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The Circumstances of the Offence: The Post-Ipeelee Sentencing of Indigenous Offenders for Manslaughter in the Superior Courts

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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The Circumstances of the Offence:
The Post-*Ipeelee* Sentencing of Indigenous Offenders for Manslaughter
in the Superior Courts

Abstract

Precisely how section 718.2(e) of the *Criminal Code* – the so-called *Gladue* provisions – is meant to apply to the sentencing of serious and violent crimes has remained an open question for two decades. This paper utilizes a comparative analysis of the sentencing of Indigenous and non-Indigenous offenders for manslaughter in the superior courts of Ontario, western Canada and the territories in an attempt to answer that question. It compares the outcomes for Indigenous and non-Indigenous offenders sentenced for manslaughter in the six years following the Supreme Court of Canada’s decision in *Ipeelee* to determine whether there is a different sentencing regime in operation for Indigenous offenders with respect to this offence and, if so, what outcomes that regime produced. The central conclusion of this paper is that a beneficial outcome attributable to the operation of the *Gladue* provisions occurred primarily in manslaughter offences where the intoxication of the offender played a central role. This suggests that sentencing judges found their way to applying the *Gladue* provisions most frequently where the offences themselves fit a pattern aligning with prevailing views around Indigenous offending and the consumption of alcohol or other intoxicants.

Key Words

Gladue
sentencing
Indigenous peoples
Canada
manslaughter
Criminal Code
drugs and alcohol

Lay Summary

There is perceived to be a crisis of over-representation among Indigenous people in Canada's prison population. In the mid-1990s, Parliament added section 718.2(e) to the *Criminal Code* in an attempt to address this by encouraging alternatives to incarceration for Indigenous offenders. This section of the *Criminal Code* is commonly referred to as the *Gladue* provisions, after the Supreme Court of Canada decision that first interpreted its application. How the provisions are meant to apply to offenders sentenced for serious and violent offences has remained an open question for sentencing judges. This paper attempts to answer that question by comparing sentencing decisions for manslaughter between Indigenous and non-Indigenous offenders over a six-year period following the Supreme Court of Canada's most recent decision related to the provisions in *R v Ipeelee*. This research examined superior court decisions to determine if Indigenous offenders were treated differently at sentencing and, if so, what differences in sentence outcome arose as a result. The central conclusion of this paper is that Indigenous offenders are most likely to see a beneficial outcome result from the application of the provisions where intoxication played a central role in the commission of the offence. This suggests that sentencing judges applied the provisions most frequently where the offences themselves aligned with prevailing views around Indigenous offending and the consumption of alcohol or other intoxicants.

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List of Abbreviations

AJS	_____	Aboriginal Justice Strategy
CCRA	_____	<i>Corrections and Conditional Release Act</i>
CSC	_____	Correctional Service of Canada
NCR	_____	Not Criminally Responsible on Account of Mental Disorder
PPSC	_____	Public Prosecution Service of Canada

Chapter One: Introduction

1. Introduction

Jamie Tannis Gladue, James Wells and Manasie Ipeelee were all intoxicated when they committed the crimes that eventually brought them to the Supreme Court of Canada. Alcohol was a factor each time the Supreme Court has entertained the application of s. 718.2(e) of the *Criminal Code* to sentencing. Alcoholism among Canada's Indigenous peoples has destroyed communities and countless individual lives. There is nothing fresh in that observation and this research contributes nothing to addressing that problem. What it does suggest is that where an offender has consumed large amounts of alcohol or other intoxicants, sentencing judges will be more apt to see a path to allowing the *Gladue* provisions to impact upon sentence.

In brief, the research conducted for this paper suggests that incidents of manslaughter that are defined to a substantial degree by an offender's state of intoxication will tend to receive more favourable treatment at sentencing. Through an analysis of nearly two hundred sentencing decisions in Canada's superior courts over the preceding six years, this research indicates that those manslaughters committed by an offender in a state of serious intoxication are both more likely to produce sentencing decisions that are conducted in such a way that they address an Indigenous offender's heritage and more likely to produce lower sentences than comparably situated non-Indigenous offenders. This diverges from manslaughter sentencing where the presence of intoxication is not seen to be a major factor in commission of the offence. In those cases, Indigenous offenders not only see a reduced likelihood of an Indigenous-focused sentencing methodology, they are also more likely to attract longer sentences than similarly-situated non-Indigenous offenders.

While this is certainly a benefit to those Indigenous people who were intoxicated while they committed an act of manslaughter, it does not serve to further the remedial aim of reducing the overrepresentation of Indigenous peoples in prisons more broadly which was the goal of the *Gladue* provisions in the first instance. Thirty years ago, a report prepared originally for the Canadian Bar Association summed up the proposition that arguably still informs the sentencing of Indigenous people today:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects the view of native people as uncivilized and without coherent social or moral order. The stereotype prevents us from seeing native people as equals. The fact that the stereotypical view of native people is no longer reflected in official government policy does not negate its power in the popular imagination and its influence in shaping the decisions of the police, prosecutors, judges and prison officials.¹

This is a stark assessment of the criminal justice system's view of Indigenous people in Canada. The truth can be ugly, particularly in a country that prides itself on being enlightened. Thirty years later attitudes towards Indigenous peoples have improved, but stereotypes remain durable. In the sentencing courts today, it may not be assumed that all First Nations, Inuit and Métis offenders are amoral and driven by substance abuse. However, this research suggests that the stereotype persists. The figure of the 'drunk Indian' who was once condemned for his inability to control his actions while intoxicated is now more likely to see a benefit, at least in sentencing for manslaughter. The sober Indigenous offender by contrast loses that benefit. It appears that the path to the application of the *Gladue* provisions to the sentencing of offenders for serious and violent crime continues to run through old stereotypes.

2. Central Question

The central question this paper addresses is how the courts are treating *Gladue* when they are sentencing offenders for serious and violent crimes. How the *Gladue* provisions should manifest themselves in the sentencing of offenders for serious and violent crime has long been an open question. Since the Parliamentary debates on Bill C-41, the provisions have been viewed by some critics as little more than an attempt to "sneak through the back door a parallel system of justice for Aboriginals."² This paper seeks to answer the related questions of what methods the courts use to address Indigenous offending in serious and violent crime and how precisely these methods manifest themselves in sentence outcomes. In order to address these questions, this paper employs a comparative analysis of manslaughter sentencing decisions between Indigenous and non-Indigenous offenders as well as different categories of manslaughter. The aim was to assess

¹ Michael Jackson, "Locking Up Natives in Canada," (1989) 23:2 UBC L Rev 215, at 218.

² Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013) at 60-61.

whether there was an identifiable difference in sentence outcomes for Indigenous offenders compared to non-Indigenous offenders sentenced for the same offence. If such a difference was evident, the project sought to resolve the questions of whether that difference was attributable to the operation of the *Gladue* provisions and how precisely such operations manifested themselves. As noted above, the evidence analyzed here suggests that across the different categories of manslaughters identified there is some difference in sentence outcomes for Indigenous and non-Indigenous offenders and that a beneficial operation of the provisions is more likely to be found where an Indigenous offender was intoxicated while committing the offence.

At the outset of this research it was assumed that in cases of serious and violent crime, where the *Gladue* provisions were found to impact sentence, this would be in the form of a reduction in sentence. The research has borne this out to an extent. The most frequent manifestation of sentence impact attributable to the operation of the *Gladue* provisions did come in the form of a reduction in sentence when compared with non-Indigenous offenders and with Indigenous offenders who appeared not to have benefitted from an impact of the provisions. This was not the only manner in which the provisions were found to impact upon sentence outcome. There were also decisions in which the judge determined that in order for the provisions to have their intended remedial effect, the offender would be required to spend time in a penitentiary so they could benefit from the programming in the federal system geared towards Indigenous offenders. In the course of writing this paper, the definition of what constitutes an impact upon sentence expanded to address the evidence derived from the decisions themselves.

3. Methodology

This paper approaches its subject matter from the doctrinal school of legal research.³ The purpose is first to analyze how the *Gladue* provisions are designed to function by the legislation that created them and the Supreme Court jurisprudence that interpreted them and second to determine how the provisions were being applied in practice to sentencing offenders for serious and violent crime. Indigenous peoples and their interactions with the criminal justice system in Canada is an expansive topic. Even the question of sentencing Indigenous persons potentially invites inquiry into a wide variety of historical and sociological phenomena such as settler

³ Terry Hutchinson, "The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law," 83 *Erasmus L Rev* 130 (2015) at 131.

colonialism and institutional and systemic racism. The potential exists to bring in interdisciplinary approaches from varied fields of academic inquiry ranging from feminism and criminology to history and critical race theory. This paper is not concerned with those broader questions, as interesting and important as those areas of inquiry are. It opts instead for a narrow focus on how a particular provision of the *Criminal Code* aimed at ameliorating the levels of Indigenous overrepresentation in Canada's prisons has functioned in practice for those offenders who have been convicted of serious and violent crimes.

The first part of this paper deals with the jurisprudence and scholarship around *Gladue* and its application in theory. The core of this paper is a quantitative and qualitative analysis of the effects of the *Gladue* provisions on sentencing manslaughter in the trial courts. There is value in quantitative assessments of sentencing decisions. The Supreme Court in *Wells* cautioned that “[t]here is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive.”⁴ While this may be true in terms of determining a given sentence, in analyzing the practice of sentencing such a comparison does have a merit. Clayton Ruby has written that “few crimes are truly original” and “their characteristic features repeat themselves with appalling regularity.”⁵ That idea underlies the research conducted for this paper. The Indigenous offenders in this study are being compared to actual rather than hypothetical non-Indigenous offenders to determine whether there are differences in sentence outcome that can be attributed to the *Gladue* provisions.

It is trite law that sentencing is an individualized process and that the determination of a fit sentence is to be made with reference to the circumstances of the particular offender and the particular offence. With that in mind, there are only so many ways in which any crime can manifest. Despite the fact that each offender has walked a distinct path to arrive where they find themselves at sentencing, the similarities between offenders and offences are frequently striking. This analysis is premised on the idea that given sufficient numbers of offenders - both Indigenous and non-Indigenous - sentencing decisions can be examined comparatively and generalizations can be made about sentencing outcomes. The information derived from a large scale comparative sentencing analysis can be used to answer the broad question of what outcomes are being produced

⁴ *R v Wells*, 2000 SCC 10 at para 86.

⁵ Clayton Ruby, *Sentencing*, Ninth Edition. (Toronto: Lexis Nexis, 2017) at 239.

from the application of this particular *Criminal Code* provision to a single offence at one level of court across Canada.

3. Organization

This paper is divided into six chapters including this one. Chapter two deals with the legislative and jurisprudential framework that gives the *Gladue* provisions their form. It then examines the scholarship and earlier empirical assessments of the operation of the provisions. This chapter concludes with a survey of the operation of the provisions in practice across Canada examining Gladue Reports, the application of the provisions in the courts, community alternatives for Indigenous offenders, the correctional system, and provincial and federal prosecutorial policies. Chapter three deals with sentencing in general and manslaughter sentencing in particular. It begins with an outline of the structure of the sentencing regime in Canada. The balance of the chapter deals with the sentencing of manslaughter in Canada with a particular focus on the different regimes operating in the provinces and territories under discussion.

Chapter four outlines the plan of the case study in detail and provides a general overview of the information drawn from the manslaughter decisions. It then breaks down this information by analyzing the different categories of manslaughter and the different jurisdictions, it concludes with a comparison between the sentencing of the two largest categories of manslaughter and the treatment of Indigenous and non-Indigenous offenders in those categories. Chapter five deals first with answering the question of how different methodologies manifest in the sentencing of Indigenous offenders and their rates of occurrence. It then considers how the *Gladue* provisions impact upon sentence outcomes before concluding with an assessment of why different methodologies are employed and different rates of sentence impact are found among different categories of manslaughter. This paper concludes in chapter six with a brief assessment of how different actors in the criminal justice system might ensure that the remedial aspects of the provisions have a greater impact on sentence outcomes for Indigenous offenders.

The central conclusion of this paper is that where an Indigenous offender is sentenced for a manslaughter involving serious intoxication, they are both more likely to be sentenced according to a different methodology than non-Indigenous offenders in that category and they are more likely to see the *Gladue* provisions impact upon sentence outcome than those Indigenous offenders whose crimes were not defined by intoxication.

Chapter Two: The Landscape of Gladue

1. Legislation and Jurisprudence

The *Gladue* principles have their origins in Bill C-41 introduced in 1995 with the aim of codifying sentencing practices in Canada. Part of this legislation was section 718.2(e) of the *Criminal Code* – the *Gladue* provisions.¹ The provisions require:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular reference to the circumstances of Aboriginal offenders.²

Since its passage this provision has expanded into many different areas of criminal law such as bail,³ parole,⁴ extradition⁵ and review board hearings⁶ but its initial interpretation extended only to sentencing.⁷

The Supreme Court of Canada first interpreted the provision in the course of a sentence appeal from Jamie Tannis Gladue for the manslaughter of her common-law spouse in 1999. In *R v Gladue*,⁸ the Court determined that Indigenous people face distinct circumstances compared with non-Indigenous people and Parliament had determined that they should be subject to a different method of determining sentence. The Court took Parliament's intention to be a remedial one and understood the provisions as meant expressly to reduce the over-incarceration of Indigenous offenders.⁹ Writing for a unanimous court, Cory and Iacobucci JJ determined that there were two considerations peculiar to sentencing Indigenous offenders:

¹ *Criminal Code*, RSC 1985, c C-46.

² *Ibid* s. 718.2(e).

³ *R v Robinson*, 2009 ONCA 205.

⁴ *Twins v Canada (Attorney General)*, 2016 FC 537.

⁵ *United States v Leonard*, 2012 ONCA 622, leave to appeal to SCC refused.

⁶ *R v Sim*, [2005] OJ No 4432.

⁷ Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook*. (Toronto: Emond Montgomery, 2019) at 146-194.

⁸ [1999] 1 SCR 688 [*Gladue*].

⁹ *Ibid* at para 33.

- (A) The unique systemic or background factors which may have played a role in bringing the particular aboriginal offender before the court; and
- (B) The types of sentencing procedures which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.¹⁰

Section 718.2(e) would be applied in light of these considerations: systemic and background factors and appropriate types of sentencing procedures and sanctions.

The Supreme Court held that sentencing judges had no discretion as to whether or not the provisions would apply. Instead their sole discretion lay with the determination of a fit sentence for the individual before the court.¹¹ As a corollary to this limitation on discretion, the degree to which an individual was connected to any particular Indigenous community would not be a bar to the application of the provisions as Indigenous people living off-reserve continue to be closely connected to their culture.¹² At sentencing, the duty to adduce evidence of the relevant factors for the consideration of the sentencing judge lay with counsel and should counsel fail in their duties, it would fall to judges themselves to ensure that the information was brought before the courts.¹³

Though the decision did not contain specific procedures for determining sentence or suggestions for alternative sanctions, it was straightforward: the determination of a fit sentence for Indigenous offenders was a bifurcated process and was universal in its application. However, there was one paragraph in the decision that would be used frequently by sentencing judges and cited disproportionately by appellate courts in applying the provisions.¹⁴ The Court added:

Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment will be closer to each other or the same, even taking into account their different concepts of sentencing.¹⁵

¹⁰ *Ibid* at para 66.

¹¹ *Ibid* at para 82.

¹² *Ibid* at para 91.

¹³ *Ibid* at paras 83-4.

¹⁴ Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal," 54 Crim LQ 470 (2008-2009) at 472.

¹⁵ *Gladue*, *supra* note 8 at para 79.

The Supreme Court would later clarify that this “was not meant to be a principal of universal application.”¹⁶ Regardless, until 2012 when the Court in *R v Ipeelee*¹⁷ dispensed with the notion that the provisions would not apply to sentencing offenders for serious and violent crime, sentencing and appeal courts would continue to cite that passage for the proposition that Indigenous status did not need to be considered for such cases. As detailed below, after the Supreme Court held that *Gladue* considerations must be analyzed in every case, there remains uncertainty among sentencing judges and appeal courts as to which alternative sanctions might be applied to sentencing of offenders for serious and violent crimes. This remains one of the primary conceptual hurdles in the exercise of the provisions and no convincing answers have so far been supplied by the courts.

In summarizing its conclusions in *Gladue*, the Court made several other points that continue to inform the interpretation of the provisions, in particular their direction that where “there is no alternative to incarceration the length of the term must be carefully considered” while cautioning that “it not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders.”¹⁸ With respect to the Indigenous worldview of crime and punishment, the Court ended its judgement by suggesting it was “unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted.”¹⁹

The year after the *Gladue* decision, the Supreme Court returned to the question of how s. 718.2(e) was meant to apply in *Wells*. The Court stated that “the guidelines set out in *Gladue*... are not intended to provide a single test for a sentencing judge to apply in determining a reasonable sentence in the circumstances. Section 718.2(e) imposes an affirmative duty on the sentencing judge to take into account the surrounding circumstances of the offender, including the nature of the offence, the victim and the community.”²⁰ Of key importance in *Wells*, were the effects that s. 718.2(e) was meant to have on the outcome of sentence. Justice Iacobucci, writing for the Court, emphasized in his reasons “that s. 718.2(e) requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate a different result.”²¹ This meant that trial

¹⁶ *R v Wells*, 2000 SCC 10 [*Wells*].

¹⁷ 2012 SCC 13 [*Ipeelee*].

¹⁸ *Gladue*, *supra* note 8 at para 93.

¹⁹ *Ibid* at para 93.

²⁰ *Wells*, *supra* note 16 at para 41.

²¹ *Ibid* at para 44.

courts were obliged to sentence Indigenous offenders differently not necessarily to arrive at a different sentence. As established in *Gladue*, in order to engage in this process judges would require information about the offender and their background. Here, the Court determined that there was an affirmative obligation on the part of the trial judge to inquire into the relevant circumstances of an Indigenous offender in the event that counsel fails to do so.²²

In response to the apparent reluctance of the judiciary to apply the considerations to the sentencing of offenders for serious and violent offences, the Supreme Court addressed these issues once more in *Ipeelee*. This decision has been seen as a repudiation of judges who had restrained the application of *Gladue* and limited its application to non-serious criminal matters.²³ The Supreme Court admonished sentencing judges that they “have a *duty* to apply s. 718.2(e).”²⁴ The application of the provisions was a statutory duty and declining to consider them:

would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore application of the *Gladue* principles is required in every case involving an Aboriginal offender... and a failure to do so constitutes an error justifying appellate intervention.²⁵

The Court justified this by saying that the consideration of background and systemic factors in the first plank of *Gladue* dealt with the moral blameworthiness of the offender. The effects of colonialism wrought on Indigenous communities would inform this consideration. The Court explained held that:

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely – if ever – attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.²⁶

²² *Ibid* at para 54.

²³ Jonathan Rudin, “Looking Backward, Looking Forward: The Supreme Court of Canada’s Decision in *R. v. Ipeelee*,” 57 SCLR 375 (2012) at 381.

²⁴ *Ipeelee*, *supra* note 17 at para 85 [Emphasis in original].

²⁵ *Ibid* at para 87.

²⁶ *Ibid* at para 73 [Emphasis in original].

The Court, in their restatement of *Gladue*, held that the provisions must be considered for all Indigenous offenders and the background and systemic factors speak directly to the moral blameworthiness of the offender.

The Supreme Court emphasized that s. 718.2(e) was aimed at the over-incarceration of Indigenous persons. As a consequence, the framework from *Gladue* required that alternatives to incarceration be employed wherever possible. Sentencing judges, the Court wrote:

can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities.²⁷

This indicated to judges that to comply with the second stage of the *Gladue* framework, they should look to develop alternative sentencing procedures for Indigenous offenders in order to give form to the provisions.

While establishing the principles from *Gladue* with greater clarity, *Ipeelee* failed to provide guidance for its application at sentencing in respect of either serious or non-serious crimes. The Court declared that section 718.2 (e) did not “create a race-based discount on sentencing.”²⁸ Neither did it provide further guidance for its application or suggest what form appropriate alternatives might take. It is evident from the decisions that the Court did not want to create an Indigenous sentencing framework. Absent action from Parliament on this issue, the justices seemed content to return the issue to sentencing judges and appellate courts to work out the details.

2. Scholarship

This is a narrow area of study and one dominated by a handful of law and criminology professors. There is scant scholarly opposition to the provisions as most writers favour them, however many question the manner in which they have manifested in practice. Most prominent among these scholars are Jonathan Rudin²⁹ and Kent Roach.³⁰ Between them they have authored

²⁷ *Ibid* at para 66.

²⁸ *Ibid* at para 75.

²⁹ Program Director at Aboriginal Legal Services Toronto and law professor at Osgoode Hall Law School, York University.

³⁰ Law professor at the University of Toronto.

a third of the articles discussed here. If there is an opposing school of thought, it is the sentencing judges who cannot see how to apply the provisions to the sentencing of offenders for serious and violent crime in practice. Scholarship is largely concerned with this failure and how it can be improved upon. This is supplemented by limited empirical research conducted to determine the function of the provisions in practice. Early scholarly reactions to *Gladue* discuss many issues that continue to trouble their application to serious crime. Some considerations in these early works are moot, as there are now more limited options since conditional sentences were made unavailable for serious bodily harm offences.³¹

Roach and Rudin offered their first assessment of the *Gladue* decision in 2000 where they identified most points of contention going forward.³² They argue that the decision holds promise for remedying the over-representation of Indigenous persons in the prison system but see barriers to its implementation. First, there are a lack of community resources available to aid in the rehabilitation of Indigenous offenders and a similar lack of culturally-relevant correctional resources; second, there is lingering uncertainty about its application to the sentencing of offenders for serious and violent crimes.

Rudin and Roach suggested that the limited nature of Indigenous-specific programming available, particularly within Indigenous communities themselves would restrain the ability of judges to offer innovation and result in a continued reliance on custodial sentences.³³ For a specialized regime of Indigenous sentencing to function properly, they argue, resources will have to be increased at the front end to allow counsel and court workers to handle the new regime.³⁴ Finally, Rudin and Roach were troubled by *Gladue*'s implication that the provisions were not intended to apply to the sentencing of offenders for serious and violent crimes, arguing this violated proportionality which the *Criminal Code* identifies as the fundamental principle of sentencing.³⁵ This paper was remarkably insightful, correctly identifying most of the pitfalls subsequently encountered by the criminal justice system in practice.

³¹ *Safe Street and Communities Act*, SC 2012, c. 1, s. 34.

³² Kent Roach; Jonathan Rudin, "*Gladue*: The judicial and political reception of a promising decision," 42 Can J Crim 355 (2000).

³³ *Ibid* at 361-2.

³⁴ *Ibid* at 375-6.

³⁵ *Ibid* at 366; *Criminal Code*, *supra* note 1, s. 718.1.

In a similar vein, Renée Pelletier³⁶ argued that the legal analysis provided by the Supreme Court failed to recognize the provisions' distinct purpose of furnishing alternatives to incarceration and would therefore limit its effective application.³⁷ Pelletier contends that the distinction between serious and non-serious crimes is inappropriate and does not exist in law.³⁸ She argues the Court is wrong in suggesting that denunciation and deterrence are aligned with Indigenous concepts of justice or that Indigenous people agree with many of the purposes of sentencing outlined in the *Criminal Code*.³⁹ Pelletier criticized the Supreme Court for its failure to appreciate the impacts of colonialism and argued that the situation would worsen by relying on traditional aggravating and mitigating factors at sentencing.⁴⁰ In her view, counsel are inadequately trained to deal with these issues and will receive no help from a system where Indigenous-specific pre-sentence reports are not available and where funding for them is unlikely to be forthcoming.⁴¹

These criticisms, like those of Rudin and Roach, proved prescient. Pelletier's analysis of the failure to focus on colonialism is apt and remains a substantial issue even post-*Ipeelee*, however her insistence that no classification of crime as serious can exist without Parliamentary approval is specious. Given the broad discretion provided to sentencing judges and the wide range of activities covered by individual *Criminal Code* offences, seriousness is clearly a consideration in virtually any sentencing, notwithstanding the absence of a formal legislative classification. In fact, Justice Iacobucci noted in *Wells* that "whether a crime is serious in the given circumstances is, in my opinion, a factual matter that can only be determined on a case-by-case basis."⁴²

One of few critiques of the provisions themselves came from Phillip Stenning⁴³ and Julian V. Roberts⁴⁴ in 2001. In a controversial article they suggested the crisis of Indigenous overrepresentation was a fiction and that the Supreme Court had failed to offer evidence of a causal relationship between sentencing and overrepresentation.⁴⁵ Interpreting various studies, Stenning

³⁶ Currently managing partner of Olthuis Kleer Townshend LLP.

³⁷ Renée Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-Representation in Canadian Prisons," 39 Osgoode Hall LJ 469 (2001) at 471.

³⁸ *Ibid* at 479.

³⁹ *Ibid* at 474 and 480.

⁴⁰ *Ibid* at 475-6.

⁴¹ *Ibid* at 481.

⁴² *Wells*, *supra* note 16 at para 45.

⁴³ Criminologist, University of Cambridge.

⁴⁴ Criminologist, Griffith University.

⁴⁵ Phillip Stenning; Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders," 64 Sask L Rev 137 (2001) at 155.

and Roberts argued there was no evidence that Indigenous people received more or longer sentences, suggesting instead that they received shorter sentences in spite of longer criminal records.⁴⁶ They contend that the social conditions outlined by the Court in *Gladue* affect other groups equally and should be ordinary considerations in the sentencing of any offender.⁴⁷ In their view, this attempt to redress historical injustice “amounts to hijacking the sentencing process.”⁴⁸ While they argue that the provisions were meant to have no effect on serious crimes, in their view the only way for them to manifest is as a sentencing discount, particularly since the Court has provided judges with no guidance to steer their implementation.⁴⁹

Stenning and Roberts’ final assessment of the provisions and the decision is bleak, arguing it offers “little more than an empty promise to Aboriginal people and a bitter pill for sentencing judges who struggle to do the right thing, but become daily more aware of their powerlessness in the face of a situation far beyond their control.”⁵⁰ This blunt assessment is the harshest offered by any scholar but elements of it remain apparent in the frustrations of many academics. Despite their dismissal of the scope of the crisis, Stenning and Roberts properly diagnosed the practical issues with the decision and its application.

In reaction to Stenning and Roberts, there was a special issue of the *Saskatchewan Law Review* in which other scholars responded to their views. Jean-Paul Brodeur⁵¹ took issue with their statistics but reserved his harshest criticisms for their refusal to acknowledge the unique nature of Indigenous social issues. Taken in their proper context, he argued, it is clear that Indigenous people are the most adversely affected by these issues, their communities are the most forlorn and devastated and they have suffered from the longest history of discrimination of any marginalized group in Canada.⁵²

In the same issue, Rudin and Roach also rejected Stenning and Roberts’ claims. They argue that limitations in their data rendered meaningful conclusions impossible.⁵³ That sentencing is not the cause of overrepresentation is irrelevant to Rudin and Roach, who point out that

⁴⁶ *Ibid* at 147-151.

⁴⁷ *Ibid* at 157-159.

⁴⁸ *Ibid* at 160.

⁴⁹ *Ibid* at 162-164.

⁵⁰ *Ibid* at 167.

⁵¹ Criminologist at L’Université de Montréal.

⁵² Jean-Paul Brodeur, “On the Sentencing of Aboriginal Offenders: A Reaction to Stenning and Roberts,” 65 Sask L Rev 45, 52 (2002) at 49-50.

⁵³ Jonathan Rudin, Kent Roach, “Broken Promises: A Response to Stenning and Robert’s Empty Promises,” 65 Sask L Rev 3, 34 (2002) at 7-12.

sentencing is traditionally used to resolve issues not themselves caused by sentencing.⁵⁴ For them, colonialism should be central to any consideration of the rationale behind section 718.2(e), since its purpose is to reduce overrepresentation in the prison system.⁵⁵ Finally, they argue that if the desire is to reduce incarceration of Indigenous people, the focus should be on restraint in sentencing.⁵⁶

Another avenue of criticism of the *Gladue* factors relates to their philosophical underpinnings. Following *Ipeelee*, Jeanette Gevikoglu⁵⁷ criticized the *Gladue* framework arguing that the emphasis on sentencing ignored the wider societal problems bringing Indigenous people before the courts.⁵⁸ She claims the Supreme Court denies power and autonomy to Indigenous peoples by constructing them as victims and reducing the voluntary nature of their conduct.⁵⁹ By concentrating on an Indigenous offender's reduced moral blameworthiness, she contends the Supreme Court is suggesting that voluntariness is reduced by trauma and so frames Indigenous peoples in the same manner as youthful offenders and the mentally ill.⁶⁰ In what she calls a "new essentialism," Gevikoglu argues that these ideas serve only to reinforce historical stereotypes.⁶¹ By conflating Indigenous concepts of "healing" with restorative justice, she maintains that the Court is making Western concepts part of the Indigenous worldview. She suggests that real solutions to the issue are properly located in addressing claims to self-government and Indigenous approaches to criminal justice.⁶² In her view, these concerns are rarely remarked upon by scholars and judges.

Ten years after *Gladue*, Kent Roach analyzed its interpretation in the courts of appeal.⁶³ With the initial controversy over, the provinces and territories were in the process of erecting the infrastructure to implement the decision.⁶⁴ Roach noted substantial regional variation but identified some commonalities. In his view, the courts of appeal were unwilling to extend the application to

⁵⁴ *Ibid* at 15.

⁵⁵ *Ibid* at 17-21.

⁵⁶ *Ibid* at 30.

⁵⁷ Public Prosecution Service of Canada.

⁵⁸ Jeannette Gevikoglu, "*Ipeelee/Ladue* and the Conundrum of Indigenous Identity in Sentencing," 63 SCLR 205 (2013) at 206.

⁵⁹ *Ibid* at 218.

⁶⁰ *Ibid* at 219.

⁶¹ *Ibid* at 223.

⁶² *Ibid* at 221-225.

⁶³ Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal," 54 Crim LQ 470 (2008-2009).

⁶⁴ *Ibid* at 471-2.

the sentencing of offenders for serious and violent crimes. He credited this phenomenon in part to successful Crown appeals restraining innovation by trial judges.⁶⁵ Roach identified a near-universal unwillingness by appeal courts to extend alternatives to imprisonment to serious offences.⁶⁶ While this analysis was conducted pre-*Ipeelee*, his subsequent research indicates that there has been little innovation related to the sentencing of offenders for serious and violent offences in the intervening decade.⁶⁷ It may be unfair to place too much criticism at the feet of appeal courts. After all, they are tasked with applying the law as it exists and if trial courts are unable to produce decisions that satisfy the relevant aspects of the law, appeal courts will not endorse them.

In his own assessment after a decade before the courts, Jonathan Rudin suggested there was reason for optimism, though reliance on incarceration continued to treat symptoms rather than underlying conditions.⁶⁸ While acknowledging that *Gladue* was not useful in crafting a different sentencing methodology, Rudin argues that this ignores how law reform is done.⁶⁹ He suggests that legislatures have abdicated their responsibilities to the courts and this, combined with public indifference, limits the potential for change.⁷⁰ Judicial creativity will not be possible without increased resources and for sentencing methodologies and procedures to change, governments will have to allocate resources to alternatives and the courts will have to modify procedures to recognize a different reality. This paper addresses the core issue in respect of the sentencing of offenders for serious and violent crimes. Courts are extremely limited in their capacity to create sanctions not outlined explicitly by law and absent actions by government, there can be no meaningful law reform based solely on a suggestion to reduce over-incarceration in one section of the *Criminal Code*.

In 2019, Kent Roach again examined the impact of *Ipeelee* in the courts of appeal.⁷¹ He argues that one “of the purposes of *Ipeelee* was to bring greater national uniformity to sentencing practices,” but that the independence granted to appeal courts “combined with the deference given

⁶⁵ *Ibid* at 479.

⁶⁶ *Ibid* at 505.

⁶⁷ Kent Roach, “*Ipeelee* in the Courts of Appeal: Some Progress, but Much Work Remains,” (April 5, 2019). Available at SSRN.

⁶⁸ Jonathan Rudin, “Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs,” 54 *Crim LQ* 447, 469 (2009) at 447-449.

⁶⁹ *Ibid* at 453-4.

⁷⁰ *Ibid* at 455-6.

⁷¹ Roach, “*Ipeelee* in the Courts of Appeal”, *supra* note 67.

to trial judges allow considerable divergence in sentencing practices.”⁷² Professor Roach found that outcomes were “mixed but run to negative,” explaining that:

On the one hand, the increasing willingness among some Courts of Appeal to relate *Gladue* background factors to an offender’s moral blameworthiness follows from the Court’s clear signal in *Ipeelee* and is in my view a positive development. At the same time, however, the appellate engagement with moral blameworthiness analysis has generally been superficial in the sense of failing to explain exactly how *Gladue* factors can reduce moral blameworthiness and not explaining how they affect the sentencing purposes of deterrence, denunciation and incapacitation that judges generally stress in serious cases. In addition, much of the application of *Ipeelee* at the appellate level still relates to rehabilitation which will often receive less weight in serious cases. Finally appellate courts have not approved (or disapproved) of alternatives to imprisonment informed either by Indigenous law or by restorative justice. All of these findings are consistent with overall conclusions that *Gladue* is applied differently in different parts of Canada and that it continues to fail to reduce growing Indigenous overrepresentation in prison.⁷³

Roach analyzed the application of *Ipeelee* in each of the provincial courts of appeal and offered his assessment of how the principles from the case were being applied.

Professor Roach found that the British Columbia Court of Appeal related background factors to moral blameworthiness “though often not without fully explaining how factors relate to each of these purposes.”⁷⁴ He suggests that the Alberta Court of Appeal jurisprudence demonstrated “some recognition of the relevance of *Gladue* factors to moral blameworthiness, but a reluctance to relate them to the punitive purposes of deterrence and denunciation and corresponding modest reductions in sentences on the basis of decreased moral blameworthiness.”⁷⁵ With respect to Saskatchewan, Roach found that the court of appeal recognized and elaborated “on the relationship between *Ipeelee* and moral blameworthiness,” however, “in most of its cases the Court of Appeal has not found reduced moral blameworthiness” and when it has “the reductions in sentence have been modest.”⁷⁶

⁷² *Ibid* at 1.

⁷³ *Ibid* at 2-3.

⁷⁴ *Ibid* at 8.

⁷⁵ *Ibid* at 14.

⁷⁶ *Ibid* at 16.

Professor Roach argues that the Manitoba Court of Appeal is reluctant to make findings of reduced moral blameworthiness and “may with the exception of cases where *Gladue* factors relate to rehabilitation be the most resistant to following *Ipeelee* and in appropriate cases relating these factors to moral blameworthiness.”⁷⁷ He credits the Ontario Court of Appeal with leading the way in the expansion of *Gladue* beyond the realm of sentencing⁷⁸ but suggests that while there were indications in *Kreko*⁷⁹ that the court recognized the connection between background factors and moral blameworthiness, “it did not fully explain how this would be achieved and this may help to explain a series of subsequent cases where the Court of Appeal seemed to assume that *Gladue* factors will not be relevant to the objectives of deterrence, denunciation, and incapacitation.”⁸⁰

Professor Roach summarizes his findings of the impact of *Ipeelee* in provincial appellate courts by arguing that:

This concern about the generally under-developed and under-theorized relation of background factors to punitive sentencing purposes is re-enforced by the frequent reference in Court of Appeal decisions about background factors not being an “excuse” or providing a “discount” for a sentence. This implicit but often unexamined assumption in such conclusions is that length of imprisonment must increase with the need to punish, deter or denounce serious crimes and to incapacitate offenders. Indeed, the failure to relate background factors to punitive purposes of sentencing and the new slogans of no “excuse” or “discount” have produced new shortcuts that have replaced the old shortcuts for not applying *Gladue* in serious cases that the Supreme Court attempted to correct in *Ipeelee*.⁸¹

Roach concludes by suggesting that half of the provincial courts of appeal have related background factors to more blameworthiness in their analysis but even those courts require further elaboration on the subject if they are to inform the actions of trial courts.⁸²

David Milward and Debra Parkes⁸³ argued in 2011 that the successful implementation of the *Gladue* provisions in Manitoba are hampered by three myths: that they were not to be considered for serious crimes; that prison works for Indigenous people; and that Indigenous

⁷⁷ *Ibid* at 20.

