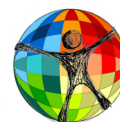


Gladue, Ipeelee and the Justice System's Bias against Indigenous People: The Story of Saskatchewan and How We Can Change Its Ending

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ABSTRACT

Saskatchewan has some of the highest rates of incarceration of Indigenous offenders in Canada. While Indigenous people account for 16.3% of the total population of the province, they represent 76% of admissions to custody. In this paper, the author attempts to identify causes for this situation in the current administration of criminal justice in Saskatchewan. She begins with the hypothesis that the confusion surrounding the correct application of the Supreme Court decisions of *R. v. Gladue* and *R. v. Ipeelee* – both concerning the effects of s. 718.2(e) of the Criminal Code, a remedial provision to reduce incarceration rates amongst Indigenous offenders – leads to a misapplication of them by the Saskatchewan judiciary, possibly motivated by unconscious racial biases. This, in conjunction with little effort to implement programs and structures for Indigenous people in Saskatchewan, in turn contributes to their overincarceration in the province. Consequently, this affects their right to liberty. The paper also examines possible solutions to this problem, if it is in fact one, by turning to alternatives from Ontario's criminal justice system.

The author proceeds by first reviewing the *Gladue* and *Ipeelee* decisions and considers how *Gladue* is generally applied in Saskatchewan and Ontario. She then studies the (mis) application of *Gladue* and *Ipeelee* in Saskatchewan by reviewing recent Saskatchewan cases that cite these decisions and by defining unconscious bias and the right to liberty. This leads the author to answer how the misapplication of *Gladue* and *Ipeelee* and possible unconscious biases on the part of the Saskatchewan judiciary and legislatures leads to the infringement of the right to liberty of Indigenous people in the province. Afterwards, the paper briefly looks at Ontario's application of *Gladue* and *Ipeelee* in cases, and how the system in place in Ontario possibly leads to lower incarceration rates of Indigenous offenders. Finally, the paper moves on to deliberating how the possible solutions found in Ontario could be applied to Saskatchewan in order to reduce the negative impacts of possible unconscious bias.

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Introduction

"Why does the Prime Minister not just say the truth and tell Indigenous peoples that he does not give a fuck about their rights?"¹

– Romeo Saganash, MP for Abitibi – Baie-James –
Nunavik – Eeyou

On September 25, 2018, Romeo Saganash spoke these now (in)famous words in front of a bewildered House of Commons. Although the Cree MP for Abitibi – Baie-James – Nunavik – Eeyou was referring to Aboriginal peoples' rights under s. 35 of the *Constitution Act, 1982*,² I could not help but think that this was also the case for Indigenous' peoples' rights within the Canadian criminal justice system. Let me explain.

During the summer of 2018, I interned at the Wiyasiwewin Mikiwahp Native Law Centre at the University of Saskatchewan, where I was assigned to work on the Gladue Awareness Project.³ This project aimed to educate criminal justice stakeholders as to Gladue issues by developing informational brochures and holding seminars throughout Saskatchewan. While working on this project, I got to discuss with criminal justice personnel and read about 200 Saskatchewan sentencing decisions concerning Aboriginal accused. This was an eye-opening experience – in a very negative sense. I got a second-hand experience of the systemic discrimination that Indigenous people face in the land of living skies.⁴ In fact, Saskatchewan has some of the highest rates of incarceration of Aboriginal offenders.⁵ I was also under the

¹ Canada, House of Commons, "Natural Resources", *Official Report of Debates (Hansard)*, 145, No 325 (25 September 2018) at 1425 (Mr Romeo Saganash).

² *Ibid*; Although the term Indigenous is preferred, please note that I will use the terms Indigenous and Aboriginal interchangeably throughout this essay. This will be to lighten the writing, given that most of the legislation and jurisprudence I will refer to uses the term Aboriginal.

³ The project ended in mid-November;

Penny Smoke, "Gladue Awareness Project travels Saskatchewan to talk about Indigenous incarceration rates" (8 August 2018), online: CBC News <https://www.cbc.ca/news/indigenous/gladue-awareness-project-travels-saskatchewan-to-talk-about-indigenous-incarceration-rates-1.4776973>.

⁴ Saskatchewan is known as the land of living skies – its license plates bear the expression.

⁵ Statistics Canada, *Table 5 Admissions to adult correctional services, by characteristic of persons admitted, type of supervision and jurisdiction*,

impression that the system – including the judiciary – was contributing to these indecently high numbers. I felt that Indigenous peoples' basic right to liberty was being violated in Saskatchewan.

Without using language as colorful as Mr. Saganash's, I would like to dissect this feeling and understand what lead me to conclude this. I will thus attempt to verify the following hypothesis in this essay. I, in fact, believe that the confusion surrounding the correct application of the Supreme Court decisions of *R. v. Gladue* and *R. v. Ipeelee* – both concerning the effects of s. 718.2(e) of the *Criminal Code*, a remedial provision to reduce incarceration rates amongst Aboriginal offenders⁶ – could lead to a misapplication of them by the Saskatchewan judiciary, possibly motivated by unconscious racial biases. This, in conjunction with little effort to implement programs and structures for Indigenous people in Saskatchewan, could in turn be contributing to their overincarceration in the province. Consequently, this would affect their right to liberty. I would also like to attempt to identify possible solutions to this problem, if there is in fact one. Ontario appears to offer some interesting alternatives.

Therefore, I will proceed by first reviewing the *Gladue* and *Ipeelee* decisions and briefly consider how *Gladue* is generally applied in Saskatchewan and Ontario.⁷ Then, I will turn to the (mis)application of *Gladue* and *Ipeelee* in Saskatchewan by reviewing recent Saskatchewan cases that cite these decisions and by defining unconscious bias and the right to liberty. This will lead me to answer how the misapplication of *Gladue* and *Ipeelee* and possible unconscious biases on the part of the Saskatchewan judiciary and legislatures could lead to the infringement of the right to liberty of Indigenous people in the province. Afterwards, I will briefly examine Ontario's application of *Gladue* and *Ipeelee* in cases and how the system in place in Ontario could possibly lead to lower incarceration rates of Indigenous offenders. Finally, if my thesis is correct, I will consider how the possible solutions found in Ontario could be applied to Saskatchewan to reduce the negative impacts of possible unconscious bias.

2016/2017, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018);

⁶ *R v Gladue*, [1999] 1 SCR 688 at para 33, 1999 CanLII 679 (SCC) [*Gladue*].

⁷ Please note that I will not consider the application of *Gladue* to young offenders or the *Youth Criminal Justice Act*, for lack of space and time.

The System in Place

a. Summary of the Gladue and Ipeelee Supreme Court decisions

To better understand the question, it is crucial that we summarize the *R. v. Gladue* and *R. v. Ipeelee* Supreme Court of Canada decisions, which serve as a foundation for all of our subsequent findings. Both decisions concern section 718.2(e) of the *Criminal Code*, which came into force in 1996, and states that:

A court that imposes a sentence shall also take into consideration the following principles: [...] 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.⁸

R. v. Gladue

The 1999 case of *Gladue* is the one of Jamie Tanis Gladue, a 19-year-old Cree woman who was convicted of manslaughter for the death of her partner Reuben Beaver.⁹ She had grown up and was living off reserve, in an unstable family environment.¹⁰ At the age of 17 years old, she gave birth to her first child with Beaver, at the hands of whom she suffered domestic abuse.¹¹ She had been celebrating her birthday and was heavily inebriated when she stabbed him, after he had verbally provoked her.¹² She was also pregnant with their third child, and suffering from a hyperthyroid condition at the time of the offence, which rendered her emotionally unstable.¹³ She pled guilty and, while on bail, followed alcohol abuse counselling and proceeded to upgrade her education.¹⁴ Furthermore, she apologized to the victim's family at the sentencing hearing.¹⁵ However, the trial judge found

⁸ *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

⁹ *Gladue*, supra note 6 at paras 2-13.

¹⁰ *Ibid* at para 2.

¹¹ *Ibid* at para 9.

¹² *Ibid* at paras 5-6.

¹³ *Ibid* at paras 2, 10.

