PRINCIPLED JUSTICE FOR INDIGENOUS PEOPLES? AN EMPIRICAL ANALYSIS OF THE APPLICATION OF *GLADUE* FACTORS IN CANADIAN LOWER COURTS

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This article examines section 718.2(e) of the Criminal Code*, which is aimed at reducing the imprisonment of Indigenous offenders and the application of the Supreme Court of Canada's decision in* R. v. Gladue*. Using court observation of docket court sentencing, this article demonstrates that the restrictive context of the lower court sentencing environment, along with the complexity of the sentencing task, influences and reduces the number and kinds of* Gladue *sentencing factors considered and restricts a judge's ability to appropriately weigh the factors that ought to play a meaningful role in Indigenous sentencing. Drawing from research literature from the fields of behavioural economics and psychology about cognitive bias, heuristics, and the use of stereotypes, the findings of this study suggest that, faced with these circumstances, judges may rely on heuristics and form judgments about a defendant's character and their potential future behaviour. In this way, stereotypes relating to offenders' race permeate their sentencing decisions. The findings that Indigenous sentencing principles are not being employed in a principled way have important implications for the legitimacy of our legal institutions.*

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I. INTRODUCTION

The overrepresentation of Indigenous peoples in Canada's prisons is a critical issue for our criminal justice system. Despite representing only 4.1 percent of the overall Canadian population, Indigenous inmates in federal institutions rose from 20 percent of the inmate population in 2008–2009 to 28 percent in 2017–2018.[1] In Saskatchewan, Indigenous peoples comprise 17.0 percent of the population[2] but 80 percent of provincial jail inmates.[3] The overrepresentation of Indigenous offenders in prison populations is an indication that discrimination may play a role in sentencing. Understanding the processes by which Indigenous peoples are sentenced and why they appear to be sentenced differently than non-Indigenous people is crucial to reducing Indigenous overrepresentation in our prisons.[4] However, while most offenders are sentenced in lower provincial courts,[5] few systematic studies have investigated the lower court sentencing of Indigenous peoples in Canada.

Parliament recognized and responded to the overrepresentation of Indigenous peoples in section 718.2(e) of the *Criminal Code* by directing sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances … with particular attention to the circumstances of Aboriginal offenders."[6] Three years later, the Supreme Court of Canada found, in *R. v. Gladue*, that there are unique contextual considerations in Indigenous sentencing that must be taken into account in order to address the issue of Indigenous overrepresentation in the criminal justice system.[7] However, it has been suggested that this approach to Indigenous sentencing is having a limited impact.[8] While some researchers have attempted to explain why this is so, most of these attempts

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1 Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*, by Scott Clark (Ottawa: Research and Statistics Division, 2019) at 1, online (pdf): *Department of Justice* [perma.cc/T4F5-TN6J].

2 Statistics Canada, *Census Profile, 2021 Census of Population*, Catalogue No 98-316-X2021001 (Ottawa: Statistics Canada, 15 November 2022), online (table): *Statistics Canada* [perma.cc/6N3Z-3C49].

3 Yasmine Ghania, "Tackle Social Issues that Lead to Incarceration, Says Sask. Advocate in Wake of Prison Watchdog Report," *CBC News* (4 November 2022), online: [perma.cc/UXH5-XWA8].

4 Library of Parliament, *Indigenous People and Sentencing in Canada* (Background Paper), Publication No 2020-46-E (Ottawa: Library of Parliament, 2020).

5 "Saskatchewan Courts," online: *Courts of Saskatchewan* [perma.cc/WZ7T-ZDGA].

6 RSC 1985, c C-46.

7 [1999] 1 SCR 688 at para 69 [*Gladue*].

8 Frank Iacobucci, *First Nations Representation on Ontario Juries: Report of the Independent Review Conducted by The Honourable Frank Iacobucci* (Toronto: Ontario Ministry of the Attorney General, 2013) at 56; Brian R Pfefferle, "*Gladue* Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration" (2008) 32:2 Man LJ 113 at 143; Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54:4 Crim LQ 470 at 504–55.

address written sentencing decisions and thereby ignore the substantial majority of judgments handed down in criminal cases in lower courts which are rendered orally. This article seeks to understand why Indigenous sentencing is not living up to its promise by building on a contextual framework for understanding judicial decision-making in the lower courts.

This contextual framework suggests that sentencing in lower courts is likely impacted by a number of factors which make up the lower court sentencing environment. First, the lower court environment is limited by a number of practical constraints, which include a high volume of cases and tight time constraints for each sentencing decision. Furthermore, sentencing in lower court is affected by limited organizational resources, which affects the type of availability and quality of information needed to meaningfully understand the unique contextual considerations[9] in Indigenous sentencing. Judges in lower courts often lack comprehensive and reliable information about numerous legally relevant Indigenous sentencing factors. Limited resources further affect a judge's ability to order appropriate alternatives to incarceration, as the absence of resources for programs that provide rehabilitative alternatives to custodial sentences are often lacking or are not adequately resourced in the offender's community.

This article demonstrates that the restrictive context of the lower court sentencing environment, combined with the complexity of the sentencing task, reduces the number and kinds of *Gladue* sentencing factors considered and restricts a judge's ability to meaningfully and appropriately weigh the factors that ought to play a key role in Indigenous sentencing. Without the required amount of information to purposively apply *Gladue* principles, and working under conditions of complexity and bounded rationality, judges may employ fast and frugal heuristics to help with sentencing decisions. Fast and frugal heuristics use a minimum amount of "time, knowledge, and computation to make adaptive choices in real environments"[10] and allow judges to make decisions based on few pieces of information that are within reach and readily available.[11] In the lower court sentencing environment, the vast majority of information about the offence and offender are contained within the police report of the crime, which often includes information relating to the use of alcohol and drugs in the commission of an offence. In this way, it is possible that stereotypes about Indigenous offenders being prone to alcohol and substance use are permeating sentencing decisions, and being used by judges as "perceptual shorthand" to "make situational imputations about defendants' character and likely future behaviour."[12] Scholars in the United States and Canada have argued that racial or ethnic perceptual shortcuts play out in ways that increase judicial assessments of risk and blameworthiness for Indigenous defendants.[13] It is widely

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9 Brian D Johnson, "The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences" (2006) 44:2 Criminology 259 at 268.

10 Gerd Gigerenzer, Peter M Todd & The ABC Research Group, *Simple Heuristics That Make Us Smart* (New York: Oxford University Press, 1999) at 14.

11 Konstantinos V Katsikopoulos, "Fast and Frugal Heuristics" (2020) Oxford Research Encyclopedia of Politics at 6, online: *Oxford Research Encyclopedia of Politics* [perma.cc/W39S-4CTQ].

12 Darrell Steffensmeier & Stephen Demuth. "Does Gender Modify the Effects of Race-Ethnicity on Criminal Sanctioning? Sentences for Male and Female White, Black, and Hispanic Defendants" (2006) 22:3 J Quantitative Criminology 241 at 246.

13 Richard F Devlin & Matthew Sherrard, "The Big Chill? Contextual Judgment after *R. v. Hamilton* and *Mason*" (2005) 28:2 Dal LJ 409 at 427: Devlin and Sherrard argue that "the systemic forces of racism in Canada that affect African-Canadians are similar to those experienced by Aboriginal people … Similar to Aboriginal offenders, African-Canadian offenders are subject to a disproportionate level of incarceration relative to their statistical representation in Canadian society" [footnotes omitted].

known that perceptions of Indigenous deviance and alcohol and drug use pervade Canadian society.[14]

When taken together, the choices our courts make in responding to crimes, including how Indigenous sentencing principles are applied and which principles are emphasized in each situation, are important expressions of Canadian values. Although scholars recognize that heuristics influence judicial decision-making,[15] researchers have yet to explore how *Gladue* principles might interact with heuristics to shape sentencing decisions. This article addresses this gap in the literature in three ways: first, by analyzing the availability of *Gladue* information in lower courts and theorising how the lack of information might interact with heuristics to make the meaningful application of *Gladue* factors less likely; second, by reflecting on the role of sentencing law and Indigenous sentencing law as a feature of the environment within which sentencing decisions are made; and third, by considering how heuristics might help produce a phenomenon whereby judges allow stereotypes relating to offenders' ethnicity to permeate their sentencing decisions. This article argues that the lack of comprehensive information, time constraints, and the complexity of Indigenous sentencing law likely affects the role heuristics play in shaping sentencing decisions and, consequently, that the system for Indigenous sentencing should be informed by research evidence from the decision sciences.

II. THE LAW OF INDIGENOUS SENTENCING

A. SECTION 718.2(E) OF THE *CRIMINAL CODE*

Section 718 of the Canadian *Criminal Code*[16] codifies the purposes and principles of sentencing, with the aim of bringing "greater consistency and clarity"[17] to sentencing. In 1996, section 718.2(e) was added under "other sentencing principles" to address the overrepresentation of Indigenous peoples in Canadian prisons.[18] Section 718.2 of the *Criminal Code* states:

> A Court that imposes a sentence shall also take into consideration the following principles:
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> …
>
> (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.[19]

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14 Katherine Morton, *The Radical Activist and the Natural Victim: Colonial Tropes of Aboriginal Identity, the Media, and Public Inquiries in Canada* (MA Thesis, Memorial University of Newfoundland, 2014) [unpublished], online: [perma.cc/7D9Y-XXKX].

15 Ian D Marder & Jose Pina-Sánchez, "Nudge the Judge? Theorizing the Interaction Between Heuristics, Sentencing Guidelines and Sentence Clustering" (2020) 20:4 Criminology & Crim Justice 399 at 399.

16 *Supra* note 6.

17 *R v Nasogaluak*, 2010 SCC 6 at para 39.

18 *Criminal Code*, *supra* note 6, s 718.2.

19 *Ibid*.

The enactment of section 718.2(e) left gaps in terms of its precise meaning and application.[20] In the absence of specific sentencing guidelines from Parliament, it was the *R. v. Gladue* decision of the Supreme Court of Canada that mapped out an outline for the application of section 718.2(e).[21]

B. *R. v. GLADUE*

In 1999, the Supreme Court of Canada's decision in *R. v. Gladue* reaffirmed the importance of section 718.2(e) for sentencing judges and set out a way for judges to address the sentencing of Indigenous people in their day-to-day work.[22] In this decision, the Supreme Court of Canada addressed how section 718.2(e) ought to be properly interpreted and applied.[23] In providing instructions to lower courts on how to apply section 718.2(e), the Supreme Court articulated the purpose behind the wording of this section:

> [T]hat sentencing judges should pay particular attention to the circumstances of aboriginal offenders *because those circumstances are unique*, and different from those of non-aboriginal offenders. The fact that the reference to aboriginal offenders is contained in s. 718.2(e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.[24]

When judges are sentencing an Indigenous offender, the Supreme Court instructed them to look at two sets of factors, which are referred to as Prong 1 and Prong 2 in this article:

> Prong 1: The unique systemic or background factors that have played a role in bringing the particular Aboriginal offender before the court.[25]
>
> Prong 2: The types of sentencing procedures and sanctions, other than imprisonment, that may be appropriate in the circumstances of the offender because of their Aboriginal heritage.[26]

The first prong of this analysis requires judges to consider the broad systemic factors and background factors affecting Indigenous peoples, particularly with respect to the issue of overincarceration. These factors include the impact of colonialist government policies such as residential schools and how, as the Supreme Court asserted, "[y]ears of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high

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20 Jonathan Rudin, "Aboriginal Over-Representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40 SCLR 687 at 691 [Rudin, "Aboriginal Over-Representation"]. See also Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63 SCLR 461; Jonathan Rudin, "There Must Be Some Kind of Way Out of Here: Aboriginal Over-Representation, Bill C-10, and the *Charter of Rights*" (2013) 17:3 Can Crim L Rev 349; Jeanette Gevikoglu, "*Ipeelee/Ladue* and the Conundrum of Indigenous Identity in Sentencing" (2013) 63 SCLR 205.

21 Rudin, "Aboriginal Over-Representation," *ibid*.

22 *Ibid* at 695.