⁷⁸ *Ibid* at 20.

⁷⁹ *R v Kreko*, 2016 ONCA 367.

⁸⁰ Roach, “*Ipeelee* in the Courts of Appeal”, *supra* note 67 at 23.

⁸¹ *Ibid* at 28.

⁸² *Ibid* at 28.

⁸³ Law professors at the Robson Hall Faculty of Law, University of Manitoba.

overrepresentation was an intractable problem.⁸⁴ They argue that continued emphasis on denunciation and deterrence in violent crime has limited the effect of the provisions and runs counter to *Gladue*.⁸⁵ As a result, the reliance of the courts on incarceration has compounded the situation as prison is ineffective in rehabilitating Indigenous people. They suggest that the lack of culturally-relevant programs in communities and the correctional system means that recourse to incarceration only aggravates what it is meant to alleviate.⁸⁶ Milward and Parkes argue that the problem is intractable when seen through the lens of sentencing alone. Increased funding for the criminal justice system will not address the problem unless it is supplemented by resources for addressing social problems.⁸⁷ The authors are correct that continued emphasis on denunciatory and punitive aspects of sentencing law are substantial barriers to the aims of the provisions. Unless judges can reorient their thinking toward a different methodology, innovation in sentencing for serious crimes will founder on the traditional common law and statutory principles of sentencing.

Julian V. Roberts and Andrew Reid⁸⁸ studied admissions to custody since 1978 to ascertain changes in the rates of Indigenous incarceration. They determined that remedial reforms had been ineffective and the problem has become more serious.⁸⁹ Roberts and Reid argue that there will be no progress in arresting the crisis unless federal and provincial governments make greater efforts to ensure their application, create a more ambitious sentencing methodology and recognize that neither of these will address the underlying social conditions.⁹⁰ They argue that section 718.2(e) and *Gladue* are insufficient and it is beyond the power of courts to address the crisis. They recommend five possible approaches: (1) a separate sentencing code for Indigenous people; (2) a strengthening of the provision itself – possibly with a rebuttable presumption against imprisonment; (3) requiring that certain criteria be met before imprisonment is imposed - similar to youth criminal justice reforms; (4) adoption of an Indigenous sentencing guideline; or, (5) adoption by Parliament of reforms that are general in nature but would benefit Indigenous peoples.⁹¹ It seems unlikely that Parliament is interested in creating potentially unpopular revisions

⁸⁴ David Milward; Debra Parkes, “Gladue: Beyond Myth and Towards Implementation in Manitoba,” 35 Man LJ 84, 110 (2011) at 86.

⁸⁵ *Ibid* at 95-98.

⁸⁶ *Ibid* at 105-7.

⁸⁷ *Ibid* at 108.

⁸⁸ Doctoral candidate in criminology at Simon Fraser University.

⁸⁹ Julian V. Roberts; Andrew Reid, “Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story,” Can J Crim & Crim J 314 (2017) at 332-333.

⁹⁰ *Ibid* at 336.

⁹¹ *Ibid* at 336-8.

to the *Criminal Code*; instead it appears that this issue will remain the purview of the courts. Nonetheless, they are correct that if the Supreme Court continues to be unwilling to step in and outline the parameters of a different methodology, Parliament may feel compelled to provide that guidance.

Brent Knazan⁹² offered a view from the bench on how the provisions should function. In his view, *Gladue* was a departure from the orthodoxy that everyone is treated equally and without bias by the courts and this requires a changed legal environment for sentencing Indigenous offenders.⁹³ Knazan does not specify the contours of such a changed environment, but this presumably refers to the idea of a different methodology for sentencing Indigenous offenders discussed in *Wells*. This different method of analysis to determine a fit sentence is particularly relevant to traditional aggravating factors. For example, where a prior criminal record is a statutorily-recognized aggravating factor, Knazan believes it should qualify as mitigating for Indigenous people.⁹⁴

Knazan is concerned with crafting alternative sanctions while recognizing that they can still include a punitive element. He believes that alternatives to imprisonment do not mean that an offender effectively escapes punishment but rather that some alternatives could be provided that both punish the offender and aid in their rehabilitation. Knazan bemoans the lack of resources and argues that until they are in place, community sanctions and alternative sentences will not be possible.⁹⁵ Without alternative sanctions, he concludes that the project of sentencing Indigenous people differently is an unrealistic one.

3. Empirical Studies

There have been four empirical studies conducted to ascertain the effects of the provisions to date. The first was undertaken in 2008 by Andrew Welsh⁹⁶ and James Ogloff.⁹⁷ They analyzed 691 randomly selected cases pre- and post-Bill C-41 to determine the weight given to different aggravating and mitigating factors and their relationship to an offender's Indigenous status. They concluded that seriousness of offence and length of criminal record were the factors most closely

⁹² Judge of the Ontario Court of Justice working within the Toronto *Gladue* (Aboriginal Persons) Court.

⁹³ Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*," 54 *Crim LQ* 431, 446 (2009) at 432-3.

⁹⁴ *Ibid* at 441.

⁹⁵ *Ibid* at 444.

⁹⁶ Criminologist at Wilfred Laurier University.

⁹⁷ Professor in the Faculty of Medicine, Nursing and Health Science at Monash University.

linked to longer sentences, while plea agreements and pre-trial detention were the mitigating factors most closely linked with shorter sentences.⁹⁸ While Indigenous offenders are more likely to have a criminal record and to be charged with a violent offence, this study suggests there is otherwise no difference in the probability of receiving a sentence of incarceration between Indigenous and non-Indigenous offenders.⁹⁹

Their sample set was randomly selected from Quicklaw and compared cases before and after the passage of the reforms in 1996. They excluded cases involving minimum sentences, dangerous offender applications, and Gladue Reports¹⁰⁰ since their purpose “was to evaluate the section 718.2(e) provision and not, specifically, the impact of the *R v Gladue* decision.”¹⁰¹ After controlling for other variables, they determined that “Aboriginal offenders were neither more or less likely to receive a custodial disposition by virtue of their Aboriginal status.”¹⁰² Welsh and Ogloff conclude that a balance between considerations of Indigenous status in combination with the presence of aggravating factors may account for the absence of an effect on sentencing outcomes.¹⁰³ This study is useful in its methodology but its focus on the effects of the *Criminal Code* provisions to the exclusion of the decision in *Gladue* is too narrow and the comparisons between pre- and post-reform sentencing does not account for the wider overhaul of practices undertaken at the time. By sampling without regard to offence, it is difficult to appreciate the utility of the custodial/non-custodial sentencing divide in their study.

A second empirical study of the impacts of section 718.2(e) was conducted by Gillian Balfour in 2012.¹⁰⁴ This study analyzed 168 decisions dealing with serious personal injury offences (61 of them appeals) between 1996 and 2004.¹⁰⁵ She acknowledges that the data set is limited to decisions made by reporting services and that the absence of sentences reached through plea bargaining is also an issue for her analysis. However, she argues that since reported decisions are

⁹⁸ Andrew Welsh; James R.P. Ogloff, “Progressive Reforms or Maintaining the Status Quo? An Empirical Consideration of Aboriginal Status in Sentencing Decisions,” 50 *Can J Crim & Crim* 4, 491 (2008) at 495.

⁹⁹ *Ibid* at 495-6.

¹⁰⁰ Gladue Reports are a form of modified pre-sentence report that speaks to the particular experience of the individual Indigenous accused with respect to the systemic and background factors outlined by the Supreme Court in *Gladue*.

¹⁰¹ Welsh and Ogloff, “Progressive Reforms”, *supra* note 98 at 497-8.

¹⁰² *Ibid* at 509.

¹⁰³ *Ibid* at 510.

¹⁰⁴ Sociologist at Trent University.

¹⁰⁵ Gillian Balfour, “Do law reforms matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada,” 19 *International Review of Victimology* 1, 85 (2012) at 88.

those considered by judges, these cases form the “dominant sentencing discourses.”¹⁰⁶ The data suggests that there is variance between provinces, with those jurisdictions with large Indigenous populations seeing an increased likelihood of custodial sentences for Indigenous offenders, particularly in the territories.¹⁰⁷

Balfour notes that no aggravating or mitigating factors were mentioned in 70% of cases and that a defendant’s Indigenous background was only mentioned in 19% of cases, most often in sexual assault cases where the offender was male.¹⁰⁸ The aggravating and mitigating factors most commonly cited by judges for Indigenous people were those most frequently cited for all offenders. Those mitigating factors identified as applying to Indigenous people in particular, such as economic deprivation, cultural dislocation, family breakdown and systemic racism, were not subject to judicial notice in the decisions she examined.¹⁰⁹ The most common aggravating factor cited in relation to Indigenous offenders was the risk of re-offending, which she found in 30% of all cases. Denunciation and deterrence dominated considerations and restorative justice goals were least likely to be cited.¹¹⁰ Balfour believes this is evidence of an inability on the part of sentencing judges to move beyond the accepted common law principles of sentencing when dealing with Indigenous offenders convicted of serious and violent crime.¹¹¹ The study provides a useful framework for assessing the operation of mitigating and aggravating factors in decisions. However, it suffers from the same flaw as Welsh and Ogloff in that the data set is drawn from both pre- and post-*Gladue* decisions. This creates an additional variable complicating the comparison between Indigenous and non-Indigenous offenders. Her concentration on serious crimes is useful because it allows a closer examination of the thorniest practical aspect of the application of the provisions which this study also looks to examine.

The most relevant of the empirical studies to this project, as it deals with analyzing *Gladue*’s application to manslaughter sentencing, was conducted by Anna Johnson¹¹² and Paul Millar¹¹³ in 2016. They studied all reported manslaughter sentencing decisions from Manitoba and Saskatchewan for two periods, the first between 1989-1997 and the second between 1998-2012.

¹⁰⁶ *Ibid* at 88.

¹⁰⁷ *Ibid* at 91-92.

¹⁰⁸ *Ibid* at 95-6.

¹⁰⁹ *Ibid* at 96.

¹¹⁰ *Ibid* at 97.

¹¹¹ *Ibid* at 98.

¹¹² Graduate student in criminology at the University of Guelph.

¹¹³ Professor of criminology at Nipissing University.

The cases were drawn only from QuickLaw and produced 105 results. After removing those with life sentences, 95 cases remained.¹¹⁴ The cases were analyzed to determine sentence length, imposition of a conditional sentence, Aboriginal status, gender, prior history of violence, and trial type.¹¹⁵ This was done to determine the effect of these variables on sentence.

While they found that sentences were longer for Indigenous offenders, the difference was not statistically significant. They concluded that efforts at reducing the rates of incarceration for Indigenous persons have not succeeded.¹¹⁶ However, the authors admit that in light of the small and incomplete sample size combined with a lack of Indigenous identification in earlier cases, they were unable to determine whether an offender's Indigenous status played a role in determining sentence.¹¹⁷ While this study is interesting and closely in line with the one conducted here, its limitations are evident. A purely empirical analysis of sentence length only serves to illustrate one aspect of how the provisions and case law are implemented. While numbers on their own are useful in determining outcomes, they should be contextualized through a critical reading of the decisions to ascertain how the provisions are being understood and applied by judges.

The most recent study was conducted by Marie-Andrée Denis-Boileau¹¹⁸ and Marie-Ève Sylvestre¹¹⁹ and examined the application of the *Gladue* provisions in a selection of decisions from trial and appeal courts. They argue that innovative sentencing practices for Indigenous offenders are discounted by judges leading to what they term a “judicial resistance” to the Supreme Court meant to protect the state's monopoly on punishment.¹²⁰ This paper randomly sampled 635 decisions released between 2012-2015 from three databases,¹²¹ dealing with the sentencing of Indigenous offenders post-*Ipeelee*. The decisions were analyzed with respect to the sentencing court's adherence to the two steps in *Gladue*: the unique background and systemic factors and the

¹¹⁴ Anna Johnson; Paul Millar, “Invisible No More: Sentencing Post-*Gladue* in Manitoba and Saskatchewan Manslaughter Cases,” 37 Windsor Rev Legal & Soc Issues 26 (2016) at 36-37.

¹¹⁵ *Ibid* at 38.

¹¹⁶ *Ibid* at 41.

¹¹⁷ *Ibid* at 43.

¹¹⁸ Law professor at the University of Ottawa.

¹¹⁹ Counsel for the Quebec Commission of Inquiry into the Relationships between Indigenous People and Certain Public Services.

¹²⁰ Marie-Andrée Denis-Boileau; Marie-Ève Sylvestre, “*Ipeelee* and the Duty to Resist,” 51 UBC L Rev 2, 548 (2018) at 553-5.

¹²¹ They do not specify but presumably they are CanLII, Quicklaw and Westlaw.

types of sentencing procedures appropriate in the circumstances.¹²² The research found sixty-one decisions deeming the provisions inapplicable altogether because the offence was serious.¹²³

With respect to the systemic and background factors, this paper distinguished between cases where they were applied satisfactorily or unsatisfactorily. Unsatisfactory decisions were those where the logic of the considerations could not be understood. Satisfactory cases were those where a minimal recognition of the factors could be discerned. This was determined to be the case in only 20% of decisions.¹²⁴ The authors believe that one major difficulty limiting the application of the provisions was the inability of judges to conceive of how moral culpability could be limited by the systemic and background factors.¹²⁵

This study determined that sentencing judges barely attended to the second stage of *Gladue* at all. Denis-Boileau and Sylvestre argue that the types of penalties employed have not changed since *Ipeelee* and that trial judges continue to prefer incarceration for Indigenous offenders in 87% of decisions.¹²⁶ Moderation as a principle was applied satisfactorily in one case in five, seven of those were cases in which “the judge attempted to adapt the type of sanction and the procedure to the Indigenous heritage of the accused,” and only three of those resulted in sentencing circles.¹²⁷ The authors credit these limitations to many of the same sources as earlier studies, such as a lack of community resources, a lack of judicial resources, a dearth of Gladue Reports, and the volume of files.¹²⁸ However, they go further in their criticism, suggesting that despite these limitations, it is the inability of judges to move outside punitive sanctions or consider legal pluralism with respect to Indigenous legal traditions that causes the analysis to be set aside in serious cases.¹²⁹

Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre suggest these failures are partially a result of the Supreme Court declining to provide guidance for crafting such sentences. In practice, they suggest that many judges cannot see how to apply the provisions and “some judges simply include the expression ‘*Gladue* factors’ among the mitigating circumstances in their judgments, or, failing anything better, lean towards a reduction of the sentence handed down.”¹³⁰ In their view,

¹²² Denis-Boileau and Sylvestre, “Duty to Resist”, *supra* note 120 at 562-4.

¹²³ *Ibid* at 564.

¹²⁴ *Ibid* at 568-570.

¹²⁵ *Ibid* at 572-4.

¹²⁶ *Ibid* at 578-9.

¹²⁷ *Ibid* at 580-1.

¹²⁸ *Ibid* at 586-592.

¹²⁹ *Ibid* at 595-6.

¹³⁰ *Ibid* at 602.

the second stage of *Gladue* is an invitation to rethink punishment and the process of sentencing altogether. They argue this creates a contact zone for legal pluralism where judges can engage with alternatives and acknowledge Indigenous legal orders.¹³¹ The paper concludes that judges should look to Indigenous legal orders and Indigenous communities in developing innovative sentencing practices.¹³² This study's narrow temporal focus is useful and it has produced an admirably in-depth analysis of the considerations at play in these cases. However, their examination of whether decisions produced custodial sentences or not is complicated by the variety of offences covered by the 635 decisions studied, many of which would not necessarily have carried a presumption of a custodial sentence.

4. Gladue Reports

The difficulties encountered by the courts in applying *Gladue* lies partially with a failure to provide courts and justice system actors with the information required to craft appropriate sentences. In the immediate aftermath of the *Gladue* decision, critics pointed out that in order for this new regime to function further resources be made available to the courts. This was particularly true with respect to Indigenous-specific pre-sentence reports, the preparation of which would require paying someone.¹³³ These criticisms were prescient, both for recognizing that Gladue Reports would materialize but also for anticipating that funding for them would not and any funding that did would be piecemeal.

There are no formal processes for the production of Gladue Reports in Newfoundland and Labrador, New Brunswick, Manitoba, Saskatchewan, the Northwest Territories and Nunavut.¹³⁴ Alberta is the only jurisdiction that directly assumes responsibility for these reports by funding and assigning them.¹³⁵ In other jurisdictions where they are available, Gladue Reports are produced by a network of independent contractors or local organizations with funding and therefore supply limited. The province of Ontario has twenty-five full-time *Gladue* writers producing some 750 reports annually. These are funded in part by the Ministry of the Attorney General, Legal Aid Ontario and the federal government but the workers themselves are drawn from a collection of

¹³¹ *Ibid* at 603-4.

¹³² *Ibid* at 606-9.

¹³³ Roach and Rudin, "*Gladue*: The Judicial and political reception", *supra* note 32 at 375-6; Pelletier, "Nullification", *supra* note 37 at 481.

¹³⁴ Rudin, *Indigenous People*, *supra* note 7 at 109.

¹³⁵ *Ibid* at 110.

non-profits, First Nations, and Indigenous organizations.¹³⁶ The small numbers of reports produced annually in Ontario means that they are not widely available, with one study finding that Gladue Reports were only mentioned explicitly in one third of sentencing decisions involving Indigenous offenders.¹³⁷

As a consequence of this scattered and under-resourced approach to furnishing judges with information, the necessary preconditions of crafting individualized sentences taking into account the *Gladue* factors are not consistently available. This is in spite of the requirement that the Supreme Court placed upon counsel and judges to procure this information.¹³⁸ This problem is exacerbated by the fact that, unlike pre-sentence reports, there is no *Criminal Code* section providing for Gladue Reports. Consequently, some judges do not feel able to order their production.¹³⁹ Courts are forced to rely on the limited capacity of non-governmental entities to produce reports in those jurisdictions where they are available at all. This state of affairs, while not fatal to the functioning of the provisions, represents a serious impediment to their effectiveness as, across the justice system, a lack of money is causing serious problems.

5. Application of Gladue in the Courts

The application of the *Gladue* provisions in practice demonstrates the difficulties for the courts in considering background and systemic factors and crafting sentences incorporating them. The *Gladue* provisions were adopted with the intention of reducing the overrepresentation of Indigenous people in prison and so far they have not achieved this aim. Indigenous people accounted for 30% of all admissions to sentenced custody in 2014-5 while accounting for only 4% of the population.¹⁴⁰ This figure is interesting when compared with earlier ones. Following the *Gladue* decision in 2000-1, Indigenous people accounted for only 15% of admissions to sentenced custody,¹⁴¹ at a time when they represented 3.3% of Canada's population.¹⁴² The continuing overincarceration of Indigenous people may be partially explained by demographic factors, in that

¹³⁶ *Ibid* at 110.

¹³⁷ Denis-Boileau and Sylvestre, "Duty to Resist", *supra* note 120 at 586.

¹³⁸ *Gladue*, *supra* note 8 at paras 83-4.

¹³⁹ Rudin, *Indigenous People*, *supra* note 7 at 114-5.

¹⁴⁰ Julian Roberts; Andrew Reid, "Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story," *Can J Crim & Crim J* 314 (2017) at 332.

¹⁴¹ Roberts and Reid, *supra* note 89 at 322.

¹⁴² "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit," <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>

the Indigenous population is generally younger than the population overall,¹⁴³ although this is not sufficient to explain the general failure of the provisions to reduce over-incarceration.

Despite the passages dealing with the need to consider background and systemic factors in *Gladue* and *Ipeelee*, the Supreme Court provided scant guidance for crafting appropriate sentences to accommodate them. The Supreme Court is ultimately limited in its capacity to offer in-depth guidance to sentencing judges without real alternative sanctions to which sentencing judges can refer. Parliament, as the author of the country's criminal law and the provinces and territories as its administrators, have largely failed to build and fund widespread alternatives to which trial judges can direct offenders.

The provisions have been applied differently by courts in different provinces. It is accepted practice in Canada that different jurisdictions will have different approaches to sentencing.¹⁴⁴ Kent Roach views the issue of regional variation in the application of *Gladue* as troubling given that section 718.2(e) was designed to remedy overrepresentation of Indigenous peoples across Canada.¹⁴⁵ In his most recent study of the impact of the provisions in the courts of appeal, Professor Roach found that different jurisdictions tended to concentrate on different aspects of the provisions. Professor Roach found that:

The Alberta and Saskatchewan Courts of Appeal have provided the most sustained analysis of how background circumstances can reduce moral blameworthiness while making only modest reductions in sentences on such basis. More recently, the BC, PEI and the Quebec Courts of Appeal appear more willing to make significant reductions of the type seen in *Ipeelee* on the basis that *Gladue* factors have reduced moral blameworthiness. The Manitoba and New Brunswick Courts of Appeal emerge as those that have been the most resistant to applying *Gladue* in serious cases. None of the Courts of Appeal have systematically related background factors to the effectiveness of deterrence, denunciation or incapacitation in responding to offending. This suggests that judicial engagement with how *Gladue* factors can affect moral blameworthiness has been generally superficial.

Many Courts of Appeal including the Ontario and Newfoundland and Labrador Courts of Appeal continue to stress the rehabilitative purposes of sentencing in their considerations of *Gladue*. Although consistent with the Supreme Court's original

¹⁴³ Rudin "Looking Backward," *supra* note 23 at 378.

¹⁴⁴ *R v M(CA)*, [1996] 1 SCR 500 at para 92.

¹⁴⁵ Roach "One Step Forward," *supra* note 14 at 487.

message in *Gladue*, this discounts the Court's recognition in *Ipeelee* that background factors can reduce moral blameworthiness and may lessen the use of *Gladue* in more serious cases where courts will stress the punitive purposes of sentencing.

Finally, almost none of the Court of Appeal decisions applying *Ipeelee* dealt with creative alternatives to imprisonment involving victims and communities. This does not mean that such sentences are never used especially in cases where the Crown supports alternatives to imprisonment, but it does mean that Crowns and trial judges have not received positive signals from their Courts of Appeal to encourage such experimentation.¹⁴⁶

Sentencing decisions are based in the jurisprudence of the relevant court of appeal and a lack of direction in sentencing will determine the range of sentences that trial judges view as acceptable for similar crimes and similarly situated offenders.¹⁴⁷ The Supreme Court in *Ipeelee* stated that sentencing is a highly individualized process in which the sentencing judge is given a high degree of deference.¹⁴⁸ This is true in respect of all offenders who are sentenced, Indigenous and non-Indigenous alike. However, judicial sentencing determinations are based on submissions from counsel and are drawn from similar cases considered by the court of appeal.

The reluctance of appeal courts to stray from conventional sentencing has likely caused trial judges to limit the originality of their decisions. This problem extends beyond concerns with appellate intervention. Despite *Ipeelee*, research indicates that the types of penalties imposed by judges have not changed and incarceration continues to be the preferred response to crimes committed by Indigenous offenders.¹⁴⁹ These offenders may be less likely to be understood by the courts as subjects for rehabilitation and retributive factors prevail in sentencing.¹⁵⁰

An inability to understand and apply the provisions continues to be a particular problem with the sentencing of offenders for serious and violent crimes. It has been argued that traditional sentencing considerations override *Gladue* considerations in such cases and limit their impact.¹⁵¹ Many judges appear unable to conceive of how an offender's moral blameworthiness can be

¹⁴⁶ Roach, "Ipeelee in the Courts of Appeal," *supra* note 67 at 2.

¹⁴⁷ Boileau and Sylvestre, "Duty to Resist," *supra* note 120 at 585.

¹⁴⁸ *Ipeelee*, *supra* note 17 at para 38.

¹⁴⁹ Boileau and Sylvestre, "Duty to Resist," *supra* note 120 at 578-9.

¹⁵⁰ Balfour, "Do Law Reforms Matter?," *supra* note 105 at 96-7.

¹⁵¹ Milward and Parkes, "Beyond Myth," *supra* note 84 at 94.

reduced with reference to the systemic and background factors.¹⁵² In one study, denunciation and deterrence were most frequently mentioned in respect of serious crimes and restorative goals least frequently, leading the author to conclude that sentencing judges were incapable of moving beyond common law principles in determining sentence.¹⁵³ It has been suggested that this is the result of an outsized emphasis on individual responsibility and a refusal of judges to consider the context of the individual in their decisions.¹⁵⁴ It has also been suggested that attempts at alternative approaches to sentencing are “confounded by staggering rates of interpersonal violence and the lack of community capacity” within Indigenous communities to deal with these issues reveals the “limits of law reforms... in the space of profound deprivation.”¹⁵⁵

Whatever the judicial reasoning, it appears that judges are reticent to set aside traditional considerations in sentencing serious crime and fall back on the established methods employed for non-Indigenous offenders. Marie-Andrée Denis-Boileau and Marie-Ève Sylvestre have suggested that this is evidence of a judicial resistance against the Supreme Court’s decisions in *Ipeelee* and *Gladue* conducted in defence of the state’s monopoly on punishment.¹⁵⁶ This is only true in the sense that judges have frequently abided by traditional considerations in crafting sentences but it points to a combination of genuine confusion and a dearth of resources rather than to active resistance. If there were more resources available to the judiciary, there could be more judicial creativity.¹⁵⁷ Sentencing decisions suggest that judges would like to utilize more creative options and would like the Supreme Court of Canada to provide additional guidance as to what forms they might take but believe they have failed twice to do so.¹⁵⁸

The Supreme Court’s lack of guidance is itself a reflection of the limited resources existing for non-custodial sanctions for Indigenous people. In the immediate aftermath of *Gladue*, this weakness was identified as one of the main impediments to the successful application of the provisions, particularly within Indigenous communities themselves.¹⁵⁹ In reflecting on the practice in his own court, Justice Knazan also argued that greater community resources would substantially

¹⁵² Boileau and Sylvestre, “Duty to Resist,” *supra* note 120 at 574-6.

¹⁵³ Balfour, “Do Law Reforms Matter?,” *supra* note 105 at 97-8.

¹⁵⁴ Boileau and Sylvestre, “Duty to Resist,” *supra* note 120 at 600.

¹⁵⁵ Balfour, “Do Law Reforms Matter?,” *supra* note 105 at 93.

¹⁵⁶ Boileau and Sylvestre, “Duty to Resist,” *supra* note 120 at 553-4.

¹⁵⁷ Rudin, “Addressing Aboriginal Overrepresentation,” *supra* note 68 at 463.

¹⁵⁸ Boileau and Sylvestre, “Duty to Resist,” *supra* note 120 at 602.

¹⁵⁹ Roach and Rudin, “Judicial and Political Reception,” *supra* note 32 at 361-2.

increase the options available for crafting meaningful sentences.¹⁶⁰ Those programs that do exist are few, underfunded and resourced, and vary greatly by region.

6. Community Alternatives

Placing blame at the feet of the Supreme Court for failing to outline appropriate responses, in Jonathan Rudin’s view, ignores how law reform works in Canada.¹⁶¹ It should be remembered that Parliament and the legislatures have not responded to the Supreme Court’s interpretation of section 718.2(e). Having passed the provisions into law, Parliament was largely satisfied to have the provisions themselves do the work of reducing overrepresentation. Parliament has made no further innovations with respect to the *Criminal Code*’s sentencing provisions dealing with Indigenous offenders and the legislatures of the provinces and territories have not built a sophisticated infrastructure to provide culturally-appropriate alternatives to their jails.¹⁶²

Scholars have recognized that there is a deficiency in culturally-appropriate resources available in communities.¹⁶³ A lack of options for sentencing offenders outside the correctional system constrains judges and increases the likelihood that they will rely on imprisonment to achieve the goals of sentencing. It is hardly ground breaking to suggest that the criminal justice system lacks resources, its attempts to respond to the ruling on delay in *Jordan* stands witness to this but resource limitations nonetheless plague the system at every stage.¹⁶⁴ We have already seen the piecemeal availability of Gladue Reports at sentencing, where most justice system participants report that culturally-relevant information is still brought forward mostly through pre-sentence reports.¹⁶⁵

The problems in crafting culturally-appropriate sentences result from of a lack of resources in the community. The Department of Justice Aboriginal Justice Strategy (“AJS”) is a cost-sharing program directed by the federal government which provides financial support for Indigenous community justice programs “grounded in principles of restorative justice and Indigenous Legal Traditions... designed to reflect the culture and values of the community in which they are

¹⁶⁰ Knazan “Time for Justice,” *supra* note 93 at 444.

¹⁶¹ Rudin, “Addressing Aboriginal Overrepresentation,” *supra* note 68 at 454.

¹⁶² Rudin, “Addressing Aboriginal Overrepresentation,” *supra* note 68 at 455.

¹⁶³ Balfour, “Do Law Reforms Matter?,” *supra* note 105 at 97.

¹⁶⁴ *R v Jordan*, 2016 SCC 27.

¹⁶⁵ Sébastien April; Mylène Magrinelli Orsi, “Gladue Practices in the Provinces and Territories”, (Ottawa: Department of Justice, Research and Statistics Division, Department of Justice, 2013) at 9-11.

situated.”¹⁶⁶ In 2015-16, this program provided \$15 million in funding for roughly 200 community-based justice programs serving 750 rural and urban Indigenous communities.¹⁶⁷ These programs, while they vary in size and scope, are designed to provide pre-trial diversion programming as well as culturally-appropriate sanctions and are accessed by way of police and Crown referral.

A Department of Justice survey of the program found that half of Crown attorneys said they were “a little,” “to a small extent,” or “somewhat” aware of the programs in their region. This lack of awareness of programs is a significant impediment to accessing them. However, even among Crown attorneys familiar with the programs, there was reluctance to recommend their use. Crowns were split evenly between those who viewed the sanctions as culturally appropriate and recommended their use and those who did not and refused to recommend them.¹⁶⁸

The Department of Justice assessment also found that the programs were troubled by a lack of quality and consistency, insufficient and unstable funding, and high staff turnover. Communities were often unable to supplement federal grants with additional funds, the level of training for staff and volunteers was inconsistent due to a lack of stable funding and resources which in turn led to high turnover, and there was a “lack of recognized core competencies for various types of programs and services.”¹⁶⁹ While programs are available across the country, their application and quality is inconsistent. Funding is so limited that the Department of Justice found it allowed “communities to hire minimal staff (in some cases, only a single part-time person) to operate programs along with volunteers or other staff paid through other sources.”¹⁷⁰

A lack of funding is a barrier to the availability of alternative and culturally-appropriate sanctions and this is due in part to a lack of political will. A \$15 million annual expenditure by the Government of Canada is insignificant in budgetary terms. The unevenness in program quality and issues with staff training alone demonstrate that current levels of funding are insufficient. Given that these programs are community based and intended to provide culturally-relevant programming for Indigenous peoples, there may be reticence on the part of governments to attach too many specific requirements to funding. Notwithstanding a desire to adopt a hands-off approach to the management of Indigenous community justice programs, if government wants them to function

¹⁶⁶ *Ibid* at i-ii.

¹⁶⁷ *Ibid* at 3-5.

¹⁶⁸ *Ibid* at 34-5.

¹⁶⁹ *Ibid* at 31.

¹⁷⁰ *Ibid* at 62.

efficiently and to see more frequent prosecutorial referrals, there will need to be increased funding accompanied by some directives regarding the kinds of programs that they will need to provide.

It is important to note that these organizations do not simply provide alternative sanctions for offenders, they also respond to the needs of victims and other members of the community.¹⁷¹ The impact of this expanded mandate on these organization is further exacerbated by the limited nature of funding arrangements which often last only for a prescribed period of time, impacting the capacity of organizations to plan effectively.¹⁷² Arguably, until these programs benefit from stable funding and political support, their potential to impact the crisis facing Indigenous peoples in the criminal justice system will remain an open question. Given their limited nature and spotty financing, it is impossible to tell if they have or could have a real impact in addressing the intended purpose of the *Gladue* provisions.¹⁷³

7. Corrections

Like the community justice programs that are designed to provide community-based services to offenders, a lack of programs and services also plagues the correctional system. In one study of sentencing decisions, a considerable number of judges spoke of their hope that the offender would be able to avail themselves of Indigenous-specific programming during their imprisonment.¹⁷⁴ This is a refrain heard frequently among sentencing judges who determine that there is no recourse except imprisonment. Justice Knazan argued that the availability of such programs is a consideration in crafting an appropriate sentence for Indigenous offenders.¹⁷⁵ Despite the need for culturally-relevant correctional programming, they do not tend to be available in provincial prisons due to the limitation on programs and resources in these institutions and the short length of sentences.¹⁷⁶

The short length of terms notwithstanding, 96% of all custodial sentences are served in provincial and territorial institutions.¹⁷⁷ This suggests that there should be an increased focus on

¹⁷¹ *Ibid* at ii.

¹⁷² Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada*. (Toronto: University of Toronto Press, 2016) at 317-8.

¹⁷³ David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights*. (Vancouver: UBC Press, 2012) at 124.

¹⁷⁴ Boileau and Sylvestre, "Duty to Resist," *supra* note 120 at 581.

¹⁷⁵ Knazan "Time for Justice," *supra* note 93 at 445.

¹⁷⁶ Milward and Parkes, "Beyond Myth," *supra* note 84 at 105.

¹⁷⁷ Roberts and Reid, "Every Picture," *supra* note 89 at 318.

the provision of Indigenous-specific services by the provinces and territories. Some jurisdictions, such as the Northwest Territories, have dealt with this issue by entering into exchange of service agreements with the Correctional Service of Canada (“CSC”) that allow offenders sentenced to a term greater than two years to serve their time in a territorial institution at the recommendation of the sentencing court.¹⁷⁸ Though federal penitentiaries are better equipped to provide programs for inmates than territorial institutions, some judges believe that allowing an Indigenous offender to serve their time in a culturally relevant and familiar environment in their own region will do more to aid their rehabilitation than CSC programming.¹⁷⁹

Federal penitentiaries tend to provide more involved rehabilitative programs for offenders than their provincial counterparts and the same is true of culturally-specific programs for Indigenous people. The CSC has suggested that “[s]ome institutions in the Prairies Provinces can be considered ‘Indigenous Prisons’,” such as the Stony Mountain Institution and the Saskatchewan Penitentiary, where 58% and 59% of inmates are Indigenous.¹⁸⁰ In recognition of the particular issues facing Indigenous people in federal custody, the CSC operates the Elder Service Program which “supports the delivery of ceremonial services, participation in the delivery of Aboriginal correctional programs and establishing and maintaining partnerships to help offenders reintegrate into the community.”¹⁸¹ However, the CSC admits that these programs are under-staffed and under-resourced and that this has taken a toll on the provision of services within the system.¹⁸²

Alongside its attempts to provide services within federal institutions, the CSC has also established healing lodges, either on their own or operated by Indigenous communities pursuant to an agreement with the CSC under section 81 of the *Corrections and Conditional Release Act*.¹⁸³ Healing lodges exist to “assist the successful reintegration of Indigenous offenders by using traditional healing approaches and holistic and culturally appropriate programming.”¹⁸⁴ At present, the CSC operates four lodges with a total of 60 beds for women and 210 for men while Indigenous communities operate a further five lodges under the auspices of section 81 of the *CCRA* with 16

¹⁷⁸ *R v Romie*, 2015 NWTSC 11 at 8; *Corrections and Conditional Release Act*, SC 1992, c 20, s. 16.