¹⁴ *Ibid* at para 10.

¹⁵ *Ibid* at para 11.

that the amendment to the *Criminal Code*, s. 718.2(e), did not apply to her because he did not consider that there were special circumstances arising from her Aboriginal background, given that she lived off reserve.¹⁶ Her appeal at the Court of Appeal of British Columbia was dismissed.¹⁷ The Supreme Court of Canada thus had to decide on the proper interpretation and application of s. 718.2(e) of the *Criminal Code*.

The Supreme Court of Canada consequently found that this provision imposed a duty on sentencing judges to consider the circumstances of aboriginal offenders, and that it had a remedial purpose with regards to their overincarceration.¹⁸ Further, the provision has to be read in conjunction with all other factors in Part XXIII of the *Criminal Code*.¹⁹ As a result, sentencing judges have to consider

(a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.²⁰

The judges thus require information concerning the accused, their culture and their community. The offender retains the right to waive the gathering of this information. Further, a prison term may be reduced if there are no alternatives to incarceration. Most importantly, the provision applies to all Aboriginal people regardless of where they live.²¹ Justices Cory and Iacobucci, writing for the majority, also specify that:

[i]n defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly so as to include any network of support and interaction that might be available, including one in an urban

¹⁶ *Ibid* at para 18.

¹⁷ *Ibid* at para 20.

¹⁸ *Ibid* at para 33.

¹⁹ *Ibid* at para 93.

²⁰ *Ibid*.

²¹ *Ibid*.

centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.²²

R. v. Ipeelee

More than a decade after *Gladue* came the *Ipeelee* decision. This decision concerned two appeals for two Indigenous men who had been declared long-term offenders, Manasie Ipeelee and Frank Ralph Ladue. Both men had long-term offender designations and a history of committing offences while intoxicated and they were both convicted of breaching conditions of their long-term supervision orders (LTSOs).²³ The Supreme Court of Canada had to decide how a fit sentence for an Aboriginal offender convicted of breach of an LTSO was to be determined.²⁴ However, the fact that the case of *R. v. Gladue* was also discussed is more of concern to this paper. Some contentious points as to its application by sentencing judges were in fact clarified.

Writing for the Court, Justice LeBel stressed the importance of the duty of sentencing judges to consider the special circumstances of Aboriginal offenders in all cases before them where the offender is Aboriginal, no matter the seriousness of the crime. A failure to do so would be considered an error in law that could justify appellate review.²⁵ It would also be considered to be inconsistent with the fundamental sentencing principle of proportionality.²⁶ Moreover, Justice LeBel mentioned *Gladue* reports and situated their importance in sentencing an Indigenous offender:

In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing

²² *Ibid.*

²³ *R v Ipeelee*, [2012] 1 SCR 433 at paras 1,10, 25, 2012 SCC 13 (CanLII) [*Ipeelee*].

²⁴ *Ibid* at para 1.

²⁵ *Ibid* at para 87.

²⁶ *Ibid* at para 68.

such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2 (e) of the Criminal Code.²⁷

Furthermore, many courts had in the past misinterpreted *Gladue* as imposing a duty on the part of the offender to prove that there is a causal link between the offence and their specific circumstances.²⁸ However, the Supreme Court found in *Ipeelee* that there was no such burden on the offender, as that would prove to be too much of a burden to put on them.²⁹

Moreover, the Supreme Court of Canada reiterated the importance of applying *Gladue* principles to serious offences. Many courts had previously erroneously interpreted the passage in *Gladue* stating that sentences for Aboriginal and non-Aboriginal offenders will be similar for more violent or serious offences as an exception allowing judges to ignore *Gladue* information in those cases.³⁰ In addition, Justice LeBel commented that it is useless to compare the sentence that the Aboriginal offender before the court would receive with the sentence that a non-Aboriginal, hypothetical offender would receive, given that there is only one offender being sentenced.³¹ Sentencing is in fact, an individualized process.³²

Further, the Supreme Court gave examples of matters that provide context for understanding the case-specific information about the offender and his community provided by counsel that courts must take judicial notice of:

[...] the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course

²⁷ *Ibid* at para 60.

²⁸ *Ibid* at para 82.

²⁹ *Ibid* at para 83.

³⁰ *Ibid* at para 84.

³¹ *Ibid* at para 86.

³² *Ibid* at para 38.

higher levels of incarceration for Aboriginal peoples.³³

Finally, it is stated that unless the right to have individualized information be considered by the court is waived by the offender, counsel have a duty to bring this information to the judge in every case where the offender is Aboriginal.³⁴

b. How Gladue is generally applied in Saskatchewan: the system in place for Gladue reports

When I was assigned to work on the Gladue Awareness Project, I was told that this project was the first phase of a larger enterprise. The ultimate goal was to create standardized training for Gladue report writers in Saskatchewan. In fact, the province currently does not have any form of training for Gladue report writers. Those accused who wish to have a Gladue report written by a writer with formal training have to look over to British Columbia.³⁵ What is even more worrisome is the fact that only 20 Gladue reports were commissioned in the province in 2017, and it is unknown how many Gladue report writers there are in Saskatchewan – it is believed there might only be one.³⁶ These numbers are abysmally low when we consider the fact that 16.3% of the Saskatchewan population is Indigenous.³⁷ However, it is difficult to get exact numbers with regards to Gladue reports written in Saskatchewan or even with regards to the amount of cases involving Aboriginal offenders that considered Gladue factors. That is because many, if not most, of these sentencing decisions in Canada are not reported.³⁸ This proved to be a

³³ *Ibid* at para 60.

³⁴ *Ibid* at para 60.

³⁵ James T.D. Scott, "Reforming Saskatchewan's Biased Sentencing Regime" (2017) 65 Crim LQ 91 at 13 (WL Can).

³⁶ Meaghan Craig, "Only Gladue report writer in Sask.: 'The people that are needing them are not getting them'" (1 March 2018), online: <https://globalnews.ca/news/4054625/gladue-report-writer-saskatchewan/>; Bre McAdam, "'Gladue reports need to be done': report writer calls for network in Sask." (5 March 2018), online: <https://thestarphoenix.com/news/local-news/sask-gladue-report-writer-calls-for-more-writers-in-province>.

³⁷ Statistics Canada, *Aboriginal identity population by both sexes, total - age, 2016% distribution, Canada, provinces and territories, 2016 Census – 25% Sample data*, Catalogue No 98-402-X2016009 (Ottawa: Statistics Canada, 25 October 2017).

³⁸ Anna Johnson & Paul Millar, "Invisible No More: Sentencing Post-Gladue in Manitoba and Saskatchewan Manslaughter Cases", 37 Windsor Rev Legal Soc Issues 26 at 36 (WL Can).

challenge for the Gladue Awareness Project. How could we make recommendations and plan for reforms to the system in place in Saskatchewan when we could not find basic information on it?

Nevertheless, there is some limited information available as to the implementation of the *Gladue* decision in Saskatchewan. For instance, it has been reported that given the high costs required to fund a full *Gladue* report, Legal Aid Saskatchewan has to ration, based on criteria, how many of them are to be paid for. Because of Legal Aid's limited funding, many Indigenous offenders who should have one prepared are thus never able to afford to have one prepared.³⁹ It seems that courts however have the option to order *Gladue* reports in certain cases.⁴⁰ It also appears that Saskatchewan courts favor pre-sentence reports (PSRs) with *Gladue* components over *Gladue* reports.⁴¹ This could be of concern to Indigenous accused, since PSRs are focusing more and more on risk assessment, which have been proven to be culturally biased against Indigenous people, including by the Supreme Court itself.⁴²

c. *How Gladue is generally applied in Ontario: the system in place for Gladue reports, Gladue Court*

While researching alternatives to the current system in place in Saskatchewan, I was told many times to look at what Ontario was doing. Many criminal justice stakeholders I spoke to believed that Saskatchewan should model itself after Ontario, which they described as having implemented measures that permit a correct application of the *Gladue* and *Ipeelee* decisions. I now turn to those specific measures.⁴³

In the first place, *Gladue* reports in Ontario are prepared by Aboriginal Legal Services following a finding of guilt or a guilty

³⁹ Scott, *supra* note 35.