23 Isobel M Findlay, "Discourse, Difference and Confining Circumstances: The Case of *R v Gladue* and the 'Proper Interpretation and Application' of s 718.2(e) of the *Criminal Code*" (2001) 10:2 Griffith L Rev 225 at 233, citing *Gladue*, *supra* note 7 at para 24.

24 *Gladue*, *ibid* at para 37 [emphasis in original].

25 *Ibid* at para 66.

26 *Ibid*.

unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation."[27] The Supreme Court noted that "[t]hese and other factors contribute to a higher incidence of crime and incarceration" for Indigenous peoples than for non-Indigenous people.[28]

The second prong of the analysis requires judges to consider more culturally appropriate processes and outcomes for sentencing Indigenous offenders. The Supreme Court acknowledged that Indigenous-specific alternatives, with an emphasis on the ideals of restorative justice, are not always available in communities for an Indigenous offender. However, the Supreme Court maintained that this lack of programming could not be a limitation when examining sentencing options and does not relieve a judge from their obligation to find these alternatives.[29] While programming, supervision, and support in an Indigenous community makes it easier to find and impose an alternative sentence, the Supreme Court stated that "even if community support is not available, every effort should be made in appropriate circumstances to find a sensitive and helpful alternative."[30]

The *Gladue* decision makes clear that sentencing judges must take judicial notice of the systemic or background factors Indigenous peoples face in general and follow the two-pronged approach to sentencing Indigenous peoples.[31] Sentencing judges have a statutory duty to consider section 718.2(e) for every Indigenous person and, as such, have no discretion regarding whether or not the provision will apply, unless the offender expressly waives consideration of their *Gladue* factors.[32]

One of the problems with this methodology is that it is not clear how the necessary information about an Indigenous offender's circumstances and background factors will be made available to the court.[33] With regard to this issue, the Supreme Court said: "[I]t will be extremely helpful to the sentencing judge for counsel on both sides to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way."[34] At sentencing, the duty to present evidence of relevant Indigenous sentencing factors for the consideration of the sentencing judge lies with counsel. If counsel is not able to put forward this information, the *Gladue* decision states that it would fall to judges themselves to ensure that the information was brought before the courts.[35] Information regarding an Indigenous person's circumstances and background factors is considered so necessary that where the accused is unrepresented, the Supreme Court indicated that it was still "incumbent upon the sentencing judge to attempt to acquire information regarding the circumstances of the offender as an aboriginal person."[36]

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27 *Ibid* at para 67.
28 *Ibid*.
29 *Ibid* at para 74.
30 *Ibid* at para 92.
31 *Ibid* at para 82–83.
32 *Ibid* at para 83.
33 Rudin, "Aboriginal Over-Representation," *supra* note 20 at 696.
34 *Gladue*, *supra* note 7 at para 83.
35 *Ibid* at para 84.
36 *Ibid*.

C. R. v. IPEELEE

In the *R. v. Ipeelee* decision, the Supreme Court of Canada reaffirmed the judgment of the Supreme Court in *Gladue*.[37] Particularly, the Supreme Court acknowledged that it is an error of law for judges to fail to consider *Gladue* factors when sentencing an Indigenous person and that "[f]ailing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*."[38] The Supreme Court also strongly endorsed the practice of producing *Gladue* reports and confirmed that "[b]ringing 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*."[39]

Additionally, the Supreme Court of Canada encouraged sentencing judges to provide "at least brief reasons" to explain how an Indigenous person's unique circumstances have been accounted for in the sentencing process.[40] The Supreme Court stated that appeal courts may intervene to overturn a decision when a sentencing judge fails to give "tangible consideration" to an Indigenous person's circumstances in their reasons.[41] The *Ipeelee* decision did not make clear what is meant by "tangible consideration" and whether a sentencing judge's application of the *Gladue* principles is considered tangible if it forms an implicit part of the sentencing decision.[42] Therefore, since *Ipeelee* many appellate courts have stated that an Indigenous person's unique circumstances and background factors must be explicitly addressed in sentencing reasons.[43] While there remains a lack of clarity about the exact nature of the duty to give reasons about how an Indigenous person's unique circumstances were considered in sentencing, it is apparent that "robust consideration" of an Indigenous person's unique circumstances is expected.[44] In terms of every day application, this means that trial judges must deliver reasons for the sentence that take into account case-specific information relating to the unique circumstances and background factors of the Indigenous offender before the courts.

III. THE CHARACTERISTICS OF THE LOWER COURT ENVIRONMENT

Despite the Supreme Court's decision in *Gladue* and its ensuing decision in *Ipeelee*, the *Gladue* principles have been understood as being both "ineffective and inconsistently

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37 2012 SCC 13 [*Ipeelee*].
38 *Ibid* at para 73 [emphasis added].
39 *Ibid* at para 60.
40 *Gladue*, *supra* note 7 at para 85.
41 *Ipeelee*, *supra* note 37 at para 95, citing *R v Ladue*, 2011 BCCA 101 at para 64.
42 Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre for BC First Nations Justice Council, 2021) at 262, online (pdf): *Indigenous Law Centre* [perma.cc/CBG5-2WHE].
43 *Ibid*, citing *R v Fontaine*, 2014 BCCA 1 at para 35; *R v Napesis*, 2014 ABCA 308 at para 8; *R v Legere*, 2016 PECA 7 at para 45; *R v Park*, 2016 MBCA 107 at para 35; *R v Laboucane*, 2016 ABCA 176 at para 5.
44 *R v Zoe*, 2020 NWTCA 1 at 54; Ralston, *supra* note 42 at 262.

applied."[45] There are several characteristics of the lower docket court environment that serve to impede the remedial purpose of section 718.2(e). These characteristics give rise to practical difficulties in the decision-making environment in which trial judges operate, a useful place to begin our discussion. To accurately understand judicial decision-making, one must consider the specific institutional setting and resulting environmental influences of each court, as this exerts an influence on the choices that are available to judges.[46] The vast majority of criminal cases are tried by a provincial court judge, and the preponderance of criminal sentencing occurs in provincial docket court. This study therefore addresses sentencing decisions made by provincial court judges in docket court and the influence of the decision-making environment on their sentencing decisions

A. HIGH VOLUME OF CASES COMBINED WITH TIME CONSTRAINTS

The lower docket court environment is characterized by high volume, with judges processing hundreds of cases month after month. This heavy caseload, despite the lack of explicit time limits, may lead to a feeling of time pressure.[47] Against the backdrop of an ever-increasing number of claimants, judges in provincial docket court perform a variety of functions, such as: overseeing case management, assessing evidence, making findings of facts and law, conducting trials, and sentencing. Although docket court judges can take time to reflect on the sentences imposed, much of their sentencing decisions are undertaken at the spur of the moment, "without the luxury of lengthy reflection or discussion."[48] They handle full dockets and expeditiously sentence convicted offenders, with most of the sentencing decisions made immediately after a finding of guilt.[49] As noted by a trial judge, "[w]e're where the action is. We often must 'shoot from the hip' and hope you're doing the right thing. You can't ruminate forever every time you have to make a ruling. We'd be spending months on each case if we ever did that."[50] The large volumes in provincial docket courts suggest that concerns about speedy resolution of docket cases and case management are significant, if not dominant, motivations in sentencing.

B. AVAILABILITY AND QUALITY OF *GLADUE* INFORMATION

Although the Supreme Court has created a duty for the sentencing judge to consider *Gladue* factors for all Indigenous offenders, scholars and practitioners have noted that trial judges often cannot effectively discharge their responsibilities because they are not given consistent and reliable information on the systemic challenges and underlying background

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45 Research and Statistics Division, Department of Justice, *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System* (Ottawa: Department of Justice, September 2017) at 20, online (pdf): *Department of Justice* [perma.cc/9EYS-K3DJ][*Spotlight on Gladue*]. See also Roach, *supra* note 8; Pfefferle, *supra* note 8; Iacobucci, *supra* note 8.

46 Pauline T Kim et al, "How Should We Study District Judge Decision-Making?" (2009) 29:1 Wash UJL & Pol'y 83 at 83.

47 Mandeep K Dhami & Peter Ayton, "Bailing and Jailing the Fast and Frugal Way" (2001) 14:2 J Behavioral Decision Making 141 at 144.

48 Robert A Carp, Kenneth L Manning & Lisa M Holmes, *Judicial Process in America*, 12th ed (Los Angeles: Sage, 2023) at 328.

49 Charles W Ostrom, Brian J Ostrom & Matthew Kleiman, "Judges and Discrimination: Assessing the Theory and Practice of Criminal Sentencing" (February 2004) at 23, online (pdf): *National Institute of Justice* [perma.cc/FT9T-426P].

50 Carp, Manning & Holmes, *supra* note 48 at 328–29.

issues experienced by Indigenous people and their communities, and culturally appropriate sentencing procedures and alternatives to incarceration that acknowledge their specific Indigenous heritage or connections.[51] *Gladue* reports are widely understood to provide the best possible information on these matters for a sentencing judge because these reports: (1) address the two prongs of section 718.2(e) of the *Criminal Code* and contain detailed information about the particular circumstances and background factors of the particular Indigenous offender and contain information on specific resources that may be available to assist in the individual's rehabilitation; and (2) are commonly drafted by someone who meaningfully understands the offender's Indigenous community.[52]

Although the Supreme Court decisions in *Gladue* and *Ipeelee* demonstrate an assumption that *Gladue* information will be readily available to the courts involved in the sentencing process, in many jurisdictions such as Saskatchewan they are often not requested for two reasons:[53] (1) report writers are in short supply (as recently as March 2018, Saskatchewan had only one *Gladue* report writer);[54] and (2) severe provincial government cuts mean that there is not enough funding to authorize *Gladue* reports for Indigenous offenders, except in very limited situations.[55] Courts therefore are often limited to their general awareness of the special circumstances of Indigenous offenders or the select information that counsel raises and are therefore restricted in their ability to impose appropriate sentences. Previous research demonstrates that when *Gladue* reports are available, 76 percent of repeat offenders receive a shorter sentence than offenders without *Gladue* reports.[56] However, for trial-level docket courts that deal with less serious offences, a *Gladue* report is almost never available.

Another source of *Gladue* information is the pre-sentence report. Prepared by probation officers and social workers, a "*Gladue* factors" section may be added to the standard pre-sentence report at the request of defense counsel.[57] Concerns have been raised about the use of a pre-sentence report as the source of *Gladue* information. As Kelly Hannah-Moffat and Paula Maurutto note, the pre-sentence report uses an actuarial approach to assess criminogenic risk[58] and there is a central inconsistency between the purpose of the pre-sentence report to provide risk assessments and the purpose of a *Gladue* report "to provide the court with culturally situated information which places the offender in a broader social-historical group context" and "reframe the offender's risk/need by holistically positioning the individual as part of a broader community and as a product of many experiences."[59]

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51 *Spotlight on Gladue*, *supra* note 45 at 26.

52 Angela Cameron, "*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism" in John D Whyte, ed, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich, 2008) 160 at 160.

53 Colton Fehr, "Infusing Reconciliation into the Sentencing Process" (2019) 28:2 Const Forum Const 25 at 26.

54 "Gladue Report Writer Says Saskatchewan Lags Behind Other Provinces," *CTV News* (1 March 2018), online: [perma.cc/A6FE-MGSX].

55 *Spotlight on Gladue*, *supra* note 45 at 27. See also "Fifteen Years After Gladue, What Progress?" *CBA/ABC National* (15 April 2014), online: [perma.cc/ML66-QMZ3]["Fifteen Years After Gladue"].

56 "Fifteen Years After Gladue," *ibid*.

57 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 87–88.

58 Kelly Hannah-Moffat & Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12:3 Punishment & Society 262 at 274 [Hannah-Moffat & Marutto, "Re-Contextualizing"]. See also Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 CJLS 451; Chad Kicknosway, "Gladue Reports: Not Just a Sentencing Report" (13 March 2015), online (blog): *Legal Aid Ontario* [perma.cc/CRD2-PM5T].

