%20Law%20Practice%20Guidelines%20Sept-2021%20(ENG)%20FINAL.pdf> [Practice Guidelines].

73. See *Knebush v Mayguard*, 2014 FC 1247 [*Mayguard*].

74. *Restoule, supra* note 18.

75. Practice Guidelines, *supra* note 72.

76. *Elders' Protocol for Restoule et al v Canada and Ontario*, Court File Nos C-3512-14 & C- 3512-14A.

77. *Ibid* at 3.

So, for the time being, except in the Federal Court, there is still no standard approach across the country for dealing with evidentiary matters in cases involving Indigenous persons.

VII CONSEQUENCES OF SETTLEMENT

Most dispute resolution mechanisms encourage settlement against a backdrop of potential litigation, very few claims that give rise to litigation are actually resolved at trial.[78] Even fewer are deemed to have sufficient precedential value to be reported. Of the small subset of cases that go to trial and are reported, the chances that one of those cases will involve an Indigenous person is even smaller given the very small population of Indigenous persons residing in Canada.[79] Of that small number of cases, the bulk of the cases will involve constitutional considerations that contribute to the body of Canadian law known as "Aboriginal law", but contribute little to our understanding of Indigenous law.

When cases settle, they do so on confidential terms, and so we also often do not have visibility into the process by which the issues in dispute were resolved or the terms of settlement. This gap leaves huge blind spots, making it challenging to fully understand how issues were dealt with and the solution that was ultimately adopted by the parties. Essentially, the effect is to cloak the manner and terms of resolution under a veil of secrecy. It may be that the settlement process, because it engages with dialogue, is more aligned with Indigenous legal traditions than litigation and may itself be seen as an application of Indigenous legal traditions. But without visibility into how negotiations were carried out, what principles of law were raised during the negotiations, what traditions and historical facts played a part in the discussions, or details of the negotiated outcome, the decision to engage in settlement discussions or the achievement of a negotiated settlement otherwise tells us very little of substance about Indigenous law.

A challenge related to the issue of confidentiality is that often there is little available in the form of a written record for identifying Indigenous law.[80] This is because Indigenous law has historically followed an oral tradition, and while there is a lively debate among Indigenous people about what (if anything) should be done about that (for some, creating a written record is an unwelcome move toward adopting a more Western-European-oriented system

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78. This basic fact is noted in numerous places in Canadian legal academic literature. For a fairly recent example, see Janet Walker et al, *The Civil Litigation Process: Cases and Materials*, 9th ed (Toronto: Emond, 2022) at 60.

79. According to Statistics Canada, in 2021 Indigenous peoples accounted for 5.0 per cent of the total population in Canada. See Statistics Canada, "Canada's Indigenous Population" (21 June 2023), online: *Statistics Canada* <https://www.statcan.gc.ca/o1/en/plus/3920-canadas-indigenous-population>.

80. This may be addressed by the parties if they articulate those principles as part of a contractual dispute resolution provision or if they articulate those principles in another part of their contract, but unless their dispute is litigated, there is no public access to the principles they have articulated. Some efforts have been made to address this through the creation of publicly available websites where decisions made by Indigenous tribunals are reported and made accessible, but these are not well known to the public and, so far, have not shown themselves to be rich sources of Indigenous law. The following two websites are of particular note: "First Nations Gazette," online: <https://fng.ca/> and "Metis Settlements Appeal Tribunal," online: <http://www.msat.gov.ab.ca/appeals/MSATDecisions.asp>.

of governance and law making[81]), the fact remains that Indigenous law is not well known or easily knowable outside of Indigenous communities.[82] The importance of these oral histories to the resolution of disputes has been recognized and acknowledged by the Federal Court,[83] which as discussed above, has developed guidelines for taking evidence from Elders that may challenge the historical record as documented by non-Indigenous people.[84] However, in the absence of a record documenting the settlement proceedings, it is exceedingly difficult to piece together what laws, Indigenous or otherwise, factored into a settlement or in the future may guide the negotiation and settlement process.

Moreover, oral histories are complex and are not necessarily as readily accessed or captured faithfully in private settlement discussions as they are in a judicial process with a well-developed protocol for dealing with such things and the means to apply it. Such complex customs may include dances, feasts, songs, and poems and often give importance to place and geographic space.[85] Given this complexity, it is hard to imagine that the Federal Court's guidelines could even be replicated in a private process funded by the parties themselves.

Resolution of matters on confidential terms has the effect of driving visibility of Indigenous law underground, making it difficult to assess what role, if any, Indigenous legal traditions played in resolving those matters. If the parties settle, there is generally little or no visibility into the solution the parties reached. Similarly, if a matter is arbitrated, that process is usually private and the decision is rarely made public.

The Federal Court is on the forefront of recognizing the power of this kind of visibility. It has included in its guidelines the suggestion that there may be some value to the parties in Aboriginal law proceedings to making the terms of settlement agreements, or at least summaries of the process and final agreement, public, as publication may provide a model—of both the process and the outcome—for other communities who may be open to resolving similar disputes by way of a settlement.[86] But, to date, it appears that no community has acted on this suggestion.

VIII CONCLUSION

The endeavour to Indigenize civil litigation within the Canadian justice system is an intricate and formidable undertaking; yet it would be a pivotal stride toward the goals of decolonization and reconciliation. The analyses and insights proffered in this paper aim to augment the ongoing discourse surrounding these objectives and to invigorate further

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81. See generally, Law Commission of Canada, *Justice Within: Indigenous Legal Traditions* (Ottawa: Law Commission of Canada, 2006), online: *Government of Canada* <https://publications.gc.ca/pub?id=9.667883&sl=0>. See also Bryan P Schwartz, "Oral History, Indigenous Peoples, and the Law: Selected Bibliography by Subject Matter" (2018) 41:2 Man LJ 397.

82. David Laidlaw, "The Challenge of Aboriginal Traditional Knowledge in the Courtroom" in Allan E Ingelson, ed, *Environment in the Courtroom* (Calgary, AB: University of Calgary Press, 2019) at 1.

83. *Mayguard, supra* note 73.

84. Practice Guidelines, *supra* note 72.

85. John Borrows, "Indigenous Legal Traditions in Canada" (2005) 19:1 Wash UJL & Pol'y 167 at 191.

86. Practice Guidelines, *supra* note 72 at 10–11.

transformation of civil dispute resolution practices in Canada, thereby edging us nearer to the realization of this goal.

To facilitate this crucial transition, it is important to dismantle the cloak of confidentiality that typically veils the resolution of civil disputes and to concurrently demystify Indigenous law for those positioned outside Indigenous communities. These challenges are inherently interconnected; the habitual secrecy that encapsulates civil dispute resolution amplifies the obscurity of Indigenous law, thereby perpetuating impediments for Indigenous litigants and precluding a deeper, more nuanced understanding of Indigenous legal principles within the mainstream legal community. Yet, undertaking such paradigmatic shifts is critical for mitigating the disadvantages confronted in civil litigation by Indigenous persons.

The *Beamish* case[87] offers an instructive window through which we can glimpse the potential for the integration of Indigenous law into contractual relationships. As we chart a course toward a future characterized by decolonization and reconciliation, the degree of transparency exemplified in this case emerges as an indispensable asset. Such transparency, sheds light on the unique challenges and opportunities presented by this important cross-cultural intersection, aiding us in our efforts to foster the integration of Indigenous law into the fabric of the Canadian justice system.

87. *Supra* note 22.

BOOK REVIEW

THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS

by Richard and Daniel Susskind

Review by Hailey Hayes[*]

CONTENTS

I COUNT YOUR DAYS, PROFESSIONALS!