⁴⁰ Tim Quigley, "Gladue Reports: Some Issues and Proposals", 31 CR-ART 405 at 3 (WL Can).

⁴¹ Alexandra Hebert, "Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice", 43 Queen's LJ 149 at 165 (WL Can).

⁴² Quigley, *supra* note 40 at 2; *Ewert v. Canada*, 2018 SCC 30 [Ewert]. In fact, in the case of *Ewert v. Canada*, the country's highest tribunal ruled against Corrections Canada's risk assessment tools, stating that they discriminate against Indigenous offenders and ordering reforms to eliminate this bias.

⁴³ Given that I do not discuss measures regarding young offenders in this paper, I will not consider Aboriginal Youth Courts in Ontario.

plea.⁴⁴ They will be prepared in cases where the prosecution aims for at least 90 days incarceration for the offender, but there can be some exceptions made.⁴⁵ A report will usually take about 6 to 8 weeks to prepare.⁴⁶ These reports are written by Gladue caseworkers, who have followed training from Aboriginal Legal Services in Gladue report writing, legal issues and available Aboriginal community programs for offenders.⁴⁷ There are currently three Gladue caseworkers in Ontario, employed by Aboriginal Legal Services.⁴⁸ Aboriginal Legal Services is funded by the Department of Justice (Canada), the Ministry of the Attorney General (Ontario), the Ministry of Children and Youth Services (Ontario), Legal Aid Ontario, Miziwe Biik Aboriginal Employment and Training, and individual donors.⁴⁹ Therefore, offenders do not need to spend their own funds to have Gladue reports prepared. This appears to ensure a better access to their Gladue rights for Indigenous people in Ontario in comparison with Indigenous people in Saskatchewan.

But where Ontario has been innovating the most is with regards to Gladue Court. In fact, from October 2001 to the present day, Gladue Court has been in operation in downtown Toronto, at the Old City Hall courthouse.⁵⁰ The court aims to apply the Gladue decision and section 718.2(e) of the *Criminal Code* in order to remedy the effects of colonialism on the justice system and Indigenous people.⁵¹ Judges sitting at Gladue Court are of

⁴⁴ Aboriginal Legal Services, "Gladue Court Request Form" (2016), online: Aboriginal Legal Services <https://www.aboriginallegal.ca/gladue-request-form.html>. For Indigenous offenders in the following courts: Barrie, Brantford, Cambridge, Cayuga, Fort Erie, Guelph, Hamilton, Kitchener-Waterloo, Lindsay, Milton, Mississauga, Niagara Falls, North Bay, Orillia, Oshawa, Ottawa, Peterborough, Sarnia, Sault St. Marie, St. Catharines, Stratford, Sudbury, Toronto and Windsor.

⁴⁵ Aboriginal Legal Services, "Gladue Report Request Form" (2016) at 2, online (pdf): Aboriginal Legal Services <https://www.aboriginallegal.ca/assets/2016-final-gladue-request-form-two-pages.pdf>.

⁴⁶ *Ibid.*

⁴⁷ Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Three October 2006-September 2007" (March 2008) at 3, online (pdf): Aboriginal Legal Services <https://www.aboriginallegal.ca/assets/gladueyear3.pdf>.

⁴⁸ *Ibid.*

⁴⁹ Aboriginal Legal Services, "Fundings" (2016), online: Aboriginal Legal Services <https://www.aboriginallegal.ca/funders.html>.

⁵⁰ Scott Clark, "Evaluation of the Gladue Court Old City Hall, Toronto" (2016) at 6, online (pdf): Aboriginal Legal Services <https://www.aboriginallegal.ca/assets/gladue-court-evaluation-final.pdf>.

⁵¹ *Ibid.*

course educated as to and aware of the past and current realities of Indigenous people in Canada. They also have access to updated lists of resources for Aboriginal individuals throughout Ontario.⁵² In addition to the judges and the Gladue caseworkers, Gladue Court is also composed of the following actors:

an Aboriginal criminal court worker, employed by Aboriginal Legal Services, who interviews and screens each defendant to see if they qualify for diversion,

[...] an Aboriginal Bail Program supervisor from the Toronto Bail Program who interviews and screens defendants without sureties for eligibility for release,

two Ontario Legal Aid Program duty counsel who have expressed an interest in defending Aboriginal persons and received training,

two Crown counsel, one for federal charges and one for provincial charges, who have expressed an interest in the particular circumstances of Aboriginal offenders and received training [...]

an Aboriginal Legal Services employee who is responsible for post-sentence follow up with specific focus on those persons for whom the Gladue caseworker has prepared a report.⁵³

As a result, it is ensured through these mechanisms that Gladue factors are taken into account when sentencing Aboriginal offenders. It is also common practice for the Aboriginal court worker to discuss with Crown attorneys to have the charges dropped or be diverted.⁵⁴ Cases will typically be diverted to the Community Council at Aboriginal Legal Services, a restorative circle. The circle is composed of Indigenous volunteers and elders with a view to rehabilitation. They collaborate with the offender

⁵² National Judicial Institute, "The Toronto Gladue (Aboriginal Persons) Court An Update" (April 2005) at 2-3, online (pdf): *Aboriginal Legal Services* <https://www.aboriginallegal.ca/assets/gladuecourtupdate2005.pdf>.

⁵³ *Ibid* at 2.

⁵⁴ Clark, *supra* note 50 at 7-9.

to discuss what led to the offence and not the offence itself to structure a rehabilitative program.⁵⁵

*d. Statistics on the incarceration of Indigenous people:
Saskatchewan and Ontario*

Before comparing the effects of the different structural approaches for application of *Gladue* in Saskatchewan and Ontario, it is necessary that we examine the demographics of these two provinces, including those of the carceral population.

It has now been well established over the years that there is an overrepresentation of Indigenous people within the criminal justice system as a whole, especially in prisons.⁵⁶ As of 2017, Indigenous people constituted 30% of all admissions to provincial and territorial custody and 27% of federal custody,⁵⁷ while only constituting 4.1% of Canada's adult population.⁵⁸ It is noteworthy that the situation is not better than before the *Gladue* decision: Aboriginal people constituted 15% of all admissions to provincial and territorial custody and 17% of all admissions to federal custody in 1998,⁵⁹ while the Canadian census of 1996 indicated that 2.8% of the Canadian population was Aboriginal.⁶⁰ It indeed appears that the overrepresentation of Indigenous people within Canadian prisons has become more pronounced since the *Gladue* decision.⁶¹

The disproportion of Indigenous people within the carceral system is also very pronounced in Saskatchewan. In 2017, Aboriginal people represented 76% of admissions to custody,⁶² while only accounting for 16.3% of the population of the

⁵⁵ *Ibid* at 42.

⁵⁶ Statistics Canada, *Adult and youth correctional statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 85-002-X (Ottawa: Statistics Canada, 19 June 2018);

Ewert, *supra* note 42 at para 57.

⁵⁷ *Supra* note 5.

⁵⁸ Malakieh, *supra* note 56.

⁵⁹ Statistics Canada, *Adult Correctional Services in Canada, 1997-98*, by Micheline Reed & Julian Roberts, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, Vol 19 no 4) at 5.

⁶⁰ Statistics Canada, *1996 Census: Aboriginal Data*, Catalogue No 93F0025XDB96000 (Ottawa: Statistics Canada, 13 January 1998).

⁶¹ Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 *Crim LQ* 470 at 471 (WL Can).

⁶² *Supra* note 5.

province.⁶³ In 1998, before the *Gladue* decision, Aboriginal people represented 72% of admissions to custody,⁶⁴ while accounting for 11.4% of the population of the province.⁶⁵

As for Ontario, in 2017, Aboriginal people represented 12% of admissions to custody,⁶⁶ while accounting for 2.8% of the population of the province.⁶⁷ In 1998, before the *Gladue* decision, Aboriginal people represented 9% of admissions to custody,⁶⁸ while accounting for 1.3% of the population of the province.⁶⁹

Thereupon, in the present day, in Saskatchewan, the proportion of Indigenous people in custody is approximately 4.7 times their proportion in the general population of the province. In comparison, in Ontario, the proportion of Indigenous people in custody is approximately 4.3 times their proportion in the general population of the province. Consequently, the overrepresentation of Indigenous people in prisons is thus slightly less pronounced in Ontario than in Saskatchewan. This is interesting because the presence of Aboriginal people in the carceral population was originally greater in Ontario than in Saskatchewan: in 1998, it was approximately 6.9 times their proportion in the general population in Ontario while being 6.3 times their proportion in the general population in Saskatchewan.⁷⁰

⁶³ *Supra* note 37.