59 Hannah-Moffat & Maurutto, "Re-Contextualizing," *ibid* at 274.

Regardless of which report is used, Canada's *Gladue* jurisprudence frequently notes the persistent lack of information for either prong of the analysis.[60] Counsel have an obligation to facilitate the gathering of information on the circumstances of Indigenous persons and on appropriate and available rehabilitative resources.[61] Further, the Supreme Court has stated that if counsel does not bring this evidence before the court, it is incumbent on the sentencing judge to acquire this information.[62] Despite this, many provinces do not have a dedicated program in place to support this endeavour on a large scale.[63] Neither *Gladue* reports nor pre-sentence reports with *Gladue* factors included are considered for many less serious offences, which constitute the bulk of criminal justice sentencing.

C. INADEQUATE RESOURCES

The meaningful application of *Gladue* principles in sentencing requires additional resources for judges, defence counsel, prosecutors, probation officers, social workers, and community organizations.[64] Not only do judges need information about the two prongs of the *Gladue* analysis, Indigenous justice programs also need to be present in the offender's community and be adequately resourced. Upon acknowledging that the lack of resources related to both prongs of the *Gladue* analysis is a critical barrier to the application of *Gladue* principles,[65] the Supreme Court stated that judges must find new sentencing options and adapt existing options such as counselling, addictions treatment, community service, and fines to the needs of Indigenous offenders in all communities.[66] While *Gladue* stated that judges must find these alternatives programs even if they are not already readily available in a particular community, how judges ought to do so was not made clear. The reality is that these alternative programs are lacking in many communities and as Andrew Welsh and James Ogloff have noted, the well-documented absence of culturally suitable sentencing processes and options aside from imprisonment unquestionably hampers the successful application of *Gladue* principles.[67] Without adequate resources invested in programs that address alternatives to imprisonment for Indigenous offenders, even the implementation of thorough *Gladue* reports across Canada will likely do little to reduce overrepresentation.[68] In a Master's thesis study conducted by Rana MacDonald, defence lawyers noted that the unavailability of Indigenous-specific programming limits their use of section 718.2(e) and *Gladue* to only a small portion of their cases.[69]

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60 "Gladue Decision Not Having Desired Effect," (13 August 2022), online (blog): *The John Howard Society of Canada* [perma.cc/SET4-L46B].

61 *Ipeelee*, *supra* note 37 at para 60.

62 *Gladue*, *supra* note 7 at para 84.

63 See e.g. Meaghan Craig, "Only Gladue Report Writer in Sask.: 'The People That Are Needing Them Are Not Getting Them'," *Global News* (1 March 2018), online: [perma.cc/5JLX-SMBP].

64 *Spotlight on Gladue*, *supra* note 45 at 26.

65 Rudin, "Aboriginal Over-Representation," *supra* note 20 at 713.

66 *Spotlight on Gladue*, *supra* note 45 at 29.

67 Andrew Welsh & James RP Ogloff, "Progressive Reforms or Maintaining the Status Quo? An Empirical Evaluation of the Judicial Consideration of Aboriginal Status in Sentencing Decisions" (2008) 50:4 Can J Criminology & Crim Justice 491 at 510. See also Susan Haslip, "Aboriginal Sentencing Reform in Canada: Prospects for Success: Standing Tall with Both Feet Planted in the Air" (2000) 7:1 Murdoch UEJL 14.

68 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015) at 173.

69 Rana McDonald, "The Discord Between Policy and Practice: Defence Lawyers' Use of Section 718.2 (e) and *Gladue*" (MA Thesis, University of Manitoba, 2008) at 105 [unpublished], online: [perma.cc/ZQJ3-MUDV].

D. THE COMPLEXITY OF THE SENTENCING TASK

Another feature of the lower court sentencing environment is the complexity of the sentencing task itself. Determining a fit sentence for a criminal offence is complex and must take into account many variables related to the offence and the offender.[70] In Canada, the law of sentencing permits judges high levels of discretion in sentencing[71] without much guidance as to how that power is to be exercised.[72] The *Criminal Code* states the various objectives of criminal punishment and the application of each objective to a particular sentencing decision varies according to the nature of the crime and the circumstances of the offence. However, while they serve as guidance in the process of determining an appropriate sentence, these objectives are sometimes incompatible.

This contradiction in the application of sentencing objectives is particularly observed in the sentencing of Indigenous offenders. To date, there exists a lack of lack of consensus and precise clarification about how the sentencing objectives should be applied in cases with Indigenous offenders. While *Gladue* has been recognized for emphasizing the restorative purpose of sentencing,[73] some note that the Supreme Court's emphasis on restorative justice in *Gladue* contradicts the traditional sentencing objectives of denunciation, separation, and deterrence[74] and that retributive and restorative approaches to justice cannot be resolved.[75] However, others claim that traditional sentencing objectives are relevant to the sentencing of Indigenous offenders because *Gladue* does not compel judges to use restorative sanctions in every case,[76] but rather that judges must "consider, to the extent possible, different alternatives when sentencing an Indigenous offender."[77]

In addition to the objectives of sentencing outlined above, there are a number of principles of sentencing which have to be balanced in each sentencing decision. The *Criminal Cod*e states that the fundamental principle of sentencing is that every sentence must be proportionate to both the gravity of the offence committed and the moral blameworthiness of the offender.[78] However, aside from the principle of proportionality, the other sentencing principles, such as the principle of parity, the principle of individualization, the principle of restraint, and the principle of totality, are not described as having any priority over each other in the *Criminal Code*.[79] Furthermore, when deciding what sentence to impose, sentencers must consider and weigh a vast amount of information, such as the "sentencing base, offense factors, prior record factors, court processing, defendant characteristics, and court process and culture"[80] among numerous other factors.

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70 Ostrom, Ostrom & Kleiman, *supra* note 49 at 23; JD Morton, "The Art of Sentencing" (1959) 1:2 Osgoode Hall LJ 95.
71 *R v M(CA)*, [1996] 1 SCR 500 at para 53.
72 Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 61.
73 McDonald, *supra* note 69 at 21.
74 *Spotlight on Gladue*, *supra* note 45 at 22.
75 Haslip, *supra* note 67 at para 26.
76 *Spotlight on Gladue*, *supra* note 45 at 22.
77 *Ibid*.
78 *Supra* note 6, s 718.1.
79 Research and Statistics Division Department of Justice Canada, *A Review of the Principles and Purposes of Sentencing in Sections 718-718.21 of the Criminal Code*, by Gerry Ferguson (Ottawa: Department of Justice, 10 August 2016) at 8, 15–16, online (pdf): *Department of Justice* [perma.cc/FRY7-2YAL].
80 Ostrom, Ostrom & Kleiman, *supra* note 49 at 128.

The complexity of the sentencing task is apparent from a number of studies that examined the number of factors that appear to influence the courts at sentencing. Joanna Shapland identifies some 229 factors of relevance,[81] while Roger Douglas, in a study of Magistrate's Courts in the State of Victoria, Australia, identifies 292 factors.[82] In the *R. v. Williscroft* decision from Australia, the Victorian Court of Criminal Appeal observed, "the purposes of punishment are manifold and each element will assume a different significance not only in different crimes but in the individual commission of each crime."[83] Gavin Dingwall[84] and Roger Tarling[85] both note that given the number of relevant sentencing considerations and the lack of a clear hierarchy among sentencing principles, "it seems reasonable to assume that, consciously or subconsciously, sentencers will have to set their own priorities"[86] and develop their own interpretations when sentencing offenders.

E. SENTENCING AN INDIGENOUS OFFENDER

The task of sentencing an Indigenous offender introduces further objectives, principles, and factors to the mix. Judges must apply the sentencing principles enunciated in section 718.2(e) of the *Criminal Code* as well as the principles stated in the *Gladue* and *Ipeelee* decisions of the Supreme Court, which make clear that when sentencing an Indigenous offender, judges and counsel have particular responsibilities. Notably, the *Ipeelee* decision states that in order to craft a just sentence proportional both to the gravity of the offence and to the offender's degree of responsibility, judges must consider *Gladue* factors.[87]

According to the *Gladue* decision, when Indigenous offenders are sentenced, courts must consider a number of unique and systemic factors. In "The Gladue Principles: A Guide to the Jurisprudence," Benjamin Ralston prepared a non-exhaustive list of *Gladue* factors that judges ought to consider in sentencing decisions.[88] This list includes the impact of the residential school system, loss of spiritual practices due to government policies the repercussions of the dislocation and dispossession of the Indigenous peoples, formal educational attainment or its absence, and the challenges posed by poverty and substandard living conditions, among many others. In light of this list and based on the findings of the aforementioned Shapland study, it is therefore reasonable to estimate that there are over three hundred factors of relevance that the courts should consider and balance at sentencing.

IV. THEORETICAL PERSPECTIVES

In this section, this article will briefly review some of the accumulating evidence that suggests that that under conditions of incomplete information judges could be prone to

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81 Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (London, UK: Routledge & Kegan Paul, 1981) at 55.

82 Roger Douglas, Tom Weber & EK Braybrook, "Guilty, Your Worship: A Study of Victoria's Magistrates' Courts" (1980) 1 Occasional Monograph 62.

83 *R v Williscroft*, [1975] VR 292 at 299.

84 Gavin Dingwall, "Deserting Desert? Locating the Present Role of Retributivism in the Sentencing of Adult Offenders" (2008) 47:4 How J Crim Justice 400.

85 Roger Tarling, "Sentencing Practice in Magistrates' Courts Revisited" (2006) 45:1 How J Crim Justice 29 at 39.

86 Dingwall, *supra* note 84 at 402.

87 *Ipeelee*, *supra* note 37 at para 73.

88 Ralston, *supra* note 42 at 156–95.

cognitive biases, a reliance on heuristics and the ensuing use of stereotypes that might affect their judicial decisions. Heuristics, or mental shortcuts used for quick decision-making, have repeatedly been shown to affect the ability of decision-makers to make rational choices. These findings suggest that a lack of *Gladue* information before the courts may inhibit a judge's ability to purposively and meaningfully apply the *Gladue* principles and instead lead to a greater reliance on stereotypes when sentencing Indigenous offenders.

A. NORMATIVE MODEL OF JUDICIAL DECISION-MAKING

All social science disciplines, including law, are based on the assumption that people act rationally.[89] In fact, the dominant image or representation of judicial decision-making is the scales of justice, which is both a portrayal of the process and an extension of rational choice theory.[90] According to this model, the judge, "in an unbiased way and directed by the law, carefully attend[s] to all of the available information in a case, weigh[s] it according to its significance for the issue at hand, and integrate[s] it to make a decision."[91] This model assumes that judges have available all of the relevant information they require to perform a cognitive balancing act between all the factors needed to make a specific decision. This model also assumes that judges have a full and complete understanding of the law they are required to apply and that they possess large attention, memory, and processing abilities.[92] The rational doctrinal model of judicial decision-making is largely accepted. As stated by Mandeep Dhami and Ian Belton, "[a] judge's ability to perform this cognitive balancing act when making highly consequential decisions is almost accepted as a given"[93] as judicial decisions are rarely challenged "on the basis of a judge's poor or biased decision-making but rather on the basis of some misapplication of law" or procedural error.[94]

B. INCOMPLETE INFORMATION

A growing body of research suggests that judicial decision-making diverges from the rational model of decision-making.[95] According to this model, in order to be fully rational a decision must be made with knowledge of all possible alternatives. However, in reality decision-makers rarely possess complete information.[96] According to the focal concerns of sentencing perspective, developed by Darrell Steffensmeier and Stephen Demuth, sentencing decision-making is likely impacted by practical constraints including limited information and organizational resources, which places pressure on judges who are already working in the context of tight time constraints.[97] The problem of incomplete information is particularly acute in the context of Indigenous sentencing as most Canadian provinces and territories lack

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89 John N Drobak & Douglass C North, "Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations" (2008) 26 Wash UJL & Pol'y 131 at 131.

90 *Ibid*.

91 Mandeep K Dhami & Ian K Belton, "On Getting Inside the Judge's Mind" (2017) 3:2 Translational Issues in Psychological Science 214 at 214.

92 Mandeep K Dhami, "Psychological Models of Professional Decision Making" (2003) 14:2 Psychological Science 175 at 175.

93 Dhami & Belton, *supra* note 91 at 214.

94 *Ibid*.