¹⁷⁹ *R v KM*, 2017 NWTSC 75 at 8.

¹⁸⁰ “Annual Report of the Office of the Correctional Investigator, 2015-16” (Ottawa: Office of the Correctional Investigator, 2016) at 43.

¹⁸¹ *Ibid* at 47.

¹⁸² *Ibid* at 47-8.

¹⁸³ SC 1992, c. 20 [*CCRA*].

¹⁸⁴ Monchalin, *Colonial Problem*, *supra* note 172 at 271.

beds for women and 131 for men.¹⁸⁵ These healing lodges are located only in Quebec and western Canada, leaving large portions of the country to do without. This is particularly troublesome given that no lodges exist in any of the three territories, where the Indigenous proportion of the population is highest.

The CSC has found a number of significant shortcomings in its analysis of the program. Availability across the country was not the only geographic issue, the CSC conceded that most Indigenous offenders will eventually be released into urban centres rather than Indigenous communities where most of these facilities are located. They determined that to increase their effectiveness and relevance, the CSC would need to concentrate on developing ties to urban Indigenous organizations for offenders on conditional release.¹⁸⁶ Because 70% of Indigenous inmates will be released to urban communities, the CSC hopes to expand the operation of healing lodges from First Nations' territory to lodges organized by urban Indigenous organizations.¹⁸⁷ Besides the limitations of geography, the capacity of these facilities is also a concern. In 2012, healing lodges could accommodate no more than 2% of Indigenous inmates in the federal penitentiary system and less than 20% of those held in minimum-security facilities.¹⁸⁸

There are also issues with community-run lodges operated in partnership with the CSC. The Office of the Correctional Investigator noted that many Indigenous communities, like non-Indigenous communities, had no desire to play host to offenders.¹⁸⁹ As with much of the system erected to support the implementation of the *Gladue* provisions, Indigenous communities and Indigenous-run justice organizations are frequently not compensated for their services but asked to volunteer their time and resources. In the context of healing lodges in particular, members of the communities in which they are located were being asked to monitor the compliance of offenders without compensation.¹⁹⁰ Like those organizations funded by the AJS, section 81 healing lodges were found to be under-resourced and their staff underpaid.¹⁹¹ These programs are not without value but they are small in scale and, as can be seen with many community justice programs in Canada, under resourced and dependant on voluntary contributions of community

¹⁸⁵ Correctional Service Canada, "Healing Lodges," (<http://www.csc-scc.gc.ca/aboriginal/002003-2000-eng.shtml>).

¹⁸⁶ Office of the Correctional Investigator, "Spirit Matters: Aboriginal Peoples and the Corrections and Conditional Release Act" (Ottawa: Office of the Correctional Investigator, 2012) at 25.

¹⁸⁷ *Ibid* at 31.

¹⁸⁸ *Ibid* at 30.

¹⁸⁹ *Ibid* at 22.

¹⁹⁰ *Ibid* at 25; Rudin, *Indigenous Peoples*, *supra* note 7 at 225.

¹⁹¹ "Spirit Matters," *supra* note 186 at 30.

labour and effort. As with other aspects of the support structure for the *Gladue* provisions, governments are attempting to achieve these goals with a minimum of expense.

8. Prosecutorial Discretion and Diversion

All actors in the criminal justice system play critical roles in ensuring that the *Gladue* provisions are implemented successfully. The Supreme Court has called directly upon counsel and judges to inform themselves of an offender's Indigenous status and to take steps to acquire the relevant information. The exercise of prosecutorial discretion is a key aspect of the system and it is at this stage that decisions are made that will substantially impact what follows. Depending on the circumstances of the case, prosecutors can divert matters, lay charges carrying mandatory minimums, choose to proceed by indictment or summary conviction, or temper their sentencing submissions. Prosecutorial decisions and directives represent an important facet of the application of the *Gladue* factors in practice. In order for courts to craft sentences that see an impact by the *Gladue* provisions, Crown counsel will have to take the *Gladue* considerations into effect when they make submissions before the court.

Given that the *Gladue* principles are remedial in nature, Marie Manikis¹⁹² has argued that to achieve this end, they should be “recognized as a stand-alone principle that also applies to all decision-making processes by criminal justice agencies that have the power to restrict an Aboriginal person's liberty.”¹⁹³ The decision to prosecute at all or how to proceed has outsized effects going forward. Consequently, Manikis argues, the background and systemic factors and their relationship to the offender should be considered by prosecutors before charges are laid against Indigenous accused.¹⁹⁴

In the context of deportation proceedings undertaken against an Indigenous respondent, the Ontario Court of Appeal in *United States v Leonard* offered the proposition that the *Gladue* factors should be considered by “all decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system... whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.”¹⁹⁵ The court determined that “[t]he sound exercise

¹⁹² Law professor at McGill University.

¹⁹³ Marie Manikis, “Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice That Applies to Prosecutors,” 21 Can Crim L Rev 173 (2016) at 181.

¹⁹⁴ *Ibid* at 192.

¹⁹⁵ *Leonard*, *supra* note 5 at para 85.

of prosecutorial discretion is fundamental to the fair administration of criminal justice. The decisions of prosecutors have enormous implications for accused persons and for the justice system” and “[g]iven the importance of prosecutorial discretion to the administration of Canadian justice and to the extradition process, I cannot accept the proposition that *Gladue* principles have no bearing on their exercise.”¹⁹⁶

The Supreme Court declined to hear the appeal in *Leonard* but rendered a judgment on the issue in 2014. In *Anderson*, the Court narrowly applied the judgment from the Ontario Court of Appeal, noting that it was only meant to apply in respect of deportation proceedings.¹⁹⁷ Justice Moldaver wrote for a unanimous Court that:

both *Gladue* and *Ipeelee* speak to the sentencing obligations of *judges* to craft a proportionate sentence for Aboriginal offenders. They make no mention of prosecutorial discretion and do not support Mr. Anderson’s argument that *prosecutors* must consider Aboriginal status when making a decision that limits the sentencing options available to a judge. Mr. Anderson’s argument in effect equates the duty of the judge and the prosecutor, but there is no basis in law to support equating their distinct roles in the sentencing process.¹⁹⁸

The Court held that prosecutorial discretion is immune to review on the basis of an accused’s Indigenous status. However, given the interest of all levels of government in pursuing a reduction in the over-incarceration of Indigenous people this does not preclude voluntary policies on the part of attorneys general and directors of public prosecutions.

The Department of Justice’s assessment of *Gladue* practices nationwide found that only two of eleven districts had formal prosecutorial directives concerning Indigenous accused.¹⁹⁹ Neither the Public Prosecution Service of Canada nor any of the four western provinces have specific Indigenous charging policies in their Crown prosecution manuals and each make only passing mention of Indigenous persons in practice directives concerning alternatives measures and diversion.²⁰⁰ The most comprehensive policy comes from the Ontario Ministry of the Attorney

¹⁹⁶ *Ibid* 86-87.

¹⁹⁷ *R v Anderson*, 2014 SCC 41 at para 27.

¹⁹⁸ *Ibid* at para 25 [Emphasis in original].

¹⁹⁹ April and Orsi, “Gladue Practices,” *supra* note 165 at 14.

²⁰⁰ Public Prosecution Service of Canada, “Public Prosecution Service of Canada Deskbook,” (<https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf>) at 3 section 3.8; British Columbia Prosecution Service, “Crown Policy Manual – Alternative Measures for Adult Offenders,” (<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/alt-1.pdf>); Alberta Justice and

General. Ontario's practice directive on Indigenous people speaks to the importance of relationships between the Crown and Indigenous peoples, diversion, bail, sentencing, Gladue Reports, and Indigenous communities with particular reference to supports available to the offender and to victims.²⁰¹ While this practice directive is comprehensive, the policy makes no particular reference to the exercise of restraint in prosecution but rather urges knowledge of and sensitivity to Indigenous considerations. As will be addressed in chapter 3, this research suggests that Crown attorneys in some jurisdictions have a tendency to make submissions for longer sentences in certain sub-types of manslaughter than others and this can affect the length of sentence for Indigenous offenders.

9. Conclusion

The academic analysis of the *Gladue* provisions suggests that practical guidelines for their application to sentencing offenders for serious and violent crime have not crystalized in the trial courts. This state of affairs is partially explained by a lack of guidance provided by the Supreme Court and the courts of appeal. However, it is equally apparent that both levels of government have failed to raise an infrastructure that would provide support for Indigenous offenders both within and outside the correctional system. As with most areas of government, a lack of funding has prevented the effective creation of programs to support Indigenous offenders and provide judges with Gladue Reports in the majority of cases. The following chapter addresses the manner in which sentencing is conducted in Canada and the approaches that the courts of appeal have taken to sentencing manslaughter in the jurisdictions being examined in this study.

Solicitor General, "Adult Alternative Measures Program," (https://justice.alberta.ca/programs_services/criminal_pros/crown_prosecutor/Pages/AdultAlternativeMeasuresProgram.aspx); Saskatchewan Justice and Attorney General, "Policy and Practice Memorandum – Alternative Measures – Adult," ([http://publications.gov.sk.ca/documents/9/93156-Alternative%20Measures%20\(Adult\).pdf](http://publications.gov.sk.ca/documents/9/93156-Alternative%20Measures%20(Adult).pdf)); Manitoba Department of Justice and Public Prosecutions, "Policy Directive – Restorative Justice and Diversion," (https://www.gov.mb.ca/justice/crown/prosecutions/pubs/restorative_justice_and_diversion.pdf).

²⁰¹ Ontario Ministry of the Attorney General – Criminal Law Division, "Crown Policy Manual," at 61-65, (https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf).

Chapter Three: Manslaughter Sentencing in Canada

1. Introduction

This chapter begins by outlining the general purposes and principles used in sentencing in Canada with an emphasis on those principles that are addressed most frequently in the sentencing of manslaughter. It then proceeds to examine the general regime for manslaughter sentencing that operates in Canada, with an emphasis on the role played by sentencing ranges in the practice. It then addresses the different subcategories of manslaughter identified in the body of cases used in this study and their general distribution in the data set. Finally, this chapter concludes by analyzing divergent manslaughter sentencing regimes established by courts of appeal in the different provinces and territories and how they treat these subcategories of manslaughter.

2. The Structure of Sentencing

A. Section 718 – Fundamental Purpose of Sentencing

Sentencing in Canada is governed primarily by the fundamental purpose of sentencing in section 718 of the *Criminal Code*, the fundamental principle of sentencing in section 718.1, and the other sentencing principles contained in section 718.2. The first stage is determining the objectives of sentencing in the case. Here, section 718 explains:

718. The fundamental purpose of sentencing is to protect society and contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate the offender from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims or to the community.

One or more of these considerations must inform a judge's reasoning in fixing a just sanction for an offence. In sentencing manslaughter, denunciation and deterrence were the objectives most

frequently cited as being the paramount considerations. After that, rehabilitation was mentioned most often but judges frequently specified that it was a subordinate or secondary objective. Separation, reparation and promotion of a sense of responsibility were offered as justifications far less frequently and most often in cases involving individuals with substantial criminal records or those offenders with a demonstrated history of being unresponsive to rehabilitative efforts.

Denunciation

Denunciation is not directed to the personal characteristics of the offender but instead to society's condemnation of the act itself.¹ The Supreme Court has explained that denunciation serves as a societal condemnation of the actions of a perpetrator who has contravened its code of values. Denunciation, they suggest:

mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law... The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.²

While denunciation is also a crucial part of the sentencing process, it takes on a particular importance when sentencing people who lead otherwise law-abiding lives.³ Societal condemnation, it is believed, has little impact on people who regularly engage in criminal behaviour but will have a substantial impact on ordinary citizens who do not. This is relevant for

¹ Clayton Ruby, *Sentencing*, Ninth Edition. (Toronto: Lexis Nexis, 2017) at 6.

² *R v M(CA)*, [1996] 1 SCR 500 at para 81. [Emphasis in original]

³ *R v Lacasse*, 2015 SCC 64 at para 73.

manslaughter sentencing since many people who commit the offence have not previously been convicted of a crime.

Deterrence

At its core, deterrence as a sentencing principle is premised on the idea that the example of punishment is itself sufficient to discourage crime.⁴ There are two distinct forms of deterrence: general deterrence, directed toward society at large and to others who may be inclined to commit a similar offence; and individual or specific deterrence, directed at the offender who is being sentenced.⁵ While the Supreme Court of Canada has cautioned sentencing judges against relying too much on the largely unproven efficacy of deterrence they nonetheless agree that there remain times when it is necessary.⁶ Whatever its efficacy in practice, general deterrence continues to be a mainstay of sentencing for manslaughter and was cited in virtually every decision in this study. Specific deterrence on the other hand is meant to deal with the particular offender before the court. The idea is not to discourage the offender from committing all crimes in future but this particular crime based on the severity of the consequences.⁷ Like general deterrence, specific deterrence was frequently noted as one of the paramount sentencing objectives in the manslaughter decisions examined here.

Rehabilitation

Canadian sentencing law places a substantial emphasis on rehabilitation even in serious cases of violent crime. In common with the criticisms of deterrence, there is little evidence to suggest that rehabilitation comes about as a result of imprisonment.⁸ The tenor of many sentencing decisions suggests that the need for rehabilitation, far from being focused on giving the offender access to programs while imprisoned, implies that the sentence should not be one that is so onerous that it forecloses any future for the prisoner when released. In this respect, rehabilitation as it is sometimes used suggests an element of restraint, however, the Supreme Court has cautioned that where denunciation and deterrence predominate “there may be few options other than

⁴ Ruby, *Sentencing*, *supra* note 1 at 7.

⁵ *Ibid* at 8-9.

⁶ *R v Proulx*, [2000] 1 SCR 61 at para 107.

⁷ Ruby, *Sentencing*, *supra* note 1 at 14.

⁸ *Ibid* at 19.

imprisonment for meeting those objectives.”⁹ This provides a partial explanation for why rehabilitation was frequently cited in the manslaughter decisions considered here as a secondary or subordinate consideration. The decisions strongly suggest a presumption of prison time resulting from a manslaughter conviction.

B. Section 718.1 - Fundamental Principle of Sentencing

The fundamental principle of sentencing in Canada is proportionality, and it is here that the “objectives of sentencing are given sharper focus.”¹⁰ Section 718.1 of the *Criminal Code* states that “[a] sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the offender.” This consideration is crucial to the determination of a fit sentence. At its simplest:

The more serious the crime and its consequences, or the greater the offender’s degree of responsibility, the heavier the sentence will be. In other words, the severity of the sentence depends not only on the seriousness of the crime’s consequences, but also on the moral blameworthiness of the offender.¹¹

The Ontario Court of Appeal expanded on the elements of proportionality in *Hamilton*, explaining that:

The “gravity of the offence” refers to the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence...

The “degree of responsibility of the offender” refers to the offender’s culpability as reflected in the essential elements of the offence – especially the fault component – and any specific aspects of the offender’s conduct or background that tend to increase or decrease the offender’s personal responsibility for the crime.¹²

⁹ *Lacasse*, *supra* note 3 at para 6.

¹⁰ *R v Nasogaluak*, 2010 SCC 6 at para 40.

¹¹ *Lacasse*, *supra* note 3 at para 12.

¹² *R v Hamilton*, [2004] OJ No 3252 (CA) at paras 90-91.

This question lies at the core of determining a just and appropriate sanction for a crime and will be defined primarily with reference to the gravity of the offence.¹³ In manslaughter, the gravity involves the death of human being. While an arson directed at a residential area may occasion a greater risk of harm to the community than the stabbing of an acquaintance in a drunken altercation, the core of the gravity consideration for manslaughter remains a person's death.

With the centrality of proportionality to the sentencing process, parity becomes a secondary consideration and the operation of proportionality may result in disparate sentences.¹⁴ However, highly similar cases involving highly similar offenders should still see sentencing outcomes that are roughly similar. The importance of proportionality to the sentencing process is such that the Alberta Court of Appeal has called it “the *only* governing sentencing principle under the *Code*,”¹⁵ and that “no matter what objective or combination of objectives a sanction is intended to achieve, to be a just sanction, the sentence imposed must comply with the proportionality principle.”¹⁶

C. Section 718.2 – Other Sentencing Principles

The determination of sentence is rounded out by considering the secondary principles of sentencing outlined in section 718.2, comprising aggravating and mitigating factors, parity, totality, restraint, and restorative justice. These considerations, which the sentencing judge must take into account, are all “either components of the proportionality principle or properly influence its interpretation and application.”¹⁷

Aggravating and Mitigating Factors

As noted, Clayton Ruby has written that, “few crimes are truly original, their characteristic features repeat themselves with appalling regularity” and these features will consequently serve to either increase or decrease the sentence.¹⁸ The *Criminal Code* lists a number of statutory aggravating factors such as hate crimes, breach of trust, domestic relationship, criminal organizations and terrorism but the list of potential aggravating factors is considerably wider. Many of the more common aggravating factors are not statutory but judicially recognized. Among

¹³ Ruby, *Sentencing*, *supra* note 1 at 33.

¹⁴ *Lacasse*, *supra* note 3 at paras 54-55.

¹⁵ *R v Arcand*, 2010 ABCA 363 at para 47.

¹⁶ *Ibid* at para 65.

¹⁷ *Ibid* at para 59.

¹⁸ Ruby, *Sentencing*, *supra* note 1 at 239.

the most common of these are prior convictions, the use of a weapon, cruelty or brutality, offences committed while subject to conditions, multiple victims or incidents, group or gang activity, planning and organization, and the vulnerability of the victim.¹⁹ All of these were found in the cases examined for this study and many appeared frequently.

Given the multiplicity of scenarios in which a manslaughter can unfold, the sentencing decisions under consideration in this study offered a variety of offence-specific aggravating factors that were frequently cited. Some of these were variations on those listed above but others were peculiar to manslaughters and other acts of serious violence such as failing to render aid to the victim, fleeing the scene, and taking steps to cover up involvement in the crime. It should be noted that there were factors that, while they may appear aggravating, cannot be employed as such at sentencing for example a failure to plead guilty, a lack of remorse, or a failure to cooperate with authorities.²⁰

The *Criminal Code* does not outline any specific mitigating factors but many have been judicially recognized. The most frequently cited mitigating factors include the offender's status as a first offender, the lack of a criminal record, prior good character, guilty plea, remorse, evidence of impairment – either mental impairment or occasionally and inconsistently intoxication, employment record, collateral consequences such as immigration considerations or family situation, rehabilitative efforts, and an offender's disadvantaged background.²¹ In the cases examined for this study, some other frequently cited mitigating factors were provocation, deficiencies in the Crown's case (where there was a guilty plea), family support, and youth. It should be noted that *Gladue* factors are not considered true mitigating factors like those outlined above. Rather, they are “mitigating in nature” and require the sentencing judge to look to the collective experiences of Indigenous peoples rather than merely to the individual and they do not require a causal link with the commission of the offence.²² Frequently, and particularly with co-accused, aggravating and mitigating factors will be the most apparent cause for the disparity between sentences for otherwise similar offences.

¹⁹ Allan Manson, *The Law of Sentencing*. (Toronto: Irwin Law, 2001) at 151-158.

²⁰ *Ibid* at 160-1.

²¹ *Ibid* at 131-147.

²² *R v Eustache*, 2014 BCCA 337 at para 13.

3. Courts of Appeal

A. Starting Points and Ranges

Categorization, ranges and starting points have developed in an attempt to rationalize sentencing and achieve some degree of uniformity.²³ Given the wide discretion conferred upon trial courts, the potential variations in sentences, and the widespread absence of minimum punishments for most crimes in Canada, these mechanisms are meant to ensure some measure of parity. The Supreme Court views these tools as useful in meeting the requirements of sentencing set out in sections 718-718.2 of the *Code*, noting that they have developed:

To ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances – the principle of parity of sentences – and that sentences are proportionate by guiding the exercise of... discretion, and to prevent any substantial and marked disparities in sentences imposed on offenders for similar crimes committed in similar circumstances.²⁴

Despite the attempts to rationalize the sentencing process undertaken by the courts of appeal, these mechanisms are meant to effect a uniformity in approach, rather than result.²⁵

These tools exist to ensure “a uniform application of sentencing principles” while avoiding the kind of rigidity that would make individualized justice impossible.²⁶ Placing an excessive emphasis on uniformity and parity risks creating a system in which the individual characteristics of the offender are ignored and those of the offence hold sway. Such a system would risk eliminating the discretionary role of sentencing judges. Criminal sentencing in United States Federal Courts has been criticized on the grounds that the sentencing guidelines in that system are so rigid that they ignore both the individual characteristics of the offender and the underlying principles of sentencing.²⁷ Parliament and the courts in Canada have rejected such an approach in favour of one focused on the individualized nature of sentencing that continues to vest discretion in the trial judge.

²³ *Arcand*, *supra* note 15 at para 92.

²⁴ *Lacasse*, *supra* note 3 at para 2.

²⁵ Ruby, *Sentencing*, *supra* note 1 at 863.

²⁶ *Ibid* at 863.

²⁷ Charles J. Ogletree Jr, “The Death of Discretion?: Reflections on the Federal Sentencing Guidelines,” (1988) 101 *Harv L Rev* 1938 at 1952-54.

Categorization

Given sufficient time, a “systematic assimilation of appellate decisions will provide guidance for the exercise of sentencing discretion.”²⁸ This assimilation will provide the body of case law that Gillian Balfour has referred to as the “dominant sentencing discourses” which will be drawn on by sentencing judges in crafting their decisions.²⁹ Among these forms of appellate guidance is categorization, defined by the Alberta Court of Appeal as “identifying a category or categories within an offence based on varying degrees of seriousness.”³⁰ Categorization serves as an integral component of both starting point sentencing and ranges by narrowing the otherwise broad categories of offences in the *Criminal Code*.³¹ Categories may serve as a first step in establishing which starting point or range is appropriate or they may exist in isolation where neither of those things have been established with respect to the offence.³² While categorization may not necessarily contain set ranges or starting points, it will almost certainly form a first step in determining the final sentence.³³ Categorization of manslaughters is nearly inseparable from ranges in the sentencing context.

Starting Points

Starting point sentencing is a practice that has been adopted sparingly in Canada. Alberta is alone among the jurisdictions in this study to have explicitly adopted a starting approach to sentencing although they have not done so for manslaughter. Only one of the decisions studied for this paper mentions a starting point for manslaughter, which it identifies as one of seven years in Saskatchewan.³⁴ The Alberta Court of Appeal suggests that starting points represent “a logical step in the judiciary’s efforts to reduce idiosyncratic decision-making” and play an important role in reducing drastic divergences in sentence for serious crimes.³⁵ They also suggest that starting points “constitute an integral component of the proportionality principle” embodied in the 1996 sentencing reforms.³⁶

²⁸ Manson, *Law of Sentencing*, *supra* note 19 at 65.

²⁹ Gillian Balfour, “Do Law Reforms Matter? Exploring the victimization-criminalization continuum in the sentencing of Aboriginal women in Canada,” 19 *International Review of Victimology* 1, 85 (2012) at 88.

³⁰ *Arcand*, *supra* note 15 at para 92.

³¹ *Ibid* at para 93.

³² *Ibid* at para 98.

³³ *R v Holloway*, 2014 ABCA 87 at para 109.

³⁴ *R v RRF*, 2008 SKCA 52 at para 9.

³⁵ *Arcand*, *supra* note 15 at para 102.

³⁶ *Ibid* at para 103.

Starting points operate within a three-step framework. The court begins by clearly defining the category into which the particulars of the offence fall. The court will then determine the appropriate starting point by comparing past cases and weighing policy considerations. Finally, the court must consider the aggravating and mitigating circumstances that apply to the offender as articulated in section 718.2(a) in order to determine a just and appropriate sentence.³⁷ The Supreme Court has recognized starting points as a legitimate tool in reducing disparity in sentencing, particularly where the potential sentences available for the offence are sufficiently broad.³⁸ However, the Court cautions that the process runs the risk of creating *de facto* minimum sentences for certain categories of offences where Parliament has not expressly chosen to do so.³⁹

The primary concern with all mechanisms aimed at reducing disparity is that they will act to restrain the discretion of trial judges and by extension Parliament's prerogative in bestowing it.⁴⁰ With this in mind, the Supreme Court was cautious in authorizing starting points. While it permitted the practice and agreed that the departure from an appropriate starting point may be suggestive of unfitness, such a departure alone would not be sufficient for a court of appeal to overturn a sentence.⁴¹ Despite its fondness for starting points, the Alberta Court of Appeal in *Tallman* determined that, given the vast potential difference in culpability with respect to manslaughter, the offence did not seem to be an appropriate one for the use of a starting point regime.⁴²

Ranges

The most frequent mechanism for addressing disparity in sentence comes in the form of ranges. The sentencing range has "gained wide acceptance because it is clearly a discernible reflection on the methods of the common law applied to sentencing decisions."⁴³ As applied at sentencing, a range will usually address itself to the seriousness of the offence and to the moral blameworthiness of the offender without considering the aggravating and mitigating factors that can serve to increase or decrease the sentence for the particular offender.⁴⁴ Ranges are ordinarily

³⁷ *Ibid* at paras 104-105.

³⁸ *Proulx*, *supra* note 6 at paras 86-87.

³⁹ *Ibid* at para 88.

⁴⁰ Manson, *Law of Sentencing*, *supra* note 19 at 71.

⁴¹ *R v McDonnell*, [1997] 1 SCR 948 at para 43.

⁴² *R v Tallman*, 1989 ABCA 47 at para 14.

⁴³ Ruby, *Sentencing*, *supra* note 1 at 866.

⁴⁴ *Ibid* at 866.

used in two distinct senses, either to mean one established by an appellate court to provide guidance for future decisions or by a trial court after surveying the landscape of similar decisions.⁴⁵

Though it does not change the role of the trial judge, where a court of appeal establishes a range for a particular offence, it provides a tool to guide the trial courts in measuring the fitness of sentence under s. 687(1) of the *Criminal Code*.⁴⁶ While they serve to provide guidance to the trial courts in their attempts to ensure parity, ranges do not relieve the sentencing judge of their obligation to proceed on a case-by-case basis.⁴⁷ Rather, where a case arises with a fact pattern that is sufficiently dissimilar from others in the generally accepted range, this will serve to expand the range of available sentences rather than create a “straightjacket to the exercise of discretion.”⁴⁸

Ranges are largely a reflection of the “objective seriousness” of the offence being sentenced.⁴⁹ Endorsing the decision in *Keepness*, the Supreme Court explained that:

although they are used mainly to ensure the parity of sentences, they [ranges] reflect all the principles and objectives of sentencing... [and]... are nothing more than summaries of minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives.⁵⁰

Whatever else they may do, ranges cannot take precedence over the principle of deference. In fact, disparity may arise “where warranted by the circumstances” in order to serve the principle of proportionality.⁵¹

In *McDonnell*, the Supreme Court expressly rejected the “judicial creation of a category of offence within a statutory offence for the purpose of sentencing” to which starting points or ranges could attach, arguing that there was no legal basis for doing so and that it was a violation of the principle against judicially-created offences in *Frey v Fedoruk*.⁵² However, the Court subsequently endorsed the dissent in *McDonnell* and “resurrected” the idea of appending starting points and ranges to subcategories of offences.⁵³ The Supreme Court included the caveat that “appellate

⁴⁵ *R v Keepness*, 2010 SKCA 69 at paras 22-23.

⁴⁶ *Ibid* at para 24.

⁴⁷ *R v Jack*, 2008 BCCA 437 at para 59.

⁴⁸ *Keepness*, *supra* note 45 at para 24.

⁴⁹ *Hamilton*, *supra* note 12 at para 111.

⁵⁰ *Lacasse*, *supra* note 3 at para 57.

⁵¹ *R v LM*, 2008 SCC 31, at paras 35-36.

⁵² *McDonnell*, *supra* note 41 at para 33.

⁵³ *Manson*, *Law of Sentencing*, *supra* note 19 at 73.

courts must clearly specify what category of offences are meant to be covered,” so it will not be sufficient for the court to refer to “this kind” of a given offence.⁵⁴ The Alberta Court of Appeal has argued that the “value of a range is directly linked to the degree to which the required sentencing rigour has been applied to defining the range and to the reasoning in the cases making up the range” and therefore “where unifying principles might be discerned from what otherwise appear to be a number of disparate results.”⁵⁵ Ranges are designed to provide some basic scope to the wide variety of potential sentences available for most offences in Canada which can theoretically be extremely broad and the “margin for unwarranted disparity... great.”⁵⁶

The Supreme Court endorsed the Nova Scotia Court of Appeal’s position in *Muise*,⁵⁷ finding that the “the most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range” given the variety of possible sentencing outcomes.⁵⁸ In determining the range, the trial judge does not need to engage in an exhaustive analysis of all the principles and purposes of sentencing. They are only required to analyze the principles in sections 718-718.2 of the *Criminal Code* “to the extent necessary to narrow the range of sentence for the offender.”⁵⁹ In this respect, establishing an appropriate range of sentence is only the first step in determining a just and appropriate sanction for a given offender and a given offence. The choice of range is left to the trial judge and subject to the same discretion before the court of appeal as other aspects of the sentencing process.⁶⁰ Should a case depart from the facts of those generally established by other cases that have informed the range, the trial judge is entitled to depart from that range as long as the sentence is one that accords with the principles and objectives of sentencing.⁶¹

Critically, ranges are guidelines and not rules, and “deviation from a sentencing range is not synonymous with an error of law or an error in principle.”⁶² In a similar vein, it can never be an error for a trial judge to fail to place a particular case into a particular category.⁶³ The existence of sentencing ranges reflect the individual cases that have preceded them, but will not govern the

⁵⁴ *R v Stone*, [1999] 2 SCR 290 at para 245.

⁵⁵ *Arcand*, *supra* note 15 at para 121.

⁵⁶ *Ibid* at para 68.

⁵⁷ [1994] NSJ No 487 (CA).

⁵⁸ *R v Shropshire*, [1995] 4 SCR 227 at para 48.

⁵⁹ *Proulx*, *supra* note 6 at para 59.

⁶⁰ *Lacasse*, *supra* note 3 at para 51.

⁶¹ *Nasogaluak*, *supra* note 10 at para 44.

⁶² *Lacasse*, *supra* note 3 at para 60.

⁶³ *McDonnell*, *supra* note 41 at para 32.

cases that follow and may be altered intentionally given an appropriate degree of consideration.⁶⁴ Even where most cases will fall within the generally accepted range for an offence, cases falling outside that range will not be treated as acceptable only in “exceptional circumstances” provided that there has been found to be a correct application of principles.⁶⁵

B. Regional Differences

Canadian sentencing law recognizes that regional differences and local conditions will produce disparate sentences for similar offenders and similar offences. There are a number of possible sources for such a disparity. Given the inherently individualized process of sentencing, the Supreme Court has recognized that sentences, “should be expected to vary to some degree across various communities and regions in this country, as the ‘just and appropriate’ mix of acceptable sentencing goals will depend on the need and current conditions of and in the particularly community where the crime occurred.”⁶⁶

The principal justification for such disparate sentences is the prevalence of crime in a given area. The sentencing judge should take “into account the needs and current conditions of and in the community.”⁶⁷ This state of affairs has been commented on frequently by the courts of appeal and endorsed regularly by the Supreme Court.⁶⁸ Local frequency itself is not an aggravating factor but there may be circumstances in which it may be included in the consideration of denunciation but it cannot be allowed to contribute to a sentence that is demonstrably unfit.⁶⁹

Given the emphasis on individualization in sentencing, the trial judge is considered to be best positioned to reach a conclusion as to the appropriate sentence. Trial judges know the local conditions and the frequency with which particular crimes come before their courts and are qualified to take judicial notice of such frequency.⁷⁰ The trial judge is not obliged to inquire into the conditions in other jurisdictions, their knowledge of local conditions is sufficient to justify disparity in sentence and the courts of appeal should defer to their expertise.⁷¹

⁶⁴ *R v Wright*, 2006 ONCA at para 23.

⁶⁵ *Keepness*, *supra* note 45 at para 29.

⁶⁶ *M(CA)*, *supra* note 2 at para 92.

⁶⁷ *Ibid* at para 91.

⁶⁸ *Lacasse*, *supra* note 3 at para 93.

⁶⁹ *Ibid* at para 90.

⁷⁰ *Ibid* at paras 93-96.

⁷¹ *Ibid* at para 102.

C. Manslaughter Sentencing

Manslaughter carries a maximum sentence of life imprisonment under the *Criminal Code* and, except where a firearm is used, there is no minimum punishment prescribed.⁷² As a consequence, the potential sentence available on a conviction for manslaughter is among the widest for any crime. Courts of appeal have remarked that the proper range for sentencing manslaughter runs from a suspended sentence to life imprisonment.⁷³ Given the vast difference in possible sentences, any manslaughter sentencing must be a fact-specific inquiry and establishing any kind of precise range for sentencing is difficult.⁷⁴ Ultimately, “[a]ny clear and definitive principles governing the sentencing of an accused on a manslaughter conviction... have not been realized.”⁷⁵

The offence itself is infinitely mutable. Manslaughters may result from criminal negligence, from an unintentional death resulting from another offence, or an intentional killing mitigated by provocation or violence.⁷⁶ Generally, the “well-established spectrum of culpability” ranges between that of “near-accident” and “near murder.”⁷⁷ Most sentences for manslaughter will ordinarily be in the penitentiary range,⁷⁸ and these lengthy sentences will be born of the need to address the gravity of the offence.⁷⁹ In all manslaughter cases the fact remains that the offender has caused the death of another person. While there may be some variation in the gravity of the offence, the result remains the same and so the gravity will always be substantial and denunciation and general deterrence will usually predominate in the sentencing of manslaughter.⁸⁰

Despite the prevalence of denunciation and deterrence in sentencing manslaughter, the highly flexible framework for sentencing the offence is meant to account for the variability of moral blameworthiness.⁸¹ Given the variety of circumstances that define different acts of manslaughter running from accidental deaths to acts of violence falling short of the intent required for murder, the scheme works to permit a sentence “tailored to suit the degree of moral fault of the

⁷² S. 236, *Criminal Code*, RSC 1985, c C-46.

⁷³ *R v Dasilva*, [1998] BCJ No 1744 (CA) at 2.

⁷⁴ *R v Hermiz*, [2007] OJ No 1589 (SCJ) at para 11.

⁷⁵ *R v Csincsa*, (1993), 85 Man R (2d) 241 (CA) at 2.

⁷⁶ Ruby, *Sentencing*, *supra* note 1 at 915.

⁷⁷ *R v EH*, [2005] BCJ No 4 (CA) at para 20.

⁷⁸ *R v Turcotte*, [2000] OJ No 1316 (CA) at para 19.

⁷⁹ *Hermiz*, *supra* note 74 at para 13.

⁸⁰ *EH*, *supra* note 77 at para 43.