Dramatic transformations of the professions because of technology are ongoing and inevitable: that is the overall thesis of *The Future of the Professions: How Technology Will Transform the Work of Human Experts*.[1] Written by father–son duo Richard and Daniel Susskind, the book was initially published in 2015, and an updated edition was released in 2022 with a new preface. Throughout *The Future of the Professions*, readers are guided through the history and development of the professions and technology. They are asked to consider why we have the professions and whether current professional organizational structures are still the most effective means of organizing knowledge and information.[2] Many professions are examined, with the authors introducing their work with the following statements:

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[*] JD Candidate 2025, Bora Laskin Faculty of Law, Lakehead University. With thanks to the anonymous peer reviewer for their insightful feedback and suggestions, Brianna Smith for proofreading the first draft, and Professor Tenille E. Brown for her thorough edits, suggestions, and support.

1. Daniel Susskind & Richard Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts*, 2nd ed (New York: Oxford University Press, 2022) [*The Future of the Professions*].

2. *Ibid* at 4.

> This book is about the professions and the systems and people that will replace them. Our focus is on doctors, lawyers, teachers, accountants, tax advisers, management consultants, architects, journalists, and the clergy (amongst others), on the organizations in which they work, and the institutions that govern their conduct.[3]

In this 514-page book, the authors consider how technology has already started to change the traditional structure of the professions and build a case suggesting that the changes in technology will continue to be so radical that there are very few professions, if any, that will remain untransformed.[4] So much so that the authors predict many current jobs will no longer require humans because machines will be able to perform certain tasks far better.[5] The authors provide a comprehensive overview of the main theories regarding the role of professions in society and the impact technology has had and will continue to have on traditional structures. Explaining why they are focusing on the professions themselves to make these predictions, the authors outline how a series of trends can categorize the shift from the professions to technology:

> The end of the professional era is characterized by four trends: the move from bespoke service; the bypassing of traditional gatekeepers; a shift from a reactive to a proactive approach to professional work; and the more-for-less challenge.[6]

The book spans seven chapters and is structured into three main parts: change, theory, and implications. In the first section, the authors explore the origin, development, changes, and overall structure and purpose of the professions in society. The second section highlights and examines various sources of theory to substantiate their claims and predictions for the future of the professions. The third section lists and responds to anticipated anxieties and objections to the claims made by the authors. It also examines what a post-professional society might look like. It acknowledges areas where further work is needed by the professionals themselves and raises questions that will need to be answered soon as a collective society.

The authors republished their work only five years after its initial publication to reflect on recent developments in technology and the professions.[7] In the preface, Susskind and Susskind acknowledge that the majority of their previous work published in 2015 remains accurate and consistent despite the unpredictable occurrence of the COVID-19 pandemic, and that their predictions from the first book have thus far proven to be accurate.[8] The preface is lengthy but informative, situating the earlier claims of the first book amidst the ongoing changes in society.

Many professions, including the legal sector, have already started to see transformation in the way their work is carried out and in the tools that are becoming available for use. Recent

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3. *Ibid* at 1.
4. *Ibid* at 3.
5. *Ibid* at 147.
6. *Ibid* at 130.
7. *Ibid* at xxvi.
8. *Ibid*.

changes in Ontario laws and regulations[9] concerning the use of technology demonstrate the relevance of the predictions made by the authors in *The Future of the Professions*. This book would be ideal for those looking for an overview of the changes in technology that are impacting the professions to begin considering the future of the professions. Readers should consider that there are gaps, some left intentionally, concerning questions about access to and control of these technologies, but also about the environmental and human rights concerns associated with such dramatic technological transformations. While relevant to legal professionals, readers should note that it is not an entirely legal-focused book. Instead, it provides an excellent foundation and overview of emerging and long-standing issues for those considering the future of the legal profession in an increasingly technology-based world.

II OVERVIEW OF MAIN THEMES

In their attempt to explain the anticipated trajectory of the professions and the eventual departure from the current way of ordering and using information, the authors are careful not to cause immediate panic or concern after making the claim that, eventually, technology will be replacing the professions as we know them.[10] The authors do this in two ways. First, they draw attention to the profession's shortcomings, such as problems with access and affordability.[11] Second, they reassure readers that this change will not occur tomorrow.[12] The authors write:

> We cannot emphasize strongly enough that we are not predicting that the professions will disappear over the next few years. We are looking decades ahead in this chapter, and anticipating an incremental transformation and not an overnight revolution.[13]

Susskind and Susskind are urging readers to understand that substantial changes are occurring across the professions while simultaneously trying to quell any panic, anger, or outright denial that might occur after reading their predictions.

Central to the authors' understanding of the professions is the grand bargain theory.[14] The grand bargain theory is the idea that the professions are engaged in an ongoing agreement that grants them exclusivity over their particular service(s) in exchange for a whole host of conditions, such as ensuring they remain up-to-date on relevant related knowledge, act reputably, and so on.[15] To answer why we have the professions, the authors examine how the professions have held a monopoly over their respective services and industries. The question the authors seem most keen to answer is whether there is a better way to organize ourselves

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9. Amy Salyzyn & Florian Martin-Bariteau, "Legal Ethics in a Digital Context," Canadian Bar Association (2021) online (pdf): <https://www.cba.org/getattachment/Sections/Ethics-and-Professional-Responsibility-Committee/Resources/Resources/Legal-Ethics-in-a-Digital-Context/LegalEthicsInaDigitalContext.pdf.>.

10. *Ibid* at 130.

11. Susskind & Susskind, *supra* note 1 at 48.

12. *Ibid* at 390.

13. *Ibid* at 390–391.

14. *Ibid* at 29.

15. *Ibid* at 29.

and our information than via the traditional professional setup that requires "exclusivity"[16] or whether the grand bargain structure should be replaced altogether.[17] Before the answer is given, the readers are reminded that the current organizational structure of the professions is far from perfect, resulting in significant barriers for those who otherwise would be accessing the services of professionals.[18]

The grand bargain is revisited several times throughout the book, each time to demonstrate how society now organizes and processes information differently than in the past. Piecing together the current state of the professions, the authors highlight that, by design, many professions are resistant to change because of their position as "gatekeepers" of information.[19] The authors go so far as to write that "[w]e have built glorious citadels of human expertise to which very few are allowed admittance."[20]

A technology-based society is raised as a solution to these problems, where advancements in technology allow the needs of individuals and communities that are currently being addressed by the professions to be instead addressed by technology, no longer requiring the involvement of the professionals as gatekeepers.[21] The transition period from the script age to the age of print is referenced within the book, with the authors making the connection that we are in the midst of what should be considered the next transitional period, from the age of print to the age of technology.[22] The authors have the following to say:

> Professionals play such a central role in our lives that we can barely imagine different ways of tackling the problems they sort out for us. But the professions are not immutable. They are an artefact that we have built to meet a particular set of needs in a print-based industrial society. As we progress into a technology-based Internet society, however, we claim that the professions in their current form will no longer be the best answer to those needs.[23]

The term "increasingly capable machines"[24] is used extensively throughout the book, which has the desired effect of ensuring that readers are aware that the changes in technology they are referring to are not small or few and far between. According to the authors, the rate of change and development in technological advancements has been quite dramatic and drives home the need for having these conversations regarding the future of human professions now that there is an alternative option to the grand bargain setup.[25] In this technology-based society, the authors predict it is also likely to be a "post-professional" society.[26]

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16. *Ibid* at 21.
17. *Ibid* at 30.
18. *Ibid* at 43–44.
19. *Ibid* at 38–39.
20. *Ibid* at 43–44.
21. *Ibid* at 131.
22. *Ibid* at 198.
23. *Ibid* at 4.
24. *Ibid* at 206.
25. *Ibid* at 39.
26. *Ibid* at 129.