⁶⁴ *Supra* note 59.

⁶⁵ *Supra* note 60.

⁶⁶ *Supra* note 5.

⁶⁷ *Supra* note 37.

⁶⁸ *Supra* note 59.

⁶⁹ *Supra* note 60.

⁷⁰ Please note that for all of these calculations, I took into consideration proportions, and not the number of people. I thought it would be more relevant to consider proportions than numbers, as Saskatchewan has a much larger Indigenous population than Ontario. Consequently, I thought that it would be fairer to compare by percentages/proportions than strictly by numbers.

To arrive to my conclusions, I divided the proportion of Indigenous people within prisons by the proportion of Indigenous people within the general population of the province. Thus, I could say that the proportion of Indigenous people in prison was “x” times their proportion within the general population of the province.

The (Mis)application of Gladue and Ipeelee in Saskatchewan

a. Summary and brief analysis of three recent Saskatchewan cases in which Gladue or Ipeelee is misapplied

I previously mentioned that I had read about 200 sentencing decisions for Aboriginal offenders from Saskatchewan. During the considerable amount of time I spent reviewing the jurisprudence, I got to observe the evolution of the Saskatchewan's judiciary's understanding of the repercussions of residential schools and intergenerational trauma on Indigenous offenders' moral blameworthiness. Nonetheless, I could still sense some form of resistance, or at least a certain discomfort on the part of judges, to introducing remedial measures to colonialism in the recent jurisprudence. This resistance – or discomfort – manifested itself in misapplications of the *Gladue* and *Ipeelee* decisions. I will attempt to identify what I would qualify as errors in the three following judgements: *Peekeekoot v. R.*, *R. v. Nippi*, and *R. v. Heathen*. I will not be summarizing the entirety of the issues in each of the cases, but only the ones that are relevant to our line of inquiry.

Peekeekoot v. R.

This 2014 appeal to the Court of Appeal of Saskatchewan tells the story of Andy Peekeekoot, a Cree man in his thirties.⁷¹ Born to parents addicted to drugs and alcohol, from the age of two he moved from foster home to foster home, in which he was subjected to physical and sexual abuse.⁷² He became involved with the criminal justice system at the age of eleven, after being convicted of theft.⁷³ He then accumulated convictions for violent offences.⁷⁴ The appeal concerned his designation as a dangerous offender and sentence to an indeterminate term of incarceration, following a 2005 conviction of assault with a weapon.⁷⁵ One of his reasons for appealing the Provincial Court's decision was his

⁷¹ *Peekeekoot v R*, 2014 SKCA 97 at para 1 [*Peekeekoot*].

⁷² *Ibid* at paras 7-10.

⁷³ *Ibid* at para 11.

⁷⁴ *Ibid* at para 15.

⁷⁵ *Ibid* at paras 17-21.

belief that the judge failed to consider his *Gladue* factors sufficiently.⁷⁶

Unfortunately for Mr. Peekeekoot, the appeal was dismissed and the Court of Appeal found that the trial judge had sufficiently considered his *Gladue* factors.⁷⁷ However, the decision rendered by the highest tribunal for the province was of importance not only to Mr. Peekeekoot but to all Indigenous people in the land of living skies. As a matter of fact, it was ruled that *Gladue* factors are not to be taken into account for the first line of inquiry in dangerous offender proceedings.⁷⁸ Section 753(1) of the *Criminal Code* describes the criteria for a dangerous offender designation – this is the first stage of the inquiry.⁷⁹ According to the Court in *Peekeekoot*, these are objective criteria that should not be influenced by *Gladue* factors and leave no room for s. 718.2(e).⁸⁰ On the other hand, the second line of inquiry, which considers the possibility of managing the offender in the community and find him a long-term offender instead, would allow the consideration of *Gladue* factors.⁸¹

The Supreme Court of Canada in *Ipeelee* did not address whether or not s. 718.2(e) applied to dangerous offender proceedings; therefore, it cannot be said that the Court of Appeal in *Peekeekoot* made an error as to this issue. While this is the case, this finding from the Saskatchewan judiciary may still be of concern with regards to the rights of Indigenous people in the province. In fact, Saskatchewan “designates people as dangerous offenders at a rate which is vastly disproportionate to [their] population when compared to all of the other Provinces.”⁸² Accordingly, Aboriginal offenders in Saskatchewan have a higher chance of being designated as a dangerous offender than in other provinces. As a result, they will not be able to use what could possibly be an important tool to avoiding indefinite incarceration – the consideration of *Gladue* factors. It could thus be said that this finding of the Court of Appeal of Saskatchewan contributes to the overincarceration of Indigenous offenders.

⁷⁶ *Ibid* at para 4.

⁷⁷ *Ibid* at paras 71, 123.

⁷⁸ *Ibid* at para 61.

⁷⁹ *Ibid* at paras 60-61.

⁸⁰ *Ibid* at para 61.

⁸¹ *Ibid* at para 62.

⁸² Scott, *supra* note 35 at 3.

Nevertheless, another part of the *Peekeekoot* decision caught my attention and appeared to be even more alarming. At paragraph 118, Chief Justice Richards, writing for the Court, states the following:

Mr. *Peekeekoot* and the Intervenor also suggest that the sentencing judge erred by failing to requisition a “*Gladue* report” in this case. In my view, that submission is misplaced. Special reports dealing only with *Gladue* concerns are rarely prepared in this jurisdiction. But, I see no problem with that [emphasis added] at the level of general principle. This is because the evidentiary aspect of the sentencing challenge presented by s. 718.2(e) of the Code is about ensuring that information relevant to, and necessary for, a *Gladue* analysis is placed before the judge. Whether this is done by way of an appropriately comprehensive pre-sentence report, a formal “*Gladue* report”, oral testimony, or a combination of such methods is beside the point. [emphasis added]⁸³

I was bewildered to read that Chief Justice Richards was not concerned by the lack of *Gladue* reports in his province, even after the country’s highest tribunal stressed the importance of *Gladue* reports and the indispensable character of their information for judges to fulfill their s. 718.2(e)-mandated duties.⁸⁴

Furthermore, in this specific case, the Court found that they had sufficient *Gladue* information about Mr. *Peekeekoot*, while most, if not all the information about him was provided by correctional services. This included a risk assessment, which was considered to be *Gladue* information.⁸⁵ However, as explained previously, risk assessment tools have been proven, including by the Supreme Court itself in *R. v. Ewert*, to be culturally biased against Indigenous people.⁸⁶ Therefore, it seems inappropriate for the Saskatchewan judiciary to accept the results of a risk assessment as contextual information about an Indigenous offender. Further, it has been demonstrated that Aboriginal

⁸³ *Peekeekoot*, *supra* note 71 at para 118.

⁸⁴ *Ipeelee*, *supra* note 23 at para 60.

⁸⁵ *Peekeekoot*, *supra* note 71 at paras 64-69.

⁸⁶ *Ewert*, *supra* note 42 at paras 63-67;
Hebert, *supra* note 41 at 160.

offenders might not give all relevant information to whoever is collecting *Gladue* information that is not a *Gladue* report writer, because they might feel uncomfortable or intimidated speaking about deeply personal and traumatic experiences to someone who they feel is part of the system.⁸⁷ Many Aboriginal people in fact still have distrust in the criminal justice system – there is a broken relationship, generated by years of systemic discrimination against Aboriginal people, that still needs to be repaired.⁸⁸ Additionally, probation officers, who often write pre-sentence reports, have a certain influence in determining what happens to an offender,⁸⁹ which could be interpreted as a conflict of interest.