⁸¹ *R v Martineau*, [1990] 2 SCR 633 at 647.

offender.”⁸² This variety of moral culpability is not limited to the distinction between the “near accident” and “near murder” divide but exists equally among a variety of impulsive killings.⁸³ As a consequence of the variance in moral culpability, there are a variety of categories into which manslaughter may be placed.

4. Types of Manslaughter

Allan Manson identifies four basic categories of manslaughter: murder reduced by provocation, manslaughter by reason of intoxication or mental disorder, unlawful act manslaughter, and manslaughter by criminal negligence.⁸⁴ This study is not concerned with criminal negligence but concentrates instead on the other three categories. While these are useful categories, they do not neatly correspond to the landscape of sentencing observed in the cases surveyed here. Many of the cases informing this paper were the result of jury convictions and, as a result, the precise basis for the conviction for manslaughter is not always evident. For the purposes of this study, manslaughters are divided into five categories defined by the circumstances of the offence.

The first category are those cases where intoxication by drugs or alcohol are the defining characteristic of the offence. These sentencing decisions do not always suggest that intoxication was sufficient to reduce murder to manslaughter but they all share the common thread that the offender was in a state of self-induced intoxication which largely precipitated the acts of violence. The second and related category are those cases classified here as “near murder.” These cases are not, following Manson’s definition, always defined by provocation, though that may have played a role. They are crimes which are very similar to the drug and alcohol cases with respect to the types of violence involved but lack the element of intoxication that defines the former.

The third category is similar to Manson’s unlawful act category. This paper deals with cases where the manslaughter occurred as part of a home invasion or robbery. These are separated from the fourth category of deaths by arson. This distinction is made because arson cases, like the home invasion and robbery category, have a distinctive sentencing regime and applicable cases as well as a tendency to draw lengthier sentences. The final category used for this paper may be

⁸² *R v Creighton*, [1993] 3 SCR 3 at 48-49.

⁸³ *Stone*, *supra* note 54 at para 233.

⁸⁴ Manson, *Law of Sentencing*, *supra* note 19 at 309.

classified as “one-punch” cases and those involving unusual circumstances. These are cases in which violence was employed by the offender but death resulted from a fluke occurrence. They most commonly involved the offender striking the victim once, causing them to lose consciousness and hit their head on the ground, dying as a result. These were treated by sentencing judges as distinct from the near murder and drug and alcohol cases given the high degree of chance involved in the resulting death.

A. Near Murder

The Manitoba Court of Appeal has commented that many of the cases that eventually result in manslaughter sentences are such that they would, had the required intent been present, have resulted in a conviction for murder.⁸⁵ While some of these cases fall into the drugs and alcohol category, the majority fall into the category defined here as “near murder” killings. Many of these cases are defined by brutality or prolonged application of violence and the resulting sentences are ordinarily in the range of 4-12 years.⁸⁶ Clayton Ruby suggests that like most categories of manslaughter, these cases often feature heavy drinking.⁸⁷ Despite the presence of intoxication in many of these cases, this paper distinguishes between these cases and those where the sentencing judge places a special emphasis on the role of drugs and alcohol in the commission of the offence. This category represented 99 offenders in total, of whom 27 were Indigenous.

B. Drugs and Alcohol

Notwithstanding their similarities, cases where drugs and alcohol predominate will generally be sentenced in a fashion similar to the near murder cases but evidence suggests that these cases will ordinarily find themselves at the lower end of the general 4-12 year range that defines both categories.⁸⁸ Notwithstanding the extreme levels of intoxication involved in these offences, the accused will not be permitted to benefit from this at sentencing since they have already benefitted by having the charge of murder reduced to manslaughter.⁸⁹ This is distinct from the issue of provocation, where the Supreme Court has ruled that it is a legitimate consideration

⁸⁵ *R v Clemons*, 2003 MBCA 168 at para 6.

⁸⁶ Ruby, *Sentencing*, *supra* note 1 at 936.

⁸⁷ *Ibid* at 936.

⁸⁸ *Csinca*, *supra* note 75 at 9.

⁸⁹ *Ibid* at 9.

both in reducing murder to manslaughter and in determining the offender's moral culpability at sentencing.⁹⁰ Cases of this kind represent the second-largest category after near murder and they comprise the majority of cases involving Indigenous offenders, accounting for 52 offenders in total, of whom 43 were Indigenous.

C. Home Invasion/Robbery

Manslaughters occurring during an indictable offence are sentenced more severely than the more spontaneous variety.⁹¹ Besides those involving arson, the only other cases defined by indictable offences here involved manslaughters committed in the course of robberies and home invasions. The element of premeditation present in these cases, along with the greater tendency of offenders to have prior records for similar offences tend to result in higher sentences for offenders. In addition, the courts will often seek to deter acts committed for financial gain with stiffer punishments. This category accounted for 14 offenders in total of whom three were Indigenous.

D. Arson

The second category of indictable offence manslaughters arising in these cases involved arsons. In many cases it is unclear whether the fire was set with the intention of killing or doing bodily harm to the victim or if that was merely its result. Notwithstanding the intent of the offender, these cases are ordinarily sentenced more severely than other types of manslaughter. In some of these cases this will be the result of multiple victims being killed in the resulting fire, but even where there is only one victim the potential for public endangerment will result in higher sentences on average. In all there were six offenders convicted for arson-related manslaughters, of whom half were Indigenous.

E. Unusual Circumstances and One Punch Cases

The final distinct category of manslaughters sentenced in this material are the so-called "one-punch" cases and those involving unusual circumstances. These are cases that are primarily defined by brief episodes of violence and will tend to attract sentences in the range of one to four

⁹⁰ *Stone, supra* note 54 at para 234.

⁹¹ *Ruby, Sentencing, supra* note 1 at 941.

years.⁹² Judges often remark that these cases are particularly hard to sentence given the substantial gravity of the offence and the outsized role played by chance in the resulting death. Decisions falling into this category represented a very small proportion of cases overall but they were almost all among those with the shortest sentences. There were a total of four one-punch offenders, half of whom were Indigenous and three unusual circumstances cases, one of which involved an Indigenous offender.

F. Domestic Manslaughter

A substantial proportion of these cases, whatever category they fell into, involved the killing of a spouse or other intimate partner. While the killing of an intimate partner is a statutorily-mandated aggravating factor under the *Criminal Code*, these cases do not appear to be substantially different from many other cases of manslaughter and will attract a wide range of sentences.⁹³ Notwithstanding the potential range of sentences, in the cases under examination domestic manslaughters appeared to be sentenced more harshly than non-domestic ones.

G. Mental Illness

Another common feature of manslaughter cases are offenders who are suffering from varying degrees of mental illness that fall short of a finding of not criminally responsible on account of mental disorder. Nonetheless, the offender's mental illness will affect their moral blameworthiness and by consequence the sentence, but it will not be sufficient to negative criminal liability altogether.⁹⁴ In these cases, the sentence may also be strongly affected by the potential treatment options made available or restricted by the choice of a federal or provincial institution.

5. Manslaughter and Sentencing Ranges

The Supreme Court has not endorsed any range of sentence with respect to manslaughter, they have only said that the possible range of sentences lies between one day and life imprisonment.⁹⁵ The British Columbia Court of Appeal have repeatedly endorsed a similar line of

⁹² *Ibid* at 934.

⁹³ *Cscinca, supra* note 75 at 15.

⁹⁴ *Creighton, supra* note 82 at 70.

⁹⁵ *Martineau, supra* note 81 at 647.

thinking, defining the only legally binding range for the offence as being one between a suspended sentence and life imprisonment as outlined in the *Criminal Code*.⁹⁶ As noted, courts of appeal can establish ranges for particular types of offences to serve as guidelines to the trial courts but these cannot be binding.

Given the wide scope of circumstances and offenders that can come under the umbrella of manslaughter, it was considered particularly ill-suited to the use of a starting point regime by the Alberta Court of Appeal.⁹⁷ While the Supreme Court did not decide that ranges were inappropriate for the sentencing of manslaughter, they cautioned that the type of manslaughter to which a range was applied would need to be defined with some precision to be of use to sentencing judges and therefore permissible. In *Stone*, the Court noted that a “need for clear direction applies to ranges set by appellate courts” and that a court of appeal’s reference simply to “this kind of manslaughter” provided no useful clarity.⁹⁸

The dubious utility of ranges for the exercise of manslaughter sentencing has not prevented their proliferation in the courts of appeal, particularly among the most common forms of manslaughter such as the near murder and drug and alcohol cases. Despite the individualized nature of sentencing and the wide range of sentences available for manslaughter, patterns nonetheless repeat and many cases emerge that bear striking similarities to those that have come before. Most courts of appeal in the jurisdictions under consideration here have some form of established range for at least some forms of manslaughter. Among the different types of manslaughter categories defined above, there are distinct bodies of cases that tend to regularly guide the sentencing practice of courts.

6. Provinces and Territories

A. Ontario

The Ontario Court of Appeal has gone back and forth on the issue of the appropriate range for manslaughter sentencing and whether it is worthwhile to affix labels to subcategories. In 2003, the court in *Clarke* found that a range of 8-12 years was appropriate for what they identified as a case of “aggravated manslaughter.” In that decision, a highly intoxicated rooming house resident

⁹⁶ *R v Archibald*, [1992] BCJ No 1408 (CA) at 6; *R v Mintert*, (1995) 57 BCAC 232 at para 19; *R v Gillies*, (1998) 107 BCAC 157 at para 11.

⁹⁷ *Tallman*, *supra* note 42 at 87.

⁹⁸ *Stone*, *supra* note 54 at 275.

brutally attacked another elderly resident with a knife, attempting to divert suspicion before ultimately confessing.⁹⁹

Three years later in *Devaney*, the Ontario Court of Appeal rejected the idea of “aggravated manslaughter” as a useful definition. A panel composed of Rosenberg, Goudge, and Feldman JJA wrote:

it is not useful to attach a label to a subcategory of the offence, then try to pigeonhole the facts of any case into the label. Adding a descriptive label to a set of facts within the defined offence adds a level of complexity to the sentencing exercise that is both unnecessary and potentially diverting for the court and could lead to errors. Nor do I read this court’s decision in *Clarke* as adopting that approach.¹⁰⁰

The court rejected the naming of subcategories of manslaughter and insisted that each offender must be subject to a case-by-case analysis.¹⁰¹ Four days later, another panel of the Ontario Court of Appeal composed of Cronk, Lang and MacFarland JJA ruled in *Cleyndert* that the sentence handed down by the trial judge was not outside the appropriate range for an “aggravated manslaughter” in Ontario.¹⁰²

Despite the obvious clarity of the panel in *Devaney*, the trial courts in Ontario continued either to adopt¹⁰³ or dismiss as inappropriate¹⁰⁴ the designation of “aggravated manslaughter.” Whatever the prevailing appellate perspective is on the propriety of defining subcategories of manslaughter, the concept of an aggravated manslaughter accompanied by an appropriate range of 8-12 years continues to predominate in sentencing in Ontario. Manslaughter sentences fitting the near murder and drug and alcohol categories are overwhelmingly understood as having a range somewhere around 8-12 years. This range is also evident in the sentencing submissions of Crown and defence counsel. In reference to this range for aggravated manslaughter the Ontario Court of Appeal held that, where appropriate, it is always within the power of the sentencing judge to depart from a range of sentence where circumstances exist that “distinguish the situation significantly

⁹⁹ *R v Clarke*, (2003) 172 OAC 133 (CA) at paras 6-7.

¹⁰⁰ *R v Devaney*, (2006) 215 OAC 253 (CA) at para 33.

¹⁰¹ *Ibid* at para 34.

¹⁰² *R v Cleyndert*, [2006] OJ No 4038 (CA) at para 12.

¹⁰³ *R v Cioppa*, 2013 ONSC 4190; *R v Gray*, [2016] OJ No 1915.

¹⁰⁴ *R v Klimovich*, 2013 ONSC 2888; *R v Mitchell, Mearo and Jocko*, 2016 ONSC 5339.

from other cases where sentences were imposed in the range”.¹⁰⁵ Whether or not the categorization of aggravated manslaughter exists in Ontario as a legal concept at the Court of Appeal, it exists in practice in the trial courts.

B. British Columbia

The British Columbia Court of Appeal continues to emphasize that manslaughter cases exist on a spectrum of near accident to near murder and that this is a factual determination for the sentencing judge.¹⁰⁶ For many years, British Columbia has relied on the decision in *Gillies* in discussions of the potential range for manslaughter.¹⁰⁷ Here, the court of appeal outlined their basic understanding of sentencing manslaughter by noting that:

While the *Criminal Code* prescribes a range of from suspended sentence to life, four to six years has been the usual range for most manslaughter cases for as long as I can remember.

There are, of course, other cases where sentences of eight to ten years or more have been given. In most of these cases, however, there were other factors that made the offence much more serious. Cases were cited where there was torture, long records of violence offences, violence against a spouse, woman or child, and killing in the course of a robbery.¹⁰⁸

This structure bears a striking similarity to that which has been in operation in Ontario with respect to “aggravated manslaughter,” where cases resembling those outlined by the court in *Gillies* are sentenced in excess of ten years.

The *Gillies* ranges were later expanded by the British Columbia Court of Appeal in *Green*, and both cases were cited with roughly the same frequency. There, the Court of Appeal stated its view that “most cases fall within the period of four to 15 years. A sentence below or above that range is imposed only in a case involving special circumstances.”¹⁰⁹ While these two cases were

¹⁰⁵ *R v Jones-Solomon*, 2015 ONCA 654 at para 82.

¹⁰⁶ *R v Richer*, 2005 BCCA 3 at para 20.

¹⁰⁷ *Gillies*, *supra* note 96.

¹⁰⁸ *Ibid* at paras 11-12.

¹⁰⁹ *R v Green*, 2001 BCCA 672 at para 10.

the most frequently cited, in *Andrew*¹¹⁰ in 2008, the Court of Appeal revived the pre-*Gillies* standard from *Mintert*.¹¹¹ Here, the Court of Appeal endorsed the trial judge's view that:

A review of the British Columbia Court of Appeal cases since 1990 dealing with the sentencing in manslaughter cases provides sentences from a suspended sentence to life imprisonment. The lower range involves a near accidental death and very special circumstances where the moral culpability of the offender is at the lowest.

In my opinion the next range involves sentences where the culpability of the offender is such that the principle of general deterrence warrants a sentence of one to seven years.

The next range involves sentences resulting in incarceration for six to twelve years where the need is to remove the offender from the community to meet [sic] risk that the offender presents after careful consideration of all the circumstances and the need for general deterrence; and the maximum sentence I've already discussed.¹¹²

To this, the court in *Andrew* added only that in their view the bottom end of the range, absent unusual circumstances was four years' imprisonment.

The consensus in British Columbia is that the appropriate range for a manslaughter sentence is between 4-15 years with sentences above or below for cases involving special or unusual circumstances.¹¹³ Circumstances justifying non-custodial sentences are most likely to appear in cases "marked by carelessness or near accident as opposed to violence."¹¹⁴ However, absent such exceptional, special or unusual circumstances, general deterrence and denunciation in the sentencing of manslaughter will require a custodial sentence.¹¹⁵ In keeping with the Supreme Court's guidance on the question of sentencing ranges, the British Columbia Court of Appeal recognizes that a departure from the recognized range does not constitute an error.¹¹⁶

British Columbia is alone in establishing a range of sentence for manslaughter that specifically addresses cases involving Indigenous offenders. Citing the need for sentencing Indigenous offenders to focus primarily on rehabilitation rather than denunciation and deterrence,

¹¹⁰ *R v Andrew*, 2008 BCCA 141.

¹¹¹ *Mintert*, *supra* note 96.

¹¹² *Ibid* at para 20.

¹¹³ *R v Seitcher*, 2007 BCCA 255 at para 7.

¹¹⁴ *R v Johnny*, [1994] BCJ No 1373 (CA) at para 15.

¹¹⁵ *Ibid* at para 14.

¹¹⁶ *R v Engebretsen*, 2016 BCCA 182 at para 13.

the British Columbia Court of Appeal suggested that “a range of sentence for a young Aboriginal offender with no prior record who committed manslaughter... appears to be generally between three and eight years imprisonment with sentences of one and ten years at the outer ends.”¹¹⁷ Other jurisdictions discuss the particular circumstances of Indigenous offenders and the need to address rehabilitation, but British Columbia is alone in suggesting a potential range of sentence that is unique to this group.

C. Alberta

Since 1995 manslaughter sentencing in Alberta has been governed by *Laberge*.¹¹⁸ This case breaks down manslaughters into three categories based on moral culpability. The court states that:

Unlawful acts may be divided into three broad groups: those which are likely to put the victim at risk of, or cause **bodily injury**; those which are likely to put the victim at risk of, or cause, **serious bodily injury** and those that are likely to put the victim at risk of, or cause, **life-threatening injury**. Only when the offender’s proven mental state at the time of the commission of the offence is evaluated in the context of the crime itself, in other words in terms of its relative degree of seriousness, is it possible to classify for sentencing purposes the degree of fault inherent in the crime committed.¹¹⁹

In order to complete the picture with respect to the culpability of the individual, the sentencing judge must then consider “those personal characteristics of the offender which would mitigate or aggravate culpability.”¹²⁰

The Alberta Court of Appeal suggests that this sort of categorization is critical in articulating intelligible principles for sentencing manslaughter and without engaging in such an exercise, the public would not be able to discern any logic in determining sentence.¹²¹ They also maintain that the *Laberge* categories are designed to satisfy the requirements of parity and proportionality and so allow a predictable pattern of sentencing.¹²² However, the court insists that:

¹¹⁷ *R v Pop*, 2013 BCCA 160 at para 25-26.

¹¹⁸ *R v Laberge*, 1995 ABCA 196.

¹¹⁹ *Ibid* at para 9 [emphasis in original].

¹²⁰ *Ibid* at para 10.

¹²¹ *Holloway*, *supra* note 33 at para 56.

¹²² *R v Wharry*, 2008 ABCA 293 at para 48.

The approach in *Laberge* does not fix any numbers for any of the categories. Nor, for that matter does it insist that a case in a particular category will necessarily be responded to by a sentence which might not also fit a different category. There are, after all, other factors to consider. *Laberge* proposes a careful consistency in approach, not arithmetic.¹²³

This is in keeping with the court's directive in *Laberge* that the categories did not represent "gradually escalating degrees of moral culpability as one moves from one to the other."¹²⁴

Despite the Court of Appeal's position to the contrary, dissenting justices have pointed out that the claims of *Laberge* to a disinterested and rational categorization of manslaughter does not reflect the practical reality. Berger JA offered a pointed criticism of the Alberta Court of Appeal's protestations in his dissent in *Holloway*.¹²⁵ Justice Berger argued that whatever the Court of Appeal may believe, trial courts will view the *Laberge* categories as consisting of an escalating scale and will sentence accordingly and without regard to the individual characteristics of the offender.¹²⁶ He suggests the *Laberge* categorization has the effect of creating three categories of manslaughter and offers the view that the trial courts have already taken up the process of populating those ranges with numbers and creating *de facto* subcategories of judicially-created manslaughter.¹²⁷

In doing so, Berger JA argues that the *Laberge* scheme relegates the personal characteristics of the offender to merely another category of aggravating or mitigating factors and in doing so usurps Parliament's prerogative by unduly constraining discretion.¹²⁸ He argues this has led to a situation where:

Notwithstanding the vehement protests of appellate decisions in this jurisdiction... that *Laberge* does not establish a grid, it does just that when, with the enthusiastic approval of this Court, the categories are populated with numbers. The practical effect is to constrain the exercise of discretion of sentencing judges in the trial courts and to facilitate appellate intervention on the basis that 'in fixing the category, the judge got it wrong'. *Laberge* quacks and walks like a grid.¹²⁹

¹²³ *Ibid* at para 56.

¹²⁴ *Laberge*, *supra* note 118 at para 17.

¹²⁵ *Holloway*, *supra* note 33 at para 60.

¹²⁶ *Ibid* at para 96.

¹²⁷ *Ibid* at para 98.

¹²⁸ *Ibid* at paras 104-108.

¹²⁹ *Ibid* at para 109.

Justice Berger is passionate in his criticism but he is correct in his view that the trial courts are busy populating the *Laberge* categories with sentence ranges. The majority in *Holloway* itself noted that the case at bar, which fit the third *Laberge* category of culpability, was similar to other cases involving factors such as protracted brutality, weapons and vulnerable victims and that the Alberta Court of Appeal had generally found that such cases warranted sentences greater than ten years or alternatively in the range of eight to twelve years. They insisted they were not “recognizing or adjudicating a starting point for such situations” but merely noting “that in a *de facto* way something of a range of that sort appears to be reflected in the present selection of decisions of this Court and some from other jurisdictions.”¹³⁰

The population of categories with ranges can be seen in *Valente*, an Alberta Court of Queen’s Bench case cited by half the Alberta cases examined for this study. Here, the sentencing judge determined that the offender’s actions fit the middle *Laberge* category involving the risk of serious bodily injury. For this category, the court found that it:

covers a broad range of circumstances and therefore a wide variety of sentences. The low end of the range is generally about 3.5 or 4 years’ imprisonment, although there are cases... where sentences of 2 or 3 years were imposed. The higher end of the range is generally about 6 or 7 years, although again there are unusual cases where higher sentence have been imposed. The higher end of the range has mostly been applied where there were weapons involved or prolonged and extreme violence.¹³¹

Here there is evidence that the second *Laberge* category, involving sentences of approximately 3.5-7 years, appears to fill a similar role to cases just below Ontario’s “aggravated manslaughter” categorization or the lower half of the standard British Columbia range of 4-15 years’ imprisonment. As noted, *Holloway*, which was cited in approximately half of Alberta cases under consideration, suggests a potential range for the third *Laberge* category of ten or more years, or eight to twelve years. This is roughly in line with the “aggravated manslaughter” designation in Ontario and the upper half of the British Columbia range. Notwithstanding the objections of the majority in *Holloway*, the concerns of the dissent seem to have been borne out in the application of the *Laberge* scheme at the trial level.

¹³⁰ *Ibid* at para 51.

¹³¹ *R v Valente*, 2012 ABQB 151 at para 47.

D. Saskatchewan

In 1990 the Saskatchewan Court of Appeal surveyed the historical landscape for manslaughter sentencing in the province over the previous quarter century. They found that between 1965 and 1980, sentences in the three to five year range were common for manslaughters, and sentences in the seven to eight year range increasingly common throughout the 1980s.¹³² The court credited these increases in sentence with a response to the mounting prevalence of the crime in the jurisdiction and the need to emphasize general deterrence in an effort to protect the public.¹³³ The increase in sentence range has continued in Saskatchewan in the three decades since *Zimmer* and, like Ontario, British Columbia and Alberta, Saskatchewan assigns ranges to types of manslaughter.

Interestingly, Saskatchewan has also adopted a starting point with respect to manslaughter. In *RRF*, the Saskatchewan Court of Appeal, stressing the need for deterrence in sentencing the crime, found that seven years' imprisonment was an appropriate starting point.¹³⁴ This seven-year starting point for manslaughter is determined generally and without reference to the specifics of either the offender or the offence. It is only subsequently that the circumstances of the offender and aggravating and mitigating circumstances are examined.¹³⁵

Following an analysis of case law in the province in 2010, the Saskatchewan Court of Appeal adopted a specific range of four to twelve years for “manslaughter involving brutality and alcohol or drugs.”¹³⁶ This range had been adopted earlier by the Court of Queen’s Bench for Saskatchewan with the caveat that sentences falling outside the four to twelve year range “ought to occur only in the most unusual, exceptional or extenuating circumstances.”¹³⁷ The court in *Keepness*, endorsed the *Hathway* model but cautioned that:

This language may lead a judge to conclude incorrectly that the lower and upper limits of the range are more fixed than they are, or that they are to be departed from in only the rarest of cases. No matter how one tries to delimit the type of case for which the range for manslaughter is being set, the description will remain nebulous

¹³² *R v Zimmer*, [1990] SJ No 654 (CA) at 13.

¹³³ *Ibid* at 14.

¹³⁴ *RRF*, *supra* note 34 at para 9.

¹³⁵ *Ibid* at para 8.

¹³⁶ *Keepness*, *supra* note 45 at para 28.

¹³⁷ *R v Hathway*, 2008 SKQB 480 at para 36.

and the circumstances variable. Correct application of the principles of sentencing should mean there are fewer sentences falling outside the range for manslaughter than within in, but in the exercise of their discretion, judges may depart, without introducing disparity, where the circumstances of the case are beyond those customarily found at the lower or upper end of the range.¹³⁸

The category of manslaughter defined by the court of appeal in *Keepness* – those involving brutality and alcohol or drugs – accounted for the overwhelming majority of cases of manslaughter that came before the courts in this study. Given the application of the decision at the trial level, *Keepness* appears to address itself to cases involving drugs and alcohol as well as cases where brutality is present but intoxication is not. In Saskatchewan, therefore, cases falling under the near murder and drugs and alcohol categories are generally subject to sentences between four and twelve years under the *Keepness* regime.

E. Manitoba

Unlike the other provinces examined, the Court of Appeal for Manitoba has declined to assign numerical ranges to the sentencing of manslaughter. In their place, they have suggested general principles to guide sentencing courts. The court has declined to recognize a difference between voluntary and involuntary manslaughters noting that “the element of provocation (which may reduce a murderous killing to a manslaughter) and drunkenness (which may reduce a culpable homicide to manslaughter because the requisite intent of murder is not proved) often merge... in particular factual circumstances.”¹³⁹ The court indicates that while involuntary manslaughters involving alcohol will attract sentences at the lower end compared to voluntary manslaughters, that heavy sentences are nonetheless reserved for drunken killings involving heavily intoxicated offenders and brutality.¹⁴⁰

Though lacking specifics, the Manitoba Court of Appeal outlined a series of general considerations to guide the trial courts in sentencing manslaughter. They noted, as in Saskatchewan, that there had been a general increase in the length of sentences in Manitoba as a reflection of the need to protect society and that the two paramount considerations in determining an appropriate sentence will be the culpability of the offender and the extent of the violence or

¹³⁸ *Keepness*, *supra* note 45 at para 29.

¹³⁹ *Csinca*, *supra* note 75 at 6.

¹⁴⁰ *Ibid* at 9.

brutality involved in the offence.¹⁴¹ With respect to the appropriate range for manslaughter, the court noted that the range offered by the *Criminal Code* moving from a suspended sentence to life imprisonment was not a particularly useful guide. While technically true, in reality:

this is not the range of reasonable sentences available to a trial judge in any particular case. The available range will be much narrower and its limits fixed by reference to the circumstances of the offence and the offender and, most particularly, the degree of the offender's blameworthiness. The higher the degree of blameworthiness, the higher will be the range.¹⁴²

Unlike the Alberta Court of Appeal, which has a tendency to keep a hand on the tiller of the trial courts, the Manitoba Court of Appeal prefers to defer to the expertise of the trial courts in determining appropriate sentences.

F. The Territories

A survey of territorial court of appeal jurisprudence on manslaughter sentencing is bare. There are few cases dealing with manslaughter and none address ranges or sentence quantum. Consequently, the determination of sentences for manslaughter in Yukon, the Northwest Territories and Nunavut appears to be left more or less to the trial courts. Much of the membership of the Courts of Appeal of the Northwest Territories and Nunavut are drawn from the Alberta Court of Appeal and those of the Yukon Court of Appeal from the British Columbia Court of Appeal. It is fair to say that the influence of these jurisdictions on the jurisprudence of the territories is strong.

One recurring theme in the manslaughter jurisprudence of the territorial trial courts is the importance of local conditions to sentencing. These courts tend to focus on the distinctive nature of life and society in the north, in particular the reality that most of the offenders coming before these courts for sentencing on convictions for serious and violent crimes are Indigenous. Nunavut manslaughter sentencing decisions in particular concentrate on the unique local conditions in the territory, placing particular emphasis on the social issues affecting the Inuit population. The Nunavut Court of Justice therefore frequently emphasizes the need for deterrent sentences given

¹⁴¹ *Ibid* at 17-18.

¹⁴² *Clemons, supra* note 85 at para 24.

the high levels of domestic homicide and violent crime and their strong connection to uncontrollable alcohol consumption.¹⁴³

7. Conclusion

Having outlined the general scheme for sentencing manslaughter in Canada and the regimes of the jurisdictions under examination, this chapter sought to provide an overview of the prevailing court of appeal jurisprudence with respect to the sentencing of manslaughter across different provinces and territories. The next chapter will assess how these regimes operate in practice. It will also present the major statistical findings of this paper comparing the sentence outcomes for Indigenous and non-Indigenous offenders for manslaughter generally and within the subcategories of manslaughter outlined in this chapter.

¹⁴³ *R v Anablak*, 2008 NUCJ 09 at paras 22-23.

Chapter Four: Comparative Sentencing Outcomes for Indigenous and Non-Indigenous Offenders

1. Introduction

This chapter examines the differences in sentence outcomes between Indigenous and non-Indigenous offenders across all categories of manslaughter and among the jurisdictions examined for this study. It begins with an outline of the study as it was conceived and carried out. It then proceeds to analyze the general data on manslaughter drawn from the study before assessing that information across different categories of manslaughter and different jurisdictions. This section concludes with a comparison of the near murder and drug and alcohol categories. These two categories account for the overwhelming proportion of offenders in this study and they demonstrate some interesting differences between the treatment of Indigenous and non-Indigenous offenders based on the category of manslaughter in which they were sentenced.

2. Plan of Study

This study is designed to examine the process of sentencing for manslaughter to determine if there is a different methodology employed in sentencing Indigenous offenders and, if so, what results it produces. The object is to take the measure of the landscape over the recent past. One problem with the earlier studies discussed above was the use of a pre-*Ipeelee* comparator group which is, in effect, a different jurisprudential regime for sentencing Indigenous offenders. This project aims to avoid that by drawing on cases exclusively from the post-*Ipeelee* period. This study is focused on a single violent offence sentenced at one level of court with the aim of addressing the application of the *Gladue* provisions to sentencing offenders for serious and violent crimes.

The decisions for this project were drawn from Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Yukon, the Northwest Territories and Nunavut. It does not deal with cases drawn from Quebec or the Atlantic provinces. The omissions of these provinces is meant to allow the study to concentrate on areas with large Indigenous populations. With the exception of Ontario, all the provinces and territories under consideration have Indigenous populations that are greater than the 4.85% national figure. The proportion of the population that is Indigenous in these jurisdictions varies from a low of just under 3% in Ontario to a high of over 85% in Nunavut and

a provincial high of nearly 18% in Manitoba.¹ These five provinces and three territories account for over 80% of Canada's Indigenous population.²

These jurisdictions, with the exception of Ontario, also have elevated levels of violent crime compared to the national average. Between 2013 and 2017, each of these provinces and territories - except Ontario - had police-reported rates of violent crime above the national average, often by considerable margins.³ Not only do these jurisdictions consistently have high levels of violent crime but in the same period they accounted for over 85% of all homicides reported in Canada and almost 95% of all homicides in which the accused was identified as Indigenous.⁴ Given that these jurisdictions account for an overwhelming number of homicides committed in Canada and particularly those alleged to have been committed by Indigenous offenders, they represent fertile ground for conducting this study. While Ontario's levels of violent crime and homicide are consistently below the national average, the province nonetheless accounts for nearly 40% of the country's population and a large proportion of its Indigenous people, its inclusion is therefore important to provide a thorough survey of the national landscape. While Nunavut and the Northwest Territories only represented 0.31% of the total population from these jurisdictions, those territories produced 8% of all the manslaughter offenders.⁵ Notwithstanding this substantial share of the total number of manslaughter offenders, both territories still maintained the lowest average sentences for drug and alcohol manslaughters.⁶

To maximize the number of cases available, this study collected all manslaughter sentencing decisions reported in CanLII, Westlaw and Quicklaw for the period 2013 to 2018 inclusive. The intention was to gather as complete a sample set as possible but one confined by

¹ Aboriginal Peoples Highlight Tables, 2016 Census – “Aboriginal identity population by both sexes, total age, 2016 counts, Canada, provinces and territories, 2016 Census – 25% Sample data,” <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/abo-aut/Table.cfm?Lang=Eng&T=101&S=99&O=A>

² *Ibid.*

³ Jillian Boyce, Adam Cotter and Samuel Perreault, “Police-reported crime statistics in Canada, 2013,” *Juristat*, Vol 34, No 1 at 29; Jillian Boyce, “Police-reported crime statistics in Canada, 2014,” *Juristat*, Vol 35, No 1 at 30; Mary Allen, “Police-reported crime statistics in Canada, 2015,” *Juristat*, Vol 36, No 1 at 36; Kathryn Keighley, “Police-reported crime statistics in Canada, 2016,” *Juristat*, Vol 37, No 1 at 37; Mary Allen, “Police-reported crime statistics in Canada, 2017,” *Juristat*, Vol 38, No 1 at 35.

⁴ Zoran Miladinovic and Leah Mulligan, “Homicide in Canada, 2014,” *Juristat*, Vol 35, No 1 at 42; Leah Mulligan, Marsha Axford, and André Solecki, “Homicide in Canada, 2015,” *Juristat*, Vol 36, No 1 at 18; Jean-Denis David, “Homicide in Canada, 2016,” *Juristat*, Vol 37, No 1 at 23; Sara Beattie, Jean-Denis David, and Joel Roy, “Homicide in Canada, 2017,” *Juristat*, Vol 38, No 1 at 31.

⁵ <https://www150.statcan.gc.ca/n1/pub/12-581-x/2018000/pop-eng.htm>

⁶ See Table 4.14 at page 87.

time and offence to allow a detailed assessment of how the *Gladue* provisions function within the sentencing process and what outcomes result. The cases produced in the initial search represent all the sentencing decisions reported in those databases in that time period and sentenced before the superior courts. The initial search resulted in 217 sentencing decisions from within the jurisdictions and time period.

This study deals only with unlawful act manslaughter and not manslaughter by criminal negligence. This is because it is meant to examine the application of the *Gladue* provisions to crimes of violence. While some crimes of violence may fall under the heading of criminal negligence, most were cases of unlawful act manslaughter. Cases involving the sentencing of accessories for manslaughter have been omitted in order to concentrate on those who have participated directly in the violent act leading to the death of the victim. Cases involving young offenders have been omitted, as have those cases involving the deaths of children to concentrate on violence committed between adults. Those cases involving dangerous offender and long-term supervision order applications have also been omitted since these decisions tend to concentrate primarily on the designation itself. Finally, some decisions were so threadbare that they did not include enough information beyond the sentence quantum to be useful and were omitted. As a result of removing these cases, the material under consideration consists of 167 cases representing sentencing decisions for 179 discrete offenders.

The core of this study is a survey of the decisions carried out to determine the outcome and the judge's reasoning in reaching their conclusions. This survey recorded the date, the presiding judge, the jurisdiction and district, the Indigenous status of the offender, the age of the offender and victim, the gender of the offender and victim, the relationship between the two, a description of the offence, the sentence quantum (gross and net), time spent on remand, the original charge (i.e. whether manslaughter was a lesser included offence), reference to Indigenous-specific sanctions or correctional programs, aggravating and mitigating factors, Indigenous-specific mitigating factors, the two stages of the *Gladue* analysis, the offender's criminal record, the offender's history of violence, the sentencing principles cited, and justifications for sentence. This data was analyzed in light of provincial sentencing jurisprudence for manslaughter to allow comparisons between Indigenous and non-Indigenous offenders and between and within jurisdictions. Drawing out this information permits an analysis of the judicial decision-making process for a particular offence across jurisdictions and between Indigenous and non-Indigenous

comparator groups in order to answer the core question of whether there is a different methodology at work and if so, what differences in outcome it produces.