95 Dhami, *supra* note 92 at 175.

96 Herbert A Simon, "Rational Choice and the Structure of the Environment" (1956) 63:2 Psychological Rev 129 at 129.

97 Darrell Steffensmeier & Stephen Demuth, "Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?" (2000) 65:5 American Sociological Rev 705 at 708–709.

fully established programs that provide *Gladue* reports,[98] something the Supreme Court of Canada has called an "indispensable" service for Indigenous offenders.[99]

Even if complete information was available to judges when making Indigenous sentencing decisions, there are limits to human cognitive capacity which serve to restrict how completely judges can incorporate all of the information in a sentencing decision.[100] According to the famous principle of bounded rationality, originated by Herbert Simon: "the capacity of the human mind for formulating and solving complex problems is very small compared with the size of the problem whose solution is required for objectively rational behaviour in the real world — or even for a reasonable approximation to such objective rationality."[101] Therefore, even when rational actors make only one decision at a time, these cognitive limitations severely limit the scope of factors that they can consider.[102] The implication here is that it may not be humanly possible for judges, who like the rest of us are not perfectly rational decision-makers, to comprehensively assimilate all the information related to the over 300 factors associated with Indigenous sentencing. In this situation, judges reduce the amount of information they need to process as a way to save cognitive effort.[103]

A critical implication emerges from this line of research. The principle of bounded rationality states that to deal with a problem, the decision-maker constructs a simplified model of it.[104] Instead of exerting maximum effort to attain the ideal outcome, decision makers focus on a pragmatic approach and level of effort when confronted with a decision to be made and thereby accept an approach and option that is satisfactory.[105] As a result, much of the information must be filtered out, and patterns must be identified.[106]

C. USE OF SIMPLE HEURISTICS

Heuristics are cognitive aids used to reduce information searches to manageable proportions.[107] In the context of judicial decisions, there are number of reasons for the superficial consideration of available information. Provincial docket court sentencing judges experience a very high workload, resulting in time pressure and only a few minutes available per case. With each case being characterized by numerous parameters and factors, judges may be induced to rely on simpler and more intuitive decision-making rules because the proper integration of all the information available is too complex, and all humans have

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98 Brittany Guyot, "Majority of Provinces, Territories Lack 'Indispensable' Gladue Report-Writing Programs," *APTN National News* (23 August 2018), online: [perma.cc/6BLZ-WT5E].

99 *Ibid*; *Ipeelee*, *supra* note 37 at para 60.

100 Timothy M Hagle, "So Many Cases, So Little Time: Judges as Decision-Makers" (1990) [unpublished], online: *Research Gate* [perma.cc/7Y67-5QXX].

101 Herbert A Simon, *Administrative Behaviour: A Study of Decision-Making Processes in Administrative Organizations*, 2nd ed (New York: Macmillan, 1957) at 198.

102 Hagle, *supra* note 100 at 2.

103 See e.g. Gigerenzer, Todd & The ABC Research Group, *supra* note 10 at 14–15.

104 Herbert A Simon, "A Behavioral Model of Rational Choice" (1955) 69:1 QJ Economics 99 at 108.

105 Gary A Klein, "A Recognition-Primed Decision (RPD) Model of Rapid Decision Making" in Gary A Klein et al, eds, *Decision Making in Action: Models and Methods* (Norwood, NJ: Ablex, 1993) 138 at 144.

106 *Ibid*.

107 Gerd Gigerenzer & Wolfgang Gaissmaier, "Heuristic Decision Making" (2011) 62 Annual Rev Psychology 451 at 454.

limited cognitive abilities.[108] Even when there are specific rules to guide their decision making, they may often be too complex to be followed in the allotted time. Furthermore, judges in docket court often have little or no feedback on the quality of their decisions.[109] Exactly which heuristic is used and how it is adapted to a particular problem is defined by the nature of the task, the state of available information and the decision-maker's cognitive abilities.[110]

Researchers have examined how judges make decisions when the task involves the application of multiples factors. Under these circumstances, studies have shown that judges use heuristic strategies to make decisions that ignore much of the available and relevant information. These studies demonstrate that judges simplify the cognitive task and that they do not integrate the available information in any complex way.[111] According to Gerd Gigerenzer, Peter Todd, and The ABC Research Group, judges rely on simple or "fast and frugal" heuristics, meaning that they help decision-makers to quickly reach conclusions by using sparse information.[112] The use of fast and frugal heuristics to simplify decision-making among judges is further supported by empirical evidence. A German study by Bettina von Helversen and Jörg Rieskamp examined whether judges are rational decision-makers who always optimally deliberate over every relevant aspect of a case or whether they also sometimes use simple heuristics.[113] This study evaluated which model, either normative or heuristic, described judicial decisions and the severity of sentences imposed in trials for theft, forgery, and fraud in a German court. Von Helversen and Rieskamp found that when sentencing relatively minor offences, prosecutors and judges considered only a limited number of factors while neglecting others that are both critical and legally relevant.[114] The discrepancies between the number of factors that should have been considered and those actually considered were higher when the offence characteristics were less serious. Von Helversen and Rieskamp suggested that the neglected factors could be explained by both cognitive constraints and also by time limitations for sentencing decisions.[115]

Additionally, a study conducted by Barton Beebe suggests that judges employ fast and frugal heuristics to circumvent a complex, multifactor analysis in trademark cases in the United States. Beebe found that although federal court judges follow a variety of multifactor tests, which incorporate over eight factors to assess consumer confusion in trademark cases, circuit court judges rely on only two or three factors when making their decisions.[116]

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108 Inbar Levy, "Simplifying Legal Decisions: Factor Overload in Civil Procedure Rules" (2017) 41:2 Melbourne UL Rev 727 at 751–56.

109 Mandeep K Dhami, Ian Belton & Jane Goodman-Delahunty, "Quasirational Models of Sentencing" (2015) 4:3 J Applied Research in Memory & Cognition 239 at 241.

110 John W Payne, James R Bettman & Eric J Johnson, The Adaptive Decision Maker (Cambridge: Cambridge University Press, 1993) at 169.

111 David Leiser & Dov-Ron Schatzberg, "On the Complexity of Traffic Judges' Decisions" (2008) 3:8 Judgment & Decision Making 667; Dhami, *supra* note 92; Birte Englich, Thomas Mussweiler & Fritz Strack, "Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making" (2006) 32:2 Personality & Soc Psychology Bull 188; Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, "Inside the Judicial Mind" (2001) 86:4 Cornell L Rev 777; Bettina von Helversen & Jörg Rieskamp, "Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment" (2009) 15:4 J Experimental Psychology: Applied 375.

112 Gigerenzer, Todd & The ABC Research Group, *supra* note 10 at 14.

113 Von Helversen & Rieskamp, *supra* note 111.

114 *Ibid* at 387.

115 *Ibid* at 388.

116 Barton Beebe, "An Empirical Study of the Multifactor Tests for Trademark Infringement" (2006) 94:6 Cal L Rev 1581 at 1614.

Additionally, there are other studies that have also shown that the cognitive processes of judges can lead to processes that are inconsistent with the law, be it for bail setting[117] or sentencing.[118] In their analysis of bail decisions, Mandeep Dhami and Peter Ayton found that a simple heuristic proved to be a better predictor of judicial decisions than a more complex model representing the principles of due process.[119] In this study, the analysis of sentencing decisions found that there was not a significant link between sentencing decisions and the case characteristics. Furthermore, Vladimir Konečni and Ebbe Ebbesen have found that legal decisions typically involve the consideration of few factors and that extremely simple decision strategies are the rule rather than the exception.[120] According to Jeffrey Rachlinski and Andrew Wistrich, while the research on bail and sentencing decisions suggests that judges realize they are supposed to consider all factors and state that they have done so, the factors considered in legal decisions are quite different from those claimed by the decision maker.[121]

D. BOUNDED RATIONALITY AND STEREOTYPES

Building on Simon's work on bounded rationality, scholars have hypothesized that when judges are faced with incomplete information, they may attempt to manage uncertainty in the sentencing decision by making "situational imputations about defendants' character and expected future behavior"[122] and developing "patterned responses" whereby race influences a judge's assessment of the offender and their risk of recidivism.[123] Doing so, however, can serve to introduce discriminatory bias and stereotypes relating to an offender's race to permeate sentencing decisions.[124]

Judges may simplify and make satisfactory, rather than optimal, sentencing decisions because the limited information they are likely to receive on the offender's background in lower courts reduces their ability to assess how dangerous the offender is and how likely they are to recidivate.[125] In docket courts, judges typically will have access to legal information such as the circumstances of the current offence, whether the offender has a prior criminal record, and whether the offender entered a guilty plea. However, these legal factors alone may be insufficient information for calibrating an appropriate sentence.[126] Lacking key information when determining how likely an offender is to recidivate, judges may only

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117 Mandeep K Dhami & Peter Ayton, "Bailing and Jailing the Fast and Frugal Way" (2001) 14:2 J Behavioral Decision Making 141.

118 Vladimir J Konečni & Ebbe B Ebbesen, "The Mythology of Legal Decision Making" (1984) 7:1 Intl J L & Psychiatry 5; Vladimir J Konečni & Ebbe B Ebbesen, eds, *The Criminal Justice System: A Social-Psychological Approach* (San Francisco: WH Freeman, 1982); Cyrus Tata, John N Wilson & Neil Hutton, "Representations of Knowledge and Discretionary Decision-Making by Decision-Support Systems: The Case of Judicial Sentencing" (1996) 2 J Inf L & Tech.

119 Dhami & Ayton, *supra* note 117 at 160.

120 Ebbe B Ebbesen & Vladimir J Konečni, "Decision Making and Information Integration in the Courts: The Setting of Bail" (1975) 32:5 J Personality & Soc Psychology 805 at 820.

121 Jeffrey J Rachlinski & Andrew J Wistrich, "Judging the Judiciary by the Numbers: Empirical Research on Judges" (2017) 13 Annual Rev L & Soc Science 203 at 218.

122 Steffensmeier & Demuth, *supra* note 12 at 246.

123 *Ibid* at 257.

124 *Ibid* at 246, 258. See also Christine Bond & Samantha Jeffries, "Differential Sentencing of Indigenous Offenders: What Does Research Tell Us?" (2013) 8:7 Indigenous L Bull 15; Christine Bond & Samantha Jeffries, "Indigenous Sentencing Outcomes: A Comparative Analysis of the Nunga and Magistrates Courts in South Australia" (2012) 14:2 Flinders LJ 359.

125 Steffensmeier & Demuth, *supra* note 12 at 246.

126 Christine Tartaro & Christopher M Sedelmaier, "Tale of Two Counties: The Impact of Pretrial Release, Race, and Ethnicity Upon Sentencing Decisions" (2009) 22:2 Crim Justice Studies 203 at 206.

examine the circumstances of the crime and develop a "perceptual shorthand"[127] which links the offender's characteristics, including factors such as "race, gender, and age to dangerousness."[128] This, in turn, may result in potential disparities in sentence severity.[129]

Several researchers have examined links between stereotypes, judge's associated understanding of "causal processes" that lead to an offence, and sentencing. Gary Fontaine and Catherine Emily investigated this relationship among municipal court judges. Relying on verbal statements made by the judge during sentencing, the authors concluded that judges attribute meaning to past and future behaviour consistent with stereotypes associated with membership in social categories.[130] Their findings are consistent with Walter Lippman's earlier research that also demonstrates a link between social category and attributions of particular traits and behaviours.[131] John Carroll also found that in parole board decisions, "the higher the stability of the attributions regarding the cause of the parole applicant's offence, the higher is the Board member's prediction of the risk of future crime, and the more reluctant he or she is to grant parole."[132]

In Indigenous sentencing, stereotypes may well influence what factors judges consider and how purposively a judge incorporates the *Gladue* principles when determining an appropriate sentence. Although the *Criminal Code* instructs judges to consider alternatives to incarceration when sentencing Indigenous offenders,[133] in the absence of comprehensive information, judges may rely on "stereotypes that link race, gender, and outcomes from earlier processing stages to the likelihood of future criminal activity."[134] For example, without the required amount of information to purposively apply *Gladue* principles, judges may rely on stereotypes that suggest Indigenous offenders commit more crimes than other groups simply because they are overrepresented in the prison system and link the offender's race to a greater likelihood of recidivism. Furthermore, judges may rely on stereotypes about Indigenous alcohol and substance abuse and link the offender's race to a greater likelihood of future criminal activity associated with substance abuse. This type of reasoning may decrease the judge's likelihood of considering a lesser sentence for the offender. As mentioned earlier, Celesta Albonetti argues that when uncertainty is high and judges are provided with limited information on the offenders and their background, judges are more likely to be influenced by stereotypes when determining appropriate sentences.[135] Therefore, judges who are not provided with pre-sentence reports or *Gladue* reports on the offender's

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127 Darrell Steffensmeier, Jeffery Ulmer & John Kramer, "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black and Male" (1998) 36:4 Criminology 763 at 767.