An effort is made to illustrate to readers that the standard by which we judge the performance and capabilities of these technologies is severely limited by our use of human-centric language.[27] This means that the emphasis on emotions and processes that we infer happen during any given interaction inhibits our ability to comprehend the potential of these technologies to carry out the same tasks or future tasks that we hadn't even considered.[28] Susskind and Susskind acknowledge the tendency of professionals to want to reform rather than transform. It is worth excerpting extensively on this point. As the authors explain in section 1.8:

> Not only are the professions themselves a human construct . . . but so too is the organization of the knowledge that they dispense—knowledge is generally structured and presented in libraries, in textbooks, and on websites, for research and learning purposes rather than for dissemination to end users. We have built these resources and systems to support, and so to sustain the professions. And before the Internet, for example, it was hard to conceive how we might have done otherwise. These constructs are so embedded in the way we think about the world that when we contemplate change and improvement, we tend to explore better execution of the methods and approaches that we already have in place. Although our professions are failing in significant ways, they are not incentivized to work differently.[29]

What the short-term future will look like for professionals entering into fields that we will eventually cede to technology is another area considered in the book. The authors emphasize the need for "flexibility"[30] and anticipate that the environment professionals will be entering is going to require quite different skills than they have ordinarily possessed.[31] On this topic, the authors write:

> More generally, there is a catch-all capability that tomorrow's professionals will need to embrace—that of being *flexible*. There will be very few jobs for life, much less security, and very little predictability. There will be an emphasis instead on being able to learn, develop, and adapt rapidly as new roles and tasks arise.[32]

The authors also note that it is unfair to judge these technologies by a higher standard than we do our current systems and not account for changes and improvements in the technologies over time.[33] Susskind and Susskind write that the impacts of technology can, more or less, fit into the categories of automation or innovation.[34] Defining the differences between the two, they explain it as follows: "Whereas automation is the use of technology to support this traditional model, innovation enables ways of making practical expertise available that simply

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27. *Ibid* at 370–372.
28. *Ibid* at 370–371.
29. *Ibid* at 57.
30. *Ibid* at 142.
31. *Ibid*.
32. *Ibid*.
33. *Ibid* at 58–59.
34. *Ibid* at 136.

were not possible (or even imaginable) without the systems in question."[35] This distinction is important because how people understand technology often informs their concerns and questions about the future use and implementation of said technologies, and the results of automation compared to innovation are different.

In responding to potential arguments in favour of retaining the exclusivity component of the professions, the authors write the following:

> But *surely*, despite what we say, there will always be some tasks that will remain forever the inescapable preserve of professionals. This is a common response to those who predict technological unemployment for professionals. And it is often supported by the view that professional jobs contain tasks that are "not susceptible" to computerization, because they are "non-routine" and so always have to be undertaken by people. But this again is to make the unwarranted assumption that non-routine tasks will never be performed by machines.[36]

The above passage felt significant to me as a reader who has a general tendency toward skepticism. It was tempting to make an immediate list of all the areas within the legal system and outside of it that, as of right now, don't appear to be structured in a way that would allow for the tasks involved to be successfully performed by a machine. Susskind and Susskind predicted this response, and they urge readers to cast these tendencies aside because the answer just might be that it is not possible *yet*.[37]

III CRITIQUES: THE I.T. FACTOR

Throughout the book, the authors attempt to answer what they anticipate to be the most prominent anxieties about their claims. As a reader, concerns of mine that were not addressed had to do with the role that professionals will play in facilitating this transition to a technology-based society, especially as it relates to creating and maintaining specific environmental standards.

The key predictions the authors make, including that technology will revolutionize the current professional fields as we know them and that professionals will no longer hold the same role, if any, in the future of a technology-based society, are already proving to be true. One example of this in law can be seen in how the Law Society of Ontario (LSO) website provides legal professionals with a list of mandatory requirements regarding the use of technology and a list of additional recommendations.[38] These requirements include being knowledgeable about technology that is relevant to one's areas of practice, possessing the ability to use technology for electronic registration during real estate transactions, and several

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35. *Ibid* at 140.

36. *Ibid* at 393.

37. *Ibid* at 207.

38. Law Society of Ontario, "Practice Management Guideline: Technology" (last modified 31 July 2020), online: <http://lso.ca/lawyers/practice-supports-and-resources/practice-management-guidelines/technology#5-13-obsolescence-6>.

others.[39] The recommendations, to name a couple, include being aware of potential security risks and considering the use of electronic research methods.[40] I predict that in the near future many of these recommendations will also become requirements. In producing this resource and setting down mandatory requirements, the LSO is most likely envisioning an increase in the available tools, products, and services for use by legal professionals, as the authors predicted.

Susskind and Susskind acknowledge that it is not possible to know for certain what the future of technology will be like because of the scope and scale of technological development and innovation and the fact that some of the revolutionary technologies have yet to be invented.[41] They also note that it would be unfair to hold the emerging systems and technologies to a higher standard than our current ones when levelling criticism or expressing concerns about the shift from the traditional structure of the professions to a technology-based structure.[42]

The disclaimers throughout the text from the authors in anticipation of responses and criticisms make acknowledging areas that appear to be missing from this book difficult. It isn't fair to expect the authors to be able to cover every subset of each profession mentioned or to know for certain what the future will look like. The authors do not purport to write a guidebook for the professions to transition from the traditional structure to a technology-based one. Instead, they share their observations and predictions about what this transition might entail and what the result of this transition might look like.

That being said, the authors do take it upon themselves to offer predictions and hypothesize as to what the future of technology and the professions will look like, so it is interesting to note which areas of this transition, mainly relating to potential risks and problems with access to and control of the technologies themselves as opposed to access to and control of the professions, are excluded.[43] Perhaps the authors were attempting to avoid applying a dystopian lens to their work, focusing instead on the aspects of technological change that they regard to be most specific to the professions' day-to-day practices. But when this book was published, the changes in technology were already being considered from a lens of security, privacy, control, and access, especially as it relates to the use of data, and the authors do acknowledge as much.[44]

Looking at access, security, privacy, and control, the Cambridge Analytica scandal is one example that raised concerns about digital surveillance and the implications that increasingly present technology in nearly every aspect of daily life will have, particularly as it relates to potential future use as a tool for social control and influence.[45] On this point, the authors of a paper entitled "Technology, Autonomy, and Manipulation" write: "Growing reliance on digital tools in all parts of our lives—tools that constantly record, aggregate, and analyse

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39. *Ibid*.

40. *Ibid*.

41. Susskind & Susskind, *supra* note 1 at 207.

42. *Ibid* at 359–360.

43. *Ibid* at 308.

44. *Ibid*.

45. Daniel Susser, Beate Roessler & Helen Nissenbaum, "Technology, Autonomy, and Manipulation," online: (2019) 8:2 Internet Pol'y Rev at 2, DOI <10.14763/2019.2.1410>.

information about us—means we are revealing more and more about our individual and shared vulnerabilities."[46]

A smaller-scale Canadian-specific example of invasive technology practices can be seen in the finding that Home Depot of Canada Inc had been sharing client data from e-receipts to Meta for advertising purposes without receiving proper informed client consent.[47] If emerging technology will one day replace the role of many professionals, there is a stark need for regulation, oversight, and transparency when it comes to how information gathered by these technologies is collected, used, stored, or shared. Further to the access and control considerations, questions go beyond who can access what information or which technologies, to which types of data will be informing the technology enabling the shift from the profession-based society to the technology-based one, which includes understanding the *context* surrounding the production of any data.[48]

Concerns about security, control, and access to these emerging technologies are directly related to the day-to-day practices of professionals.[49] These concerns are particularly present for lawyers, as risks will arise both as part of the future litigation matters lawyers take on and the fact that lawyers will be faced with increasing regulations that will inform the expectations and codes that govern them. Answers to these questions and concerns are essential to informing the type of transition that takes place in between the largely profession-based society and the largely technology-based one. In the updated preface, Susskind and Susskind acknowledge their intention to exclude these issues and write, "[i]n future editions, this would be one of the most obvious gaps to fill."[50]

IV LOOKING TO THE FUTURE

There are aspects of technology and the profession that are not satisfactorily addressed in *The Future of the Professions*. However, the points I raise here are less a critique of the book and more comments made from my perspective as a junior member of the legal profession in Ontario. These are (1) inattention to the physical impact of technology on our environments, (2) the human rights implications that exist when sourcing essential materials for these technologies, and (3) a desire to consider the application of the book's thesis in the Ontario context.