The first part of this analysis presents an overview of the landscape of manslaughter sentencing in the cases surveyed. This section examines the characteristics of offences such as the subcategory of manslaughter, the manner of death, the age of the offender, their relationship to the victim, the type of trial chosen by the offender, joint submissions, the positions of the parties at contested sentencings, and the age and gender distribution of offenders. The second half of this section examines the sentencing outcomes by subcategory of manslaughter and jurisdiction to highlight differences and similarities between Indigenous and non-Indigenous offenders across types of manslaughter and jurisdictions.

3. National Manslaughter Data

A. National, Annual and Provincial Data Totals

Of the 179 offenders examined in this study, 80 were Indigenous and 99 were non-Indigenous. The vast majority of decisions came from Ontario and British Columbia with 59 and 67 offenders respectively of whom 12 and 40 were Indigenous. The prairie provinces produced another 38 offenders divided between Alberta with 14, Saskatchewan with 10 and Manitoba with 12 each. These provinces produced five, nine and 11 Indigenous offenders respectively. The Yukon produced one Indigenous and one non-Indigenous offender. The Northwest Territories and Nunavut produced six and nine decisions respectively, with all offenders identified as Indigenous.

Manitoba, Saskatchewan, the Northwest Territories and Nunavut all had proportions of Indigenous offenders in excess of 90%. Alberta and British Columbia had proportions of approximately 35% and 40% respectively, and Ontario some 20%. Half the cases in the Yukon dealt with Indigenous offenders but since there were only two cases in the data, this was insufficient to come to any conclusions about the general distribution between Indigenous and non-Indigenous offenders for that territory.

Table 4.1 – Sentencing Decisions by Jurisdiction, Year and Indigenous Status

	ON	BC	AB	SK	MB	YK	NT	NU	Total	Ann. %
2013 Ind.	1	5	1	2	4	-	-	1	14	53.84
2013 Tot.	10	7	2	2	4	-	-	1	26	-
2014 Ind.	-	7	1	-	3	-	2	1	14	56.00
2014 Tot.	5	13	1	-	3	-	2	1	25	-
2015 Ind.	1	3	1	1	-	-	1	3	10	40.00
2015 Tot.	8	9	2	1	1	-	1	3	25	-
2016 Ind.	5	3	1	2	2	1	-	4	18	58.06
2016 Tot.	14	7	1	2	2	1	-	4	31	-
2017 Ind.	3	4	-	2	1	-	2	-	12	34.28
2017 Tot.	8	15	5	3	1	1	2	-	35	-
2018 Ind.	2	5	1	2	1	-	1	-	12	32.43
2018 Tot.	14	16	3	2	1	-	1	-	37	-
Tot. Ind.	12	27	5	9	11	1	6	9	80	44.69
Tot. Non	47	40	9	1	1	1	-	-	99	55.31
Overall	59	67	14	10	12	2	6	9	179	-
Prov. %	20.33	40.29	35.71	90.00	91.66	50.00	100.0	100.0	44.69	-

B. Manner of Death

The most common methods of committing manslaughter in these cases were stabbing (48.60%), beating (24.02%) and shooting (15.64%) followed by arson (3.35%), strangulation (4.04%) and the “one-punch” and unusual circumstances cases (3.34%). The method of homicide remained largely consistent between Indigenous and non-Indigenous offenders with stabbings the leading cause of death in both groups of cases. However, there were two significant differences between the two groups. Just over 20% of all cases involving a non-Indigenous offender resulted from a shooting; among Indigenous offenders, this was less than 10%. Conversely, nearly one third of Indigenous offenders killed the deceased by beating them to death. The comparable figure for non-Indigenous offenders was slightly less than 20%.

Table 4.2 – Cause of Death

	Stabbing	Shooting	Beating	Strangle	Vehicle	One Punch	Arson	Unusual	Unknown	Total
Indigenous	40	7	25	1	1	2	3	0	1	80
Percentage	50.00	8.75	31.25	1.25	1.25	2.50	3.75	-	1.25	-
Non-Ind.	47	21	18	4	2	2	3	2	0	99
Percentage	47.47	21.21	18.18	4.04	2.02	2.02	3.03	2.02	-	-
Total	87	28	43	5	3	4	6	2	1	179

C. Relationship to Victim

The most common relationships between victims and offenders in these cases were strangers (32.59%), acquaintances (32.59%), family relationships (11.59%), spousal relationships (9.38%), and intimate relationships (8.28%), with the relationship in the remaining cases not

discernible from the decision (5.52%).⁷ Like the figures for cause of death, the relationship between the victim and the offender were largely similar between Indigenous and non-Indigenous offenders. The figures for familial, spousal and intimate relationships, for example, were nearly identical. The most substantial difference between the two groups comes with respect to strangers and acquaintances. Non-Indigenous offenders (40.59%) were nearly twice as likely to kill a stranger than were Indigenous offenders (22.5%). Conversely, cases involving Indigenous offenders were slightly more likely to involve the death of an acquaintance than those with non-Indigenous offenders. This may be a result of larger numbers of Indigenous offenders living in smaller communities such as First Nations' reserves where they were less likely to encounter strangers.

Table 4.3 – Relationship to Victim

	Stranger	Acquaintance	Spouse	Intimate	Relative	Unknown
Indigenous Number	18	29	9	8	8	6
Indigenous Percentage	22.50	36.35	9.25	10.00	10.00	07.50
Non-Ind. Number	41	30	8	7	13	4
Non-Ind. Percentage	40.59	29.70	9.22	6.93	12.87	03.96
Total Number	59	59	17	15	21	10
Total Percentage	32.59	32.59	9.38	8.28	11.59	05.52

D. Original Charge and Trial Type

It has been noted by the Manitoba Court of Appeal that it is quite rare that a conviction for manslaughter will arise from a charge of manslaughter and this is likely the result of “overcharging” on the part of the Crown.⁸ While no opinion is offered on the latter conclusion, the former is borne out by the evidence from this study. For 37 of the 179 offenders examined here, the sentencing decision did not indicate the original charge. However, that information was available in the remaining cases and confirms the observations of the Manitoba court. Among cases where information was available, nearly nine in ten cases resulted from an indictment alleging murder. The overwhelming number of these charges were for second degree murder (69%), with first degree murder (15.49%), unspecified murder (4.22%), and manslaughter (11.26%) charges accounting for the remainder. In the sample set of cases reviewed, non-Indigenous offenders were more than twice as likely to be charged with first degree murder compared with Indigenous offenders. Similarly, Indigenous offenders were charged with murder

⁷ “Intimate relationship” includes current and former intimate partners; “spousal relationship” includes current, former and separated spouses; “acquaintance” includes criminal relationship.

⁸ *R v Csicsa* (1993), 85 Man R (2d) 241 (CA) at 17.

in nearly two-thirds of cases (63.75%) compared with non-Indigenous offenders in more than three-quarters of cases (75.57%).

Table 4.4 – Original Charge

	First Degree	Second Degree	Murder – Unspecified	Manslaughter	Unknown
Ontario	13	35	3	3	5
British Columbia	7	37	2	10	11
Alberta	2	5	-	-	7
Saskatchewan	-	5	-	1	4
Manitoba	-	6	-	1	5
Yukon	-	2	-	-	-
NWT	-	2	-	-	4
Nunavut	-	6	1	1	1
Total	22	98	6	16	37
Percentage	12.29	54.74	03.35	8.93	20.67
Percentage Where Charge is Known	15.49	69.00	04.22	11.26	n/a

More than half of all convictions for manslaughter arose from guilty pleas (55.86%), followed by trials by judge and jury (27.37%) and trials by judge alone (15.08%). Indigenous offenders demonstrated a slight preference for pleading guilty (60%) over non-Indigenous offenders (52.52%). However, non-Indigenous offenders were twice as likely to opt for a trial by judge and jury (35.35%) than Indigenous ones (17.5%). Jury trials were most common in Ontario where over 60% of offenders opted for them. This was in contrast to British Columbia where only one in ten offenders chose trial by judge and jury. Judge alone trials, while the rarest overall, were favoured in relative terms by offenders in British Columbia who opted for them in nearly one quarter of cases regardless of whether the offenders was Indigenous or non-Indigenous.

The near murder and drug and alcohol categories formed 84% of the body of cases used in this study but they accounted for 91% of all guilty pleas. Therefore discussions of guilty pleas and joint submissions will mostly be conducted with respect to these two subcategories. Ontario and British Columbia, the two largest provinces in this study, accounted for 65 of the 100 offenders who pleaded guilty. This figure was relatively close to their combined total of seven in ten cases overall. However, there was a clear disparity between the two provinces. British Columbia accounted for a disproportionate number of guilty pleas at 43 out of 100, or approximately 64% of all cases resolved in this fashion. Ontario represented the opposite end of the spectrum with only 22 guilty pleas accounting for some 37% of trials.

Table 4.5 - Trial Type

	Guilty Plea	Jury	Judge Alone	Unknown
Total	100	49	27	3
Percentage of Total	55.86	27.37	15.08	01.67
Indigenous	48	14	15	3
Percentage of Indigenous	60.00	17.50	18.75	03.75
Non-Indigenous	52	35	12	-
Percentage of Non-Indigenous	52.52	35.35	12.12	-

E. Guilty Pleas and Joint Submissions

It is a well-established principle of sentencing that where an offender has pleaded guilty they can expect to receive a more lenient sentence compared with one who has not. However, this was not strictly true in these manslaughter cases and a close examination of the figures suggests an interesting contradiction. A simple comparison of offenders who did and did not plead guilty in the drug and alcohol category found that guilty pleas resulted in sentences that were less than one month shorter. A comparable examination of the figures for near murder manslaughters showed that guilty pleas resulted in sentences that were longer on average by one month.

Dividing the guilty pleas between contested sentencings and those arrived at by way of a joint submission suggests an explanation. The average near murder sentence coming about through a guilty plea and determined by a trial judge was slightly less than seven years and nine months or nearly nine months shorter than cases where the offender did not plead guilty. By comparison, cases involving a joint submission had an average sentence just short of nine years, a figure that was ten months longer than those who opted for a trial. A similar pattern was discernible in drug and alcohol cases, where joint submissions resulted in sentences that were 20 months longer than offenders who did not plead guilty and over 30 months longer among those who pleaded guilty but contested the sentence. This pattern was common to Indigenous and non-Indigenous offenders. Sentencing decisions unfortunately do not contain particulars of the negotiations leading to joint submissions, so there is no way of knowing how these figures were arrived at or why they were longer than those who opted to forego the supposed benefit of a guilty plea. While joint submissions tended to carry heavy sentences in this research, the benefit of pleading guilty was clearly demonstrated where the sentence was determined by a judge.

Table 4.6 – Sentence Outcomes with Guilty Pleas and Joint Submissions – In Months

	Near Murder – Indigenous	Near Murder – Non-Indigenous	Drugs/Alcohol – Indigenous	Drugs/Alcohol – Non-Indigenous
No Guilty Plea	115.63	90.85	78.25	88.5
Guilty Plea	113.20	91.05	85.79	85
GP with Joint Submission	116.57	97.61	99	104
GP no Joint Submission	110	87.85	71.4	66.5

Of the 100 cases resolved through guilty pleas in this study, 36 involved joint submissions and one joint submission arose from a jury trial. The near murder and drug and alcohol categories accounted for 34 of the total in roughly similar proportions (39% and 33%). As a percentage of their respective groups, one third of Indigenous offenders had their sentence determined by a joint submission while the figure for non-Indigenous offenders was slightly more than 40%. As with guilty pleas overall, joint submissions were most frequently found in British Columbia. Here, half of all guilty pleas resulted in joint submissions, compared to over a third of guilty pleas in Ontario. British Columbia alone accounted for approximately six in ten joint submissions compared with only one in five for Ontario.

F. Positions of the Crown and Defence

Among the majority of cases not resolved by way of a joint submission it is useful to examine the sentences proposed by Crown and defence counsel and their relationship to sentence quantum. In approximately half of all contested sentencings, whether involving Indigenous or non-Indigenous offenders, the sentence lay somewhere between the ranges proposed by the parties. Around one fifth of all sentences ended up within the ranges proposed by the Crown and an equal number within that proposed by defence counsel.

Around one quarter of sentences between the ranges proposed by the parties were closer to that proposed by the Crown and around a fifth closer to that proposed by the defence. Indigenous offenders were as likely to have received sentences closer to the range proposed by either party, with approximately one fifth falling into each category. However, non-Indigenous offenders were more likely to find their sentences closer to that proposed by the Crown (25%) than by the defence (15%). In approximately one third of cases, the judge found a sentence that was within or closer to the range proposed by the Crown. This was also true for the proposed ranges of defence counsel, where the judge passed a sentence that was within or closer to the range proposed by defence counsel in approximately one third of cases. By contrast, judges found a sentence within or closer

to the defence range in around a third of cases involving non-Indigenous offenders but closer to or within the Crown range in approximately 45% of cases.

In those provinces with generally accepted ranges for manslaughter most of the proposed sentences lay within those ranges. For British Columbia, Alberta and Saskatchewan this was not a significant issue since those ranges are broad, running from four to 12 years in Alberta and Saskatchewan and four to 15 years in British Columbia. Ontario was a different matter and one that presents a distinct issue for the proposed sentences of the Crown. In British Columbia, 65% of near murder sentence proposals from the Crown were above eight years and only 43% of those proposed for drug and alcohol manslaughters were above the eight year mark. There was an evident separation between the two groups of cases where Crown submissions were concerned. In Ontario, by contrast, 77% of all near murder sentence proposals by the Crown were eight years or more as were 71% for the drug and alcohol category. This was connected to the fact that Ontario only has an established category and range for “aggravated manslaughter” which corresponds to the near murder classification used in this study. As a result, the Crown in Ontario appeared to treat those manslaughters falling into the drug and alcohol category as corresponding to an aggravated manslaughter. Borrowing Gillian Balfour’s phrase, the dominant sentencing discourse in Ontario understands virtually all manslaughters not in the near accident category as belonging to the aggravated category and they were treated as such by the Crown in their sentencing submissions.

G. Criminal Records

Indigenous offenders were more likely to have a criminal record (63.5%) than non-Indigenous ones (51.51%). However, this was not consistent across the country. Indigenous offenders in Ontario, the prairie provinces and the territories were more likely to have a criminal record than non-Indigenous accused. The opposite held true in British Columbia, which accounted for one third of all Indigenous offenders. Among offenders with criminal records, there was no appreciable difference in the likelihood that Indigenous and non-Indigenous offenders had criminal records for violence. Within both groups, the criminal records for seven in ten of those offenders contained convictions for violence. Unlike the lower number of Indigenous offenders in British Columbia with criminal records on the whole, over 90% of those with prior convictions in that province involved violence. This figure was the highest of any jurisdiction except for Nunavut where all offenders with criminal records also had convictions for violence and were Indigenous.

Table 4.7 - Criminal Records

	Indigenous	Indigenous %	Non-Ind.	Non-Ind.%	Total
Ontario	9	75.00	19	40.42	28
British Columbia	12	44.44	23	57.50	35
Alberta	4	80.00	6	66.66	10
Saskatchewan	5	55.55	1	100	6
Manitoba	10	90.09	1	100	11
Yukon	-	-	1	100	1
NWT	5	83.33	-	-	5
Nunavut	5	55.55	-	-	5
Total	50	63.50	51	51.51	101

Table 4.8 - Criminal Records with Violence

	Indigenous	Indigenous %	Non-Ind.	Non-Ind.%	Total
Ontario	4	44.44	14	73.68	18
British Columbia	11	91.66	16	69.56	27
Alberta	1	25.00	4	66.66	5
Saskatchewan	3	60.00	-	-	3
Manitoba	7	70.00	-	-	7
Yukon	-	-	1	100	1
NWT	4	80.00	-	-	4
Nunavut	5	100.00	-	-	5
Total	35	70.00	35	68.62	70

H. Age Distribution

This study divided manslaughter offenders into four age groups: 18-24 year-olds, 25-34 year-olds, 35-49 year-olds and those over 50 years of age.⁹ The sentencing decisions suggest that judges generally considered a youthful offender as one who was under 25 years of age and so represented a strong potential for rehabilitation. Judges have remarked that offenders between the ages of 25 and 34 had the potential for rehabilitation but they did not appear to benefit from the mitigating effects of youth. Those between 35 and 49 were not considered strong prospects for rehabilitation. Those older than 50 were similarly not viewed as good candidates for rehabilitation but their more advanced age was taken into consideration with regard to how many years they may have left to live and the threat they might pose to society as they age. The distributions between Indigenous and non-Indigenous offenders did not vary substantially from age group to age group, as might be expected given the comparatively youthful Indigenous population.

Approximately one third of offenders were under the age of 25, roughly 40% were between 25 and 34-years-old, just over 17% between 35 and 40, and less than a tenth were over 50 years old. These figures show little variation between Indigenous and non-Indigenous offenders. Along with the presence of a criminal record, age was one of the leading indicators for sentencing judges of an offender's prospects for rehabilitation and could play a substantial role in determining

⁹ Age of offender was available for 156 of 179 offenders.

sentence. For near murder and drug and alcohol manslaughters, there were clear spikes in sentence length among offenders in the 25-34 category, which dropped off in the two categories of older offenders. The other types of manslaughter did not provide sufficient numbers of offenders to make any meaningful observations about the distribution among age groups.

Table 4.9 – Age Distribution – As Percentage of Total

	18-24	25-34	35-49	50+
Indigenous	32.81%	42.18%	14.06%	10.93%
Non-Indigenous	34.78%	36.95%	19.56%	08.69%
All	33.97%	39.10%	17.30%	09.61%

I. Gender and Domestic Violence

As with most acts of violent crime, men represented the overwhelming majority (87.15%) of offenders in these cases. However, Indigenous women were over-represented in the figures for female offenders in manslaughter convictions. As a proportion of their respective demographic groups, Indigenous women represented twice the number of manslaughter offenders as non-Indigenous women. One in five Indigenous offenders were women compared with only one in ten non-Indigenous offenders. While Indigenous people are vastly overrepresented within the criminal justice system, Indigenous women are over-represented to an even greater degree than men.¹⁰ In these decisions, female offenders received lower sentences overall than male offenders, with an average sentence of just over seven years and seven months' imprisonment, compared with an average for male offenders of less than eight years and one month. This was partially a result of the fact that female offenders were not found in the home invasion and robbery categories which tended to have higher sentences.

Among domestic manslaughters overall, three quarters were committed by men and Indigenous men accounted for roughly half of all domestic manslaughter convictions. Female offenders were also more than twice as likely to be convicted of a domestic manslaughter than male offenders. Over one third of all female Indigenous offenders were sentenced for the manslaughter of a domestic partner compared to approximately one fifth of non-Indigenous female offenders. Most domestic cases were either in the near murder or drug and alcohol categories. The remaining two were arsons and those sentences lay at the high and low end of sentences overall. For the remaining domestic manslaughter cases, men received an average sentence of nine years

¹⁰ Elspeth Kaiser-Derrick, *Implicating the System: Judicial Discourses in the Sentencing of Indigenous Women*, (Winnipeg: University of Manitoba Press, 2019) at 4-5.

and five month's imprisonment. This was substantially higher than the six-year average sentence received by women for the same. This was largely attributable to the fact that many female offenders were in a relationship in which they had been victims of domestic violence. While they were not necessarily acting in self-defence at the time they killed the deceased, the nature of the relationship was a factor at sentencing.

Table 4.10 - Gender Distribution

	Male	Female	Female % of Total
Indigenous - Number	66	14	21.21
Indigenous - Percentage	82.50	17.50	-
Non-Indigenous - Number	90	9	10.00
Non-Indigenous - Percentage	90.09	09.09	-
Total - Number	156	23	-
Total - Percentage	87.15	12.85	-

Table 4.11 - Gender Distribution – Domestic Violence

	Male	Female
Indigenous - Number	11	5
Indigenous - Percentage	52.38	71.42
Non-Indigenous - Number	10	2
Non-Indigenous - Percentage	47.62	28.57
Total - Number	21	7
Total - Percentage	13.46	30.43

J. Mental Illness

Mental illness as a consideration in sentencing for manslaughter arose infrequently in these cases. It was only cited in a total of 11 decisions. Seven of those decisions arose in Ontario and two in British Columbia. All cases involving mental illness were classified in the near murder category. They received an average sentence of nearly eight years and four months, or approximately four months shorter than the national average for that category among offenders not determined to be suffering from a mental illness. This was predictable given that mental illness is typically understood as diminishing the offender's moral blameworthiness and renders deterrence and punishment less important as factors at sentencing.¹¹

In only one case citing the offender's mental illness were they Indigenous. This outcome mirrors a pattern seen in the forensic mental health system. While these cases do not deal with findings of not criminally responsible on account of mental disorder ("NCR"), studies have found that such findings are rarely made for Indigenous people. One study determined that Indigenous

¹¹ *R v Batisse*, 2009 ONCA 114 at para 38.

offenders accounted for only 2.9 percent of NCR findings nationwide, a number below their proportion in the population but well below their relative numbers in the criminal justice system.¹²

4. Manslaughter by Categories

Of the 179 offenders studied here, 175 received a defined period of imprisonment. One Indigenous offender in British Columbia and a second non-Indigenous offender in Ontario received suspended sentences and probation.¹³ In addition, one Indigenous offender in Manitoba and a second non-Indigenous offender in Alberta received sentences of imprisonment for life. Both of the life imprisonment cases involved multiple victims. The Alberta case involved an elderly couple murdered in the course of a robbery and the Manitoba case involved five victims burned to death in a fire deliberately set at a rooming house.¹⁴ These four cases have therefore been omitted from the analysis of sentence quantum in this section but they form part of the analysis elsewhere in the paper.

It is important to consider the regional distribution of offenders. In Ontario there were a total of 12 Indigenous and 47 non-Indigenous offenders sentenced and in British Columbia, 27 Indigenous and 40 non-Indigenous offenders. These two provinces provide distinct groups large enough to allow a robust comparison. Alberta produced two smaller groups from which some conclusions could be drawn with nine Indigenous offenders and five non-Indigenous ones. Saskatchewan and Manitoba, with ten and 12 offenders respectively, each had only one non-Indigenous offender and therefore no effective intra-provincial comparisons can be made. The same was true for the Yukon which had one Indigenous and one non-Indigenous offender and so it was not possible to draw conclusions about sentencing generally or an Indigenous/non-Indigenous comparison in particular for that territory. The Northwest Territories and Nunavut had six and nine offenders respectively but all were Indigenous and so no conclusions can be drawn about the relationship of these sentences to those of non-Indigenous offenders in those jurisdictions - to the extent that they might exist.

Taken alone, the national averages present a fairly simple picture. The overall average sentence for a manslaughter among the 175 offenders receiving determinate sentences was just

¹² Patrick Baillie, "A Valuable (and Ongoing) Study: The National Trajectory Project Addresses Many Myths About the Verdict of Not Criminally Responsible on Account of Mental Disorder" in 60 Can J Psych 3 (2015) at 94.

¹³ *R v Alphonse*, 2018 BCSC 2045; *R v Anguelov*, 2014 CarswellOnt 18747.

¹⁴ *R v Vader*, 2017 ABQB 48; *R v Flett*, 2013 MBQB 124.

over eight years' imprisonment. Among the 78 Indigenous offenders, the average sentence was slightly less than seven years, nine months' imprisonment and for the 97 non-Indigenous offenders, it was just under eight years and three months' imprisonment. Taken as a whole, Indigenous offenders were more likely to receive a shorter sentence. However, once the numbers were broken down into different categories of manslaughter, a more nuanced picture emerged.

Table 4.12 - Provinces/Territories Gross Sentence Lengths

	All	Indigenous	Non-Indigenous
Ontario	103.55 months	108.33 months	120.30 months
British Columbia	88.26 months	85.32 months	91.47 months
Alberta	102.38 months	73.20 months	120.62 months
Saskatchewan	98.90 months	100.55 months	84 months
Manitoba	95.73 months	98.4 months	84 months
Yukon	96 months	108 months	84 months
Northwest Territories	62 months	62 months	-
Nunavut	116 months	116 months	-
Total	96.04 months	92.63 months	98.78 months

On the whole, Indigenous people received longer sentences in most categories of manslaughter and in most jurisdictions than non-Indigenous offenders. The one factor that appears to account for this difference were the sentences for drug and alcohol cases. Here, the average sentence was lower than other types of manslaughter and a majority of Indigenous offenders were sentenced for this type of manslaughter.

A. Near Murder

Near murder cases for the purposes of this paper included both those in which provocation was found to reduce a charge of murder to manslaughter as well as cases where, though such provocation was absent, a jury nonetheless convicted for manslaughter, or a plea to manslaughter was accepted by the court. Notwithstanding that distinction, these cases tended to closely resemble those in the drugs and alcohol category but for the absence of intoxication as a defining feature. This category accounted for 99 offenders representing 55.30% of the total of whom 98 received determinate sentences. Indigenous offenders were underrepresented in these cases, accounting for only 27 of 99 offenders. This was in contrast to the drug and alcohol cases where Indigenous offenders represented the overwhelming majority.

Near murder accounted for 72.72% of all sentences for non-Indigenous offenders but only 31.25% of sentences for Indigenous offenders. This category of manslaughter was sentenced more severely than the overall average, with sentences of approximately eight years and eight months' imprisonment on average. Non-Indigenous offenders in this category were sentenced to slightly

less than eight years, three months' imprisonment. By contrast, Indigenous offenders received an average sentence of over nine years, 11 months or nearly one year, nine months longer than non-Indigenous offenders.

Table 4.13 – Provincial and Territorial Average Sentences for Near Murder Manslaughter

	All	Indigenous	Non-Indigenous
Ontario	100.57 months	108 months	99.7 months
British Columbia	95.91 months	114 months	92.17 months
Alberta	108.66 months	66 months	130 months
Saskatchewan	100.5 months	106 months	84 months
Manitoba	111.6 months	122 months	96 months
Yukon	96 months	108 months	84 months
Northwest Territories	-	-	-
Nunavut	175.2 months	175.2 months	-
Total	103.92 months	117.87 months	98.67 months

i. Nunavut

This difference can be partially attributed to the long average sentences handed down in Nunavut. While Nunavut accounted for only nine Indigenous offenders, it produced five of the 25 Indigenous offenders convicted for a near murder manslaughter. These five individuals received average sentence of 14 years and seven months' imprisonment, considerably higher than the overall average. However, even if Nunavut were removed from the calculations, the average sentence for an Indigenous offender overall would be over eight years, nine months imprisonment, approximately nine months longer than those for non-Indigenous offenders. Two near murder cases in Nunavut have among the longest sentences in the survey and skew the territorial average. One case involved an offender who killed three men with a semi-automatic rifle when they attacked his home armed with a sword and a golf club. This was taken to be a case of excessive force used in self-defence and resulted in a sentence of 20 years.¹⁵ The other was a domestic killing that had gone through a lengthy process of trial and retrial before finally resulting in a guilty plea and a sentence of 18 years' imprisonment which amounted to time served.¹⁶ Notwithstanding these two cases, the average of the other three Nunavut near murder cases remained 11 years and eight months, still the longest in the country. This appears to be the result of the Nunavut Court of Justice's attempts to strongly denounce the use of firearms to commit homicide in the territory.

¹⁵ *R v Bishop*, 2015 NUCJ 10.

¹⁶ *R v VanEindhoven*, 2016 NUCJ 19.

ii. Ontario

Ontario accounted for the largest number of near murder manslaughter cases at 38, or nearly four in ten of those decisions in the data set. It also accounted for four of the 25 Indigenous near murder cases. The average sentence for this category in Ontario was around eight years and four months for non-Indigenous offenders and nine years for Indigenous ones. This accorded roughly with the national average for the category and is situated toward the bottom of the range of eight to 12 from Ontario's "aggravated manslaughter" category. There were only four cases to inform the findings for Indigenous offenders and so it was difficult to reach a definitive conclusion about the relative length of sentences.

iii. British Columbia

British Columbia produced 35 near murder manslaughter cases and six of those involving Indigenous offenders, or around 35% of all sentences for near murder and approximately one quarter of Indigenous sentences for the same. The average sentence for non-Indigenous offenders in that province was slightly more than seven years and eight months' imprisonment. The average for Indigenous offenders was nearly one year and ten months longer at an average of nine years and six months. Sentence lengths for non-Indigenous offenders were below the middle of British Columbia's established range of four to 15 years where sentences for Indigenous offenders were in the middle of the range. The British Columbia courts' tendency to sentence drug and alcohol cases more leniently for Indigenous offenders compared to non-Indigenous ones did not appear to extend to near murder cases.

iv. Alberta

Alberta accounted for nine near murder cases and three involving Indigenous offenders. The average sentence for the six non-Indigenous offenders was ten years and ten months' imprisonment. The average sentence for Indigenous offenders was shorter by five years and four months for an average sentence among the three Indigenous offenders of five years, six months. The near murder category accorded most closely with the third *Laberge* category of manslaughter classification in Alberta which captures actions placing the victim at risk of life-threatening injury. This category was generally associated with ranges of eight to twelve years.

It appears from the data that non-Indigenous offenders were sentenced roughly in accordance with the range set out by the Alberta Court of Appeal but that Indigenous offenders were benefitting from lower sentences. The actions of five of the six non-Indigenous offenders were mentioned as belonging in the third category of *Laberge*. No mention was made of *Laberge* for the sixth but much of the sentencing material concentrated on her mental health issues and their impact on her moral blameworthiness.¹⁷ A *Laberge* classification was not provided for two of the three Indigenous offenders but the third was described as being situated somewhere between the second and third categories, though the circumstances of the offence appear to fall clearly within the near murder category. Based on this limited data set from Alberta, as illustrated in Table 4.13, it would appear the Court of Queen's Bench was reticent to apply the third *Laberge* category to Indigenous offenders who committed a near murder manslaughter but were comfortable in doing so with non-Indigenous offenders. Despite a body of only nine cases, there was an evident difference between Indigenous and non-Indigenous offenders, with the lowest sentences handed down to Indigenous offenders in this category. The absence of explicit reference to the appropriate *Laberge* category in the sentencing of Indigenous offenders in near murder manslaughters could suggest a reticence to classify them under the third category which allowed for lower sentences for those offenders without running afoul of the Alberta Court of Appeal.

v. *Saskatchewan*

A total of four near murder cases were drawn from Saskatchewan with three Indigenous and one non-Indigenous offender. The average sentence for all four was eight years, four and a half months' imprisonment. The single non-Indigenous offender received a sentence of seven years, while the Indigenous offenders received average sentences of eight years and ten months' imprisonment, or 22 months longer. Both of these average sentences were around the middle of the accepted Saskatchewan range of four to 12 years for manslaughters involving brutality and drugs and alcohol. Once again, the small sample set, particularly the presence of only a single non-Indigenous offender, makes it impossible to draw a conclusion on the question of sentence differential in the province for the Indigenous/non-Indigenous divide.

¹⁷ *R v Lamb*, 2017 ABQB 239.

vi. *Manitoba*

Manitoba produced five near murder cases in total, divided between three Indigenous and two non-Indigenous offenders. The average provincial sentence for this category of manslaughter was approximately nine years and four months' imprisonment. The two non-Indigenous offenders in the group received an average sentence of eight years between them. By contrast, the three Indigenous offenders received an average sentence two years and two months longer at ten years and two months. Of note for the Manitoba near murder category is that all three Indigenous offenders were co-accused in the beating death of a federal inmate arising from an internal conflict within a prison gang rather than from unconnected incidents of manslaughter.¹⁸ Therefore there was no variation in the fact patterns giving rise to this particular group of cases and so it was difficult to arrive at any generalizations.

vii. *Yukon and the Northwest Territories*

While both cases arising in the Yukon were near murders, they represented too small a sample set to analyze in a useful manner. It consisted of one Indigenous offender receiving a sentence of nine years imprisonment and one non-Indigenous offender receiving a sentence of seven years. There was no Yukon Court of Appeal range against which to examine them. No sentencing decisions from the Northwest Territories Supreme Court dealt with manslaughters in the near murder category. Nor was there any jurisprudence dealing with this category of manslaughter from the Northwest Territories Court of Appeal.

viii. *Trial Types, Guilty Pleas and Joint Submissions*

Nearly 60% of all near murder cases were resolved through a guilty plea regardless of whether the offenders were Indigenous or non-Indigenous. There was, however, a stark division between Ontario and British Columbia. In British Columbia over 80% of near murder sentences came about as the result of a guilty plea compared with only one third of Ontario cases. In Ontario, by contrast, 68% of non-Indigenous offenders opted for a trial by jury but only one Indigenous offender of the four did the same. In British Columbia, less than 10% of offenders chose a jury trial and none of those were Indigenous. Judge alone trials were the least common option for

¹⁸ *R v Ryle*, 2013 MBQB 33.

offenders overall but Indigenous offenders opted for them in over a fifth of cases, where non-Indigenous offenders did the same in only 5% of cases. As with manslaughter on the whole, Indigenous offenders in this category expressed a clear preference for trial by judge alone or pleading guilty over taking their chances with a jury.

Near murders accounted for 23 of the 37 joint submissions found in this research and arose in 40% of all guilty pleas for this category. About half of all Indigenous offenders who pleaded guilty did so in connection with a joint submission, this was true of only 35% of non-Indigenous offenders. As noted above, the averages for near murder cases involving a joint submission suggest that no benefit arose for an offender entering into a joint submission with the Crown relative to a mere guilty plea. While it may be that the cases resolved by joint submissions tend to involve more serious factual circumstances and were likely to result in longer sentences if decided by a judge, this does not appear to be the case. Whatever the logic may be, it is impossible to know what the outcome might have been.

The tendency of joint submissions to result in sentences that were longer than bare guilty pleas suggests that Crown counsel were not playing a part in attempting to reduce the over-incarceration of Indigenous people for serious and violent crimes through the plea bargaining process. As noted in chapter one, only Ontario among the jurisdictions studied for this research, has a Crown policy directive dealing with Indigenous accused but it does not contain many specifics. While *Gladue* speaks to the role of judges in remedying the overrepresentation of Indigenous people in the criminal justice system, judges frequently work with the tools provided to them by counsel. Joint submissions that were in excess of bare guilty pleas run counter to the project of reducing Indigenous overrepresentation. Though defence counsel plays a role in the plea negotiation process, the Crown retains the balance of power and appear uninterested in making concessions to Indigenous offenders. This was visible both in the elevated prison terms resulting from joint submissions – some six and a half months longer than bare guilty pleas – and the nearly 21-month gap between joint submissions for Indigenous and non-Indigenous offenders.

ix. Criminal Records and Violence

In this category, of the 98 cases where information was available, 52 offenders had criminal records and 35 of those records involved violence. This held true across Indigenous and non-Indigenous offenders with more than half of all offenders having prior criminal records. As a

proportion of all near murder offenders, one third had criminal records for violence whether or not they were Indigenous. There was effectively no difference in the proportion of Indigenous and non-Indigenous offenders who had criminal records and criminal records involving violence. However, there was a clear difference in average sentence outcome for those who had criminal records and records with violence.¹⁹

Indigenous offenders without a criminal record received an average sentence of eight years and two months, compared to an average sentence of over seven years, seven months for non-Indigenous offenders without a criminal record. Where a criminal record was present, those figures increased to almost nine years, four months for Indigenous offenders and nearly eight years and ten months for non-Indigenous ones. Finally, where the criminal record contained convictions for violence, the average sentence for Indigenous offenders was ten years and 11 months, compared to less than eight years and ten months for non-Indigenous offenders. There was an escalation in sentence quantum due to the presence of criminal records and a further increase attributable to records with violence. There was also a clear indication that Indigenous offenders with criminal records and records for violence consistently received lengthier sentences than their non-Indigenous counterparts. This indicates that criminal records for Indigenous offenders may be understood as making the offender less receptive to rehabilitation and therefore presenting a greater risk to reoffend.

x. Age of Offenders

As with the figures for criminal records, there was a pattern among the age groups represented in the cases. Offenders between the ages of 25 and 34 received the longest sentences, followed by those over the age of 50, and by those between 35 and 50. Offenders who were under the age of 25 received the lowest sentences on average. This pattern was consistent between Indigenous and non-Indigenous accused. For Indigenous offenders under the age of 25, the average sentence for near murder was seven years and eight months' imprisonment, compared to over six years and nine months for their non-Indigenous analogues. For those between the ages of 25 and 34, Indigenous offenders received average sentences of more than ten years and two months compared to more than eight years and five months for non-Indigenous offenders.