128 Ostrom, Ostrom & Kleiman, *supra* note 49 at 38.

129 Anna Johnson, *Equitable Access: A Comparison of the Sentencing of Aboriginal Offenders Across Canada* (MA Thesis, University of Guelph, 2016) at 32 [unpublished], online (pdf): [perma.cc/WSA9-QZRT].

130 Gary Fontaine & Catherine Emily, "Causal Attribution and Judicial Discretion: A Look at the Verbal Behavior of Municipal Court Judges" (1978) 2:4 L & Human Behavior 323 at 329–30.

131 Walter Lippman, *Public Opinion* (New York: Macmillan, 1922).

132 John S Carroll, "Causal Attributions in Expert Parole Decisions" (1978) 36:12 J Personality & Soc Psychology 1501 at 1509–10.

133 *Supra* note 6, s 718.2(e).

134 Celesta A Albonetti, "Theoretical Perspectives and Empirical Assessments of Race/Ethnicity Disparities in Federal Sentencing" in Mathieu Deflem, ed, *Race, Ethnicity and Law* (Bingley, UK: Emerald, 2017) 95 at 98, citing Celesta A Albonetti, "An Integration of Theories to Explain Judicial Discretion" (1991) 38:2 Soc Problems 247 at 250 [Albonetti, "An Integration of Theories"].

135 Albonetti, "An Integration of Theories," *ibid* at 249.

background may be more likely to rely on stereotypes when sentencing Indigenous offenders as they are less able to purposively apply *Gladue* principles. Building on the work of Albonetti, discrimination and disparity in Indigenous sentencing decisions may be the product of judicial attempts to achieve a bounded rationality in sentencing by relying on stereotypes of defendants most likely to recidivate.[136]

V. THE PRESENT STUDY

Enhancing our comprehension of how judges apply Indigenous sentencing principles is imperative, as this knowledge is essential for assessing the fairness of present sentencing practices. This study sought to understand the complexity of judges' Indigenous sentencing decisions and their application of Indigenous sentencing principles and considerations within the context of contested sentencing decisions of the provincial docket court. When sentencing in docket court, do judges consider *Gladue* factors, such as an Indigenous person's circumstances and the alternatives to incarceration? Further, how complex are their sentencing decisions and on which factors and information do they rely? An examination of dynamic sentencing that considers contextual features could help to better explain the persistent overrepresentation of Indigenous offenders in prisons.

The empirical aspect of this study was exploratory in nature; hence, it can only propose connections between concepts. These connections have not been verified by experiment. Research has suggested that this exploratory approach has benefits because experimental research "intentionally de-emphasizes or eliminates aspects of realistic social environments."[137] The de-emphasis resulting from experimental research defeats the purpose of attempting to understanding how various contextual features affect decision-making and restricts its applicability in understanding how judges make real world sentencing decisions for Indigenous offenders.[138] Further, experimental research about judicial sentencing decisions, which necessarily includes the recruitment of judges, was attempted for this study, with no success. This study relied on data gathered from observations of real life sentencing decisions, prior research, and reasonable assumptions. As a result, this study does not formulate a hypothesis but rather research propositions. The hope is that the propositions formulated here will suggest promising areas of inquiry for researchers that can help to better pinpoint how, why, and when features of the provincial docket court environment shape judicial sentencing decisions for Indigenous offenders.

The propositions formulated in this study are as follows:

> Proposition 1: Sentencing decisions for Indigenous offenders in provincial docket courts are made in low-information environments, where judges work under tight time constraints and lack sufficient knowledge of a particular Indigenous offender's circumstances, background, and *Gladue* factors.

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136 *Ibid*.

137 Elizabeth Bruch & Fred Feinberg, "Decision-Making Processes in Social Contexts" (2017) 43 Annual Rev Sociology 207 at 208. See also Mattia Casula, Nandhini Rangarajan & Patricia Shields, "The Potential of Working Hypotheses for Deductive Exploratory Research" (2021) 55:5 Quality & Quantity 1703.

138 Bruch & Feinberg, *ibid*.

Proposition 2: Faced with a lack of comprehensive and reliable information about complex Indigenous sentencing factors, judges limit the number of factors considered when making sentencing decisions.

Proposition 3: Without access to comprehensive information, judges rely on heuristics and form judgments about a defendants' character and their potential future behaviour. In this way, stereotypes about substance abuse and Indigenous crime permeate their sentencing decisions.[139] By doing so, judges fail to give full consideration to the principles of Indigenous sentencing.

Proposition 4: As judges apply more factors in their sentencing decisions, reliance on stereotypes about Indigenous crime and the involvement of substance abuse, are reduced.

VI. STUDY DESIGN AND DATA COLLECTION

A. OBSERVERS AND OBSERVED JUDGES

The decisions made by judges in two provincial docket courts in Saskatoon, Canada, were observed over a four-month period. Four observers recorded 118 sentencing decisions of Indigenous offenders.

B. OBSERVATIONAL CODING SCHEME

Details of the cases and the sentencing decisions made were recorded using a structured coding scheme. Construction of the coding scheme was informed by a task analysis of (1) the *Gladue* sentencing principles; and (2) relevant contextual and background factors such as the details about each defendant, lawyers, and the judge, timing of sentencing decisions, offences charged, legal representation, source of *Gladue* information, and aspects of the judge's interactions with various participants. The coding scheme was pilot tested on eight sentencing hearings observed over two days in the same courts.

Data were recorded on verbal, non-verbal, and written cues that the task analysis indicated may be available to judges during sentencing hearings. The cues are shown in Table 1. They can be divided into those referring to: (1) the personal characteristics of the defendant; (2) the source of the *Gladue* information; (3) the systemic and background *Gladue* factors assessed; and (4) the consideration of the availability of appropriate alternatives to imprisonment as a sentence. In addition to recording details on each case and the decision, observers measured the duration of sentencing hearings using a stopwatch. The observers consisted of three graduate students as well as the researcher.

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[139] See e.g. *R v Barton*, 2019 SCC 33 at para 203 [*Barton*].

C. INTEROBSERVER RELIABILITY

Interobserver reliability was assessed in the middle of the observation period, when two observers recorded data on 20 hearings in one week in the two courts. The use of standardized coding sheets and instructions further increased the reliability and validity of the research strategy and confidence that the events observed have been accurately captured.

D. DATA ANALYSIS

This study examines how the court environment and heuristics may interact with sentencing law to affect the meaningful application of *Gladue* principles and considerations. To answer this question, information was recorded solely from court observation and was coded on the following characteristics:

TABLE 1:
VERBAL, NONVERBAL, AND WRITTEN CUES FOR CODING SCHEME

Factor	**Description**
Offender Information	
Offender Gender	Male/Female/Transgender Male/Transgender Female
Offender Age	20-29/30-39/40-49/50-59/60-69/70-79
Offender Indigenous Status	Indigenous/Non-Indigenous
Type of Offence	Summary Offence/Indictable Offence
Offences Charged	List
Duration of Sentencing	Start Time/End Time
Represented by Defence Lawyer	Y/N
Sentence	• Guilty/Not Guilty • Absolute Discharge/Conditional Discharge/Probation/ Restitution/Fines/Conditional Sentence/Imprisonment/ Intermittent Imprisonment • Duration of sentence
Sentencing Principles	
Principle of Proportionality	Is the principle of proportionality mentioned? If yes, which arm of the proportionality test was mentioned? • Sentence must be proportionate to the gravity of offence • Sentence must be proportionate to the degree of responsibility of the offender
Gladue *Principles and Considerations*	
Judicial recognition of leading case law that outlines the sentencing framework for Indigenous Peoples	Was there judicial recognition of the following cases? • *Gladue*, Y/N • *Ipeelee*, Y/N • *Chanalaquay*, Y/N

Factor	**Description**
Acknowledgement that Indigenous persons have different circumstances	Yes/No
Presence of *Gladue* waiver	*Gladue* waiver present/*Gladue* waiver not present
Presence of *Gladue* information	*Gladue* information available for sentencing/*Gladue* information not available for sentencing
Source of Gladue information	*Gladue* report/ Pre-sentence report/Prosecutor/Defence Lawyer
Judicial notice of effect of broad systemic factors	• Colonialism, Y/N • Displacement, Y/N • Residential schools, Y/N
Assessment of degree to which systemic and background factors unique to Indigenous offenders have played a role in the accused's life and in bringing the offender before the courts	• Low income/poverty • High or uncertain unemployment • Lack of opportunities/employment opportunities, • Substance abuse • Loneliness • Community fragmentation • Widespread discrimination both inside and outside penal institutions • Offender's relationship to their community/Indigenous community. • Family flexibility • Family breakdown • Family cohesion • Family resilience • Offender's physical health • Offender's mental health • Leisure activities • Relationship with significant other • Family and social relationships • Financial situation • Independence/autonomy • Offender's religious/spiritual expression • Pre-mature deaths of family members due to substance abuse accidents, violence, and suicides • Negative experiences in foster care or out-adoption
The role these background and personal factors played in the determination of the sentence	• Did the judge find these factors played a significant role in the Indigenous person's life? Y/N
Judicial assessment of appropriate alternatives to imprisonment	• Is there evidence that the judge considered all available sanctions that are reasonable in the circumstances when sentencing Indigenous offenders? • Was there an assessment of the availability of appropriate alternatives to imprisonment as a sentence?
Judicial mention of ideals of restorative justice; need for offenders to take personal responsibility for their actions; and desire to heal the victim, offender, and community	• Did the judge cite the ideals of restorative justice in the sentence? Y/N • If so, did the judge refer to: o The need for the offender to take personal responsibility for their actions o The desire to heal the victim, offender, and community from the damage caused by anti-social behaviour

VII. RESULTS

This research builds on a contextual framework for understanding judicial decision-making in lower courts. By analyzing court observation data, this study explores whether judges in docket courts render sentencing decisions that align with the requirements of section 718.2(e) of the *Criminal Code* and the consistent application of the *Gladue* principles, such as the consideration of Indigenous person's circumstances and the alternatives to incarceration.

A. PROPOSITION ONE

The data demonstrate that sentencing decisions for Indigenous offenders in provincial docket courts are made in low-information environments, where judges work under tight time constraints and lack sufficient knowledge of a particular Indigenous offender's circumstances, background, and *Gladue* factors.

This study on Indigenous sentencing was part of a larger study on the use of sentencing principles for adult offenders, both Indigenous and non-Indigenous. The duration of sentencing decisions was recorded in an attempt to understand the environment in which judges are making sentencing decisions. Recording of duration began when the prosecution began to lay out the facts of the case until the judge completed rendering a sentence. In this period, the prosecutor presented the facts of the case, any evidence available such as police reports, witness statements, the offender's criminal record, any statements made by the offender, information contained in a pre-sentence report or *Gladue* report, and the presence of any aggravating factors. The defence lawyer then either agreed or disagreed with the statement of facts, questioned the evidence put forward by the prosecution, addressed the mitigating circumstances and explored other possible interpretations, and highlighted *Gladue* factors of relevance. Judges then deliberated and rendered a verbal sentence.

The sentencing duration was recorded and recoded to reflect this duration in minutes for each defendant. On average, the 118 Indigenous sentencing decisions observed had a maximum duration of 44 minutes and a minimum duration of two minutes. The 108 non-Indigenous sentencing decisions had a maximum duration of 52 minutes and a minimum duration of two minutes. Indigenous sentencing decisions were conducted more quickly (mean = 6.3 minutes) than non-Indigenous sentencing (mean = 7.4 minutes); however, this difference was not statistically significant ($t(175) = -0.88$; $p = 0.380$).