R. v. Nippi

Mr. Dion Ivan Nippi, a 35-year-old Saulteaux man, was found guilty of sexual assault contrary to section 271 of the *Criminal Code* and of being unlawfully in a dwelling house with intent to commit an indictable offence therein contrary to section 349(1) of the *Criminal Code*.⁹⁰ In the sentencing decision from the Court of Queen's Bench for Saskatchewan, his personal circumstances are laid out, provided from a *Gladue* report.⁹¹ Mr. Nippi, an alcoholic, was intoxicated when he committed the offence against a long-time friend. As a result, he did not remember it but apologized and expressed regret to the victim anyway.⁹² Mr. Nippi was also affected by schizophrenia and Hepatitis C and had intellectual disabilities resulting from his mother's consumption of alcohol during pregnancy.⁹³ Furthermore, after traumatizing experiences in foster care and at Gordon Residential School, where he was sexually, physically and mentally abused, he began drinking heavily at the age of 12

⁸⁷ Quigley, *supra* note 40 at 2.

⁸⁸ Nancy Macdonald, "Canada's prisons are the 'new residential schools'" (18 February 2016), online: *Maclean's* <https://www.macleans.ca/news/canada/canadas-prisons-are-the-new-residential-schools/>.

⁸⁹ Hebert, *supra* note 41;

Emploi Québec, "Probation and parole officers and related occupations (NOC 4155)", online: *Emploi Québec* http://imt.emploiuebec.gouv.qc.ca/mtg/inter/noncache/contenu/asp/mtg_in_validurl_01.asp?lang=ANGL

⁹⁰ *R v Nippi*, 2015 SKQB 90 at paras 1, 6 [*Nippi*].

⁹¹ *Ibid* at para 1.

⁹² *Ibid* at paras 4, 14.

⁹³ *Ibid* at para 13.

and consuming drugs at the age of 14.⁹⁴ This also affected his cognitive development.⁹⁵ Consequently, Mr. Nippi ceased attending school in Grade 9, after which he accumulated criminal offences and began living on the streets.⁹⁶ In addition to those hardships, he was frequently subjected to racism and discrimination for being First Nations.⁹⁷ However, the *Gladue* report points out that he now had considerable support from family in his community, Kinistin Saulteaux Nation, and also had access to culturally-specific therapeutic resources.⁹⁸ It is expressed that Mr. Nippi desired to turn his life around.⁹⁹

The Court of Queen's Bench decided not to reduce his sentence because of *Gladue* factors or consider alternatives to incarceration: he was sentenced to imprisonment for two years less a day, followed by two years of probation.¹⁰⁰ He would only have access to the programs enumerated in the *Gladue* report during the probation period.¹⁰¹ The Court justified this conclusion using reasoning which misapplies *Ipeelee*.

Indeed, the sentencing judge, Justice Turcotte, put undue emphasis on the passage at paragraph 33 of *Gladue*, in this case as cited in *R. v. Wells* at paragraph 44, about serious offences attracting similar sentences for Aboriginal and non-Aboriginal offenders.¹⁰² Here, Justice Turcotte, qualifying the sexual assault by Mr. Nippi as a serious offence,¹⁰³ stated that "the consideration of *Gladue* factors will not always attract a reduced sentence for aboriginal offenders, especially when the aboriginal person is charged with a serious offence."¹⁰⁴ Subsequently, he cited paragraph 75 of *Ipeelee*, which explains that:

Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially

⁹⁴ *Ibid* at paras 9.

⁹⁵ *Ibid* at para 13.

⁹⁶ *Ibid* at para 9.

⁹⁷ *Ibid*.

⁹⁸ *Ibid* at paras 10, 14.

⁹⁹ *Ibid* at para 14.

¹⁰⁰ *Ibid* at paras 24, 44-48.

¹⁰¹ *Ibid* at para 48.

¹⁰² *Ibid* at para 24.

¹⁰³ *Ibid* at para 45.

¹⁰⁴ *Ibid* at para 24.

reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case.¹⁰⁵

He cited this passage to justify the fact that applying *Gladue* factors will not necessarily imply reducing a sentence.¹⁰⁶ However, he failed to mention that only a few paragraphs later in *Ipeelee*, it was stated by the Supreme Court that this passage of *Gladue* had received “unwarranted emphasis”¹⁰⁷ and that “there is no such thing as a ‘serious’ offence.”¹⁰⁸

It thus seems that Justice Turcotte selected specific passages of *Ipeelee* to better suit his views, while deciding to ignore the ones that do not. This purposeful misapplication of *Ipeelee* is not without consequence – it contributes to the overincarceration of Indigenous offenders by condemning Mr. Nippi to a longer prison term.

R. v. Heathen

This very recent decision by Justice Agnew of the Provincial Court of Saskatchewan solely concerns whether *Gladue* is to be applied at the bail stage.¹⁰⁹ After reviewing authorities from Alberta, British Columbia and Ontario, which all consider that it does apply, he found that it does not in Saskatchewan.¹¹⁰ He reached this conclusion by explaining why each of the decisions he has reviewed were wrong – according to his judicial interpretation. Below are a few that poorly interpret the Supreme Court of Canada’s views on the application of s. 718.2(e) in the *Gladue* and *Ipeelee* cases.

Justice Agnew qualified some of the decisions that consider *Gladue* factors at bail hearings as “cultural context cases”.¹¹¹ In those cases, the Court finds that judges should look at:

¹⁰⁵ *Ipeelee*, *supra* note 23 at para 75.

¹⁰⁶ *Nippi*, *supra* note 90 at para 25.

¹⁰⁷ *Ipeelee*, *supra* note 23 at para 84.

¹⁰⁸ *Ibid* at para 8.

¹⁰⁹ *R v Heathen*, 2018 SKPC 29 at para 1 [*Heathen*].

¹¹⁰ *Heathen*, *supra* note 109.

¹¹¹ *Ibid* at para 15.

whether the sureties offered, in the context of the Aboriginal culture, can control the accused's behaviour. The Court must also look at whether detention of the Aboriginal accused has a disproportionately negative impact on that accused, and whether that impact could be alleviated by strict bail conditions. Finally, the Court must look at whether aboriginal law and customs provide the assurances of attendance in court and protection of the public that are required for release. Each case will be dependent on its specific facts, but a broader analysis is required where the accused is an Aboriginal.¹¹²

The Provincial Court of Saskatchewan in *Heathen* nonetheless found that this is not specific to Aboriginal accused; personal circumstances, including cultural ones, will be taken into account whether the accused is Aboriginal or not.¹¹³ Further, Justice Agnew asserted that what was listed above does not relate to *Gladue* considerations, because these "cultural context" factors do not fit within the list of possible *Gladue* factors provided at paragraph 60 of the *Ipeelee* decision.¹¹⁴

These conclusions by Justice Agnew arise from a misapplication of *Ipeelee*. He disregarded the first part of the sentence from paragraph 60 of *Ipeelee* (included in his reasons), by cutting it out of the citation.¹¹⁵ The full sentence from the Supreme Court judgement reads as follows:

To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.¹¹⁶

¹¹² *Ibid.*

¹¹³ *Ibid* at para 19.

¹¹⁴ *Ibid* at para 20.

¹¹⁵ *Ibid* at para 20.

¹¹⁶ *Ipeelee*, *supra* note 23 at para 60.

By not including the first part of the sentence before the enumeration, which uses the words “such matters as”, Justice Agnew implied that the enumeration is a closed list of factors when it is not and misled the reader of his decision into believing that it is in fact one. Since it is an open list, there is still a possibility that what the “cultural context” cases consider could be included within it.

Additionally, Justice Agnew argued that to qualify “cultural context” considerations at bail as *Gladue* factors suggests that non-Aboriginal accused could be “denied bail because they do not raise cultural-context arguments in the mistaken belief that such arguments apply only to Aboriginal persons.”¹¹⁷ However, as stated by Justice Agnew himself, this would be a mistaken belief – which could easily be corrected by courts. Furthermore, this argument failed to consider that s. 718.2(e) is meant to have a remedial purpose for the overincarceration of Indigenous offenders, as expressed in *Gladue*.¹¹⁸ It is the very purpose of the provision to right the wrongs suffered by Aboriginals that non-Aboriginals have not experienced. Hence, it is not an error to apply *Gladue* factors with a view to substantive and not formal equality¹¹⁹ – it is the law.