A. Technology and Our Environs

First, there is a lack of attention throughout the book on the potential implications of this move to a technology-based society on the environment and human health. This may seem like an odd critique, since the authors make it clear that they are considering the professions

46. *Ibid* at 8.

47. Office of the Privacy Commissioner of Canada, "Home Depot Failed to Obtain Customer Consent before Sharing Personal Data with Meta" (26 January 2023), online: <https://www.priv.gc.ca/en/opc-news/news-and-announcements/2023/nr-c_230126>.

48. Catherine D'Ignazio & Lauren F Klein, *Data Feminism* (Cambridge, MA: The MIT Press, 2020) at 153.

49. Susskind & Susskind, *supra* note 1 at 308.

50. *Ibid* at liv.

specifically and not the surrounding environments. However, they do discuss the recipients of professional work, revisit barriers to accessing professional work, and in their conclusion acknowledge that many of the questions raised throughout the book apply not only to the professions but to society as a whole.[51] I feel as though the environment should have been included here.

Of course, many of the innovative future technologies mentioned in the book may aid in responding to the increasing environmental concerns across the globe. Still, as professions navigate and facilitate these changes, questions should always be raised about the impact of said changes on the environment, if any. Surely, the constant development of new technologies will render older technologies ineffective, but there is no consideration within *The Future of the Professions* for what the role of the professions will be in dealing with this. It may be necessary for the professions themselves to tackle this question. Similarly, the environmental impact of constantly storing large amounts of data, ensuring backups, and processing all this data are not addressed but should be on the minds of every professional as they participate in the transition to a technology-based society.[52]

There are many areas where law and climate change intersect, and in recent years increasing attention has been given to the role of lawyers concerning climate change and environmental movements.[53] One area in particular features voices calling for lawyers to revisit what is meant by "the rule of law" to determine whether climate change and environmental considerations should be viewed as falling under a lawyer's obligations.[54] But these considerations have not yet manifested in Canada; two proposed resolutions, one in 2021 and one in 2022, both of which address the ramifications of climate change and call for acknowledgement by the legal profession, have been unsuccessful.[55]

This particular critique is not on the central argument of the book but instead is a practical concern about the physical use and proliferation of technologies. Considering the rates of both automation and innovation, none of the book's key predictions about the impact of technologies on the professions should be entirely shocking to readers. Any conversations surrounding technology should include a substantial discussion about the future access and control dilemma beyond the current status of professionals as gatekeepers. Additionally, future technology conversations should require consideration of the impact, both beneficial and harmful, on the natural environment and human health, although the two are not mutually exclusive.

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51. *Ibid* at 394.

52. Preeta Ghoshal, "The Environmental Impact of Digitalisation: What's Your Take on Sustainable Technology?" (21 April 2023), online (blog): *Preeta Ghoshal* <https://www.fdmgroup.com/blog/environmental-impact-of-digitalisation>.

53. Steven Vaughan, "Climate Change and the Rule of Law(yers): What Thinner and Thicker Accounts Might Require of Those in Practice" (8 August 2022), online (pdf): <https://ssrn.com/abstract=4184919>.

54. *Ibid* at 9.

55. Aleem Bharmal, "Lawyers and Climate Change," BarTalk (April 2023), online: <https:www.cbabc.org/BarTalk/Articles/2023/April/Columns/Lawyers-and-Climate-Change-April-2023>.

B. Emerging Technologies and Human Rights Implications

Second, there are varied concerns about the sourcing of materials that are necessary for many current technologies, as well as the implications of improper use of technology as "tools of harassment and tools of surveillance."[56] The actual sourcing of materials essential to the production of various types of technology has been linked to extreme human rights violations, such as the use of child labour in mines to harvest cobalt for lithium batteries.[57] In response to these concerns, some scholars suggest revamping international and human rights standards so that they hold large corporations that are knowingly contributing to exploitation to a higher standard of accountability.[58]

The potential for discriminatory practices using data that has been obtained from various everyday technologies is another area sure to require further consideration by Canadian courts and legislators. The above-mentioned findings by the Office of the Privacy Commissioner of Canada as a result of the investigation into Home Depot of Canada Inc[59] provides a window into the ways that data collected about users, with or without their consent, can be used if not for proper consumer protections being put into place. Further to this, any protections implemented would necessarily need to be those that are agreed upon and established by Canadian legislation, and that becomes worrisome when considering controversial issues such as reproductive rights. For example, apps that monitor and track a person's menstrual cycle can pose a risk in places where various forms of contraception are prohibited.[60] The way we carry out many commonplace activities, from dating to using a calendar, has shifted dramatically over the last few decades because of accessible, user-friendly technology. These are smaller examples of the changes set to continue at a much larger scale as technology becomes further integrated into everyday life. Some scholars also point out the ways that access becomes particularly important when looking at the ways that technology might be used to further centralize knowledge and power without the proper checks and balances in place.[61]

C. Recent Changes Regarding the Law and Regulations of Technology in Ontario

Finally, I want to turn to how the legal profession in Canada, particularly Ontario, fits into the authors' thesis and observations. Writing about anticipating and understanding the future of the professions, Susskind and Susskind note:

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56. Molly K Land & Jay D Aronson, "Human Rights and Technology: New Challenges for Justice and Accountability," (2020) Ann Rev L & Soc Sci 223 at 226 online: <doi.org/10.1146/annurev-lawsocsci-060220-081955>.

57. D'Ignazio & Klein, *supra* note 48 at 183–184.

58. Amogh Dimri, "Child Labor and the Human Rights Violations Embedded in Producing Technology," online: (18 January 2022) Colum Undergraduate L Rev, online: <https:culawreview.org/journal/child-labor-and-the-human-rights-violations-embedded-in-producing-technology>.

59. Office of the Privacy Commissioner of Canada, *supra* note 47.

60. Laura McQuillan, "Americans Are Being Urged to Delete Period Tracking Apps. Should Canadians Do the Same?" *CBC News* (5 July 2022), online: <https:www.cbc.ca/news/health/period-tracker-apps-data-privacy-1.6510029>.

61. Land & Aronson, *supra* note 56 at 234, 236.

> For those who are trying to understand possible future directions for their own profession, we suggest that one promising line of inquiry is to identify those trends that already apply and to anticipate that most if not all of the remainder will take hold, sooner or later.[62]

The implementation of technology in the legal profession has been ongoing and steadfast over the last several years. Partly accelerated by necessity due to the COVID-19 pandemic, the legal system has embraced the use of technologies often already developed but not heavily integrated or widely used by the entire profession, such as video conferencing software. In July 2023, it was announced by the Ontario government that $166 million was being invested to facilitate the delivery of select legal services online, with Thomson Reuters at the helm.[63] This means that, in what many regard to now be a post-COVID world, the use of technology within various areas of the legal profession is here to stay and, in keeping with the predictions of Susskind and Susskind, is only going to expand in reach.[64]

In 2021, the Ontario Superior Court heard the case of *Worsoff v MTCC*[65] regarding attendance requirements for examinations for discovery. More specifically, the court was asked to decide whether virtual attendance was an appropriate method of attendance for oral examinations for discovery.[66] In making the decision, the court in *Worsoff* acknowledged the inaccessibility of the justice system and cited the potential to address some aspect of this inaccessibility by allowing remote access to continue when the circumstances are appropriate.[67]

The guidelines provided by the Canadian Bar Association in "Legal Ethics in a Digital Context"[68] are a valuable resource for lawyers looking to understand both the benefits and the risks of using emerging technologies as part of the legal profession. The introduction to these guidelines categorizes the current state of legal practice as being "necessarily digital."[69] The commentary within the guidelines also considers those who are at risk of being left behind.[70] One such group are those for whom the introduction of technology might present a further barrier to accessing legal services because of their economic situation or other personal circumstances, like the lack of Internet services.[71] Extra consideration for those most likely to be left behind in an increasingly digital age is critical, as is examining ways that potential new barriers can be broken down. "Legal Ethics in a Digital Context" considers many of the intricate pieces that are essential to the use of technology and includes an overview of the expectations and responsibilities of lawyers engaging in their work while accessing digital tools and services.[72]

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62. Susskind & Susskind, *supra* note 1 at 125.