¹⁹ Given the handful of extreme sentences handed down in Nunavut for near murders involving Indigenous offenders, that territory has been removed as a statistical outlier.

These figures dropped off again for offenders between 35 and 49-years-old, where Indigenous offenders received an average sentence of more than nine years and nine months, and their non-Indigenous counterparts received average sentences greater than seven years, eight months. Average sentences for non-Indigenous offenders over the age of 50 were greater than nine years and ten months. There was only a single near murder case involving an Indigenous offender over the age of 50 and so no meaningful comparison can be made for that age group.

The severity of sentence was tied to age distribution in the near murder category and it remained consistent between Indigenous and non-Indigenous offenders. It is clear in each age range, where sufficient information was available to reach a conclusion, that Indigenous offenders received sentences longer than their non-Indigenous equivalents. Among younger offenders, Indigenous ones could expect to receive a sentence over one year longer and for older Indigenous offenders, the difference was closer to two years.

xi. Summary of Near Murder

The near murder category of manslaughter is defined by the striking similarities between Indigenous and non-Indigenous comparator groups while nonetheless producing a dissimilarity in sentence outcome to the detriment of the former. The one significant distinction involves the tendency of Indigenous offenders to avoid trial by pleading guilty but this does not produce any reduction in sentence compared to non-Indigenous offenders. Criminal records and records for violence were nearly identical as were the age distributions of both groups. The longer sentences for Indigenous offenders for near murder were mostly consistent across the country with noticeably lower sentences only in Alberta and the Saskatchewan, both of which had few Indigenous offenders to contribute to the overall figures. There did not appear to be any substantial difference between these two groups that would justify the difference in sentence outcome observed.

B. Drugs and Alcohol

Drug and alcohol cases are those where the intoxication of the offender was taken by the sentencing judge to be the defining characteristic of the case. It would often be that the offender could not form the requisite intent for murder due to their level of intoxication or that death was not intended but the offender was nonetheless intoxicated to the point where such cases could be differentiated from the near murder category where the offender was sober or relatively so. This

category contained the majority of cases involving Indigenous offenders, accounting for 43 of the 80. Of a total of 52 drug and alcohol cases, only nine involved the sentencing of non-Indigenous offenders. These cases had an average sentence of approximately six years, ten and a half months' imprisonment. Indigenous offenders, at six years, nine and a half months, received average sentences that were slightly more than five months shorter than the seven year, two and-a-half month average handed down to non-Indigenous offenders.

Table 4.14 - Provincial and Territorial Average Sentences for Drug and Alcohol Manslaughter

Jurisdiction	All	Indigenous	Non-Indigenous
Ontario	100 months	106.28 months	91.2 months
British Columbia	76.97 months	79.03 months	86 months
Alberta	77.66 months	84 months	65 months
Saskatchewan	101.83 months	101.83 months	-
Manitoba	81.8 months	81.8 months	-
Yukon	-	-	-
Northwest Territories	62 months	62 months	-
Nunavut	52 months	52 months	-
Total	82.43 months	81.56 months	86.55 months

The fact that the majority of Indigenous offenders were sentenced in relation to drug and alcohol cases and that these cases carried lower sentences accounted for the lower sentences of Indigenous offenders overall in the body of cases examined for this research. The lower sentences of Indigenous people were not a result of more lenient sentencing across the board occasioned by the application of *Gladue*, but instead of Indigenous offenders being sentenced for a category of manslaughter that carried lower average penalties. Unfortunately, comparative information for this category was only available for British Columbia, Ontario and Alberta as no non-Indigenous offenders were convicted for drug and alcohol cases in other jurisdictions. However, the evidence suggests that the lower average sentences for drug and alcohol cases involving Indigenous offenders themselves were sufficient to bring down the overall average for all manslaughters involving Indigenous offenders. If drug and alcohol cases are removed from consideration for all offenders, the average sentence for an Indigenous offender for all other categories of manslaughter changes from six months shorter than the average for a non-Indigenous offenders to six months longer. The result was an increase in overall Indigenous sentences by nearly 14 months and an increase in non-Indigenous sentences of just over one month. It initially appeared as though the lower Indigenous figure nationally may have been the product of lower sentences overall in British Columbia and the large proportion of Indigenous offenders in that province. However, if British Columbia is removed from the national figures, this serves to increase averages for Indigenous and non-Indigenous offenders alike in roughly the same proportion. It therefore appears that the

difference between Indigenous and non-Indigenous sentences was attributable to differences in the sentencing of offenders in the drug and alcohol category rather than to a more lenient sentencing regime in British Columbia overall.

Table 4.15 – Overall Averages without Drug and Alcohol Cases – In Months

	All	Indigenous	Non-Indigenous	Difference for Ind.
With Drug and Alcohol	96.04	92.63	98.78	-6.15
Without Drug and Alcohol	101.78	106.22	100.03	+5.92
Change	+5.74	+13.59	+1.25	

Table 4.16 – Overall Averages without British Columbia – In Months

	All	Indigenous	Non-Indigenous	Difference for Ind.
With British Columbia	96.04	92.63	98.78	-6.15
Without British Columbia	100.75	97.28	103.91	-6.63
Change	+4.71	+4.65	+5.13	

It is important to discuss the limitations of the data available for assessing the drug and alcohol category. Drug and alcohol killings involving non-Indigenous offenders were limited to Alberta, British Columbia and Ontario. This is because these killings were distributed in a way that made intra-provincial or territorial comparisons impossible in all but these three jurisdictions. This is illustrated in Table 4.14, which demonstrates the relative sentences in provinces where that information was available and also shows those jurisdictions where it was not. The national numbers saw higher overall sentences for non-Indigenous offenders compared to Indigenous ones when it came to drug and alcohol killings. This was also true of the cases arising in British Columbia. However, Alberta and Ontario both produced higher average sentences for drug and alcohol killings among Indigenous offenders compared with non-Indigenous offenders than did British Columbia. If we remove Ontario from the figures on the assumption that it is an outlier, the average sentences for Indigenous and non-Indigenous offenders nationwide in the drug and alcohol category decrease in roughly the same proportion; the drawback, however, is that the analysis then becomes dependent almost exclusively on British Columbia. The tendency of Ontario courts to sentence drug and alcohol manslaughters harshly is explored below in the discussion of the role played by that province’s “aggravated manslaughter” categorization. However, this does not provide an explanation for why Indigenous offenders received longer sentences for drug and alcohol killings in that province than non-Indigenous offenders did.

Because of the limitations in the data, the sentences given to non-Indigenous offenders as a whole had to be compared with data that relied heavily on jurisdictions where there were no non-

Indigenous drug and alcohol offenders sentenced at all. This required a comparison that used the national averages for the two groups and consequently was not able to adequately explain the longer sentences received by Indigenous offenders in Alberta and Ontario when compared with British Columbia. This is not ideal but the limitations in the data do not allow for more robust comparisons. Differences in average sentences between Indigenous and non-Indigenous offenders in the drug and alcohol category is smaller than that for near murder and the conclusions drawn about the relative length of drug and alcohol sentences for non-Indigenous offenders are based primarily on the fact that such offenders tended to receive shorter sentences in Ontario and longer sentences in British Columbia. To draw general conclusions about the relative figures required bringing in averages from jurisdictions that contained no non-Indigenous offenders. The relative differences in sentences involving drug and alcohol killings between Indigenous and non-Indigenous offenders should therefore be assessed cautiously given that over a third of all drug and alcohol manslaughters occurred in jurisdictions where no non-Indigenous offenders fell into that category.

i. Ontario

Ontario produced a total of twelve drug and alcohol cases involving seven Indigenous and five non-Indigenous offenders. These accounted for slightly more than one quarter of these cases. Indigenous offenders received average sentences of greater than eight years and ten months' imprisonment. In contrast, sentences for non-Indigenous offenders were over one year, eight months shorter at slightly more than seven years, seven months. Overall, Ontario had the second-highest average sentences in the country for drug and alcohol manslaughters, falling only four months short of the province's average sentence for a near murder manslaughter. It also had the highest average sentence for Indigenous offenders in this category of manslaughter.

This phenomenon may be a result of the Ontario courts' approach to establishing ranges for manslaughter. British Columbia and Saskatchewan have large, general ranges for manslaughters running from a low of four years to a high of 12 and 15 years respectively. Similarly, Alberta has established ranges for the two highest categories of manslaughter that together accord roughly with the wider ranges in British Columbia and Saskatchewan. By contrast, the Ontario courts have only developed one range for what is referred to as "aggravated manslaughter". While a good deal of these cases had characteristics that fit the model of aggravated

manslaughter there was still a recognizable pattern in Ontario and across the country that the drug and alcohol cases received lower sentences. In Ontario, the absence of a wider range for general manslaughter or a specific range for manslaughters of a lower category created a situation in which eight to 12 years was viewed as the standard range for most violent manslaughters not falling into the unusual circumstances or one-punch categories on the one hand or home invasion and robbery category on the other. This produced higher average sentences than other jurisdictions, as a sentence below the eight-year bottom of the range appeared comparatively lenient. In the absence of a lower end of the range in which such crimes could be placed, manslaughter sentences for this category were pulled higher.

ii. British Columbia

The largest proportion of drug and alcohol cases - around one third - originated in British Columbia. This province produced 17 cases in total, 14 involving Indigenous offenders and only three non-Indigenous ones. While not the lowest sentences in the country, these sentences were among the lowest and given that they represented a substantial number of Indigenous offenders, they served to lower the average sentence for these offenders across the country. The average sentence for an Indigenous offender in British Columbia was just over six years and three months' imprisonment. Non-Indigenous offenders received average sentences that were nearly 11 months longer at seven years and two months.

What is notable for the British Columbia figures was that Indigenous offenders convicted for drug and alcohol manslaughters received sentences which were nearly three years and three months shorter than Indigenous offenders convicted in near murder cases. The comparable difference for non-Indigenous offenders were sentences that were lower by slightly more than six months. The Indigenous average for drug and alcohol murders was situated in the lower half of the established British Columbia range for manslaughter of four to 15 years, where non-Indigenous offenders were found in the middle of the range and closer to the average for near murder cases.

There was a clear difference between near murder and drug and alcohol charges among Indigenous offenders in British Columbia. Drug and alcohol manslaughters were viewed as a separate and less morally blameworthy category of homicide and offenders were sentenced accordingly. While Alberta also saw lower sentences for non-Indigenous offenders sentenced for

drug and alcohol cases, this was a result of a single non-Indigenous offender and so does not permit a worthwhile comparison.

iii. Alberta

The Alberta data produced one non-Indigenous and two Indigenous offenders in this category. Unfortunately, this sample was not large enough to reach any conclusions about the differences between the two sets of offenders. The two Indigenous offenders received an average sentence of seven years where the lone non-Indigenous offender received one of five years. These figures were below the national average for drug and alcohol cases. This is notable since Alberta generally produced among the highest sentences overall for manslaughter. The two Indigenous offenders received an average sentence that was actually 18 months longer than the Indigenous average for the near murder category, while the non-Indigenous offender received a sentence that was five years and five months shorter than the non-Indigenous average for the same.

One of the Indigenous offenders was found to be in the second *Laberge* category, while the other was found to be in the third and their sentences reflect this with a difference of two years. The single non-Indigenous offender was found to be in the upper part of the second category of *Laberge* and he received a sentence that was six months shorter than the Indigenous offender found within the second category. Nonetheless, all three sentences were within the generally accepted higher end of the range for the second *Laberge* category. Such a small difference in sentence could be attributable to any number of factors. As noted above, the small number of cases makes it difficult to draw useful conclusions for this category in this province.

iv. Saskatchewan

Six drug and alcohol cases emerged from Saskatchewan, representing the majority of cases from the province. All of these decisions dealt with Indigenous offenders and accounted for two thirds of the Indigenous total for that province. The average sentence handed down in the province for these cases was just over five years and two months' imprisonment. This figure was lower than that for near murder cases in the province by over three years and two months. The average sentences for drug and alcohol cases involving Indigenous offenders were located toward the lower end of the province's established four to twelve-year range for manslaughters involving brutality

and drugs and alcohol. There were no non-Indigenous cases in this category and it was therefore not possible to determine whether this was also true of those offenders.

v. Manitoba

Like Saskatchewan, the drug and alcohol decisions in Manitoba all involved Indigenous offenders. The five offenders in this category represented nearly half of those in the province overall as well as half of Indigenous offenders. The average sentence for such cases was slightly less than six years and ten months' imprisonment. This figure was approximately three years and four months shorter than the average sentence for Indigenous offenders involved in a near murder case. It should be recalled that Indigenous offenders received sentences in excess of two years longer for near murder cases in Saskatchewan than did non-Indigenous ones. Even accounting for that, Indigenous offenders in drug and alcohol cases in the province still received sentences that were more than 14 months shorter than the non-Indigenous figures for a near murder manslaughter. This difference was present despite the Manitoba Court of Appeal's insistence that there will be heavier sentences for drunken killings. Unfortunately, the lack of a non-Indigenous comparator group makes it impossible to determine if this was a trend common to all drug and alcohol cases in the province, or merely those involving Indigenous offenders.

vi. The Territories

There were no cases fitting this category of manslaughter in the Yukon. By contrast, all six cases in the Northwest Territories were classified as drug and alcohol manslaughters and all involved Indigenous offenders. The average sentence in the territory for these killings was five years and two months' imprisonment. While there were no near murder or non-Indigenous cases against which to compare these decisions, they were on average slightly less than 17 months shorter than the national average for an Indigenous offenders convicted of a drug and alcohol manslaughter and more than two years shorter than those for non-Indigenous offenders.

Three of Nunavut's nine decisions were classified as drug and alcohol killings and like all decisions arising in the territory, they dealt with Indigenous offenders. Nunavut had the highest sentences for manslaughters overall and the highest by far for near murders at over 14 years and seven months. Nunavut had the lowest average sentences in the country for drug and alcohol killings at four years and four months' imprisonment. This is unusual given the territory's often

strong emphasis on local conditions and the particularly harsh manner in which the near murder category of manslaughters was sentenced there.

vii. Trial Types, Guilty Pleas and Joint Submissions

It is important to note that drug and alcohol cases amounted to a total of 52 offenders, therefore this discussion of trial types was based on a smaller sample set than the foregoing discussion of near murder cases. For this type of manslaughter, the largest group consisted of Indigenous offenders from British Columbia. Overall, Indigenous offenders demonstrated a slight preference (62.6%) for pleading guilty in drug and alcohol cases, compared with non-Indigenous offenders. Like the figures for near murders, there was a marked difference between Ontario and British Columbia. In Ontario, only 40% of non-Indigenous offenders pleaded guilty with the remainder opting for trial by jury, while 85% of Indigenous offenders opted to plead guilty and the remainder – consisting of only one offender – chose trial by jury. These figures were roughly consistent with the Ontario figures for near murders.

In British Columbia, two of the three non-Indigenous offenders pleaded guilty while the third opted for trial by judge alone. By contrast, less than half of Indigenous offenders pleaded guilty with a fifth choosing trial by judge and jury and a quarter trial by judge alone. There was no information to determine the trial type for the remaining offender. The Indigenous offender figures for British Columbia dealing with drug and alcohol cases offered a very different picture than those for near murder. The judge alone figures were fairly consistent at a fifth for near murder and a quarter for drug and alcohol cases. However, where 80% of Indigenous offenders chose a guilty plea for near murder, only 46% did so in drug and alcohol cases. Similarly, while no Indigenous offenders in the near murder category chose trial by judge and jury, a fifth of those involved in drug and alcohol cases did. Though nearly half of Indigenous offenders pleaded guilty in the drug and alcohol category, this was far lower than the 80% figure for near murder cases. The Indigenous offenders from British Columbia in drug and alcohol cases demonstrated a discernible preference for taking their chances at trial rather than pleading guilty.

Eleven of the 37 joint submissions were the product of guilty pleas in drug and alcohol cases. Sixty percent of non-Indigenous offenders who pleaded guilty did so in connection with a joint submission, but the comparable figure for Indigenous offenders was under 30%. As noted, there was no demonstrated benefit arising from a joint submission when compared with a bare

guilty plea. Non-Indigenous offenders who did not plead guilty received sentences of an average of seven years and four months, compared with Indigenous offenders who received an average of six years and six months. For bare guilty pleas, the figures were effectively identical at around seven years and one month. Where there was a bare guilty plea, Indigenous offenders received sentences of roughly five years and 11 months compared with five years and six months for non-Indigenous offenders. While the sentences were higher overall for joint submissions at eight years and three months for Indigenous and eight years and eight months for non-Indigenous offenders, the figures for Indigenous offenders were lower than non-Indigenous ones. This was in contrast to those for near murders, where Indigenous sentences were higher across the board. Therefore there was a benefit for Indigenous offenders in a joint submission but only relative to non-Indigenous ones, rather than Indigenous offenders who had their sentence determined by a judge.

viii. Criminal Records and Violence

In drug and alcohol manslaughters, among the 52 cases, 37 offenders had criminal records and 27 of those included convictions for violent offences. Unlike the near murder category where there was no discernible difference between Indigenous and non-Indigenous offenders with respect to criminal records and records with violence, there was a striking difference among the drug and alcohol cases. Nearly 80% of Indigenous offenders had a criminal record compared with only one third of non-Indigenous ones. Within those figures, nearly three quarters of Indigenous records involved violence, a figure which was two thirds for non-Indigenous offenders. As a proportion of all offenders, nearly 60% of Indigenous offenders had criminal records for violence compared to just over 20% of non-Indigenous ones.

Indigenous offenders without criminal records received an average sentence of five years and eight months' imprisonment, where non-Indigenous offenders without criminal records were given sentences averaging seven years and three months. Where the offender had a criminal record, those figures increased to slightly more than seven years for Indigenous offenders and nearly seven years and two months for non-Indigenous offenders. Finally, for offenders with criminal records including convictions for violence, the average sentence for an Indigenous offender was just over seven years and one month. The comparable figure for non-Indigenous offenders was more than five years and eight months, however this sample consisted of only two offenders and so it does not allow for a useful comparison to the 25 Indigenous offenders with records for violence.

While there was an obvious escalation for all offenders with criminal records, and then for Indigenous offenders with records involving violence, the information was insufficient to make a similar conclusion for non-Indigenous offenders. Despite the clear increase of over 16 months between Indigenous offenders without criminal records and those with prior convictions, there was no discernible increase between those with criminal records and those with records involving violence. This was in contrast to Indigenous offenders convicted for near murder manslaughter, where there was an increase of around 20 months for those with records for violence compared to those with criminal records without convictions for violence.

This suggests that in the drug and alcohol categories, while criminal records were a consideration at sentencing, the presence of violence in those records was not treated as a further aggravating factor on the whole. It should be noted that 30% of Indigenous offenders in this category were from British Columbia and that 70% of them had records for violence. Given British Columbia's generally low sentences in this category and relatively large share of the total number of offenders, these cases play an outsized role in determining the figures overall.

ix. Age of Offenders

As with all figures in this section, there were fewer non-Indigenous drug and alcohol offenders to deal with so limited conclusions can be drawn about their presence in the different age categories. For Indigenous offenders the patterns between age groups were similar to those for the near murder category. Indigenous offenders under 25 years of age received an average sentence of slightly less than five years and eight months' imprisonment. This figure increased to nearly seven years and nine months for those between the ages of 25 and 34 and decreased for Indigenous offenders between 35 and 50 to five years and three months. One point of interest here was the presence of five individuals older than 50 among Indigenous offenders, who received an average sentence of nearly seven years and six months' imprisonment. There was only a single non-Indigenous offender over the age 50 among drug and alcohol offenders.

For non-Indigenous offenders the pattern among the handful of drug and alcohol offenders in the data followed a pattern similar to Indigenous offenders. The three offenders aged 18-24 years old received an average sentence of almost six years and four months. This increased to ten years for the single non-Indigenous offender aged between 25-34 and decreased again to six years

for the one offender aged between 35-50. The single non-Indigenous offender over the age of 50 received a sentence of four years' imprisonment.

The pattern of increasing sentences for offenders in the 25-34 category that was apparent among Indigenous drug and alcohol offenders and both categories of near murder offenders persisted for non-Indigenous drug and alcohol offenders. The shorter sentences for Indigenous offenders in the drug and alcohol category were apparent across the age distribution with the exception of offenders over 50, where the single non-Indigenous offender received a lower sentence.

Interestingly, while there were five Indigenous offenders over the age of 50 in the drug and alcohol category against a single non-Indigenous one, the figures were reversed for the near murder category where there were six non-Indigenous offenders compared with a single Indigenous offender over the age of 50. In the respective categories in which Indigenous and non-Indigenous offenders represented the overwhelming number of offenders, non-Indigenous offenders over 50 represented only 9% of offenders compared to older Indigenous offenders representing 13.5% of the total.

x. Summary of Drug and Alcohol

Drug and alcohol manslaughter cases saw more differences between Indigenous and non-Indigenous offenders. Most notable was the overall reversal in sentence severity in this category, with Indigenous offenders receiving lower sentences without a significant difference in guilty pleas, despite the substantially higher likelihood that Indigenous offenders would have both criminal records and records with convictions for violence. There was some evidence in these cases that the Crown was willing to offer more lenient plea agreements in their joint submissions to Indigenous offenders than to non-Indigenous ones. This was the reverse of the plea bargaining situation for near murder cases which resulted in longer sentences for non-Indigenous offenders. Like the near murder category, there does not appear to be any readily discernible explanation for the difference in sentence outcome from this data alone.

C. Robbery and Home Invasion

Home invasion and robbery cases represented a fairly small fraction of the total sentencing decisions for manslaughter in the country but tended to be sentenced most severely. These cases

generally dealt with the offender killing the victim in the course of a robbery or a home invasion and the severity of sentence results from premeditation and the indifference to human life demonstrated in the course of a crime committed for financial gain. There were a total of 14 cases involving either home invasions or robberies and only three involved Indigenous offenders. Eight of these decisions were from Ontario, three from British Columbia, two from Alberta and one from Manitoba. Thirteen of these cases resulted in a determinate sentence and one offender from Alberta was sentenced to life imprisonment for killing an elderly couple during a robbery on a remote stretch of highway.²⁰

Indigenous offenders were largely underrepresented in this category. While such decisions accounted for a tenth of all non-Indigenous offenders, they accounted for less 4% of Indigenous ones. Among manslaughters of this kind, the average sentence was over ten years and nine months imprisonment or two years, ten months longer than the average sentence for a manslaughter generally. For non-Indigenous offenders, the average sentence was in excess of 11 years, seven months which was over three years and seven months longer than the Indigenous average of eight years' imprisonment. However, the Indigenous figure was drawn from a sample of only three cases and so can provide little in the way of general information about Indigenous robbery and home invasion cases.

Table 4.17 – Provincial and Territorial Average for Robbery and Home Invasion Manslaughters

	All	Indigenous	Non-Indigenous
Total Months	1,680	288	1,392
Number of offenders	13	3	10
Average in months	129.23	96	139.2

D. Arson

There were six offenders sentenced for manslaughters committed by arson, and they were split evenly between Indigenous and non-Indigenous offenders. In discussing arson cases it is not particularly useful to analyze them in terms of averages as the difference between the cases was too great. One Indigenous offender was given a life sentence for setting a fire in which five residents of a rooming house were killed.²¹ In another case, a non-Indigenous man in British Columbia set his home on fire with his wife and five children inside and killed his spouse for

²⁰ *R v Vader*, 2017 ABQB 48.

²¹ *Flett*, *supra* note 14.

which he was given a sentence of 18 years following a guilty plea.²² Another case involved an Indigenous woman in Nunavut who was sentenced to one year imprisonment when, following an argument with her husband, she set the small shed in which he was drinking on fire and killed him.²³ While this case and the rooming house fire that resulted in five deaths were the outliers, it can be said that manslaughters resulting from arson were punished most severely. If the life sentence and the reformatory sentence are removed from consideration, there remains an average sentence of 13 years and seven and a half months' imprisonment. The high average for arson sentences was derived from the extraordinary risk to the public created by the intentional setting of fires and the obvious indifference to human life involved.

Of the six cases involving arson, four were domestic homicides. All arson cases involving non-Indigenous offenders were domestic homicides wherein the offender's spouse was either the victim or the intended victim. In only one case involving an Indigenous offender was this true. The domestic violence aspect of arsons were considered to be a significant aggravating factor that produced substantial sentences for two of the non-Indigenous offenders.²⁴ However, for the single Indigenous offender where the arson was domestic in nature, the sentence was among the lowest received by any offender in this study for any manslaughter conviction.²⁵

E. Unusual Circumstances and One-Punch

The lower end of the sentence averages were occupied almost exclusively by those classified as one-punch and unusual circumstances cases. In both these categories, the resulting death depended heavily on the element of chance. One-punch cases consist of a single punch to the victim where they subsequently lost consciousness and struck their head causing death. Unusual circumstances manslaughter cases were varied but the resulting death also depended substantially on chance. There were four one-punch cases, all arising in British Columbia and divided evenly between Indigenous and non-Indigenous offenders. One Indigenous and one non-Indigenous offender were sentenced to six months and one Indigenous and one non-Indigenous offender were each sentenced to three years.

²² *R v BKJL*, 2018 BCSC 379.

²³ *R v Ussak*, 2013 NUCJ 9.

²⁴ *BKJL*, *supra* note 22; *R v Dosanjh*, 2018 BCSC 2302.

²⁵ *Ussak*, *supra* note 23.

There were a total of three cases classified as unusual circumstances, all occurring in British Columbia, of which two involved non-Indigenous offenders. In both cases with non-Indigenous offenders, they both received sentences of six months. The only Indigenous offender in the category received a sentence of five years. The death in that case resulted from the offender attempting to attack the victim with pepper spray and a length of chain while he was sitting in a car, causing the deceased to flee into the street where he was struck by a passing vehicle and killed.²⁶ Despite the substantial sentence, it was classified as an unusual circumstances case because of the degree of chance that led to the death. As with the arson cases, the wide differences in the circumstances of the offence and the small number of cases make generalizations about these cases difficult.

5. Comparison Between Drug and Alcohol and Near Murder Categories

Comparing Indigenous and non-Indigenous offenders convicted of manslaughter demonstrates that the two groups of offenders were substantially similar to one another. The principal differences arose in the types of manslaughter for which they were convicted and the dissimilarity in sentence quantum. Indigenous offenders tended to be involved in more personal crimes. They were more likely to kill acquaintances and family members than non-Indigenous offenders and they were less likely to be involved in offences committed for profit. The most substantial difference has to do with the classifications of their crimes. Indigenous offenders were largely convicted in the drug and alcohol category and this was the sole category in which they received lower sentences overall.

Drug and alcohol and near murder killings between them represented 84% of all offenders examined in this study. The two categories essentially represented a division between the bulk of Indigenous and non-Indigenous offenders. Seventy two of ninety nine near murder offenders were non-Indigenous and represented roughly 72% of both the near murder category and the total number of non-Indigenous offenders. By contrast, forty three of fifty two three drug and alcohol offenders were Indigenous, which represented just under 54% of all Indigenous offenders and just short of 83% of all drug and alcohol offenders. Drug and alcohol killings therefore represented less than one in ten of all non-Indigenous offenders compared to over half of Indigenous ones.

²⁶ *R v Cote*, 2013 BCSC 2424.

In the near murder category the difference in average sentence outcome between Indigenous and non-Indigenous offenders was evident. There, Indigenous offenders received sentences that were an average of twenty months longer than those handed down to non-Indigenous offenders. Among drug and alcohol killings there was a less substantial difference in sentence outcome between Indigenous and non-Indigenous offenders with Indigenous offenders receiving average sentences five months shorter than non-Indigenous ones.

Of particular interest in the division between these two groups was the presence of criminal records in the two categories. Among the body of offenders for near murder, there was virtually no difference between the rates of criminal records and criminal records with violence between Indigenous and non-Indigenous offenders. However, Indigenous offenders still received demonstrably longer sentences than non-Indigenous offenders. By contrast, nearly 80% of Indigenous offenders in the drug and alcohol category had criminal records compared to a third of non-Indigenous offenders and those Indigenous offenders with criminal records were more likely to have convictions for violence on their records. Despite these differences between Indigenous and non-Indigenous offenders in the two categories, near murder sentences still saw consistently longer sentences applied to Indigenous offenders despite identical rates of criminal records and records with violence. In the drug and alcohol category, notwithstanding the substantially higher numbers of Indigenous offenders with criminal records and records for violence, sentences for Indigenous offenders remained lower for than those for non-Indigenous ones.

The difference in criminal records and records with violence was the only significant one between the bodies of offenders in the near murder and drug and alcohol killings. Otherwise, they were substantially similar. Given the relative difference in the rates of criminal records in the drug and alcohol category it would be expected that sentences for Indigenous offenders would be longer instead of shorter. In the near murder category, the similar rates of criminal records and records with violence would be expected to produce similar sentence outcomes, with all else being equal. This suggests that the criminal record issue, despite its importance in sentencing overall, did not play a significant role in determining relative sentence outcome, meaning that some other factor was at play in creating that difference.

The vast bodies of Indigenous and non-Indigenous offenders were substantially similar in most aspects, the only significant differences lay in the types of manslaughters for which they were convicted and the differences in sentence quantum between those categories. This suggests that

something else explains the relative differences in sentence length between the two categories of manslaughter offenders. Indigenous offenders, despite pleading guilty at roughly the same rates as non-Indigenous offenders and having similar rates of criminal records and records with violence received longer sentences for near murder and with similar rates of guilty pleas and a greater likelihood of criminal records and records with violence, Indigenous offenders received shorter sentences for drug and alcohol killings. This suggests that a contributing factor in both of these was the impact or lack of impact of the *Gladue* provisions on sentence.

6. Conclusion

The social conditions of many Indigenous communities and neighbourhoods in Canada are well known, as are the community's struggles with substance abuse. It should therefore not be surprising that many of the manslaughters committed by Indigenous people fell into the drugs and alcohol category. Despite the more frequent guilty pleas in near murder cases and nearly identical figures for criminal records and for violence, Indigenous people received longer sentences than non-Indigenous offenders for this type of manslaughter. Conversely, lower rates of guilty pleas but considerably higher rates of criminal records and records with violence in the drug and alcohol category led to lower sentences for Indigenous offenders compared with non-Indigenous offenders.

This apparent contradiction was likely related to the operation of the *Gladue* principles but in a particular fashion. Drug and alcohol killings may be viewed by judges, although never explicitly in these terms, as a typically Indigenous style of manslaughter. Because of the role played by intoxication, such crimes can be connected more easily with the prevalent stereotypes about the social conditions of Indigenous people and the effects of residential school and intergenerational trauma. Therefore, when Indigenous offenders committed types of manslaughter that did not fit the drug and alcohol pattern they were viewed as departing from crimes that could be readily connected to these experiences and so lost the benefit of a reduced sentence that might result from that connection. Instead, they were being viewed as more dangerous to the public and in need of longer sentences to deter them from committing further crimes. These questions are explored in more depth in the following chapter through the analysis of the application of the *Gladue* principles to the judicial decision-making process and their impact on sentence outcomes.

Chapter Five: The Application of Gladue at Sentencing

1. Introduction

This chapter examines the application of the *Gladue* provisions in the sentencing process itself. Its purpose is to ascertain whether there was a different methodology employed in sentencing Indigenous offenders and how that manifested in judicial decisions. The previous chapter suggested that in comparing Indigenous and non-Indigenous offenders there were distinctions in sentence outcomes between these two groups. Indigenous offenders received lower sentences for drug and alcohol killings compared to non-Indigenous offenders but they received equal or higher sentences in other categories such as near murder. This section serves to assess whether causes for these disparities can be attributed to the operation of the *Gladue* provisions.

This chapter begins with an analysis of the rates of Gladue Reports in the cases examined and the material which they contained. It then moves to a consideration of the two stages of *Gladue* by trial courts. The balance of this chapter involves an examination of the different types of methodologies that have been employed to sentence Indigenous offenders for manslaughter before comparing the impact of the provisions on sentence outcome between and within Indigenous-specific sentencing methodologies and traditional methodologies.

2. Gladue Reports

Before analyzing the application of the provisions themselves, it is necessary to return to the question of Gladue Reports and place the information submitted to the sentencing courts into context. As noted in chapter one,¹ the availability of Gladue Reports is not consistent across Canada and some provinces and territories have no mechanisms for producing them. However, with the seriousness of a conviction for manslaughter, it would be reasonable to expect Gladue Reports to appear frequently in these cases. Even where resources for their production are scarce – which is the case everywhere – given the potential severity of sentence, manslaughter convictions are a good place to direct the limited resources available to the Gladue Report infrastructure.

¹ See pages 24-25.

Unlike pre-sentence reports, there is no established form for Gladue Reports and no particular mechanism for ordering them.² While they are not standardized in any fashion, these reports will usually convey information on the background and systemic factors related to the offender being sentenced and the community from which they come. Here, this often included discussions of the individual's personal experiences with physical, emotional, and sexual abuse;³ substance use;⁴ history in the child welfare system;⁵ and, any relevant experiences they may have had with residential schools.⁶

These reports also dealt with the offender's family history where appropriate. This often involved a discussion of the residential school experiences of parents and grandparents,⁷ or their adoption into non-Indigenous families and the resulting intergenerational trauma that may have affected the offender.⁸ This may be in the form of personally experiencing violent and neglectful childhoods⁹ or witnessing widespread substance abuse and physical violence in the home.¹⁰ A Gladue Report is designed to bring this information to the attention of the court in order to appreciate the impact of the background and systemic factors on the offender and craft a sentence taking them into account.¹¹ It should be noted that Gladue Reports are not expert reports and instead serve to convey the information without any judgment as to its veracity.¹²

As outlined in chapter one,¹³ formal processes do not exist for producing Gladue Reports in Manitoba, Saskatchewan, the Northwest Territories and Nunavut. The Yukon created a pilot program to produce Gladue Reports in 2018 but only after the single case from that jurisdiction

² Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook*. (Toronto: Emond Montgomery, 2019) at 109.

³ *R v Jourdain*, 2016 ONSC 7890; *R v Johnny*, 2015 BCSC 615; *R v Fiddler*, 2018 SKQB 197; *R v Flett*, 2013 MBQB 124; *R v Taniskishayinew*, 2018 BCSC 296.