Furthermore, there was no *Gladue* information, present in the form of either a *Gladue* report or pre-sentence report with *Gladue* section in 114 of 118 decisions. When provided, *Gladue* information most frequently came from the defence lawyer (11 percent; $n = 13$) and occasionally the prosecutor (0.8 percent; $n = 1$).

B. PROPOSITION TWO

This study proposes that faced with a lack of comprehensive and reliable information about complex Indigenous sentencing factors, judges limit the number of factors considered when making sentencing decisions.

1. PRONG 1 OF THE *GLADUE* ANALYSIS

The analysis below examines: (1) whether judges consider the circumstances of Indigenous offenders, including the systemic and background factors; (2) the complexity of the *Gladue* factors analysis undertaken by judges; and (3) whether judges consider the relationship between these factors and the principle of proportionality.

a. Do Judges Consider the Unique Circumstances of Indigenous Offenders?

Overall, a complete assessment of an Indigenous offender's systemic and background factors occurred very seldom. In 94.9 percent of cases, judges did not consider a complete assessment of background and systemic factors to be applicable to the matter at hand.

In the *Ipeelee* decision, the Supreme Court recognized that the reasons for historical traumas are complex and noted that in light of this, all lower courts in Canada must take judicial notice of such matters as the history of colonialism, displacement, and residential schools.[140] In this study, judges did not expressly take judicial notice of the effects of either colonialism, displacement, or residential schools for the vast majority of sentencing decisions. Judges acknowledged that Indigenous defendants were affected by colonialism (2 percent; $n = 2$), displacement (3 percent; $n = 3$), and residential schools (3 percent; $n = 4$).

The *Ipeelee* decision also states that judges must consider how the systemic factors and the history of trauma that results continues to translate into background factors such as lower educational attainment, higher unemployment, lower incomes, higher rates of substance abuse and suicide, and higher levels of incarceration of Indigenous offenders.[141] While judges did not consider a complete assessment of background and systemic factors as necessary in the majority of cases, judges referred to a variety of background factors, either individually or in combination, as potentially influencing Indigenous defendants in the 118 sentencing decisions examined. Overall, substance abuse was mentioned as a background factor most frequently (41.5 percent; $n = 49$) followed by family cohesion (25.4 percent; $n = 30$), and relationship with the offender's significant other (13.6 percent; $n = 16$). Of note, high or uncertain employment opportunities (4.2 percent) and the widespread discrimination faced by Indigenous Peoples in Canadian society (0.85 percent); were among the least often mentioned by judges (see Figure 1).

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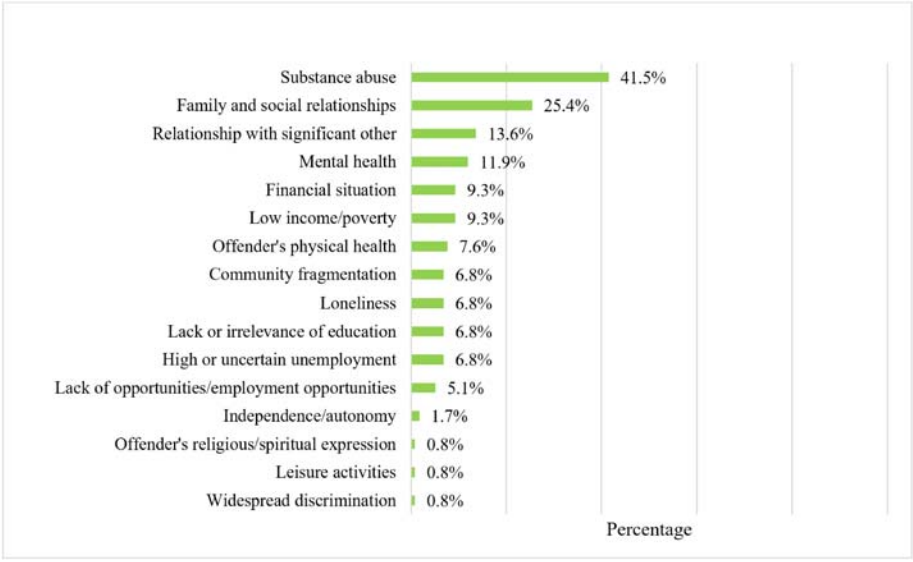
140 *Ipeelee*, *supra* note 37 at para 60.
141 *Ibid*.

FIGURE 1:
BACKGROUND *GLADUE* FACTORS MENTIONED

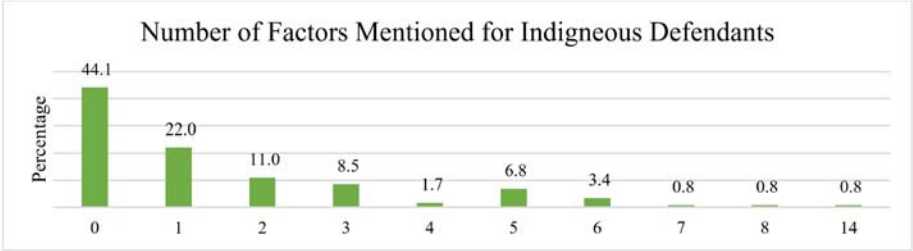


Overall, specific background and systemic factors were mentioned in 55 unique cases. Of these 55 cases in which background and systemic factors were considered, the judge considered these factors to have played a significant role in the Indigenous accused's life 40 percent of the time (n = 22). Further, this study recorded only two instances in which the judge made the connection between the factors and the sentencing outcome. In the first instance, the judge stated that they were inclined to give a longer custodial sentence then they would have otherwise, despite the presence of *Gladue* factors. In the second case, the judge said that the presence of the systemic factors made a community-served sentence more viable.

b. How Complex Was the *Gladue* Factors' Analysis?

Data were recoded to indicate the complexity of the *Gladue* factors' analysis. This analysis examined how many background or systemic factors were considered or mentioned in each sentencing decision. Judges had the opportunity to examine up to 19 *Gladue* factors for each defendant. The columns represent the number of factors mentioned for a particular sentencing decision. These findings are depicted in Figure 2.

FIGURE 2:
SENTENCING DECISIONS BY NUMBER OF FACTORS CONSIDERED



Evidence of Indigenous considerations were present, meaning that at least one factor was mentioned, in just over half of the 118 cases (56 percent; *n* = 66). This mean that no consideration was given to any *Gladue* factors 44 percent of the time (*n* = 52).

c. Do Judges Consider the Relationship Between the Background and Systemic Factors and the Proportionality Principle?

Consideration of an Indigenous person's background and systemic factors informs the culpability of the offender and their level of moral blameworthiness.[142] The systemic and individual circumstances of an Indigenous offender are highly relevant to the assessment of moral blameworthiness.[143] If *Gladue* information is lacking or there is no satisfactory analysis of the background and systemic factors performed, it is difficult for a judge to ascertain the moral blameworthiness and therefore the proportionality of a sentence.[144] The principle of proportionality was seldom mentioned (by the judge: *n* = 2; by the defence counsel: *n* = 1). Of the three cases that did mention the principle of proportionality, none made the connection between the background and systemic factors and the principle of proportionality.

The principle of proportionality consists of two crucial and separate components: (1) the gravity of the offence; and (2) the degree of responsibility of the offender. The gravity of the offence relates to the harm done by the crime and the degree of responsibility refers to the offender's moral culpability.[145] All three mentions of proportionality were made in the context of gravity of the offence. The results of this study demonstrate that judges are not making the connection between the background and systemic factors and how their acknowledgment could diminish the moral culpability of the accused.

142 *Ibid* at para 73.
143 *Ibid*.
144 *Ibid*.
145 Marie Manikis, "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions" (2022) 59:3 Osgoode Hall LJ 587 at 593–94.

2. PRONG 2 OF THE *GLADUE* ANALYSIS

While the data in this study demonstrate that trial judges do not meaningfully consider an Indigenous person's background and systemic factors, which make up the first prong of the *Gladue* analysis, it also appears that the second prong does not gain much of judges' attention. This point is significant because the second prong presents an opportunity for rethinking sentencing in alignment with the Supreme Court's decision in *Ipeelee*.

Data were collected to determine whether alternative sanctions, other than imprisonment, which are reasonable in the circumstances, were mentioned in sentencing decisions for Indigenous defendants, and whether they were meaningfully considered. Alternative sanctions can take the form of probation, fines, suspended sentences, restitution, counselling services, community-based programming, and community-based sentencing, to name a few. This factor was coded as "meaningfully considered" if the judge verbally explored the availability of alternative sanctions that are suited to the offender and the offence or if an assessment of the availability of local appropriate alternatives to imprisonment as a sentence was undertaken. The intersection of these data was analyzed to determine the number of cases that were both mentioned and meaningfully considered. This intersection occurred just 3 percent of the time ($n = 4$) out of the 118 sentencing decisions of Indigenous defendants observed.

Data were collected to determine if the judges cited the ideals of restorative justice. When they did mention restorative justice principles, data were collected to determine if judges referred to: (1) the need for the offender to take personal responsibility for their actions; or (2) the restorative justice principle to heal the victim, offender, and community from the damage caused by anti-social behaviour. Overall, the desire to heal aspect of restorative justice (12 percent; $n = 14$) was mentioned more often than the personal accountability aspect (5 percent; $n = 6$).

When sentencing an Indigenous offender, judges are expected to abide by the principle that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. Data was gathered to see how often judges mentioned this principle and also if judges explained any impediments to the application of this principle. Overall, this principle was mentioned in 16.9 percent of cases ($n = 20$). In 5.1 percent of those cases, judges noted that there were circumstances that prevented the application of this principle.

C. PROPOSITION THREE

This study proposes without access to comprehensive information, judges rely on heuristics and form judgments about a defendants' character and their potential future behaviour. In this way, stereotypes about substance abuse and Indigenous crime permeate their sentencing decisions.[146] By doing so, judges fail to give full consideration to the principles of Indigenous sentencing.

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[146] *Barton*, *supra* note 139 at para 203.

There were 66 of 118 sentencing decisions in which at least one factor was mentioned. There were 26 sentencing decisions in which the judge referred to one *Gladue* factor. Substance abuse was the primary factor considered ($n = 18$). The offender's relationship with their significant other was second most considered, with that *Gladue* factor being mentioned in two sentencing decisions. High or uncertain employment, family flexibility, family cohesion, family and social relationships, and physical health and mental health of the offender were each mentioned once.

There were 13 sentencing decisions in which the judge referred to two *Gladue* factors. There was an increase in the overall number and variety of *Gladue* factors from eight different factors in sentencing decisions in which only one *Gladue* factor was considered to nine different factors in sentencing decision in which two *Gladue* factors were considered. Substance abuse remained the primary factor considered ($n = 9$). Low income/poverty, family and social relationships, and family cohesion were all the second most often considered factor ($n = 4$). High or uncertain employment, lack of opportunities/employment opportunities, the offender's physical health, and the offender's relationship with their significant other were each mentioned once.

There were ten sentencing decisions in which the judge referred to three *Gladue* factors. When three factors are mentioned, there is an increase in the variety of the factors considered by judges to twelve different *Gladue* factors. For the sentencing decisions in which the judge referred to three *Gladue* factors, substance abuse was still cited more often than any other factor. Family flexibility ($n = 4$) and family cohesion ($n = 4$) were equally the second most often mentioned. The offender's mental health and high or uncertain employment were the third most often mentioned ($n = 3$). Loneliness, family and social relationships, the offender's relationship with significant other, the offender's financial situation, their lack or irrelevance of education, and the offender's relationship with their significant other were each mentioned once.

D. PROPOSITION FOUR

The data demonstrates that as judges apply more factors in their sentencing decisions, reliance on stereotypes about Indigenous crime and the involvement of alcohol and drug abuse are reduced. There were only two sentencing decisions in which the judge referred to four *Gladue* factors.