63. Ontario Ministry of the Attorney General, "Ontario Investing in Digital Justice Platform" (18 July 2023), online: <https:news.ontario.ca/en/release/1003292/ontario-investing-in-digital-justice-platform>.

64. Susskind & Susskind, *supra* note 1 at 294.

65. *Worsoff v MTCC* 1168, 2021 ONSC 6493.

66. *Ibid* at para 6.

67. *Ibid* at paras 24–25.

68. Salyzyn & Martin-Bariteau, *supra* note 9.

69. *Ibid* at 5.

70. *Ibid* at 13.

71. *Ibid*.

72. *Ibid* at 9.

Expectations regarding the use of technology are also now found under the competency requirements for lawyers in section 3.1-2 of the *Rules of Professional Conduct* as set out by the Law Society of Ontario.[73] Lawyers who aim to meet the expected level of competence will now be required to understand and use relevant technology.[74] They also need to "understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3."[75]

These changes in the administration and regulation of the law within the Canadian legal system reflect some elements of Susskind and Susskind's work throughout *The Future of the Professions* and confirm the predictions made by the authors that the responses of professions to emerging technologies will need to be ongoing. Reflecting on recent developments in the law caused by technology, the authors draw readers' attention to the prevalence of online legal communities, virtual courts, and technology that can be used for legal research and document assembly services, to name a few.[76]

V CONCLUSION

This book was a long but informative read. While some chapters were geared toward the more theory-inclined reader and others toward those interested in the economic approach, there were also several chapters aimed at casual readers interested in the transformative influence of technology. Susskind and Susskind also tried to give guideposts to readers as to where to skip should they not be interested in reading a given section.

Those working as teachers, architects, doctors, lawyers, accountants, tax advisers, management consultants, journalists, members of the clergy, and all related roles within these professions will benefit from reading the thorough account of how we have collectively organized information via the professions and will appreciate the work that Susskind and Susskind have done to provide such an overview. For those readers who are members of the legal community, this book touches on some legal-specific areas that have been transformed by technology, but it is not the book's core focus. As highlighted above, the legal profession has already started to see changes and transformation as a result of technology.

These changes drive home the need for conversations about the future of technology to happen now. The authors write, "Before too long, we will need to revisit our ideas about full-time employment, the purpose of work, and the balance between work and leisure."[77] They also call for public debate to discuss the question raised throughout the book about where to draw the line and how to respond to questions about certain moral issues that arise during these discussions.[78] One such issue that is raised has to do with who will have ownership of the

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73. Law Society of Ontario, *Rules of Professional Conduct* (2022), online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct>, ch 3.1-2.

74. *Ibid,* rule 3.1-2 [4A].

75. *Ibid.*

76. Susskind & Susskind, *supra* note 1 at 85–88.

77. Susskind & Susskind, *supra* note 1 at 394.

78. *Ibid* at 407.

knowledge and expertise.[79] Another is the question of whether there are certain areas where it would be morally questionable or inappropriate to use technology.[80]

Those skeptical about the anticipated transformation of the professions and the overall shift to a technology-based society would benefit from reading this text. As would those interested in understanding the various theories underpinning the role that professions have played in society historically as knowledge keepers and how technology is likely to render what was once a necessarily exclusive structure ineffective in favour of emerging alternatives. I would recommend this book and look forward to observing how the Canadian legal profession continues to respond to the constantly developing area of technology.

79. *Ibid* at 406.

80. *Ibid* at 406.

BOOK REVIEW

THE RIGHT TO BE RURAL

Karen R. Foster & Jennifer Jarman, Editors

*Review by Jane van Moorsel**

CONTENTS

I INTRODUCTION

In their volume *The Right to Be Rural*,[1] editors Karen R. Foster and Jennifer Jarman provide an exploratory look at the ways in which rights in rural and urban communities differ in application and outcome for people living in these communities. The text is a response to the challenges Foster and Jarman identify in rural life, including issues such as climate change, neoliberal social and economic policies, globalization, food security, sovereignty (including in the Indigenous context), migration, and job security.[2] The edited volume demonstrates through the diverse subject matter contained in each chapter that though these challenges exist throughout Canada—and indeed the world—they have a unique manifestation in the rural

* JD 2024, Bora Laskin Faculty of Law, Lakehead University. I would like to thank my friends and family who continually support and inspire my passion for advocating for rural people and places. I would also like to especially thank Professor Tenille Brown for all of her incredible guidance and encouragement throughout this writing and publishing process.

1. Karen R Foster & Jennifer Jarman, eds, *The Right to Be Rural* (Edmonton: University of Alberta Press, 2022).

2. *Ibid* at 2.

context. The exploration of "the right to be rural" throughout the edited volume is guided by central themes and ideas, as is described by the editors in the introductory chapter:

> The chapters in this collection take up the question of the right to be rural, asking whether we can meaningfully think about rights to nature and natural resources in rural places, rural livelihoods, public services in rural and remote communities, political representation, technologies, and connectivity.[3]

The editors take up the language of "rights" as a way to frame the challenges felt by rural persons and communities, arguing that "because such challenges are altering the relationship between rural citizens and their states, it is time to analyze and articulate rural decline, survival, and sustainability of rights."[4] For the purposes of this review, the term "rurality" refers to what can be described as "rural character."[5]

A rights framework helps to parse out rights and duties that are conferred on people in rural communities specifically because of their citizenship in said rural communities. Rather than the creation of a right to be rural conceived of as a singular right, Foster and Jarman explain that the framework is akin to the "right to the city" as is articulated by Henri Lefebvre[6] and David Harvey.[7] Each chapter is thus connected by the key theme of citizenship and explores how citizenship is uniquely engaged with by rural individuals, institutions, and communities.

Foster and Jarman have assembled a collection of chapters, each written by different authors, who research the experiences of rural citizens both within Canada and globally. The book is 381 pages long, consisting of 20 chapters. The central theme of citizenship as it is connected to rights and rural life is successfully explored throughout the volume from different perspectives, including but not limited to the disciplines of sociology, policy studies, history, education, political science, urban planning, and gender studies.

The volume chapters are what would primarily be described as sociolegal scholarship in nature, as they take up questions related to law, citizenship, construction of the rural, and their sociopolitical or regulatory connections. Consequently, the intended readership of the book would most likely be academics, but could also include anyone who is connected to rural life in Canada or is living, working, and interacting in rural spaces. I read this book from the perspective of someone who has lived almost exclusively in a rural community their entire life and now attends a law school that highlights the importance of small town law practice. I am deeply familiar with issues related to what are still largely underrepresented rural communities in mainstream discourse; the issues discussed in this book represent many underexplored issues between rurality and law that are present in and applicable to rural communities. Ultimately, the volume highlights rurality as an area that needs to be further explored by legal, social, gender, education, and political scholars. The question of whether there is a "right to be rural" is answered affirmatively, though there is still work to be done to move from the abstract idea to concrete rights claims.