⁴ *R v Jourdain*, 2016 ONSC 7890; *R v Cote*, 2013 BCSC 2424; *R v Johnny*, 2015 BCSC 615; *R v Taniskishayinew*, 2018 BCSC 296.

⁵ *R v Beaulieu*, 2014 BCSC 2068; *R v Touchie*, 2015 BCSC 1833; *R v Isadore*, 2016 ABQB 83.

⁶ *R v Stonechild*, 2017 SKQB 138.

⁷ *R v Touchie*, 2015 BCSC 1833; *R v Abraham*, 2014 MBQB 242; *R v Dick*, 2014 MBQB 187; *R v Isadore*, 2016 ABQB 83; *R v Johnny*, 2015 BCSC 615; *R v Scotchman*, 2016 BCSC 652; *R v David*, 2017 BCSC 877; *R v Johnson*, 2017 BCSC 1240; *R v Taniskishayinew*, 2018 BCSC 296; *R v Swampy*, 2015 ABQB 319.

⁸ *R v Nicholls*, 2015 ONSC 8136.

⁹ *R v Jourdain*, 2016 ONSC 7890; *R v Thomas*, 2016 ONSC 7944; *R v Brererton*, 2013 BCSC 1029; *R v Beaulieu*, 2014 BCSC 2068.

¹⁰ *R v Touchie*, 2015 BCSC 1833; *R v Gray*, [2015] OJ No 1915; *R v Jourdain*, 2016 ONSC 7890; *R v Johnny*, 2015 BCSC 615; *R v Swampy*, 2015 ABQB 319.

¹¹ Rudin, *Indigenous People*, *supra* note 2 at 111-112.

¹² *Ibid* at 114.

¹³ See page 24.

considered in this study was decided.¹⁴ Among the jurisdictions examined, Ontario, British Columbia and Alberta each have a formal system for producing Gladue Reports.¹⁵ Resources in the criminal justice system are scarce everywhere and this is evident in the paucity of coverage for Gladue Reports. As Jonathan Rudin has stated, “[t]o describe that availability of Gladue Reports across the country as a patchwork quilt would do a disservice to quilt makers” as even “patchwork quilts do not have huge holes in them.”¹⁶

Table 5.1 – Gladue Reports by Province/Territory

	Gladue Report	PSR – Gladue Component	Gladue Report Waived	None/Unknown	Percentage of Jurisdiction
Ontario	8	-	-	4	66.66
British Columbia	12	4	5	6	44.44
Alberta	2	-	-	3	40.00
Saskatchewan	2	1	-	6	22.22
Manitoba	6	-	-	5	54.54
Yukon	-	-	-	1	-
NWT	-	-	-	6	-
Nunavut	-	-	-	9	-
All	30	5	5	40	-
Percentage of Total	37.50	6.25	6.25	50.00	-

The differences in Gladue Report production across the country are apparent in the cases considered in this research. Of the 80 Indigenous offenders examined here, only 30 had Gladue Reports prepared for their sentencing hearings. While the absence of some Gladue Reports can be attributed to the presence of a joint submission and a more limited sentencing hearing,¹⁷ there were also cases involving joint submissions that included Gladue Reports,¹⁸ so this was not determinative. There were no Gladue Reports cited in the decisions from the territories at all. Two-thirds of Ontario cases involved a Gladue Report compared to less than half of British Columbia cases, while in Alberta only two of the five Indigenous offenders had a Gladue Report prepared. Despite the absence of a formal system for their production in Manitoba, over half of all cases from that province involved a Gladue Report as did two of the nine cases from Saskatchewan. Reports were produced in less than one third of near murder cases but close to 40% of drug and alcohol cases, however, all three home invasion or robbery cases involved a Gladue Report.

¹⁴ Rudin, *Indigenous People*, *supra* note 2 at 110.

¹⁵ *Ibid* at 109-110

¹⁶ *Ibid* at 110.

¹⁷ *R v Grenier*, 2013 BCSC 1894; *R v Saar*, 2014 BCSC 847; *R v Strongquill*, 2016 SKQB 397.

¹⁸ *R v Skead*, 2017 ONSC 179; *R v David*, 2017 BCSC 877; *R v Berrerton*, 2013 BCSC 1029; *R v Abraham*, 2014 MBQB 242.

Table 5.2 – Gladue Reports by Category of Manslaughter

	Gladue Report	PSR – Gladue Component	Gladue Report Waived	None/Unknown	Percentage by Offence
Near Murder	8	3	1	15	29.62
Drug/Alcohol	17	2	2	23	38.63
Home Invasion/Robbery	3	-	-	-	100.0
Arson	1	-	1	1	33.33
One Punch	-	-	1	1	-
Unusual Circumstances	1	-	-	-	100.0
Total	30	5	5	40	-

There were occasions where a pre-sentence report was written that contained a “*Gladue* component.” These were essentially pre-sentence reports where the probation officer who drafted them attempted to address the background and systemic factors affecting the offender and offering their conclusions about possible impacts. Caution has been expressed by scholars toward this practice because of the tendency of pre-sentence reports to focus on risk assessment and from fears that discussion of the systemic and background factors may cause the offender to be deemed a higher risk than they might be were these details omitted.¹⁹ Notwithstanding the potential negative effects of these reports, they served to convey some of the same relevant information to the court. Pre-sentence reports with a *Gladue* component were submitted to the court in four cases in British Columbia and one in Saskatchewan.²⁰

In most other cases where the provision of pre-sentence information was specified it came in the form of a traditional pre-sentence report or occasionally from psychiatric reports and sometimes from a combination of the two. It is evident from reading the decisions that even in the absence of Gladue Reports or *Gladue* components within pre-sentence reports, most traditional pre-sentence reports contained some information germane to the offender’s Indigenous background that could be useful in determining sentence. Where this was not the case, there were rare instances in which submissions of defence counsel were presented in lieu. One of these submissions occurred in British Columbia²¹ and two in the Northwest Territories.²² A final case from Nunavut involved a “Gladue Report” that was written by defence counsel.²³

It is impossible to determine from the information contained in the decisions why Gladue Reports were submitted in some cases and not in others. However, there were several cases where

¹⁹ Kelly Hannah-Moffat and Paula Maurutto, “Recontextualizing Presentence Reports: Risk and Race,” (2010) 12:3 Punishment & Society 262, at 275.

²⁰ *R v Laglace*, 2013 BCSC 2143; *R v Williams*, 2013 BCSC 1082; *R v Neel*, 2014 BCSC 1989; *R v Robinson*, 2017 BCSC 681; *R v Stewart*, 2015 SKQB 182.

²¹ *R v Morris*, 2018 BCSC 803.

²² *R v Sayine*, 2014 NWTSC 85; *R v DSA*, 2017 NWTSC 22.

²³ *R v Makpah*, 2015 NUCJ 34.

the preparation of a Gladue Report was waived by the offender. In one instance, this was because the offender was not sufficiently affected by the *Gladue* factors, however, defence counsel nonetheless made submissions on the matter.²⁴ In another, the offender's connection to their First Nations' heritage was deemed insufficient by defence counsel to merit the preparation of a report.²⁵ In one case, no report was prepared on the basis that a joint submission had been agreed and the preparation of a Gladue Report was therefore not necessary as sentence had been determined.²⁶ In a final instance, defence counsel waived the report on the basis that the offence was simply too serious to warrant consideration of the *Gladue* factors, though the provisions were still considered by the court.²⁷

While the Gladue Report is the preferred vehicle for bringing evidence of systemic and background factors before the court, this information found its way before the courts one way or another in virtually all cases. In the Northwest Territories and Nunavut, where Gladue Reports were not produced at all, this often took the form of judicial notice by the court. Given that these jurisdictions have substantial Indigenous populations, the judges may well have sufficient knowledge of local conditions to take notice of the effects that the background and systemic factors have had on the wider community, though they may lack an in-depth understanding of the role they have played in the life of any particular offender.

3. Gladue Provisions

A. Stage One

Following the direction of the Supreme Court, the application of the *Gladue* provisions is a two-stage process. The first stage consists of analyzing the “unique systemic and background factors which may have played a role in bringing the particular aboriginal offender before the court.”²⁸ This is where the information relevant to the offender is considered by the court. It is here that the Gladue Report comes into play by providing a detailed description, though this information most frequently came by another route in these cases. This is a fairly low bar to clear. While it is preferable for this information to come about in a formal manner or through witness testimony,

²⁴ *R v Morris*, 2018 BCSC 803.

²⁵ *R v Hanley*, 2014 BCSC 1373.

²⁶ *R v Grenier*, 2013 BCSC 1894.

²⁷ *R v Houle*, 2013 ABQB 70.

²⁸ *R v Gladue*, [1999] 1 SCR 688 at para 66.

the presiding judge may also take judicial notice of the effects of the systemic and background factors on the offender and their community where evidence has not been adduced.²⁹ This is a common practice in cases drawn from Nunavut where judges tended to recognize the damaging effects on the wider community regardless of whether the offender had been personally impacted.³⁰ In this respect, *Gladue* was sometimes seen as being relevant to the wider community and not just the individual.

The first stage was addressed in 72 of the cases involving Indigenous offenders in this study. In five of the eight cases where the first stage was not considered, the decision involved a joint submission.³¹ These decisions were generally cursory and consisted mostly of the judge assessing whether the joint submission was acceptable to the court rather than examining the life of the offender or the principles of sentencing in detail. This was not, however, the case with most joint submissions, where the judge nonetheless undertook the first stage of the *Gladue* analysis before endorsing the joint submission. The lack of a first stage consideration was not fatal to a subsequent consideration of the second stage of *Gladue*.³² In virtually all cases involving Indigenous offenders, even those with tenuous connections to their heritage and those who had waived the considerations altogether, the court nonetheless engaged in some limited examination of the first stage of the *Gladue* provisions. As likely as not this had to do with judges assuring themselves that they had at least given the offender's Indigenous status some attention should an issue arise on appeal. There is no airtight formula for identifying an application of the first stage of *Gladue*, a state of affairs that is equally apparent with the second stage.

B. Stage Two

The second stage of *Gladue* requires a consideration of “[t]he types of sentencing procedures which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”³³ This stage speaks to two distinct aspects of sentencing Indigenous people. Following strictly from the *Criminal Code*, the first aspect requires a remedial approach emphasizing restraint in sentencing and a suggestion that alternatives to

²⁹ *Ibid* at para 83.

³⁰ *R v Ussak*, 2013 NUCJ 09; *R v Kappi*, 2016 NUCJ 28.

³¹ *R v Quigley*, 2016 BCSC 2184; *R v Murphy*, 2016 YKSC 48; *R v Bishop*, 2014 NUCJ 1; *R v VanEindhoven*, 2016 NUCJ 19; *R v Côté*, 2016 SKQB 49.

³² *R v Johnny*, 2015 BCSC 615.

³³ *Gladue*, *supra* note 28 at para 66.

imprisonment or restorative justice be considered.³⁴ The second aspect requires sentencing an Indigenous offender according to a different methodology following the decision of the Supreme Court in *Wells*.³⁵

As the Supreme Court has stated, *Gladue* does not mandate a different result.³⁶ The assumption entering into this research was that, with those few exceptions where restorative justice measures or a non-custodial sentence were found to be appropriate, manslaughter convictions would result in a period of imprisonment. This presumed that where the remedial aspect of *Gladue* was being addressed by the sentencing court there would be some evidence of a reduction in sentence quantum. However, a different methodology employed to arrive at the final sentence is distinct from whether or not the final sentence is different from what it may have been for an offender to whom the *Gladue* provisions do not apply. A judge could sentence an Indigenous offender in a manner entirely undifferentiated from how they would a non-Indigenous offender and still fulfill the remedial aspect of *Gladue* by passing a lower sentence. Equally, the judge could undertake a non-traditional approach to sentencing an Indigenous offender and nonetheless arrive at the conclusion that the sentence warranted was no different from a proportionate sentence for a similarly situated non-Indigenous offender.

Therefore, the measure of the second stage is not simply whether it results in restorative justice or alternatives to incarceration or even a reduction in sentence quantum. Rather, analyzing a court's approach to *Gladue* at sentencing requires looking first to whether there are distinct procedures utilized in sentencing the Indigenous offenders and second to whether a difference in the sentence outcome can be ascertained. Examples of the latter are not confined to restorative justice, other alternatives to imprisonment, or to comparatively lower sentences. This chapter examines the process of sentencing first through assessing any differences in methodology employed and then through ascertaining the impact which the application of the provisions were found to have on sentence. A different methodology employed in sentencing an Indigenous offender is distinct from an outcome in which *Gladue* can be seen to affect sentence and could be exhibited in different ways. There were two distinctive forms of different methodologies employed

³⁴ *Criminal Code*, RSC 1985, c C-46, s. 718.2(e).

³⁵ *R v Wells*, 2000 SCC 10 at para 44.

³⁶ *Ibid* at para 44.

for sentencing Indigenous offenders identified in this study: one involving a first principles' methodology and the other an Indigenous comparator case methodology.

4. Differences in Methodology

A. Traditional Methodology

The traditional methodology of sentencing involves a judge assessing the principles and purposes of sentencing, along with any relevant mitigating and aggravating factors, and then coming to a decision as to the appropriate penalty with reference to any relevant case law in much the same fashion as any offender would be sentenced. An illustrative example of this was a case where the *Gladue* provisions were explicitly applied as a sentence reduction. In *R v Mitchell, Mearow, and Jocko*, two Indigenous offenders (Eric Shane Joseph Mearow and Dylan Albert Jocko) and one non-Indigenous offender (Ronald Albert Mitchell) participated in a group attack on a fourth man in a “flop house” in Sault Ste. Marie, Ontario where drugs were sold and consumed and in which Eric Mearow resided.³⁷ All three were charged with first degree murder in the stabbing death of Wesley Hallam and the subsequent dismemberment and disposal of his body. All three pleaded guilty and agreed to a joint submission for a period of imprisonment of ten years for manslaughter and three years to be served concurrently for indecent interference with human remains. All three men spent prolonged periods on remand and all received reformatory sentences as a result.

The sentencing proceeded in an identical fashion for all three offenders and they were treated in a manner consistent with a traditional sentencing. The principles and purposes of sentencing were analyzed, as were the aggravating and mitigating factors, and the cases used in sentencing followed similar fact patterns and involved non-Indigenous offenders. Neither Indigenous offender had a *Gladue* Report prepared and while their Indigenous status and background were discussed, they clearly had no effect on the gross sentence as Mr. Mitchell – the non-Indigenous offender - received an identical one, although he had spent slightly longer in custody and would receive a lower net sentence as a result. In his final pronouncement of sentence, Justice McMillan gave Mearow and Jocko a further reduction in sentence of five months based on their status as Indigenous offenders and in recognition of time spent in solitary confinement while

³⁷ 2016 ONSC 5339.

awaiting trial. The judge made no distinctions about how that reduction was apportioned between *Gladue* and solitary confinement.

Though this case was resolved by way of a guilty plea and joint submission, the presiding judge nonetheless undertook a full review of the sentence to determine its fitness and did not make any particular allowance for the Indigenous status of two of the offenders during that process. *Gladue* clearly impacted sentence outcome in this case but as a reduction after the appropriate sentence had been determined by the court as being one of ten years' imprisonment. Even with the resulting reduction of five months, both Indigenous offenders were still sentenced to more time in prison than their non-Indigenous co-accused because of his longer remand time. Though this is one of the few cases produced in this research in which the judge explicitly outlined how *Gladue* was impacting sentence, and one of even fewer in which that explicit application took the form of a sentence reduction, it was nonetheless conducted as a textbook sentencing following the traditional methodology.

B. Indigenous Comparator Cases

The first difference in methodology manifested as a consideration of the offender and offence with reference largely to decisions involving other Indigenous offenders and the manner in which they had been sentenced, rather than cases dealing with non-Indigenous offenders. For the purposes of this discussion, these decisions are referred to as *Indigenous comparator cases*. These decisions qualify as a different methodology, despite their procedural similarities to the traditional approach to sentencing. This methodology effectively required sentencing the offender as an Indigenous person but employing the traditional framework. This sometimes involved more emphasis being placed on what impact the offender's actions had on their community or the judge downplaying the importance of an offender's criminal record or their past difficulties abiding by conditions, but the sentencing procedure still closely resembled those employed for non-Indigenous offenders. This Indigenous comparator case methodology nonetheless emphasized the Indigenous status of the offender within a traditional framework.

An illustrative example of this sentencing methodology was the British Columbia decision of *R v Johnny*.³⁸ Dakota Dillon Johnny, aged 19, beat Cindy Scow, aged 28, to death with a wooden

³⁸ 2015 BCSC 615.

dowel on the Tsulquate Reserve of the Gwa'Sala 'Naxwaxda'xw Nation and left her to die in an abandoned house before returning to the party where he had been drinking heavily. At no point was the offender able to offer an explanation for his actions in the death of the victim, but he pleaded guilty nonetheless.

Justice Maisonville of the British Columbia Supreme Court, sitting in Campbell River, ultimately sentenced Johnny to eight years' imprisonment, the lowest sentence suggested by the Crown's range and the highest suggested by the defence. The sentencing proceeded in a more or less traditional manner. While it involved discussions of Johnny's life story and his personal problems occasioned by the background and systemic factors outlined in the Gladue Report, the sentence was largely determined with reference to factually-similar cases involving Indigenous offenders introduced by counsel. The only cases not involving Indigenous offenders with similar facts were those British Columbia Court of Appeal cases establishing the general range for manslaughter in the province. Justice Maisonville approached the sentencing of Johnny in a fashion that recognized the cases suited to his circumstances were defined by the Indigenous heritage of the offenders as much as by the similarities of the offences themselves.

After accounting for time spent on remand, Johnny was sentenced to a further seven years' imprisonment. While sentencing Mr. Johnny, Justice Maisonville noted that the community options suggested would not be relevant at this stage but that his rehabilitation could be assisted by the Integrated Code Program Model in the Pacific Region of Correctional Services Canada. He suggested:

This model is an innovative and holistic approach to correctional programs with a view to enhancing public safety. It endeavours to address the needs and risk of a specific offender population in the most effective manner possible. If sentenced to a federal sentence... an aboriginal person would be managed within the context of an aboriginal continuum care model, and could then access various aboriginal programs and services, including elders, traditional circles, smudging kits, aboriginal liaison officers, aboriginal-specific units, sweat lodge ceremonies, powwows, and other ceremonies.³⁹

In the case of Dakota Johnny, circumstances ultimately did not coalesce to allow his sentence to be reduced to a reformatory term but the judge suggested that his time in a federal penitentiary

³⁹ *R v Johnny*, 2015 BCSC 615 at para 31.

should be focused as much as possible on his First Nations' heritage. Notwithstanding the outcome, the sentencing procedure was undertaken with the understanding that Mr. Johnny was an Indigenous offender and that the cases against which to compare an appropriate sentence were others involving Indigenous offenders.

C. First Principles' Cases

The second fashion in which a different methodology was apparent was where offenders were not subject to an Indigenous-focused version of the traditional sentencing model but were instead sentenced in a manner that was more holistic. These are referred to here as the *first principles'* cases. In these decisions, though they might have been listed and considered, the traditional considerations such as the principles and purposes of sentencing and the weighing of aggravating and mitigating factors did not play a central role. Instead, judges were mostly concerned with the offender as an Indigenous person and they were sentenced in a fashion where this took centre stage. Other considerations were either not mentioned at all or played a secondary role. Often these cases did not involve the use of comparator cases at all but instead focused on *Gladue* and *Ipeelee* – or the leading provincial cases interpreting their application – to assess how the criminal justice system should deal with the offender as an Indigenous offender. These first principles' cases focused heavily on the needs of the individual and the community rather than abstract discussions of society and the necessity of the legal system to condemn the actions of the offenders. These were the closest thing to a truly distinct method of sentencing Indigenous offenders that appeared in these cases.

A case that exemplifies the type of sentencing procedures found in first principles' decisions is *Holmes*.⁴⁰ Barbara Elizabeth Holmes killed her intimate partner in what was described as a frenzied attack with a knife, stabbing him 17 times. It was a difficult relationship and there were suggestions that she had been the victim of domestic violence but these were not examined in depth as aggravating and mitigating factors as would be expected with a more traditional approach. Justice Langston of the Alberta Court of Queen's Bench, sitting in Lethbridge, instead engaged in a lengthy discussion of Ms. Holmes, what the process meant to her and what beneficial outcomes could possibly come from sending her to prison.

⁴⁰ 2018 ABQB 916 [*Holmes*].

There was no Gladue Report submitted nor were the particulars of her life connected explicitly to any analysis of the *Gladue* provisions. While he ultimately felt constrained by the submissions of counsel, Justice Langston made no reference to the cases offered to support those positions. Instead he looked to the offender as an Indigenous person and attempted to justify how imprisonment would serve to further the ends of justice. He wrote of the limitations of the criminal justice system to address the needs of Ms. Holmes and of the *Gladue* provisions to offer real alternatives, remarking:

...I'm limited to some degree by the numbers game. Counsel for the accused recognizes this, as does the Crown. So how many years is appropriate for this woman to stay in jail, to stay isolated, locked up, away from her family, away from her community, away from the support mechanisms which we all recognize would be advantageous to her?... if I were to ask everyone in this room, if there were police who investigated this charge and the Crown who is prosecuting, is this woman likely to go out and commit another crime like this, I am sure the overwhelming response would be no. This was a singular, aberrant, inexcusable, unexplainable act, but yet we will send this woman to jail to deter others who find themselves in that inexcusable, unexplained situation. Will anyone in this community, apart from those that the press tells, have any inkling about this woman or her history or why she got the number of years which I will impose? I would think that they would be unlikely to be interested.

If denunciation and deterrence truly worked, then those societies and countries that indulge in sending great percentages of their population to jail would surely be expected to be the safest places on Earth. The reality is that just isn't the fact. We in my criminal justice system yearn to find better solutions for antisocial conduct, and some of that, fortunately, has come from the Aboriginal world, where we take a more holistic view of how we deal with antisocial behaviour. But as today illustrates, their input is restricted by the largess of the Supreme Court when they announce the rules in *Gladue*, cautiously encouraging judges to take an Aboriginal offender's background into the equation of sentencing yet recognizing that probably there aren't many because, after all, we have to deal with deterrence and denunciation.⁴¹

In the end, the offender was sentenced to five years' imprisonment resulting in slightly less than two years after accounting for remand time and ordering no probation. Justice Langston

⁴¹ *Ibid* at paras 6-7.

recommended that she be placed in a healing lodge and that culturally-relevant supports from her community be provided to her while she was incarcerated. Though Barbara Holmes would ultimately have to serve time in prison, she was nonetheless given the lowest sentence that the judge felt he was able to give and the focus of her sentencing and its outcomes was geared toward her Indigenous heritage. No principles of sentencing were offered in support of this position, with the exception of section 718.2(e), and no cases were cited as justification for the sentence. Barbara Holmes was the sole focus of the hearing that sentenced her for manslaughter.

Despite the fact that submissions of counsel were seen as a controlling factor in sentence outcome by the court, this case still involved a different methodology than what is found in the traditional sentencing process. The fact that the court felt constrained by the submissions of counsel with respect to sentence suggests that the role played by counsel, in particular the Crown, is an important one in allowing the provisions to impact upon sentence. Where the Crown continues to suggest sentences that are in line with those for non-Indigenous offenders, the courts will have to deal with those submissions and may feel obliged to respect them.

Evident in this decision and others like it is a palpable sense of frustration with the tools supplied to sentencing judges to deal with Indigenous offenders in cases of serious and violent crime. This decision could be quoted in its entirety but the excerpt above provides a clear illustration of the conclusions reached in first principles' cases. Though Barbara Holmes was not given a suspended sentence, the final outcome was not reached through a traditional analysis but through an attempt to conduct a sentencing focused on the offender as an Indigenous person rather than as an offender who is Indigenous. The first principles' cases were not always this direct in their indictment of the sentencing regime nor did they always include judicial recognition of their own limitations with respect to the positions of the parties, but they had in common an approach that viewed the traditional methods of sentencing as having little relevance to Indigenous offenders and minimizing their consideration. The outcomes of these cases varied but the tendency to emphasize the offender as an individual and an Indigenous person remained their central focus.

D. Methodologies vs. Outcomes

The differences between methodologies are fine distinctions but they are important ones. Neither of these processes nor the traditional sentencing model were consistent with crafting sentences where the *Gladue* provisions ultimately impacted upon sentence. A judge who sentenced

an Indigenous person from the first principles of *Gladue* might still conclude that the offender must be imprisoned for a prolonged period for their own sake or that of the public. A judge who undertook a textbook traditional sentencing might equally find that the offender was best served by spending a bare minimum of time in prison and engaging instead with a restorative justice process. No particular methodology was the handmaiden of any outcome. However, not all outcomes are created equal. A judge who determined the quantum of sentence and then deducted six months or a year from that figure for *Gladue*, while they were fulfilling their remedial duty to reduce the over-incarceration of Indigenous people, had not really considered the directive to sentence Indigenous offenders differently. Such a judge would be following the letter of the law but not the spirit of the different methodology imagined in *Wells*.

In those cases, of which there were several, there was doubtless an impact on the sentence in practice but it was formalistic rather than fundamental. By the same token, some first principles analyses of an offender resulted in a lengthy term of imprisonment. While this would not be understood as a remedial application of the provisions, in that the sentence was not noticeably different from what it might have been for a non-Indigenous offender, it did comprise a different methodology. The question of methodology and sentence impact were therefore treated as separate ones and while they were found together in some cases, they were not symbiotic.

The intention here is to engage in a qualitative evaluation of the operation of the provisions in order to classify them. The individualization of the sentencing process renders it more art than science, and the alchemy of sentencing does not lend itself easily to having its constituent elements examined. The whole is greater than the sum of its parts, even in the rare situation where all those parts are visible, as such the divisions between methodologies were not as clean where those decisions depended on Indigenous comparator cases rather than a first principles' approach. This paper discusses both the impact or lack of impact on sentence outcomes separately from the approaches taken in sentencing by the courts. Therefore, a first principles' case did not necessarily equate to an application of the *Gladue* provisions nor a traditional methodology to their rejection.

5. Gladue's Impact on Sentence Outcome

As noted in chapter one,⁴² it was assumed at the outset of this study that the *Gladue* provisions were likely to manifest in cases involving the sentencing of offenders for serious and violent crime as a reduction in sentence rather than as alternatives to imprisonment. This is not to say that there would not be situations where the offender served no time in prison, however, this would remain a sentence reduction in the broadest sense. Even a decision that did not see the offender sentenced to a term of imprisonment but to a suspended sentence with probation – of which there was one among these cases⁴³ - still constitutes a reduction in sentence compared to the body of manslaughter offenders examined here. A sentence reduction for the purposes of this paper was therefore a reduction in the length of sentence compared to a comparable offender in comparable circumstances who was found not to have been affected by the systemic and background factors. Because of the wide variety of sentences available for manslaughter, such a reduction had to be substantial to qualify or would have to have been explicitly identified as such by the presiding judge. A sentence reduction that could be attributed to the provisions was one possible indicator suggesting that the provisions had impacted upon sentence but it was not analogous to a different methodology.

Much of the *Gladue* analysis was conducted in an unspoken fashion. This is not merely because it is impossible to assign a numerical value to the suffering of individuals – let alone cultures – but because it is difficult to assign such a value to virtually any aspect of sentencing, though that is the final form the product takes. This, combined with the potentially slippery problem of public reaction to applying discounted sentencing to Indigenous people, means that the impact on the provisions upon the final sentence was often not explicit but could be ascertained by comparing such decisions to one another and to the comparative data between Indigenous and non-Indigenous offenders discussed in the preceding chapter.

These cases have been divided into two broad categories based on the manner in which the *Gladue* provisions were found to have impacted upon sentence or not. The remaining few cases were decisions where it was difficult to ascertain whether or not any form was given to the provisions. There were cases where the impact of the provisions were made explicit by the judge who stated that a particular action was being taken with respect to the offender as a direct result of

⁴² See page 3.

⁴³ *R v Alphonse*, 2018 BCSC 2045.

the operation of the provisions. Some of these cases focused on restorative justice, either in the form of a suspended sentence⁴⁴ or reformatory time plus probation,⁴⁵ others included an explicit reduction in sentence attributed to *Gladue*.⁴⁶ Some viewed *Gladue* as being satisfied either in the submissions of counsel⁴⁷ or through a joint submission to the court,⁴⁸ while others attributed a refusal to impose a period of parole ineligibility to the operation of the provisions.⁴⁹ Judges sometimes decided that the impact of *Gladue* must manifest in the form of a prison sentence because they believed that prison was the best place for the offender to receive culturally-relevant programming that might serve them in their rehabilitation and that prison was therefore necessary for the good of the offender.⁵⁰

In other cases the impact on sentence was not outlined explicitly by the trial judge but was nonetheless still apparent. These decisions fell into two categories. The first involved judges noting that *Gladue* had informed the sentence handed down by the court but it was not stated how nor was it always readily apparent. In the second category, offenders received sentences that were clearly lower than those in line with jurisdictional averages. These decisions often, but not always, involved reformatory time and probation, though this was frequently a result of long periods spent on remand. Over 90% of Indigenous offenders examined in this study were not released on bail at any time between their arrest and sentencing and so there was no clear connection between long periods on remand and reformatory sentences. It should be noted with respect to bail, that the same was true for non-Indigenous offenders. While non-Indigenous offenders were slightly more likely to have been released on bail at some point leading up to sentencing, they were not released at all in around 87% of cases. As a point of interest, a total of 41 offenders, both Indigenous and non-Indigenous, received net prison sentences of two years or less – including suspended sentences and those sentenced to time served – which accounted for around a quarter of Indigenous offenders and a fifth of non-Indigenous offenders.

There were a variety of justifications provided by judges for why the provisions would not have an impact on sentence for an offender. Some judges determined that the *Gladue* factors had

⁴⁴ *Ibid.*

⁴⁵ *R v Taniskyahayinew*, 2018 BCSC 296; *R v Okewmow*, 2016 MBQB 240.

⁴⁶ *R v Mitchell, Mearo and Jocko*, 2016 ONSC 5339; *R v David*, 2017 BCSC 877; *R v Dick*, 2014 MBQB 187.

⁴⁷ *R v Abraham*, 2014 MBQB 242.

⁴⁸ *R v Brerrton*, 2013 BCSC 1029.

⁴⁹ *R v Halkett*, 2013 SKQB 41; *R v Fiddler*, 2018 SKQB 197.

⁵⁰ *R v Johnny*, 2015 BCSC 615.

a limited effect on the life of the offender⁵¹ while others noted that there could be no impact because counsel had failed to make submissions connecting the *Gladue* factors to the offender.⁵² The most common reasoning provided by judges was that the circumstances of the offence were such that this was precisely the sort of case envisioned by the Supreme Court when they cautioned that there will be cases where the sentence would be the same for an Indigenous offender as for a non-Indigenous one.⁵³ Some cases saw the court determine there would be no impact on the basis that both counsel had proposed a term of imprisonment and the judge felt constrained by those submissions.⁵⁴ Related to this, some decisions determined there would be no impact based on the need to protect Indigenous victims of crime or from a need to tailor the sentence to reflect local conditions in order to emphasize denunciation and deterrence.⁵⁵

Cases in which the judge did not explicitly state that there would be no impact followed many of the same forms as those in which the judge's reasoning was stated explicitly but without the court taking the step of officially declining to do so. There were cases waived by counsel,⁵⁶ suggestions that prison would be necessary for the offender,⁵⁷ or statements that the sentence had been determined by a joint submission or submissions of counsel.⁵⁸ The remainder of cases contained no substantive discussion of the second stage of *Gladue* and moved on to the imposition of long sentences.

Finally there were cases where the existence of a sentence in the mid-range and no explicit discussion of the impact or lack of impact of the provisions on sentence made it impossible to assess the judge's reasoning with respect to the provisions.⁵⁹ These cases were few, representing only three of the total. Unfortunately, not all sentencing decisions are written with academic analysis in mind and sometimes they are not as neatly divided as one might like. With that in mind, it is still possible to examine these divisions to come to some general conclusions about how the provisions did or did not impact sentence and to what types of manslaughter such impacts were being most frequently applied.

⁵¹ *R v Morris*, 2018 BCSC 803.

⁵² *R v Decoine-Zuniga*, 2014 ABQB 155.

⁵³ *R v Wabason*, 2016 ONSC 349; *R v Langevin*, 2018 ONSC 6020; *R v Beaulieu*, 2014 BCSC 2068; *R v Woodford*, 2016 MBQB 72; *R v Buggins*, 2014 NWTSC 24; *R v Padluq*, 2016 NUCJ 22; *R v Sateana*, 2016 NUCJ 20.

⁵⁴ *R v Laglace*, 2013 BCSC 1044; *R v Wesley*, 2013 ONSC 7197.

⁵⁵ *R v Peter*, 2014 NUCJ 28; *R v Geetah*, 2015 NUCJ 10.

⁵⁶ *R v Grenier*, 2013 BCSC 1894.

⁵⁷ *R v Nicholls*, 2015 ONSC 8136.

⁵⁸ *R v Neel*, 2014 BCSC 1989.

⁵⁹ *R v Bourque*, 2015 NWTSC 48; *R v Charles*, 2013 SKQB 139; *R v DSA*, 2017 NWTSC 22.

A. Different Methodology Decisions

Of the 80 decisions involving Indigenous offenders, 24 were decided according to a different methodology. Nineteen of those offenders were convicted for a drug and alcohol manslaughter, four in connection with a near murder, and one for manslaughter involving arson. In total there were eight offenders classified as first principles' cases, all of which were drug and alcohol manslaughters. Like all cases in this study, the manner in which *Gladue* impacted sentence or not varied greatly in both the different methodology categories and the similar methodology one. For those decisions involving a first principles' consideration of *Gladue*, in only two cases did the provisions not appear to have an impact on sentence, in the remaining six the impact was discernible in the form of low sentences.

Sixteen offenders were sentenced in the Indigenous comparator cases category. Of these, 11 were drug and alcohol manslaughters, four near murders, and one involved arson. One issue arising with the decisions from the Indigenous comparator cases, was that in those jurisdictions where there is a large Indigenous population it was difficult to establish if the offender was being sentenced in comparison to Indigenous offenders as a matter of methodology or whether the cases in the jurisdiction overwhelmingly involved Indigenous offenders. It is difficult to parse this question, though it may be an academic distinction in the end. Among these decisions, there were six cases in which the provisions were not found to have impacted the sentence, eight in which an appreciable impact on the outcome of sentence could be observed, and two in which no conclusion could be reached.

Table 5.3 –Different Methodology - Gladue Impact on Sentence

	Impact	No Impact	Unclear	Impact %
First Principles	6	2	-	75.00
Comparator Cases	8	6	2	50.00
All	14	8	2	58.33

Together, the cases sentenced according to a different methodology accounted for 30% of all Indigenous offenders in this study and represented the largest proportion of cases in Saskatchewan at 55% - the only jurisdiction in which a different methodology was employed for the majority of Indigenous offenders. That Saskatchewan is leading the way in its treatment of Indigenous offenders has been remarked upon by judges in Alberta, who have suggested that more

Indigenous people would benefit from the regime operating in that province.⁶⁰ Different methodology cases accounted for half of those from the Northwest Territories and 40% from Alberta. Approximately one quarter of cases from British Columbia and Ontario were sentenced according to a different methodology, one third of those in Nunavut, and a single case from the eleven arising in Manitoba.