Substance abuse was no longer considered more often than other factors ($n = 1$). In fact, high or uncertain unemployment ($n = 2$) and family cohesion ($n = 2$) were equally considered most often. Other factors considered include the accused's relationship with their significant other ($n = 1$), the accused's financial situation ($n = 1$), and social relationships ($n = 1$).

There were eight sentencing decisions in which the judge referred to five *Gladue* factors. For the eight sentencing decisions in which the judge referred to five *Gladue* factors, substance abuse and family cohesion were the most often cited factor ($n = 6$), closely followed by family and social relationships ($n = 5$). The offender's lack of education ($n = 3$), community fragmentation ($n = 3$), and offender's mental health ($n = 3$) were the next most often cited. Family resilience was mentioned twice ($n = 2$). For the first time, a judge

was observed considering the offender's understanding of Indigenous traditions and their religious or spiritual expression (n = 1). Also mentioned once were factors such as low incomes/poverty, the offender's relationship with their significant other, the offender's physical health, the offender's financial situation, the offender's family flexibility and family resilience, and loneliness. For sentencing decisions in which judges considered five *Gladue* factors, a greater variety of factors (n = 14) were considered overall.

There were four sentencing decisions in which judges considered six *Gladue* factors. Once again, substance abuse was no longer considered more often than other factors. The offender's family and social relationships (n = 4) and family cohesion (n = 4) was considered in every decision and were the most often mentioned. The offender's financial situation (n = 3) was the second most often mentioned *Gladue* factor. Community fragmentation, substance abuse, and the offender's physical health were each mentioned twice (n = 2). The offender's relationship with their significant other, their engagement in leisure activities, the offender's mental health, family flexibility, loneliness, lack of opportunities/employment opportunities, and the offender's level of independence/autonomy were all mentioned once (n = 1).

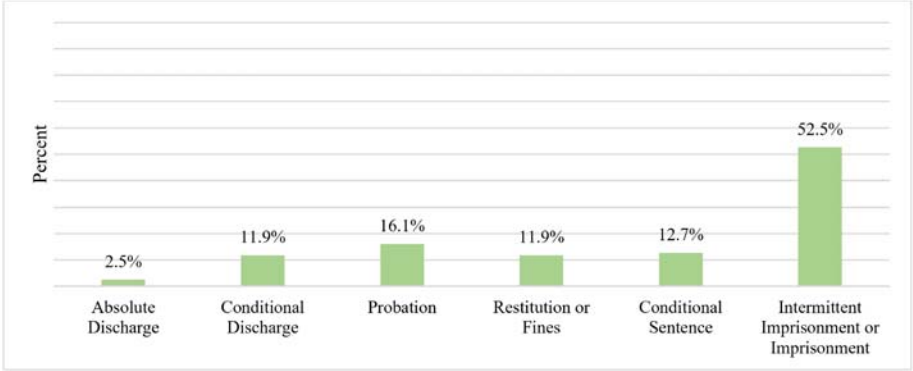
There was only one sentencing decision that considered eight *Gladue* factors. Although substance abuse was one of the factors considered, the judge undertook a more widespread and purposive analysis of the *Gladue* factors that brought the offender before the Court. Interestingly, factors rarely considered by judges in this study, such as the offender's loneliness, mental health, low income/poverty, high or uncertain employment, family cohesion, and community fragmentation that leads Indigenous Peoples to have a higher incidence of crime and incarceration were factors considered by the judge.

In the observed sentencing decisions, there was only one decision in which fourteen different *Gladue* factors were considered in order to provide the sentencing judge with the necessary context to craft an appropriate sentence. In addition to substance abuse, a variety of *Gladue* factors including low income/poverty, lack or irrelevance of education, loneliness, family flexibility, mental health, financial situation, lack of opportunities/employment opportunities, community fragmentation, family cohesion, the offender's physical health, family and social relationships, and the offender's level of independence/autonomy were considered by the sentencing judge.

E. SENTENCE OUTCOME BY INDIGENOUS STATUS

The frequencies of sentence outcomes for Indigenous defendants were explored. As mentioned above, imprisonment (intermittent and non-intermittent) was by far the most common outcome observed (52 percent; n = 61), distantly followed by probation (16.10 percent; n = 19) (see Figure 3). Because defendants may have received multiple sentences, the sum of total outcomes exceeds 100 percent.

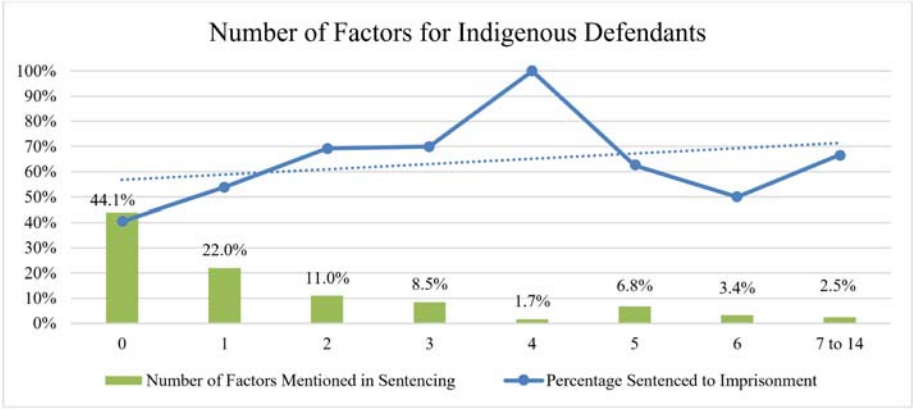
FIGURE 3:
SENTENCE OUTCOMES FOR INDIGENOUS DEFENDANTS



A chi-square test of independence was performed to explore the possibility that the sentencing outcome may be disproportionately likely to occur to either Indigenous or non-Indigenous defendants. In fact, Indigenous defendants were less likely than non-Indigenous defendants to owe a fine or restitution ($X2$ (1, N = 226) = 19.65, $p < .001$), and more likely than non-Indigenous defendants to be imprisoned ($X2$ (1, N = 226) = 9.33, $p < .01$). No significant differences were detected for conditional discharge, probation, and conditional sentencing, and no comparisons could be made for absolute discharge.

Furthermore, the data shows that the percentage of Indigenous offenders sentenced to imprisonment increases as the number of *Gladue* factors considered increases (see Figure 4).

FIGURE 4:
IMPRISONMENT SENTENCING BY FACTORS CONSIDERED



To further explore this finding, a depiction of the likelihood of imprisonment by total factors considered is depicted in Table 2. A chi-square analysis testing the difference between the frequencies in the cases versus the number imprisoned did not yield a significant difference, ($X2$ (2, N = 118) = 2.3, p = .315), indicating that imprisonment was in fact more likely to occur as more factors were considered.

TABLE 2:
UNSATISFACTORY SENTENCING DECISIONS BY FACTORS CONSIDERED

Number Factors	Number of Cases	Number Sentenced to Imprisonment	% Imprisonment	*p value*
0	52	21	40.3%	
1–4	51	32	62.7%	p = .315
5+	15	11	73.3%	

Sentencing decisions were further classified as satisfactory and unsatisfactory. Sentencing decisions were defined as unsatisfactory if four or less *Gladue* factors were considered and alternative sanctions were not considered. Sentencing decisions were classified as unsatisfactory if four or less *Gladue* factors were considered for two reasons: (1) the superficiality of the *Gladue* analysis if only a few factors were considered; and (2) the types of factors this study demonstrates were the "first few" considered and their propensity to lead to improper inferences. Sentencing decisions were defined as satisfactory if they considered a minimum of five *Gladue* factors and considered alternative sanctions. Of 118 sentencing decisions, 103 (87 percent) were considered unsatisfactory because they considered four or less *Gladue* factors (see Table 3). While 15 sentencing decisions (12.7 percent) considered five or more *Gladue* factors, only two of 118 sentencing decisions in this study (1.69 percent) met the definition of being satisfactory, in that they considered both five or more *Gladue* factors and alternative sanctions.

VIII. DISCUSSION

Despite the clear message sent by the Supreme Court of Canada in *Ipeelee*, that sentencers must follow the analysis laid out in *Gladue* when sentencing Indigenous offenders, this study found that the majority of provincial docket court judges are not following the methods or applying the principles of Indigenous sentencing. Failure to consider or apply the principles in section 718.2(e) of the *Criminal Code*, *Gladue*, and *Ipeelee* amounts to a reviewable error of law and also has significant systemic consequences.[147]

Almost 24 years after the *Gladue* case, the data from this study demonstrates that the *Gladue* factors have scarcely permeated sentencing decisions in lower courts. In *Gladue*, the Supreme Court states that when sentencing Indigenous defendants, judges are obligated to put the background and systemic factors at the centre of their analysis because these factors "figure prominently in the causation of crime."[148] Despite these requirements, an individual's Indigenous status was only acknowledged, let alone purposively examined, 8 percent of the

147 Ralston, *supra* note 42 at 129.
148 *Gladue*, *supra* note 7 at para 67.

time (n = 9). In 95 percent of the sentencing decisions examined in this study, the judges demonstrated that they had not thoroughly assessed the defendant's background and systemic factors. In failing to apply these factors in sentencing Indigenous offenders, the judges appear not to have considered the role these factors played in their lives. In 44 percent of the decisions examined, no *Gladue* factors were considered in determining the sentence; in 22 percent, judges considered one *Gladue* factor; and in 8.5 percent, three *Gladue* factors.

Although the courts carrying out an assessment of the factors that form the first prong of the *Gladue* analysis alone is not enough to reverse the trend of Indigenous overincarceration in our justice system, it is important because a lack of analysis of systemic and individual background factors impedes a judge's ability to innovate with respect to the sanctions considered in the second prong. Determining an appropriate sentence for Indigenous offenders requires using the second prong of the *Gladue* analysis, which invites judges to consider the types of sentences that may be appropriate, with an eye to addressing the overrepresentation of Indigenous offenders in Canadian prisons. However, in only 3.4 percent of sentencing decisions were alternative sanctions to imprisonment meaningfully considered, and judges seldom referred to the ideals of restorative justice. Although all judges are required to consider appropriate sentencing procedures and sanctions for Indigenous individuals, in this study no judge tried to adapt the sanction or procedure to reflect the Indigenous heritage of the accused. For example, in no cases were there referrals to a sentencing circle for sentencing recommendations.

The results of this study are concerning because an Indigenous person's unique systemic and background factors are relevant to sentencing in several distinct but interrelated ways:

> (i) shedding light on why they ended up before the court; (ii) assessing whether prison will impact them more adversely than others; (iii) assessing whether prison is less likely to rehabilitate them; (iv) determining whether prison is likely to deter or denounce their conduct in a way that is meaningful to their community; and (v) addressing whether restorative sentencing principles ought to be given primacy to address crime prevention and bring about individual and broader social healing.[149]

In the cases examined in this study in which at least one *Gladue* factor was mentioned in sentencing remarks, substance abuse was the *Gladue* factor most frequently considered (39 percent of cases; n = 46). When two factors were mentioned (11 percent of cases; n = 13), substance abuse was again the most frequently considered factor (n = 7). When three factors were mentioned (8.5 percent of cases), substance abuse was the most considered factor (n = 7). That substance abuse was the most frequently considered *Gladue* factor in most sentencing decisions suggests that *Gladue* principles were not meaningfully implemented.

Canadian case law has long recognized that Indigenous peoples are particularly vulnerable to stereotyping, including stereotypes related to alcohol and drug abuse.[150] In *R. v. Williams*, the Supreme Court of Canada found that "[r]acism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity."[151] Furthermore, in an article

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149 Ralston, *supra* note 42 at 81.
150 *Barton*, supra note 139 at para 199.
151 [1998] 1 SCR 1128 at para 58.

entitled "Locking up Natives in Canada," Michael Jackson stated "there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals."[152]

The theory of bounded rationality provides insight into why judges' decisions can be informed by stereotypes and prejudices, which in turn lead to discrepancies in sentencing between Indigenous and non-Indigenous offenders. In any criminal justice system, Albonetti suggests that "[i]mposing punishment … is the result of 'satisficing' or simplifying causal assumptions in an effort to achieve rationality."[153] Albonetti further explains that judicial sentencing decisions are often constrained by a lack of complete information about how dangerous an offender is and how likely they are to offend in the future. This lack of information leads courtroom actors "to reduce uncertainty by relying upon a rationality that is the product of habit and social structure."[154] Under these conditions of bounded rationality, sentencing decisions are influenced not just by the law, but are likely to be influenced by stereotypes in their sentencing.[155]

This tendency has serious implications when judges are presented with only limited or no information on an Indigenous defendant's background to use in determining an appropriate sentence. In this study, the vast majority of Indigenous sentencing decisions were made without case-specific *Gladue* information. How can a judge purposively apply *Gladue* principles if no information is presented to them about an offender's Indigenous background or the alternatives to incarceration available in the offender's local community? Under circumstances of limited information, it is likely that stereotypes may influence which *Gladue* principles judges rely on in determining sentences for Indigenous offender. This reliance, in turn, may lead to disparities in the severity of sentences.