Moreover, refusing to leave space for the application of Indigenous law at the bail stage appears to reflect a refusal on the part of the Provincial Court of Saskatchewan to consider the Supreme Court’s opening to Indigenous customary law in the *Gladue* and *Ipeelee* decisions.

Next, Justice Agnew criticized how certain decisions justify considering *Gladue* factors at bail hearings on the possibility of allowing rehabilitative measures earlier in the criminal justice process. He argued that rehabilitation is a sentencing objective that only applies to offenders that have been found guilty, and not to accused at the bail stage. To consider a sentencing objective pre-finding of guilt would have negative implications to the accused’s presumption of innocence, “the fundamental premise of our entire justice system”.¹²⁰

¹¹⁷ *Heathen*, *supra* note 109 at para 24.

¹¹⁸ *Gladue*, *supra* note 6 at para 33.

¹¹⁹ *United States v. Leonard*, 2012 ONCA 622 at para 60, 112 OR (3d) 496.

¹²⁰ *Heathen*, *supra* note 109 at para 29.

While this argument is not wrong, it ignores something important. Indeed, Indigenous people are denied bail more often than non-Indigenous people. This has been recognized many times in academic literature as well as by the Supreme Court itself in the *Gladue* and *Ipeelee* decisions.¹²¹ Given the many delays in our criminal justice system, Indigenous accused consequently often find themselves awaiting trial in prison for months at a time.¹²² When they finally reach the trial stage, they often plead guilty even when they are innocent as a way to avoid further incarceration during the longer trial proceedings required by a non-guilty plea.¹²³ This is a clear affront to the presumption of innocence. In fact, it appears to be a greater affront to the presumption of innocence than considering rehabilitative action at the bail stage, given that it implies declaring innocent people guilty of a crime they did not commit. Therefore, the argument against considering *Gladue* factors at bail hearings is not very convincing.

Furthermore, while rehabilitation is indeed a sentencing objective according to the *Criminal Code*, it could also be considered as being part of Indigenous customary law, given that many Indigenous legal traditions aim for re-establishing harmony in an individual and their community.¹²⁴ By considering rehabilitation as a *Gladue* “cultural context” factor itself, and not just as justifying their application, it would not be problematic to aim for rehabilitation. The Provincial Court of Saskatchewan’s argument against it would then not stand.

b. What is unconscious bias and what is its role in the Saskatchewan judiciary?

Unconscious racial biases, also sometimes referred to as implicit racial biases, have been the subject of many studies in the past half-century.¹²⁵ Indeed, as conscious or explicit racial biases become less socially acceptable and thus less put forward, many scholars wonder about the effects of unconscious ones in people

¹²¹ Macdonald, *supra* note 88;
Gladue, *supra* note 6 at para 65;
Ipeelee, *supra* note 23 at para 61.

¹²² Macdonald, *supra* note 88.

¹²³ *Ibid.*

¹²⁴ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* – 2nd ed. (Don Mills: Oxford University Press Canada, 2009) at 66-67.

¹²⁵ Mark Bennett, “The Implicit Racial Bias in Sentencing: The Next Frontier” (2017) 126 *Yale LJ* 391 at 391.

holding positions of power, such as judges. Similarly, I ask what role unconscious racial biases against Indigenous people play in decision-making in Saskatchewan. As previously mentioned, I believe that it impacts it in a manner that contributes to the overincarceration of Indigenous people in the province.

As defined by Elek & Hannaford-Agor, unconscious or implicit biases are “unconscious attitudes (including culturally learned associations or generalizations that we tend to think of as stereotypes) [that] introduce unjustified assumptions about other people and related evidence that can distort a person’s judgment and behavior.”¹²⁶ It appears that most contemporary cognitive scholars’ adopt similar definitions.¹²⁷ It is quite obvious why the presence of implicit biases amongst judicial decision-makers would be problematic: the Rule of Law, constitutionally-protected in Canada, as well as section 15 of the *Canadian Charter of Rights and Freedoms*, guarantee equal treatment for all before and under the law.¹²⁸

On the other hand, while the country’s highest tribunal requires impartiality from judges,¹²⁹ the test for reasonable apprehension of bias in a decision is quite difficult to satisfy. As judges benefit from a presumption of impartiality, the threshold to ground a finding of bias is high.¹³⁰ A reasonable and informed person has to find “a real likelihood or probability of bias”.¹³¹ Hence, while explicit manifestations of bias are not necessarily required, it is difficult to imagine a finding of bias from a Court without external manifestations of it. As a result, this approach leaves little judicial recourse against decisions to incarcerate Indigenous offenders where it is alleged the judge was influenced by an unconscious racial bias against Indigenous people.

Nonetheless, it has been argued by James Scott in his 2017 article “Reforming Saskatchewan’s Biased Sentencing

¹²⁶ Jennifer K. Elek & Paula Hannaford-Agor, “First, Do No Harm: On Addressing the Problem of Implicit Bias in Juror Decision Making” (2013) 49 Ct Rev 190 at 190.

¹²⁷ Bennet, *supra* note 125 at 393.

¹²⁸ *Roncarelli v Duplessis*, [1959] SCR 121 at 142, 1959 CanLII 50 (SCC); *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹²⁹ *R v S(RD)*, [1997] 3 SCR 484 at para 29, 1997 CanLII 324 (SCC).

¹³⁰ *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, [2015] 2 SCR 282 at para 30, 2015 SCC 25 (CanLII).

¹³¹ *Ibid* at para 25.

Regime” that the Saskatchewan judiciary is biased against Indigenous offenders.¹³² In fact, after reviewing sentencing decisions from the province, he has found that Aboriginal offenders are sentenced more frequently to jail terms than non-Aboriginal offenders, and that they are also sentenced to longer periods of incarceration.¹³³ For instance, “[o]n average, Aboriginal people are sentenced to over twice as much jail time per person.”¹³⁴ Consequently, Scott argues that s. 718.2(e) of the *Criminal Code* and the *Gladue* decision have not had much effect in the land of living skies and that its sentencing regime and its judges perpetuate the overincarceration of Indigenous offenders because of their biases against them.¹³⁵ Henceforth, the overrepresentation of Aboriginal people in Saskatchewan prison populations is not to be blamed only on the systemic factors leading them to offend more, as described in *Gladue*,¹³⁶ but on the criminal justice system and its actors as well.

Likewise, when taking into account this article as well as my finding above that the proportion of incarcerated Indigenous people is presently greater in Saskatchewan than in Ontario while it was originally greater in Ontario pre-*Gladue*, I am driven to conclude that there has to be some form of bias against Indigenous people in the Saskatchewan criminal justice system. The fact that there are no explicit mentions of racism in the research leads to the conclusion that judges and the Saskatchewan criminal justice system as a whole are shaped by unconscious racial biases against Aboriginals.

Signs of systemic bias against Indigenous people in Saskatchewan

While Canada has constitutional authority with regards to Aboriginal people, provinces have clear authority over the administration of justice, and thus over the remedial measures to be implemented with regards to them, such as the ones deriving from s. 718.2(e) of the *Criminal Code* and the *Gladue* and *Ipeelee* decisions.¹³⁷ Thusly, provinces chose how they want to reduce the impacts of colonialism on Aboriginal people with regards to the criminal justice system. It is the provinces’

¹³² Scott, *supra* note 35.

¹³³ *Ibid*, at 2.

¹³⁴ *Ibid*.

¹³⁵ Scott, *supra* note 35.

¹³⁶ *Gladue*, *supra* note 6 at para 67.

¹³⁷ Quigley, *supra* note 40 at 4.

responsibility to decide how much they want to invest to remedy this problem.