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3. *Ibid* at 5.
4. *Ibid* at 2.
5. *Collins English Dictionary*, online, *sub verbo* "rurality."
6. Henri Lefebvre, *Le Droit á La Ville* (Paris: Anthropos, 1968).
7. David Harvey, "The Right to the City" (2003) 27:4 Int'l J Urb & Reg Research 939.

This book review will provide a summary of the chapters and themes that are present within the book, a discussion on gaps in the literature, and finally will comment on the book itself and where it may fall best within future areas of examination.

II THEMES: CITIZENSHIP AND RURAL LIFE

The breadth of the topics covered in the chapters of this book is notable. The diversity of subject matter means that the chapters sometimes feel slightly disconnected from those in the sections before them, yet despite this, the chapter authors and the editors have done a compelling job of providing the necessary contexts, definitions, and descriptions of the themes of rurality, citizenship, and rights.

To explore such a broad question of rurality, the editors provide a rights-based framework in their introductory chapter through which to view the subsequent chapters. The editors do not provide a description of what the confines of a rights-based framework are. Rather, they list a series of questions that the reader is able to call to mind when thinking about the content found throughout the book. Some of these questions include, "How is the right to be rural claimed, protected, and enforced?" "If citizenship rights have a spatial character, what are the implications for the principles of equity and access that underpin most legal charters and declarations, at state and international levels?"[8] The editors suggest to the reader that such questions, and the subsequent dilemmas flowing from them, offer the framework "for studying and understanding the many demographic, social, economic, environmental, and political challenges faced by rural communities worldwide."[9] This interdisciplinary framework considers the rights associated with each area and, as noted, the challenges associated with implementing or accessing those rights due to the location and nature of rural communities.

The editors engage with this rights framework by examining the interaction between citizenship and rights. They argue that rights flow from the status of "citizenship" that is conferred on a person in a number of different ways.[10] Citing sociologist Margaret Somers, the editors first explain rights as being legal claims that are applied as a "package" called citizenship.[11] It is that status of having citizenship that gives rights to people, while in return providing justification for the duties associated with said citizenship.[12] The editors go on to demonstrate how this status of citizenship is strongly linked to a person's ability to contribute through capitalism.[13] It is important to point out this connection to capitalism because this critical perspective runs throughout the book. The value that is placed on a person's ability to contribute to a community through means of their labour is discussed across the chapters, often as it relates to the lack of rights afforded to rural communities when the output of labour is diminished. To demonstrate this point, the reader will see that many rural communities were often once places with thriving labour markets that have diminished over time, such as is

8. Foster & Jarman, *supra* note 1 at 1.

9. *Ibid* at 2.

10. *Ibid*.

11. *Ibid*.

12. *Ibid*.

13. *Ibid* at 3.

described in Chapter 5 with respect to the fishing industry in Newfoundland and Labrador.[14] It is as resources and sources of labour diminish that rural communities may begin to see a deterioration in the way their inhabitants experience the rights afforded to them through the nature of citizenship. The less work there is, the fewer people there are working, and those that do remain, even if they are working, are "placed among contractual malfeasants and denied the full rights of citizenship, by virtue of where they live."[15]

Interestingly, the editors do not provide a structured definition of what "rural" is intended to mean throughout the book, only briefly describing "rural" as "small, peripheral communities outside urban zones."[16] Instead, the editors leave the work of defining what "rural" means to the individual chapter authors. Many of the authors use detailed descriptions of things such as the geography of the study location, the population of the area, or the type of industry that exists in that community, rather than giving a set definition of what terms such as "rural" or "rights" mean. These descriptions provide the central context of rurality necessary for the reader, which is that rural communities are as unique and diverse as urban communities are (which have received much more attention in like literature). I think it is a highlight of the book that the authors are given the opportunity to describe rural communities in a way that captured the nuance of the individual communities studied.

The themes are explored in a consistent yet novel manner in each individual chapter, adding greatly to the flow of the book. The choice of the editors to have each of the authors provide their own standpoints on the themes of the book—particularly rurality, rights, and citizenship—brought forward some of the many characteristics that shape the intersection of rural living, policy, accessibility, and the law.

III CHAPTER SUMMARY

The first chapter sees Karen R Foster and Jennifer Jarman provide their own overview of the book, indicating what readers can expect with respect to the individual chapters, detailing the reasons for their interest in compiling this book, discussing the themes they and the contributing authors see as running through the chapters, and finally distinguishing what questions they hope to explore throughout the book.[17] The book is then split into six parts based on the central theme.

A. The Right to Rural Education

Chapter 2, written by Katie MacLeod, explores "the intersections of rural and linguistic minority rights to demonstrate how state interests can both benefit and work against the efforts of a community at the local level" through a case study the author conducted in Pomquet, Nova Scotia.[18] This chapter provides an excellent demonstration of the diversity

14. *Ibid* at 53.

15. *Ibid* at 3.

16. *Ibid* at 5.

17. *Ibid*, ch 1.

18. Katie K MacLeod, "The Right to Language in Rural Nova Scotia, Canada" in Foster & Jarman, *supra* note 1 at 20.

that exists even within incredibly small communities, providing perspective to readers who may perceive rural communities to be largely homogenous. In contrast, Chapter 3, written by Laura Domingo-Peñafiel, Laura Farré-Riera, and Núria Simó-Gil, supplies the reader with a comparison of three different Catalan secondary schools in Spain.[19] They focus on how rural education contexts may contribute to the learning of citizenship, specifically how it may open new ways to achieve democracy and participation within the school.[20] The authors conclude that it is through democratic experiences that citizenship is learned, and this is done specifically through service learning projects that students engaged in with their communities.[21]

The final chapter in Part I looks at a somewhat novel issue—the phenomenon of fake news and problematic social media content among students.[22] Through participant observation and in-depth interviews, author Ario Seto conducted ethnographic research at several schools on the Burin Peninsula in Newfoundland and Labrador. Seto discusses the challenges faced by rural students and teachers when engaging with critical citizenship education inside and outside the classroom, considering the rising circulation of problematic online content.[23] In the conclusion, the author notes that rural communities face particular vulnerabilities because of the limited access to resources aimed at supporting students' learning about social and civic skills.[24] It would be interesting to learn if findings would be different in 2024, given how much has changed with social media and content creation since the time the study was completed in 2018 and 2019.

B. The Right to Rural Livelihoods

Only two chapters are included to address this topic, yet the editors chose chapters that reflect the diversity of experiences in rural livelihood well. The two chapters explore the experiences of rural people, globally, trying to sustain themselves as citizens in their communities and their right to do so. Chapter 5, written by Gregory Hadley, is set in rural Nova Scotia and focuses on the trend of school closures in rural Canadian communities.[25] In particular, it addresses what effect these closures will have on the students who have fewer educational opportunities, the increase in outmigration caused by urban-centric curriculums teaching students to "learn to leave," and the ultimate impact this has for the right to be a citizen in a rural community. These issues pertain to what Hadley calls "matters of rural social stability and vitality."[26] This concept is also drawn on in Chapter 6, although it is from the experience of small-scale fishers living in Chilika Lagoon, India. In that chapter, the author, Pallavi Das, explores the impact that capital accumulation and the market economy play on

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19. Laura Domingo-Peñafiel, Laura Farré-Riera, & Núria Simó-Gil, "Experiencing an Active Citizenship: Democratic and Inclusive Practices in Three Rural Secondary Schools in Spain" in Foster & Jarman, *supra* note 1 at 35–50.

20. *Ibid* at 35.

21. *Ibid* at 36.

22. Ario Seto, "Hallway Pedagogy and Resource Loss: Countering Fake News in Rural Canadian Schools" in Foster & Jarman, *supra* note 1 at 51–68.