Information on whether an offender was under the influence of alcohol or drugs during the commission of a crime is readily available from police reports. In the absence of comprehensive *Gladue* information, this may help to explain the judges' reliance on this factor above others.

One of the many *Gladue* factors judges ought to consider is the role that alcohol and drugs have played in the offender's background. But if this factor is primarily considered or if the *Gladue* principle primarily applied is that which fits stereotypes about Indigenous crime — those involving the abuse of alcohol or drugs — then there is little hope that these principles will achieve the remedial objective envisioned by Parliament. The *Gladue* principles govern the sentencing of all Indigenous offenders, not only those who have acted under the influence of alcohol and drugs. A failure to consider all *Gladue* factors is a failure to recognize that historical and intergenerational trauma, including the impact of colonialization, loss of

152 Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215 at 218 (cited in *ibid)*.
153 Albonetti, "An Integration of Theories," *supra* note 134 at 250.
154 *Ibid* at 248–49.
155 *Ibid* at 261.

traditional culture and language, and experiences with residential schools, has contributed significantly to the elevated risk of substance abuse amongst Indigenous peoples.[156]

Further, compared to non-Indigenous Canadians, Indigenous peoples often face major social and economic challenges such as high unemployment, poverty, sub-standard or a lack of housing, and inequitable access to education, health, and other significant social services. These disparities in the social determinants of health between Indigenous and non-Indigenous peoples contribute to challenges with substance use in some Indigenous communities.[157] For example, in the context of the opioid crisis, in the first six months of 2020, overdose death rates for Indigenous peoples in Alberta were seven times higher than for non-Indigenous peoples.[158] Similarly, in British Columbia overdose death rates for Indigenous peoples are 4.8 times higher than those for non-Indigenous people.[159] Population survey data shows that, for individuals aged 12 years or older, the prevalence of heavy drinking was 35 percent for off-reserve First Nations individuals, 30 percent for Métis individuals, and 39 percent for Inuit individuals, compared to a rate of 23 percent among non-Aboriginal individuals.[160] Similarly, recent data from the Métis Nation of Alberta show that Métis Albertans experience higher rates of opioid prescribing, hospitalizations, and emergency department visits related to opioid use than do non-Métis Albertans.[161] All Canadian courts must recognize that most Indigenous people who come before the criminal courts in Canada have been affected to one degree or another by many *Gladue* factors, which may largely account for the presence of alcohol and drugs as one of their background factors.

In very few cases in this study did judges use five or more *Gladue* factors to tailor a sentence. When they did, they relied on substance use as a factor in their decision-making, although they did not consider it more often than other *Gladue* factors. When six, seven, eight and 14 factors were considered in sentencing decisions, judges mentioned the defendant's lack of opportunities/employment opportunities more often than their involvement with alcohol or drugs. For these same decisions, community fragmentation was mentioned as often as substance abuse. Decisions with six *Gladue* factors (3.4 percent; n = 4) showed that factors such as family flexibility and financial situation were considered more often than others. When seven and eight *Gladue* factors were considered, other factors were considered as often as substance abuse. These included low income/poverty, lack of opportunities, loneliness, community fragmentation that leads to a higher incidence of crime and incarceration, mental health, and relationships with significant others. When judges use

156 Piotr Wilk, Alana Maltby & Martin Cooke, "Residential Schools and the Effects on Indigenous Health and Well-Being in Canada: A Scoping Review" (2017) 38:8 Public Health Reviews at 2.

157 *Ibid*.

158 Blair Gibbs et al, "Canada's Health Crisis: Profiling Opioid Addiction in Alberta & British Columbia," *Report for the Stanford Network on Addiction Policy (SNAP)* (March 2023) at 3, online (pdf): [perma.cc/GM3U-MYJQ].

159 *Ibid* at 4.

160 Statistics Canada, *Aboriginal Peoples: Fact Sheet for Canada*, by Karen Kelly-Scott & Kristina Smith, Catalogue No 89-656-X2015001 (Ottawa: Statistics Canada, 3 November 2015), online (pdf): [perma.cc/87UX-JCLC].

161 Métis Nation of Alberta, "Opioids and Substance Misuse and the Métis Nation of Alberta from 2013-2017," online (pdf): *Métis Nation of Alberta* [perma.cc/3J2C-Y3DR].

several factors to tailor a sentence, they can develop a fuller picture of the individual's life circumstances. Indeed, individuating information has been shown to reduce stereotyping.[162]

Only two sentencing decisions in this study met the test of being satisfactory, which was defined as sentencing decisions that mentioned a minimum of four *Gladue* factors and considered alternative sanctions to incarceration. However, this study also showed that the likelihood of imprisonment increased with the number of factors considered. This surprising result perhaps has two explanations. First, the sample size of the sentencing decisions that mentioned more than two *Gladue* factors was small, possibly compromising any conclusions that can be drawn. Second, the insufficient allocation of resources to fund programming alternatives that address criminogenic factors in Saskatchewan has been widely acknowledged. As a result, judges may not have reasonable alternatives to imprisonment available to them as a viable choice. This, in combination with any stereotypes that may influence the decision-making process and outcome, may further criminalize the poverty and addictions that underlie crimes and lead to the overrepresentation of Indigenous offenders in Canadian jails and prisons.

Against the backdrop of characteristic limitations of the lower court environment, cognitive constraints and the complexity of Indigenous sentencing law that serves to hamper the application of *Gladue* principles, judges are asked to undertake the sentencing of Indigenous offenders against the backdrop of optimistic presumptions regarding judge's capabilities. Judges are faced with cognitive limitations that prevent the proper integration of all information and are situated within a court environment marked by heavy workloads and time pressure. These limitations affect the time available per sentencing variable. The time available per variable which has been shown to affect decision-making.[163] This, in turn, leads to the reduced consideration of fewer variables and the substitution of complex cognitive strategies with simpler ones.[164] Furthermore, judges work in the context of the constraints relating to the existence, preparation, and quality of *Gladue* reports and the general lack of *Gladue* information on which to base a sentencing decision. Additionally, although the Supreme Court is clear in *Gladue* and *Ipeelee* about the mandatory nature of Indigenous sentencing principles, it has been acknowledged that there is little indication on how to implement them.[165] As a result, judges simply do not know how to operationalize the factors set out in *Gladue* and *Ipeelee*. In fact, as illustrated in the quotation below, some judges expressly say so in their decision:

> I return, then, to the question of how to factor in the issue of the Defendant's aboriginal status, as I am required to do. I must confess that I have always found this issue to be elusive indeed, and no less so now that I have read and re-read the decisions in *R. v Gladue*, *R. v. Ipeelee*, and *R. v. R.L.W.*[166]

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162 Rachel S Rubenstein, Lee Jussim & Sean T Stevens "Reliance on Individuating Information and Stereotypes in Implicit and Explicit Person Perception" (2018) 75 J Experimental Soc Psychology 54 at 54–55. See also Jennifer L Wessel & Ann Marie Ryan, "Past the First Encounter: The Role of Stereotypes" (2008) 1:4 Industrial & Organizational Psychology 409.

163 Mieneke WH Weenig & Marleen Maarleveld, "The Impact of Time Constraint on Information Search Strategies in Complex Choice Tasks" (2002) 23:6 J Economic Psychology 689 at 701.

164 *Ibid*.

165 Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548 at 602.

166 *R v EHS*, 2013 BCPC 48 at para 36 [citations omitted].

Additionally, although the Supreme Court states that a judge should not automatically reduce a sentence due to an offender's *Gladue* factors, *Ipeelee* suggests that the terms of imprisonment should be reduced.[167] Faced with these contradictions among others, some judges may be superficially canvassing and including the expression "*Gladue* factors" among the mitigating circumstances in their judgments. However, according to Marie-Andrée Denis-Boileau, and Marie-Éve Sylvestre, judges "must not understand subsection 718.2(e) and the teachings of the Supreme Court as propounding one sentencing principle among others, amongst which one may pick and choose according to the circumstances, but rather as an invitation to rethink not only the punishment, but the entire sentencing process."[168] In other words, judges must place the background and systemic factors of Indigenous offenders at the centre of their analysis.

According to Hardie Rath-Wilson, "[w]e must be ambitious about the scope of *Gladue* and its potential remedies, given the crushing scale of the permanent crisis of Indigenous overincarceration."[169] The efficacy of *Gladue* should not rely solely on those judges who fully understand the intent of Parliament in formulating section 718.2(e) of the *Criminal Code* and the rulings of the Supreme Courts in *Gladue* and *Ipeelee*.

Similarly, the success of *Gladue* must not be constrained by inadequately funded provincial government programs. Strengthening the efficacy of *Gladue* will mean clarifying what *Gladue* actually means and determining how it can realistically be applied in a resource-limited environment. Efforts must be made to ensure that judges clearly understand the teachings of the Supreme Court in *Gladue* and *Ipeelee*, that *Gladue* factors are closely tied to the principle of proportionality of sentences, and that this analysis of proportionality requires that Indigenous defendants' background and systemic factors be considered in assessing their responsibility, and not as an additional risk factor.

We must also examine how the complexity and uncertainty of sentencing law shapes the role played by heuristics in sentencing decisions. The lack of guidelines in many areas of sentencing means that judges may be unable to make decisions according to the law or policy. According to Mandeep Dhami, Ian Belton, and Jane Goodman-Delahunty, the task of criminal sentencing must be evidence-based, and policymakers must develop cognitive roadmaps for sentencing that "encourage a mode of cognition"[170] that "corresponds best with properties of the sentencing task."[171] To create these models, policymakers "must identify the properties of the task, attempt to alter properties which may lead to biased or inconsistent decisions, and provide the decision-maker with aids that help to overcome any cognitive limitations (i.e., attention, memory and processing capacity) so they can comfortably apply the prescribed mode of cognition."[172]

Further research is required to provide the evidence required for such legal and policy reforms. We must advance our understanding of the psychology of sentencing in the court

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167 *Ipeelee*, *supra* note 37 at para 30.
168 Denis-Boileau & Sylvestre, *supra* note 165 at 603.
169 Hardie Rath-Wilson, "Constitutionalizing Gladue Rights: Critical Perspectives and Prospective Paths Forward" (2021) 44:5 Man LJ 29 at 48.
170 Dhami, Belton & Goodman-Delahunty, *supra* note 109 at 245.
171 *Ibid* at 239.
172 *Ibid* at 245.

environment. Researchers must seek to develop and test cognitive aids to sentencing decision-making that assists judges to make optimal decisions. As Christoph Engel and Elke Weber argue, "*how* we decide often determines *what* we decide."[173] By better understanding the sentencing decision-making task, how decisions are made, and the resources that are available, "legal institutions can, and have, influenced how sentencing judges decide."[174] We must begin this process with an acknowledgement of the failure of the decisions in *Gladue* and *Ipeelee*. What is prescribed in these Supreme Court decisions does not accord with the real-life circumstances in which judges make decisions. We must see this as an opportunity to work with the research community and Indigenous peoples to strategically tackle the problem of Indigenous overrepresentation in Canada's criminal justice system.

[173] Christoph Engel & Elke U Weber, "The Impact of Institutions on the Decision How to Decide" (2007) 3:3 J Institutional Economics 323 at 323 [emphasis in original].

[174] Dhami, Belton & Goodman-Delahunty, *supra* note 109 at 245.