As a result, if the absence of systemic structures negatively impacts the overincarceration of Indigenous people, it is because of choices made by the province's government. In the absence of more information, the lack of certain structures in Saskatchewan that Ontario has could be pointed to as responsible for the higher rates of incarceration of Indigenous offenders in Saskatchewan. For instance, Ontario has chosen to have publicly-funded *Gladue* report writers and *Gladue* courts, with many trained professionals that work with Aboriginal offenders throughout the province. Conversely, as previously stated, Saskatchewan seems to only have one trained *Gladue* report writer, who was trained in British Columbia, and it does not have any *Gladue* courts. Furthermore, Aboriginal justice workers in Saskatchewan come from and are funded by Aboriginal communities themselves.¹³⁸ While the proportions of incarcerated Indigenous offenders in the two provinces cannot be directly linked to programs meant to respond to *Gladue*, they are still a factor that can be taken into account. The factors leading Indigenous people to prisons are multiple and complex, but the provinces' investment cannot be ignored.

Hence, it appears that Saskatchewan's choice to barely implement any measures following the *Gladue* decision, which negatively impacts on the overincarceration of Indigenous people, is motivated by unconscious racial biases. Saskatchewan, unlike Ontario, denies the need to put in place more structures,¹³⁹ which shows a disregard for Aboriginal communities. In the absence of any clear racial discrimination, this points to unconscious racial biases in the Saskatchewan legislatures that motivate their decision-making.

Signs of judicial bias against Indigenous people in Saskatchewan

The misapplications, or errors of interpretation, of the *Gladue* and *Ipeelee* decisions found in Saskatchewan sentencing decisions also present as signs of judicial unconscious bias against Indigenous people.

In the *Peekeekoot* case, the refusal to apply *Gladue* factors to dangerous offender proceedings' first line of inquiry, as

¹³⁸ From what I was told by Aboriginal justice workers during my internship.

¹³⁹ *Hebert*, *supra* note 41 at 165.

well as to consider the inadequacy of PSRs in lieu of full *Gladue* reports, points to an unconscious bias against Aboriginal people. It is a refusal by judges to fully commit to remedying their overincarceration and treating them differently to achieve substantive and not formal equality.

In the *Nippi* case, the judge ignored the Supreme Court's comments in *Ipeelee* on serious offences and non-Aboriginal offenders. He even purposefully selected which parts of the judgement allowed him to limit the application of *Gladue* the most. This interpretation of the *Ipeelee* decision seems to be guided by unconscious motives: implicit biases against Aboriginal people that lead him to limit their rights.

Finally, a similar phenomenon can be observed in the *Heathen* case. While the judge could have decided to extend *Gladue* rights to the bail stage, like his colleagues in Alberta, British Columbia and Ontario have, he instead went into complex and abstract reasoning to deny Indigenous people more rights. He also ignored the systemic problems that Aboriginals face at bail hearings, recognized by the Supreme Court itself.¹⁴⁰ Again, this seems to have been motivated by unconscious bias against Indigenous people.

In sum, it appears that the gaps left for judges to interpret in the *Gladue* and *Ipeelee* decisions have left room for the Saskatchewan judiciary's unconscious racial biases to operate, negatively impacting on the overrepresentation of Indigenous people in the carceral system.

c. *What is the right to liberty in Canada?*

The right to liberty, first introduced as legislation in the English *Magna Carta* of 1215,¹⁴¹ is a human right that has been recognized by Canada through the adoption of many human rights instruments. It is in fact recognized in the country through, amongst others, article 3 of the *Universal Declaration of Human Rights*, adopted by Canada in 1948, article 9 of the *International Covenant on Civil and Political Rights*, adopted by Canada in

¹⁴⁰ *Gladue*, *supra* note 6 at para 65.

¹⁴¹ Icelandic Human Rights Centre, "The Right to Liberty", online: Icelandic Human Rights Centre <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-liberty>.

1966, and of course, article 7 of the *Canadian Charter of Human Rights and Freedoms*, constitutionally protected in Canada since 1982.¹⁴²

Liberty, the state of being free, is generally defined as opposed to imprisonment.¹⁴³ However, liberty as a right is more precise. Given that deprivation of liberty is recognized as legitimate in certain circumstances – such as when someone is found guilty of a crime and sentenced to a term of imprisonment – it follows that the right to liberty is not absolute.¹⁴⁴ What the right to liberty in human rights instruments does guarantee is that “detention will not be arbitrary or unlawful.”¹⁴⁵ While the right to liberty also usually offers other protections, I will concentrate on this one, which is most relevant to our inquiry.

Indeed, protection against unlawful or arbitrary detention is especially important in the context of the overincarceration of Indigenous people in Saskatchewan. Furthermore, the specific right to liberty of Indigenous individuals, guaranteed through article 7 of Bill C-262, meant to implement in Canada the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is on its way to being formally protected in Canada, having passed the third reading in the House of Commons.¹⁴⁶ This specific right was already supported by Canada through its full support of UNDRIP since 2016.¹⁴⁷

¹⁴² *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71;

International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171;

Canadian Charter of Rights and Freedoms, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

¹⁴³ Encyclopaedia Britannica, “Liberty” (2018), online: *Britannica Academic* <https://academic-eb-com.proxy3.library.mcgill.ca/levels/collegiate/article/liberty/630232>.

¹⁴⁴ Icelandic Human Rights Centre, *supra* note 141.

¹⁴⁵ *Ibid.*

¹⁴⁶ Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2018 (third reading 30 May 2018).

¹⁴⁷ Indigenous and Northern Affairs Canada, “United Nations Declaration on the Rights of Indigenous Peoples” (3 August 2017), online: *Government of Canada* <https://www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

*d. How the misapplication of Gladue and Ipeelee in
Saskatchewan leads to the infringement of the right to
liberty of Indigenous people in the province*

Accordingly, when considering the disproportionately high number of incarcerated Aboriginals in Saskatchewan caused by misapplications of the *Gladue* and *Ipeelee* decisions through a lack of structural implementation and judicial errors of interpretation in the province, it becomes clear that Saskatchewan is breaching the right to liberty of Aboriginal offenders. The broad definition of the right to liberty, guaranteed to its citizens by Canada through all the above-mentioned instruments, of a right against arbitrary or unlawful detention, is being violated by Saskatchewan.¹⁴⁸

In fact, the errors of interpretation described in section 2. B. i., resulting in sentences of imprisonment for the Indigenous offenders, constitute unlawful detention. In the Canadian common law, Supreme Court rulings constitute law.¹⁴⁹ Therefore, if *Gladue* and *Ipeelee* are applied incorrectly, these errors are unlawful. A sentencing judgment from Saskatchewan that condemns an Indigenous offender to a term of imprisonment because of a misapplication of *Gladue* or *Ipeelee* would thus result in unlawful detention, and hence, in a violation of Indigenous people's right to liberty. In addition, the refusal of the Saskatchewan legislatures to create structures or enforce measures meant to implement the remedial purposes of the *Gladue* and *Ipeelee* decisions, resulting in higher rates of incarceration for Indigenous people, could also be seen as infringing on their right to liberty.

Consequently, the misapplication of *Gladue* and *Ipeelee* in Saskatchewan – motivated by unconscious racial biases – which contributes to the overincarceration of Indigenous people

¹⁴⁸ Please note that I will not analyze the situation through the legal approach to a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*. Given that this approach concerns government, as per s. 32 of the *Charter*, and that judges have been found not to be government according to the Supreme Court of Canada decision *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, the analysis would only partially be relevant to our inquiry. I will thus speak of the general right to liberty that is guaranteed in Canada through many human rights instruments.

¹⁴⁹ The Canadian Online Legal Dictionary, "Stare decisis", online: *Irwin Law* https://www.irwinlaw.com/cold/stare_decisis.

in the province, leads to an infringement of Indigenous people's right to liberty, a right that should be guaranteed to all Canadians.