23. *Ibid* at 51.

24. *Ibid* at 64.

25. Gregory RL Hadley, "Stemming the Tide: Youth Entrepreneurial Citizenship in Rural Nova Scotia, Canada" in Foster & Jarman, *supra* note 1 at 71–90.

26. *Ibid* at 72.

the lives of rural people that rely on natural resources, such as waterways and fish, for their livelihoods.[27] Like the previous chapter, Das highlights the pattern of rural people necessarily leaving their rural communities in search of what they perceive to be better opportunities in urban centres due to the influx of urban-centric practices.[28]

C. The Right to Rural Health

The first chapter in this section, written by Sarah Rudrum, Lesley Frank, and Kayla McCarney, addresses the barriers related to birthing and maternity care in rural Canada. The premise of this chapter is that "[w]ithout accessible maternity care in rural areas, women experience the right to be rural as contingent or under threat."[29] The authors conclude that aside from immigration and migration growing communities, pregnancy, birth, and parenting are literal reproductions of society, and the right to give birth in a rural community is central to maintaining the right to be a rural citizen more broadly.[30] Chapter 8 switches focus and takes a look at rural food, specifically the rights and remedies for older persons in Canada in relation to food security.[31] Authors Kathleen Kevany and Al Lauzon frame "older persons' food security and insecurity as components of the right to be rural"[32] and conclude on the critical point that people cannot live where they cannot eat, and policy in Canada must reflect this.[33] The editors conclude this part by once again incorporating an international perspective, this time on conceptions of home amongst what authors Katja Rinne-Koski and Sulevi Riukulehto deem "third age residents" living in rural Finland.[34] In this chapter Rinne-Koski and Riukulehto frame citizenship as strongly connected to a place and relational interactions.[35] The findings of their study suggest that encouraging a sense of belonging will be key to developing sustainable rural housing and fostering the right to be rural.[36]

D. The Right to Rural Representation

In Chapter 10, Ilona Matysiak examines patterns of local civic engagement among young university graduates living in rural areas of Poland.[37] In her words, "the chapter aims to explore whether these young university graduates, as citizens, use their resources in terms of

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27. Pallavi V Das, "Dispossession, Environmental Degradation, and the Right to Be Rural" in Foster & Jarman, *supra* note 1 at 91–106.

28. *Ibid* at 102.

29. Sarah Rudrum, Lesley Frank, and Kayla McCarney, "Reproducing the Rural Citizen: Barriers to Rural Birthing and Maternity Care in Canada" in Foster & Jarman, *supra* note 1 at 107–122.

30. *Ibid* at 120.

31. Kathleen Kevany & Al Lauzon, "Rural Food: Rights and Remedies for Older Persons in Canada" in Foster & Jarman, *supra* note 1 at 123–140.

32. *Ibid* at 123.

33. *Ibid* at 134.

34. Katja Rinne-Koski & Sulevi Riukulehto, "The Multifaceted Sense of Belonging: Discursive Conceptions of Home by Third Age Residents in Rural Finland" in Foster & Jarman, *supra* note 1 at 141–156.

35. *Ibid* at 141.

36. *Ibid* at 154.

37. Ilona Matysiak, "Citizens or Individuals? Patterns of Local Civic Engagement of Young University Graduates Living in Rural Areas in Poland" in Foster & Jarman, *supra* note 1 at 159–176.

education and skills for the benefit of their villages."[38] This chapter is reminiscent of Chapter 5 in that it too looks at opportunities for young, educated people to work and remain in their home communities. But in contrast, Matysiak determines that individuality is one of the major forces driving weakened citizenship in these rural communities. Chapter 11 brings the reader back to Atlantic Canada where authors Rachel McLay and Howard Ramos frame citizenship through politics, values, and practices and compare them across urban and rural people.[39] The authors found that there is no evidence to suggest that social conservatism in Atlantic Canada's rural areas is linked to increased political activity, and in fact that rural participants with more progressive values actually reported the highest rates of political participation.[40] The final chapter in Part IV is the only chapter in the book that discusses citizenship through an Indigenous lens.[41] The chapter, written by Satenia Zimmermann, Sara Teitelbaum, Jennifer Jarman, and Peggy Smith, centres on Indigenous peoples' right to self-determination and the conflict that this constitutionally protected right is in when it comes up against the idea of Canadian citizenship.[42] The authors state that to reconcile this issue, citizenship must be approached with an allowance for the recognition of the right to self-determination and Canadian citizenship as being distinct from and, at the same time, parallel to this right.[43]

E. The Right to Rural Policy

Starting with Chapter 13, Ray Bollman writes on Canadian public policy from a rural perspective, specifically within a framework of analyzing rights, rurality, and access to services using health policy and the delivery of health services as a local patient.[44] Bollman analyzes policy respecting the geospatial dimensions of rurality, such as distance-to-density, and concludes that rural policy needs to reflect an attention to the density of the targeted policy areas.[45] Chapter 14, written by Jeofrey Matai and Innocent Chirisa, brings the reader to rural Zimbabwe and a discussion of the role that spatial planning has as a way to protect the right to be rural.[46] The chapter posits that spatial planning can be used as a comprehensive approach to developing both urban and rural areas to eliminate bias in development, thus safeguarding the citizenship of people in rural communities.[47]

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38. *Ibid* at 160.

39. Rachel McLay & Howard Ramos, "Beyond the 'Rural Problem': Comparing Urban and Rural Political Citizenship, Valus, and Practices in Atlantic Canada" in Foster & Jarman, *supra* note 1 at 177–192.

40. *Ibid* at 188.

41. Satenia Zimmerman, Sara Teitelbaum, Jennifer Jarman, & MA (Peggy) Smith, "Defining Indigenous Citizenship: Free, Prior and Informed Consent (FPIC), the Right to Self-Determination, and Canadian Citizenship" in Foster & Jarman, *supra* note 1 at 193–207.

42. *Ibid*.

43. *Ibid* at 204.

44. Ray D Bollman, "Density Matters and Distance Matters: Canadian Public Policy from a Rural Perspective" in Foster & Jarman, *supra* note 1 at 211–236.

45. *Ibid* at 228.

46. Jeofrey Matai & Innocent Chirisa, "Rural Citizenship under the Impact of Rural Transformation: Unpacking the Role of Spatial Planning in Protecting the Right to be Rural in Zimbabwe" in Foster & Jarman, *supra* note 1 at 237–252.

47. *Ibid* at 250.

Chapter 15, written by Ashleigh Weeden, deals with the right to multiple futures in the wake of smart city movements in Canada, arguing that rural areas have an opportunity to "be thoughtful about the way technology is invited into the public domain."[48] The author leaves the reader with a number of questions to consider moving forward with respect to striking a balance between the right to rural citizenship and the ways that the future of digital infrastructure will be required to meet the demands of the contemporary economy.[49] The final chapter in the section, authored by Eshetayehu Kinfu and Logan Cochrane, discusses the regularization and urbanization of rural land in Ethiopia.[50] Two distinct issues are brought forward: that accumulation of land by dispossession at the hands of the state does not consider the rights of rural residents, and that rural residents have the tools to resist and counteract these processes.[51]

F. The Right to Rural Mobility

Beginning with Chapter 17, author Stacey Haugen explores rural citizenship through displacement—namely, through analyzing citizenship within the context of refugee resettlement and integration in rural Canadian communities.[52] Haugen argues that "many of the challenges and barriers that newcomers face when attempting to access their social citizenship rights in rural and smaller communities are inherent to life in rural Canada today" and that without this understanding, everyone living in rural Canada will continue to face the difficulties associated with underfunding and disappearing social services.[53] Chapter 18 then transitions to local politics of inclusion and exclusion through an exploration of migrant labourers and their descendants following land reform in rural Zimbabwe.[54] The authors of the chapter, Clement Chipenda and Tom Tom, argue for a nuanced approach moving forward that focuses on achievement, opportunity, challenges, and prospects to frame the politics of inclusion and exclusion that are used to reduce social, political, and civil rights as well as the benefits of migrant labourers.[55] The final chapter in the book before the editors' concluding chapter is written by Jens Kaae Fisker, Annette Aagaard Thuesen, and Egon Bjørnshave Noe. The chapter centres on the Danish housing market and uses an analytical framework to understand spatial

48. S. Ashleigh Weeden, "The Right to Multiple Futures in the Shadow of Canada's Smart City Movement" in Foster & Jarman, *supra* note 1 at 253.

49. *Ibid* at 264.

50. Eshetayehu Kinfu & Logan Cochrane, "'What Makes our Land Illegal?' Regularization and the Urbanization of Rural Land in Ethiopia" in Foster & Jarman, *supra* note 1 at 271–286.

51. *Ibid* at 283.

52. Stacey Haugen, "Exploring Rural Citizenship through Displacement: An Analysis of Citizenship in the Context of Refugee Resettlement and Integration in Rural Canada" in Foster & Jarman, *supra* note 1 at 289–302.

53. *Ibid* at 301.

54. Clement Chipenda & Tom Tom, "Local Politics of Inclusion and Exclusion: Exploring the Situation of Migrant Labourers and Their Descendants after Land Reform in Rural Zimbabwe" in Foster & Jarman, *supra* note 1 at 303–320.

55. *Ibid* at 316.

injustice by specifically discussing how people who want to live in rural areas are being denied the chance to do so.[56]

The final chapter in the book is written by the editors, Jennifer Jarman and Karen Foster, and asks, "what's next for the right to be rural?"[57] They discuss the enthusiasm and positive response they received about embarking on this project and all of the interest from researchers working in such diverse subject matter areas.[58] They also return to the central question of the book, "Is there a right to be rural?" They remark that the authors in this book are "suggesting that a right to be rural means more than just the freedom to inhabit a place outside the city."[59] The editors also provide their own summaries of each section of the book and conclude with the assertion that this book is a comprehensive start to "fleshing out what the right to be rural looks like on the ground."[60]

IV Futures in Rurality and the Law

The chapters in this book highlight the dearth of attention given to rural issues in Canada and globally, and thus reveals future avenues for reflection. First, while the book is largely focused on Canadian jurisdictions, there are also many chapters written in international settings. As my perspective is that of a rural Canadian and as someone who will likely practice law in rural Canada, it would be great to see a book in the future set entirely within and across Canada. As of 2021, one in five Canadians live in a rural community, communities that represent 98 per cent of the country's landmass.[61] With that said, rurality is a distinct feature of many parts of the country, and the diversity from one rural community to another cannot be ignored. Additionally, many of the chapters in *The Right to Be Rural* were set in eastern or Atlantic Canada. This is not so much a criticism of the book, but rather a comment that this geographic focus presents an opportunity for future students, legal practitioners, and researchers to consider rural communities across all provinces and territories in Canada.

Second, *The Right to Be Rural* also includes one chapter that is centred on the experience of Indigenous peoples in Canada. In Chapter 12, Satenia Zimmerman, Sara Tetelbaum, Jennifer Jarman, and Peggy Smith provide an interesting view into how settler colonialism shapes so many of the rights that are afforded to Canadians.[62] Yet there are huge discrepancies between settler colonial communities and the Indigenous communities in Canada when it comes to accessing and exercising rights. In line with the inclusion of more Canadian literature, a future area for expansion would be on the inclusion of more Indigenous discourse and perspectives,

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56. Jens Kaae Fisker, Annette Aagaard Thuesen, and Egon Bjørnshave Noe, "Rural Redlining in the Danish Housing Market: Toward an Analytical Framework for Understanding Spatial (In)justice" in Foster & Jarman, *supra* note 1 at 321–338.

57. Jennifer Jarman & Karen R Foster, "What's Next for the Right to Be Rural?" in Foster & Jarman, *supra* note 1 at 339–349.

58. *Ibid* at 339.

59. *Ibid* at 343.

60. *Ibid* at 349.

61. Infrastructure Canada, "Canada's Rural Economic Development Strategy: Progress Report, August 2021," online: <https://ised-isde.canada.ca/site/rural/sites/default/files/documents/2022-03/rural-strat-august-2021-aout-eng.pdf>.

62. Zimmerman et al, *supra* note 41.

especially as it relates to the framework of rights and the interactions of those rights as they come to bear on citizenship. Call to Action 65 from the Truth and Reconciliation Commission of Canada calls upon the government, in collaboration with Aboriginal peoples, post-secondary institutions, and educators, to establish a research program with multi-year funding to advance an understanding of reconciliation.[63] It is of the utmost importance to recognize that many of the Indigenous communities in Canada are located in rural and remote locations, and to be effective, the steps taken toward reconciliation must take into account the rurality of the large number of Indigenous communities in Canada and North America. Call to Action 65 presents the legal and sociological fields of academia with an opportunity to highlight and learn more about the particular issues affecting rural and remote Indigenous communities, and books like *The Right to Be Rural* are where the knowledge acquired can be shared for future students, communities, and researchers to learn from.

Finally, the text does not provide a detailed and definitive description of what exactly the "right to be rural" is. No doubt this lack of detail is the result of a specific choice made by the editors to highlight the citizen-centred approach to creating the rural, which in turn is considered from an interdisciplinary perspective grouped around subject matter concerns (such as health, education, representation, etc.). Through this multifaceted examination, the authors collectively create a detailed account of the variability in rural spaces and reject a binary understanding of rural versus urban. As noted earlier in this review under the discussion of themes, the editors do not provide a definition of what a rights-based framework truly represents to them. Writing as a law student and future lawyer, a more succinct definition on "the right to be rural" would be useful to understand how these rights might manifest in legal claims.

My law school, Bora Laskin Faculty of Law at Lakehead University, boasts three curriculum mandates, one being a focus on small town/sole practitioner law. This particular mandate is one of the main reasons that students from rural communities, such as myself, are interested in studying here. Law schools such as the Bora Laskin Faculty of Law are a great example of how the academic sphere can encourage more interest in rurality, how legal concerns manifest in the rural context, and the importance of that context. Having the ability to read and access books such as *The Right to Be Rural* is a helpful tool for exploring legal issues in a rural setting.

V CONCLUSION

The Right to Be Rural is a comprehensive introduction to many of the sociolegal issues that rural communities and individuals are faced with in Canada and worldwide. As such, I would highly recommend this book for an academic audience because of its appeal to several academic disciplines. As mentioned, the book would be best described as sociolegal, not strictly legal, but there are also themes of economics, psychology, urban planning, and more. The organizational structure of having six sections that tackle different aspects of rurality and rights provides structure to the different themes of the book and would be helpful for locating

63. Truth and Reconciliation Commission of Canada, *Calls to Action* (2015), online: <https://www2.gov.bc.ca/assets/gov/british-columbians-our-governments/indigenous-people/aboriginal-peoples-documents/calls_to_action_english2.pdf>.

content based on fields of study—for example, the three chapters on health may be of interest to rural healthcare practitioners.

The book should be of particular interest to legal and sociological academics and researchers, and especially those with an interest in rights-based concerns viewed from a contextual perspective. With the starting points of an introduction to a rights-based framework, lawyers and future lawyers are the exact group of people who would benefit from thinking about and researching further on the theory and practical application of rights in rural communities; my own life experience and desire to practice in my own rural community is a perfect example of the purpose of this book in action. This edited volume demonstrates the importance of prioritizing research focused on making rural communities more liveable and sustainable in the long term by growing and maintaining the population of young people who call rural communities home and trying to prevent outmigration.