Possible Alternatives: A Look at Ontario

On the other hand, Ontario, which has reduced the overrepresentation of Aboriginals in prisons since the *Gladue* decision, applies the *Gladue* and *Ipeelee* decisions with a different approach. The following section describes three decisions in which this was the case.

a. Three recent Ontario cases in which Gladue and Ipeelee are applied

R. v. Sim

In 2005, the Ontario Court of Appeal significantly expanded the application of *Gladue*. Indeed, in *R. v. Sim*, it ruled that consideration of *Gladue* factors also applies to decisions reached by the Ontario Review Board with regards to releasing an Aboriginal individual found to be non-criminally responsible of a crime by reason of mental disorder.¹⁵⁰ The Ontario Court of Appeal reached this conclusion by finding that *Gladue* principles should be considered at any stage of the criminal justice process where the liberty of an Aboriginal person is at stake.¹⁵¹

R. v. Kakekagamick (II)

In 2006, in *R. v. Kakekagamick (II)*, the Ontario Court of Appeal ruled on the importance of a *Gladue* analysis within a sentencing decision. It indicated that "sentencing judges must do more than merely mention the fact that an offender is Aboriginal to meet the criteria of s. 718.2(e)."¹⁵² Further, the methodology and information required from judges to sentence Indigenous offenders was restated by the court, with emphasis on the greater weight to be given to *Gladue* factors than in the past.

¹⁵⁰ *R v Sim*, 2005 CanLII 37586 (ON CA) at para 27, 78 OR (3d) 183; Aboriginal Legal Services, "Gladue at the Ontario Court of Appeal" (2016), online: Aboriginal Legal Services <https://www.aboriginallegal.ca/gladue-court-of-appeal.html>.

¹⁵¹ Aboriginal Legal Services, *supra* note 150.

¹⁵² *R v Kakekagamick*, 2006 CanLII 28549 (ON CA), 81 OR (3d) 664; Aboriginal Legal Services, *supra* note 150.

R. v. Brant

In 2008, the Ontario Superior Court of Justice further expanded the reach of *Gladue*. In *R. v. Brant*, it confirmed that *Gladue* principles were to be a part of bail hearings.¹⁵³ A failure to do so would justify appellate intervention.¹⁵⁴

b. How the application of Gladue and Ipeelee and the system in place in Ontario possibly leads to lower incarceration rates of Indigenous offenders in the province

The factors driving Indigenous people in Canada to prisons in large numbers are complex and numerous. While I cannot enumerate them all in this paper, I have established that the misapplication of *Gladue* by the judiciary and legislatures of Saskatchewan leads to higher proportions of representation of Saskatchewan Aboriginals in the carceral system. The opposite reasoning can be applied to Ontario. As established previously, Ontario has managed to reduce its originally greater proportion than Saskatchewan of Aboriginals incarcerated pre-*Gladue* to a presently smaller proportion of Aboriginals incarcerated than in Saskatchewan. It is thus possible to point to the application of *Gladue* and *Ipeelee* by Ontario courts as a possible cause of the existence of these numbers. In fact, by adopting an expansive approach to the application of *Gladue* and *Ipeelee*, Ontario courts ensure Indigenous peoples' rights and contribute to reducing their presence in prisons. The same can be said of the approach adopted by Ontario legislatures with regards to their progressive programs that implement *Gladue*.

c. What approach should Saskatchewan adopt?

Therefore, Saskatchewan decision-making bodies, whether judicial or legislative, could benefit from adopting approaches to *Gladue* that mirror Ontario's, given their greater success with reducing the overrepresentation of Indigenous offenders in prisons. For instance, Saskatchewan legislatures should consider funding and training *Gladue* report writers, and implementing *Gladue* courts and Aboriginal sentencing circles. As to the Saskatchewan judiciary, it should consider adopting more expansive approaches to interpretation of *Gladue* and *Ipeelee* like Ontario's, such as accepting consideration of *Gladue* at all

¹⁵³ *R v Brant*, 2008 CarswellOnt 9594 at para 14, [2008] O.J. No. 5375.

¹⁵⁴ *Ibid* at para 15.

stages of the criminal justice process where an Aboriginal's liberty is at stake, or simply not interpreting the Supreme Court's decisions in a manner that restricts Indigenous peoples' s. 718.2(e) rights.

Having Saskatchewan adopt these measures appears simple on paper. However, there are resource issues at play: Saskatchewan has a larger Indigenous population than Ontario,¹⁵⁵ which necessarily implies larger funding requirements. Nonetheless, as explained previously, this would be an important political choice for Saskatchewan, given that it impacts on Indigenous peoples' right to liberty. Therefore, even when considering resource issues, it is necessary for Saskatchewan to commit to repairing the wrongs done by the Canadian criminal justice system to Indigenous people.

Nevertheless, while these measures may contribute to reducing the proportion of incarcerated Aboriginal individuals, they may not reduce unconscious racial biases amongst decision-makers in Saskatchewan. There are some additional measures that can be implemented. Some American studies of the judiciary have shown, through the use of Implicit Association Tests (IATs), that judges are not immune to unconscious bias.¹⁵⁶ However, these studies have also shown that awareness of one's own implicit biases, through, for instance, the administration of IATs, allows individuals such as judges to control and limit the impact of their unconscious biases on the decisions they reach.¹⁵⁷ Saskatchewan should thus require its judges to undergo IATs to assess their unconscious racial biases against Indigenous people. This would allow judges to control their implicit biases when sentencing Indigenous offenders, as to not restrict their liberty unnecessarily.

Conclusion

To conclude, the confusion surrounding the correct application of the Supreme Court decisions of *R. v. Gladue* and *R. v. Ipeelee* does lead to a misapplication of them by the Saskatchewan judiciary, motivated by unconscious racial biases. This, along with little effort to implement programs and structures

¹⁵⁵ *Supra* note 37.

¹⁵⁶ Bennett, *supra* note 125 at 400-401;
Rachlinski et al., "Does Unconscious Racial Bias Affect Trial Judges?" (2009) 84:3 Notre Dame L Rev 1195 at 1221.

¹⁵⁷ Rachlinski, *supra* note 156 at 1221.

for Indigenous people in Saskatchewan, is in turn contributing to their overincarceration in the province. As a result, there is an infringement of their right to liberty. I have also concluded that the alternatives offered by Ontario – correct interpretations of *Gladue* and *Ipeelee*, training for *Gladue* report writers, publicly funded *Gladue* reports and *Gladue* Court, amongst others – should be implemented in Saskatchewan to remedy these problems.

However, even with these measures in place, unconscious racial biases may still influence decision-making in Saskatchewan. Another way to eradicate implicit bias besides controlling it would be to simply make decision-making bodies, whether judiciary or legislative, more inclusive. Diversifying them by including more Indigenous individuals appears to be an obvious solution: it seems logical that they would be less inclined to discriminate against Indigenous people. Indigenous individuals are also more likely to understand their complex realities and histories at a deeper level, having lived them. Fortunately, this process has already begun. On March 23rd, 2018, two Métis women were appointed as judges to the Provincial Court of Saskatchewan.¹⁵⁸ More of importance to myself and the *Gladue* Awareness Project, is the fact that Michelle R. Brass, from Peepeekisis First Nation, was appointed as judge to the provincial court in Estevan, Saskatchewan, a few weeks ago.¹⁵⁹ Judge Brass, a First Nations woman and an all-around amazing person, was whom I had the opportunity to spend most of my internship with. She was, in fact, in charge of the *Gladue* Awareness Project. During a long drive to Lac La Ronge, a Cree community in northern Saskatchewan where we presented a seminar on *Gladue*, she told me that she had applied to become a judge. She spoke of representation issues in the Saskatchewan judiciary and the thought of this conversation stayed with me until I learned of her appointment. I now feel that this made the project come full circle: the point of it was to educate to better implement the *Gladue* decision in

¹⁵⁸ Indigenous Bar Association, “Indigenous Bar Association congratulates two new indigenous judge appointments in Saskatchewan” (2018), online: Indigenous Bar Association <https://www.indigenousbar.ca/indigenous-bar-association-congratulates-two-new-indigenous-judge-appointments-in-saskatchewan/>.

¹⁵⁹ Thomas Piller, “First Nation woman appointed judge at Estevan, Sask. Provincial court” (23 November 2018), online: Global News <https://globalnews.ca/news/4694149/first-nation-woman-judge-estevan-sask-provincial-court/>.

Saskatchewan. I have no doubt that Judge Brass will be the best person for the job.

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