Table 5.4 – Different Methodology – Jurisdiction

	First Principles	Comparator Cases	All	Percentage of Total
Ontario	2	1	3	25.00
British Columbia	3	4	7	25.92
Alberta	1	1	2	40.00
Saskatchewan	-	5	5	55.55
Manitoba	-	1	1	09.09
Yukon	-	-	-	-
Northwest Territories	2	1	3	50.00
Nunavut	-	3	3	33.33
All	8	16	24	30.00

Table 5.5 – Different Methodology – Categories of Manslaughter

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Near Murder	2	2	-	50.00
Drug/Alcohol	11	6	2	57.89
Home/Robbery	-	-	-	-
Arson	1	-	-	100
Unusual	-	-	-	-
One Punch	-	-	-	-
All	14	8	2	58.33

i. First Principles' Cases

Distribution

These decisions represented the closest thing to an entirely different approach to the sentencing of Indigenous offenders. As a consequence they were rare, representing only one in ten Indigenous offenders. Notwithstanding their rarity, they were the category seeing the highest likelihood of the *Gladue* provisions impacting sentence outcome at 75%, compared to an average of 47.5% in decisions overall. Importantly, they were also made up entirely of drug and alcohol cases and accounted for nearly one in five of the Indigenous offenders in that category, twice their proportion among offenders Indigenous overall. They were not confined to any particular jurisdiction and were found in Ontario, British Columbia, Alberta and the Northwest Territories. This is opposed to Indigenous offenders sentenced in the Indigenous comparator cases category which appeared in every jurisdiction except for the Yukon.

⁶⁰ *R v Holmes*, 2018 ABQB 916 at para 13.

Outcomes

In this category, there were only two cases in which the provisions clearly did not impact the outcome of the sentence. One involved a killing in which a young man in a state of extreme intoxication beat a 65-year-old elder to death who was suffering from cancer.⁶¹ Justice Fitzpatrick of the Ontario Superior Court, sitting in Thunder Bay, determined that the provisions could not be applied on the basis that both counsel had proposed terms of imprisonment and sentenced the offender, Mr. Wesley, to eight years' imprisonment. In another decision from the Northwest Territories, a woman stabbed her common-law husband once in the back following an alcohol-fueled argument.⁶² The judge decided that *Gladue* would not impact sentence outcome based on the need to protect Indigenous victims. Justice Charbonneau noted that Indigenous victims were no less worthy of protection than non-Indigenous ones and that the rights of both must be balanced to achieve a fit sentence. As a consequence, she endorsed the joint submission of five years' imprisonment. This sentence accorded with the territorial average for drug and alcohol manslaughters in the Northwest Territories.

In the remaining six cases the impact of the provisions on sentence outcome was ascertainable. At no point in any of these decisions did the judge state that *Gladue* was being utilized to lower the sentence but it was clear in the final outcome that lower sentences were the result of an application of the provisions. Three cases involved the imposition of net sentences resulting in reformatory time.⁶³ In another decision, the offender was given a sentence of two years to be served in a federal penitentiary followed by three-years' probation.⁶⁴ Finally, two offenders received sentences of imprisonment below what would be expected given the circumstances of the offence and the offender.⁶⁵ Altogether, there was no impact on the final sentence in two cases in this category and there was an appreciable impact in the remaining six, for an overall impact rate of 75%. All cases in this category were drug and alcohol manslaughters.

⁶¹ *R v Wesley*, 2013 ONSC 7197.

⁶² *R v Villeneuve*, 2017 NWTSC 6.

⁶³ *R v Smith*, 2017 BCSC 2513; *R v Holmes*, 2018 ABQB 916; *R v Thomas*, 2016 ONSC 7944.

⁶⁴ *R v Robinson*, 2017 BCSC 681.

⁶⁵ *R v Williams*, 2013 BCSC 1082; *R v Tetso*, 2018 NWTSC 36.

ii. Indigenous Comparator Cases

Distribution

These decisions were, after the first principles' cases, the most likely to see the sentence impacted by the provisions, which occurred at a rate of 50%. Together they represented one fifth of all Indigenous offenders and, unlike the first principles' cases, they were not limited to drug and alcohol manslaughters, but those represented nine of the total, along with four near murders, and a single case involving arson. These cases were found in every jurisdiction with the exception of the Yukon and were most common in Saskatchewan, where they accounted for more than half. Ontario, Alberta, Manitoba and the Northwest Territories each produced one case in this category, there were three from Nunavut, four from British Columbia, and five from Saskatchewan.

Outcomes

In eight cases the provisions impacted the final sentence outcome. In one case the offender was sentenced to three years and eight month's imprisonment which, after accounting for remand, resulted in a sentence of two years less a day and three-years' probation.⁶⁶ Justice Keyser of the Manitoba Court of Queen's Bench, sitting in Winnipeg, justified this sentence on the basis that the offender would be best served by a sentence geared toward returning him to the community so he could reconnect with his Indigenous heritage while noting that the analysis must be holistic, and that there could not be an automatic reduction in sentence for an Indigenous person.

In another case, the provisions were applied following the same rationale. The offender was sentenced to slightly more than three years and three months' imprisonment, resulting in a sentence of two years less a day and three-years' probation for the beating death of a man he discovered sexually assaulting an unconscious woman.⁶⁷ Justice Baird of the British Columbia Supreme Court, sitting in Nanaimo, connected the probation order to the need to engage in a restorative justice process with the family of the victim but he did not link this directly to the *Gladue* provisions. In the remaining six cases, the impact of the provisions could be seen in the

⁶⁶ *R v Okemow*, 2016 MBQB 240.

⁶⁷ *R v Touchie*, 2015 BCSC 615.

form of sentences lower than might otherwise be expected. Three of the decisions were drug and alcohol killings,⁶⁸ two were near murder cases,⁶⁹ and one involved a death by arson.⁷⁰

Two decisions involving Indigenous comparator cases, one near murder and one drug and alcohol manslaughter, did not see an impact on sentence quantum but instead saw the judge tie prison time to the needs of the offender as an Indigenous person. The court justified this on the basis that prison was necessary for the offender to rehabilitate and that they would be aided by the Indigenous-specific programming available in the federal correctional system.⁷¹ While it may not be satisfying to think of the need for prison as an impact of the *Gladue* provisions, this scenario remains one in which the judge has crafted a sentence they feel will be the most beneficial for the offender given their status as an Indigenous person.

In four cases, the *Gladue* provisions clearly did not impact the final sentence. In two of these decisions, both drug and alcohol manslaughters, this was demonstrated by the imposition of long terms of imprisonment, albeit preceded by lip service to the importance of alternative sanctions for Indigenous offenders, albeit ones not permitted by the particular facts of those cases.⁷² Two other cases, one a near murder and the other a drug and alcohol manslaughter, also saw no impact as demonstrated by long sentences but the judges did not pay any heed to alternatives to incarceration and instead proceeded directly to sentencing.⁷³ Finally, there were two drug and alcohol decisions in which it was not possible to come to any conclusion about whether or not the provisions were applied.⁷⁴ In all, eight decisions involving Indigenous comparator cases saw the provisions impact sentence, six did not, and two were not sufficiently clear to make a determination resulting in an sentence impact rate of 50%. This impact rate was below that of the first principles' cases but above those in the traditional methodology categories.

⁶⁸ *R v Peters*, 2014 BCSC 1009; *R v Johnson*, 2017 BCSC 1240; *R v Spence & Debassige*, 2017 ONSC 4749.

⁶⁹ *R v Isadore*, 2016 ABQB 83; *R v Kappi*, 2016 NUCJ 28.

⁷⁰ *R v Ussak*, 2013 NUCJ 09.

⁷¹ *R v Peter*, 2014 NUCJ 28; *R v Johnny*, 2015 BCSC 615.

⁷² *R v Stonechild*, 2017 SKQB 138; *R v Kurek* 2018 SKQB 168.

⁷³ *R v Stewart*, 2015 SKQB 182; *R v Moostoos*, 2017 SKQB 12.

⁷⁴ *R v Charles*, 2013 SKQB 139; *R v DSA*, 2017 NWTSC 22.

B. Traditional Methodology Cases

Distribution

Decisions sentenced according to the traditional methodology made up the majority of cases involving Indigenous offenders, occurring in seven out of ten decisions. In 57% of cases involving drug and alcohol manslaughters and 85% of near murder cases, Indigenous offenders were sentenced according to the traditional methodology. These cases were found in all provinces and territories, and Manitoba led with nearly 82% of offenders sentenced in this manner. Ontario and British Columbia saw approximately 75% of Indigenous offenders sentenced according to the traditional methodology with Alberta and Saskatchewan slightly lower at 60% and 45%, respectively. This was also true of half of offenders in the Northwest Territories, two-thirds of those in Nunavut and of the single decision involving an Indigenous offender in the Yukon.

Table 5.6 – Similar Methodology – Gladue Impact on Sentence

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
All	23	32	1	41.07

Outcomes

Twenty-three decisions in this category saw the provisions impact sentence. One of those cases was a drug and alcohol manslaughter involving an already low sentence reduced to reformatory time and three-years' probation.⁷⁵ In that case, Justice Griffin of the British Columbia Supreme Court, sitting in Vancouver, imposed this sentence on the offender despite the fact that he considered the crime a particularly vicious and unnecessary killing. Still, he believed the offender would be better served by treatment programs related to her issues with alcohol. With four offenders, three in the drug and alcohol category and one involving a robbery, the judge explicitly applied the provisions as a sentencing discount. The two offenders in one of the drug and alcohol cases received a reduction of 5-months' imprisonment bringing the total down to a reformatory sentence,⁷⁶ the remaining drug and alcohol offender received a reduction in sentence of one year,⁷⁷ as did the offender in the robbery manslaughter.⁷⁸ Finally, in one near murder case,

⁷⁵ *R v Taniskishayinew*, 2018 BCSC 296.

⁷⁶ *R v Mitchell, Mearo, and Jocko*, 2016 ONSC 5339.

⁷⁷ *R v David*, 2017 BCSC 877.

⁷⁸ *R v Dick*, 2014 MBQB 187.

the court decided that the offender would be better served by the programming available in the federal correctional system.⁷⁹

In two drug and alcohol cases involving a total of three offenders, the judge determined that the provisions had already been applied because the sentence proposed in the joint submission was low enough to have incorporated them.⁸⁰ Finally, in one near murder and one drug and alcohol case arising in Saskatchewan, the judges refused to impose a period of parole ineligibility on the offenders in recognition of their status as Indigenous people.⁸¹ Eight of the ten cases in this category in which the judge stated explicitly that *Gladue* would impact sentence were drug and alcohol killings.

In one case, the offender was given a suspended sentence and three-years' probation after stabbing his friend to death in a drunken fight in the home shared by their girlfriends.⁸² Though it was never stated outright, the final determination of sentence immediately followed the judge's remarks that section 718.2(e) should form part of any consideration of sentence though he drew no direct connection. In seven cases, the judges remarked only that *Gladue* had been considered in crafting the ultimate disposition of the case. In some of these cases it was difficult to determine precisely what the impact on sentence had been. However, as the judge had explicitly stated that the provisions had been taken into account in crafting the sentence, they were counted as cases in which sentence outcome had been impacted by *Gladue*. Among these cases were a single arson in which five people were killed and for which the offender received a sentence of life imprisonment,⁸³ a single drug and alcohol manslaughter,⁸⁴ and five near murder offenders⁸⁵- with one case involving three offenders.⁸⁶ Finally, one near murder and one drug and alcohol offender were each given net sentences involving reformatory terms and probation,⁸⁷ while one drug and

⁷⁹ *R v Nicholls*, 2015 ONSC 8136.

⁸⁰ *R v Brerrton*, 2013 BCSC 1029; *R v Abraham*, 2014 MBQB 242.

⁸¹ *R v Halkett*, 2013 SKQB 41; *R v Fiddler*, 2018 SKQB 197.

⁸² *R v Alphonse*, 2018 BCSC 2045.

⁸³ *R v Flett*, 2013 MBQB 124.

⁸⁴ *R v Sayine*, 2014 NWTSC 85.

⁸⁵ *R v Scotchman*, 2016 BCSC 652; *R v Ndlovu*, 2017 MBQB.

⁸⁶ *R v Ryle*, 2013 MBQB 33.

⁸⁷ *R v Gray*, [2016] OJ No 1915; *R v Anderson*, 2018 MBQB 13.

alcohol offender,⁸⁸ one home invasion offender⁸⁹ and a single one-punch offender⁹⁰ received sentences lower than might be expected in the circumstances.

A total of 32 offenders saw no appreciable impact on sentence outcome. In seven cases, the impact of the provisions were rejected explicitly on the basis that the sentence for those offenders would be the same as it would be for a non-Indigenous offender. Judges made this finding with respect to offenders in four drug and alcohol cases,⁹¹ two near murder cases,⁹² and one home invasion case.⁹³ In a single near murder case, the judge declined to allow the provisions to impact sentence length as both counsel had proposed time in prison and he felt bound by those submissions.⁹⁴

In three cases, the court decided that the circumstances of the offence and the offender were such that there must be prison time and therefore the provisions could not operate to lower the sentence. This occurred in one drug and alcohol case,⁹⁵ one case involving unusual circumstances,⁹⁶ and one involving arson.⁹⁷ In one near murder case the judge refused to apply the provisions on the basis that local conditions, there the prevalence of gun violence in Nunavut, dictated that a prison sentence was necessary.⁹⁸ In one near murder and one drug and alcohol decision, the judge declined to apply the provisions on the basis that the relevance of the *Gladue* factors to the life of the offender had not been explained by counsel and therefore they could not be considered.⁹⁹ In a single one-punch manslaughter, the judge simply determined that the *Gladue* factors had a limited effect on the life of the offender and therefore it was not appropriate to consider them.¹⁰⁰

In one near murder case and one drug and alcohol case, defence counsel waived the consideration of the provisions.¹⁰¹ In one drug and alcohol decision, the judge paid lip service to

⁸⁸ *R v Makpah*, 2015 NUCJ 34.

⁸⁹ *R v Martinez*, 2015 BCSC 653.

⁹⁰ *R v Marchand*, 2014 BCSC 2554.

⁹¹ *R v Beaulieu*, 2014 BCSC 2068; *R v Woodford*, 2017 MBQB 72; *R v Buggins*, 2014 NWTSC 24; *R v Padluq*, 2016 NUCJ 22.

⁹² *R v Langevin*, 2018 ONSC 6020; *R v Sateana*, 2016 NUCJ 20.

⁹³ *R v Wabason*, 2016 ONSC 349.

⁹⁴ *R v Laglace*, 2013 BCSC 1044.

⁹⁵ *R v Swampy*, 2015 ABQB 319.

⁹⁶ *R v Cote*, 2013 BCSC 2424.

⁹⁷ *R v Marion*, 2014 BCSC 1425.

⁹⁸ *R v Geetah*, 2015 NUCJ 10.

⁹⁹ *R v Decoine-Zuniga*, 2014 ABQB 155; *R v Houle*, 2013 ABQB 70.

¹⁰⁰ *R v Morris*, 2018 BCSC 803.

¹⁰¹ *R v Hanley*, 2014 BCSC 1373; *R v Grenier*, 2013 BCSC 1894.

the need to consider alternatives to incarceration before moving on to impose a sentence of considerable length.¹⁰² In two drug and alcohol cases¹⁰³ and six near murder cases,¹⁰⁴ the presence of a joint submission meant there was no discussion of the need to apply the provisions. In addition, in two drug and alcohol decisions¹⁰⁵ and three near murder cases¹⁰⁶ there was no suggestion of sentence impact by the judge and the offenders received long sentences. Finally, in one drug and alcohol case it was not clear if the provisions had impacted sentence.¹⁰⁷ In all, 23 cases saw an impact on sentence resulting from the *Gladue* provisions, 32 involved no appreciable impact, and one was not sufficiently clear to make a determination. This produced an overall rate of sentence impact of 41% for offenders sentenced in accordance with a traditional methodology.

6. Comparative Analysis of Outcomes Between Methodologies

The manner of sentence impact varied considerably between offenders as did the rates of sentence impact between those decisions involving traditional and different methodologies and within those different methodologies. However, there were some patterns which could be discerned when examining this information, although some conclusions are necessarily limited by the small sample sizes involved in some jurisdictions, as was seen in discussions of sentence quantum in the preceding chapter.

Slightly over 58% of all cases sentenced according to a different methodology saw the *Gladue* provisions impact sentence in some fashion and in all jurisdictions with the exception of the Yukon and Saskatchewan. While the Northwest Territories, Manitoba and Alberta had a one hundred percent impact rate for different methodology cases, each of those jurisdictions only represented a single case. Nunavut had a 40% impact rate among five cases in the territory and Ontario had a rate of 66% among three cases in that jurisdiction. British Columbia, with the largest number of different methodology cases at seven, had an impact rate of 85%.

The twenty-four cases involving different methodologies were so widely distributed between different provinces and territories and some jurisdictions produced so few cases that it

¹⁰² *R v George*, 2016 BCSC 2291.

¹⁰³ *R v Skead*, 2017 ONSC 179; *R v Cote*, 2016 SKQB 249.

¹⁰⁴ *R v Neel*, 2014 BCSC 1989; *R v Saar*, 2014 BCSC 847; *R v Quigley*, 2016 BCSC 2184; *R v Strongquill*, 2016 SKQB 397; *R v Murphy*, 2016 YKSC 48; *R v Van Eindhoven*, 2016 NUCJ 19.

¹⁰⁵ *R v Baldwin*, 2017 ONSC 5040; *R v Camille*, 2018 BCSC 1595.

¹⁰⁶ *R v Cheveldayoff*, 2018 ONSC 6154; *R v Sundman*, 2018 BCSC 1337; *R v Bishop*, 2015 NUCJ 28.

¹⁰⁷ *R v Bourque*, 2015 NWTSC 48.

was not possible to make any definitive statements about the rates of application in those jurisdictions for cases employing a different methodology.¹⁰⁸ In many of the jurisdictions examined, there were so few cases sentenced according to a different methodology it was not possible to make statements about the rate of sentence impact that would be statistically significant. Similarly, looking within and comparing the first principles' and Indigenous comparator categories also does not yield enough cases to make definitive statements about their rate of sentence impact in a given province or territory, as only British Columbia and Saskatchewan had more than three offenders sentenced according to a different methodology. Notwithstanding this difficulty, within the different methodology cases from all provinces and territories considered together, there was a clear divide. First principles' cases saw an impact rate of 75% and Indigenous comparator cases had an impact rate of only 50%.

Table 5.7 – Different Methodology –Impact on Sentence – Jurisdiction

	Impact on Sentence	No Impact Sentence	Unclear	Impact Percentage
Ontario	2	1	-	66.66
British Columbia	6	1	-	85.71
Alberta	2	-	-	100
Saskatchewan	-	4	1	00.00
Manitoba	1	-	-	100
Yukon	-	-	-	-
NWT	1	1	1	33.33
Nunavut	2	1	-	66.66
All	14	8	2	58.33

The number of cases sentenced according to a traditional methodology was large enough and sufficiently well distributed among jurisdictions that some conclusions could be drawn from intra-jurisdictional comparisons. The overall rate at which the *Gladue* provisions were found to impact sentence in some manner among the traditional methodology cases was approximately 41%. The nine cases in Ontario saw an impact rate of 33% and the twenty in British Columbia had a similar rate at 35%. Likewise, the three cases in the Northwest Territories saw an impact rate of 33% and the six in Nunavut were half that rate at 16%. The only two provinces in which the impact rate exceeded half were the five cases in Saskatchewan at 60% and the nine cases in Manitoba at 89%. No traditional methodology cases in Alberta saw the provisions impact sentence outcome. While these were not large numbers of cases to deal with, they were sufficient to allow a slightly clearer picture within different provinces and territories than did cases from the different methodology categories.

¹⁰⁸ For example, Manitoba which had one case and Alberta which had two.

Table 5.8 – Similar Methodology –Impact on Sentence – Jurisdiction

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Ontario	3	6	-	33.33
British Columbia	7	13	-	35.00
Alberta	-	3	-	00.00
Saskatchewan	3	2	-	60.00
Manitoba	8	1	-	88.88
Yukon	-	1	-	00.00
NWT	1	1	1	33.33
Nunavut	1	5	-	16.66
All	23	32	1	41.07

It is fairly clear – even with the limited number of cases in the different methodology categories – that where these methodologies were employed, the *Gladue* provisions were more likely to impact sentence outcome on average at a rate of roughly 60%, against 40% for the traditional methodology. Where a different methodology was used, the impact of the *Gladue* provisions was more likely on average, however, it was unlikely in any given jurisdiction that a different methodology would be used to sentence Indigenous offenders. As noted in Table 5.4, the likelihood of a different methodology being employed to sentence an Indigenous offender was low, with only Saskatchewan and the Northwest Territories reaching the halfway mark and the overall average brought down to 30% by the low numbers produced in Ontario, British Columbia and Manitoba. Therefore, while an Indigenous offender frequently fared better when sentenced according to a different methodology, the likelihood of that coming to pass was generally quite low.

Table 5.9 - Proportion of Similar and Different Methodologies by Jurisdiction

	Same Methodology	Same Methodology Percentage	Different Methodology	Different Methodology Percentage
Ontario	9/12	75.00	3/12	25.00
British Columbia	20/27	74.07	7/27	25.92
Alberta	3/5	60.00	2/5	40.00
Saskatchewan	4/9	44.44	5/9	55.55
Manitoba	9/11	81.81	2/11	18.18
Yukon	1/1	100.0	0/1	-
NWT	3/6	50.00	3/6	50.00
Nunavut	6/9	66.66	3/9	33.33
All	56/80	70	24/80	30

When examined across categories of manslaughter a similar pattern emerged to that seen in chapter three, showing an appreciable difference in the treatment of near murder and drug and alcohol cases. The robbery and home invasion, arson, unusual circumstance, and one-punch cases had too few incidents from which to draw any conclusions about sentencing patterns. What was immediately apparent about the near murder category is that in over 85% of those cases, a traditional methodology was employed to sentence Indigenous offenders. By contrast, in drug and

alcohol killings, only 57% of cases were sentenced according to the traditional methodology used in sentencing non-Indigenous offenders. As with the lower average sentence quantum for Indigenous offenders in drug and alcohol manslaughters compared to non-Indigenous offenders, it is clear that among Indigenous offenders, drug and alcohol cases were also treated more favourably from the standpoint of *Gladue* application and impact than were near murder killings.

Table 5.10 - Proportion of Similar and Different Methodologies by Category

	Same Methodology	Same Methodology Percentage	Different Methodology	Different Methodology Percentage
Near Murder	23/27	85.18	4/27	14.81
Drugs and Alcohol	25/44	56.81	19/44	43.18
Home/Robbery	3/3	100.0	-	-
Arson	2/3	66.66	1/3	33.33
Unusual Circumstances	1/1	100.0	-	-
One Punch	2/2	100.0	-	-
All	56/80	70.00	24/80	30.00

Where a different methodology was employed in sentencing offenders for near murder cases, the *Gladue* provisions were likely to impact sentence in 50% of all cases, in drug and alcohol manslaughters this number was closer to 58%. Unfortunately, there were only four near murder decisions against which to compare the 19 drug and alcohol cases in the different methodology categories and therefore it is difficult to draw any definitive conclusions about sentence impact in near murder cases sentenced according to a different methodology. As noted, where the first principles' approach was used, the rates of sentence impact for drug and alcohol manslaughters increased to 75%.

Table 5.11 – Different Methodology – Categories of Manslaughter

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Near Murder	2	2	-	50.00
Drug/Alcohol	11	6	2	57.89
Home/Robbery	-	-	-	-
Arson	1	-	-	100
Unusual	-	-	-	-
One Punch	-	-	-	-
All	14	8	2	58.33

The traditional methodology category had more cases and a greater geographical distribution and so a better comparison could be made between near murder and drug and alcohol categories here. The sample set of 23 near murder decisions using this methodology produced an average sentence impact rate of around 30%. By contrast, the 25 drug and alcohol decisions sentenced according to a traditional methodology saw the *Gladue* provisions impact sentence in 48% of cases. This suggests, like the outcomes of sentencing examined in chapter 3, that drug and alcohol manslaughters were not only receiving lower sentences overall compared to near murder

manslaughter but they were also seeing the provisions impact sentence more frequently than near murders when sentenced according to the traditional methodology. The drug and alcohol cases also held a slight edge in sentence impact in the different methodology category overall and a demonstrably higher rate of impact where a first principles' methodology was employed.

Table 5.12 – Similar Methodology – Categories of Manslaughter

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Near Murder	7	16	-	30.43
Drug/Alcohol	12	12	1	48.00
Home/Robbery	2	1	-	66.66
Arson	1	1	-	50.00
Unusual	-	1	-	100
One Punch	1	1	-	50.00
All	23	32	1	41.07

Every angle from which methodology used and impact on sentence of the *Gladue* provisions could be approached suggests that drug and alcohol cases were given more favourable treatment than near murder cases. This began with the Gladue Report, where nearly 40% of all drug and alcohol cases had a Gladue Report prepared, compared with slightly less than 30% of near murder cases. This pattern continued in the methodology utilized in sentencing offenders. With 43% of drug and alcohol cases sentenced according to a different methodology, such cases were three times more likely to receive that treatment than near murder cases which were sentenced according to a different methodology in only 15% of cases. Drug and alcohol cases represented nearly 80% of all cases sentenced according to a different methodology, as opposed to just under 17% for near murders.

This pattern of differential treatment between near murder and drug and alcohol manslaughters continued within the different methodology categories. Drug and alcohol cases represented close to 70% of all decisions in the Indigenous comparator cases category, compared to only 25% for near murder cases. Drug and alcohol cases also represented all cases in which the first principles' methodology was employed. Among the combined cases sentenced according to a different methodology, drug and alcohol cases were slightly more likely to see the *Gladue* provisions impact sentence at 58%, compared to only 50% for near murder cases.

The preference for the provisions impacting sentence in drug and alcohol cases continued in decisions sentenced according to the traditional methodology. Here, the *Gladue* provisions impacted on sentence nearly 50% of the time for offenders sentenced for drug and alcohol manslaughters compared to 30% for offenders in the near murder category. Altogether, judges were substantially more likely to employ either of the different methodologies when sentencing

offenders facing a drug and alcohol manslaughter than a near murder. Finally, when considering all decisions together without reference to the methodology used, drug and alcohol manslaughters saw the *Gladue* provisions impact sentence in approximately 52% of cases compared to a comparable figure of 33% for near murder manslaughters.

When the *Gladue* provisions impacted sentence, there was a greater likelihood that this would occur in drug and alcohol cases when a different methodology was used and there was a significantly greater likelihood that they would impact sentence in drug and alcohol cases rather than near murder cases where courts employed a traditional methodology. It appears that sentencing judges were more likely, in every respect, to treat drug and alcohol manslaughters not only as a category of manslaughter to which a different methodology should be utilized but equally as one in which the *Gladue* provisions would more frequently impact sentence outcome. This does not necessarily suggest that the courts were ignoring *Gladue* where drugs and alcohol were not involved but it does suggest that they were more likely to see how the provisions could impact sentence in these cases.

7. Explanations for the difference

What then is the cause of the evident difference in the treatment of drug and alcohol killings compared to near murder killings in both the methodologies used and the impact on sentence? At the conclusion of chapter 3 it was suggested that drug and alcohol killings were viewed by judges as a typically Indigenous form of manslaughter and that due to the role played by intoxication in these offences, they could be connected more readily to prevailing stereotypes around the social conditions affecting Indigenous peoples. It was also suggested that where manslaughters committed by Indigenous peoples departed from these patterns, the offenders in those cases lost the benefit of a sentence reduction that came from the operation of the *Gladue* provisions. The analysis conducted in this chapter with regard to methodology and differences in sentence impact reinforces that conclusion.

As discussed above, the likelihood that a traditional methodology would be used to sentence a given Indigenous offender remained high in all categories of manslaughter. The difference between the rates of similar methodologies between drug and alcohol and near murder were clear. With 85% of near murder cases sentenced according to a traditional methodology and only 57% of drug and alcohol cases receiving the same treatment, some explanation for the

differentials in sentence quantum seen in chapter 3 becomes apparent, that is that Indigenous offenders received slightly lower sentences than non-Indigenous offenders for drug and alcohol killings but received higher sentences for near murder manslaughters. When comparing all methodologies of sentencing, drug and alcohol manslaughters saw an impact rate of slightly over half and near murders saw a rate of only one third. What is clear from the divisions between drug and alcohol and near murder manslaughters is that once a given offender in the near murder category had passed the threshold into either of the different methodology categories, the rate of *Gladue* impact on sentence narrowed considerably compared with a drug and alcohol killing to 58% and 50%.

Table 5.13 – Rates of Impact – All Methodologies - All Categories of Manslaughter

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Near Murder	9	18	-	33.33
Drug/Alcohol	23	18	3	52.27
Home/Robbery	2	1	-	66.66
Arson	2	1	-	66.66
Unusual	-	1	-	00.00
One Punch	1	1	-	50.00
All	37	40	3	46.25

Table 5.14 – Rates of Impact – All Methodologies – All Jurisdictions

	Impact on Sentence	No Impact on Sentence	Unclear	Impact Percentage
Ontario	5	7	-	41.67
British Columbia	13	14	-	48.14
Alberta	2	3	-	40.00
Saskatchewan	3	6	1	30.00
Manitoba	9	1	-	90.00
Yukon	-	1	-	00.00
NWT	2	2	2	33.33
Nunavut	3	6	-	33.33
All	37	40	3	46.25

In respect to both the methodology employed and the impact on sentence, drug and alcohol cases received a more favourable treatment under the *Gladue* regime. Once again, it appears that judges viewed acts of violence perpetrated by Indigenous offenders in the drug and alcohol category as fitting more closely with the conventional cultural image of Indigenous criminality as driven by alcohol consumption. Where judges could make this connection as well as trace the violence perpetrated by the offender back to the experiences of colonialism, family separation, and residential schools for example, they could more readily see their way to applying the *Gladue* provisions. Where the violence was perpetrated by a sober Indigenous offender, or at least one who was not heavily intoxicated, the explanations for the behaviour and the connections to the *Gladue* provisions were not made as readily. This was despite the fact that many individuals who

were sentenced according to the traditional methodology or who did not see an impact on sentence resulting from the *Gladue* provisions, had led lives every bit as traumatizing and in line with prevailing stereotypes as their counterparts.

One potential explanation for the disproportionate number of drug and alcohol cases finding themselves in the different methodology categories as well as greater *Gladue* impact rates, is the existence of large numbers of Indigenous comparator cases in the drug and alcohol category dealing with Indigenous offenders. As noted in chapter three, more than eight in ten drug and alcohol manslaughters examined involved Indigenous offenders. If these numbers hold nationwide and over time, this would explain why cases in that category were more likely to find themselves sentenced under the Indigenous comparator cases methodology. As was discussed in chapter 3, Indigenous offenders tended to receive somewhat lower sentences in those categories when compared with non-Indigenous offenders so this may also be the result of the use of Indigenous comparator cases.

Even if this holds true, it still represents a substantial problem for the application of *Gladue* to manslaughter sentencing. If offenders in drug and alcohol killings were being treated more favourably under the *Gladue* regime because of the circumstances of the offence, it would appear that more is required for the operation of *Gladue* in manslaughter sentencing than merely being affected by the background and systemic factors. It suggests that the circumstances of the offence itself has to align with how Indigenous people are viewed by the courts. While this is clearly beneficial for those offenders who stand convicted of drug and alcohol killings, it does not accord with *Gladue*'s focus on the individual as an Indigenous offender if they are not also seen as having committed an Indigenous offence.

The *Gladue* provisions were being applied, both in methodology and in sentence impact, to a significant proportion of the cases examined in this paper. However, besides the divide between drug and alcohol manslaughters and near murder killings, there did not appear to be a consistent pattern to this application. Much of it appears to result from the judge deciding the case and to counsel arguing sentence. The concluding remarks in the final chapter of this paper offer suggestions for how the parties involved in the sentencing process can work toward a more even-handed application of the provisions to manslaughter and perhaps to sentencing offenders for serious and violent crime more widely.

Chapter Six: Conclusion

1. Introduction

This research started with the question of how the *Gladue* provisions were being applied to the sentencing of offenders for serious and violent crimes and what impact that application was having on sentence. It was stated at the beginning of this paper that from the outset of the research it was assumed that where there was an application of the provisions to a sentence of manslaughter, it would likely manifest as a reduction in sentence. There were some cases where, in reference to *Gladue*, judges determined that prison would best serve the needs of the offender in the long term, either through generalized or Indigenous-specific programming, sentences that resulted in reformatory time and probation, and in very few cases in time served. Despite this, more often than not where an impact was evident, it was in the form of a reduced sentence compared to a comparable non-Indigenous offender.

The fact that the impact of the provisions most often manifested as a reduction in sentence is not the lip service and discount that was initially feared by supporters and detractors of the provisions alike. What emerges from the decisions examined for this paper is a more nuanced landscape. While there were no truly innovative responses to crafting sentences for Indigenous offenders convicted of manslaughter, given the gravity the offence, such outcomes were always unlikely. What does emerge from this research is a sense that some judges are attempting to approach the sentencing of offenders differently and that this different approach will more often impact the final sentence quantum than instances in which a traditional sentencing methodology is used. In the end, lower sentences for Indigenous offenders may be the best outcome that can be expected for the application of the *Gladue* provisions to an offence like manslaughter.

2. Summary of Findings

The perpetrators of manslaughter examined for this study were broadly similar to one another whether Indigenous or non-Indigenous. Most offenders were relatively young men with prior criminal records who were charged with the murder of someone they knew personally, the majority of whom subsequently pleaded guilty to manslaughter. Despite these similarities, Indigenous and non-Indigenous offenders differed in one important respect. On average,

Indigenous offenders received sentences for manslaughter that were some six months shorter than those handed down to non-Indigenous offenders.

This simple difference in sentence outcome, when examined closely, suggests a much more substantial divide between the two groups. The difference in overall sentence does not account for the fact that the majority of each group of offenders found themselves convicted of different categories of manslaughter. The majority of non-Indigenous offenders were convicted of manslaughter fitting the near murder category. They represented some 72% of offenders in that category and 72% of non-Indigenous offenders overall. The majority of Indigenous offenders were convicted of drug and alcohol manslaughters, representing 83% of offenders in that category and more half of Indigenous offenders overall.

It was the shorter average sentences for drug and alcohol manslaughters that accounted for the overall lower sentences received by Indigenous offenders when compared with non-Indigenous ones. Within the drug and alcohol category, Indigenous offenders received sentences that were an average of five months lower than non-Indigenous offenders. This was despite the greater incidence of criminal records and records with violence for Indigenous offenders in that category. For Indigenous offenders who were convicted of near murder manslaughters by contrast, the average sentence was 20 months longer than those for non-Indigenous offenders. This was true despite no appreciable difference in criminal records or records with violence between the two groups and the increased instances of Indigenous offenders pleading guilty. Taken as an average of all manslaughter offenders sentenced during the period 2013-2018, Indigenous offenders received lower sentences. However, this conceals the fact that Indigenous offenders were most likely to be sentenced in a category of manslaughter that generally resulted in lower average sentences. While Indigenous offenders also received somewhat lower sentences on average than non-Indigenous offenders within the drug and alcohol category, they received longer sentences in the other categories. Therefore, the lower sentences for Indigenous offenders overall were almost entirely the result of the category of manslaughter in which most were convicted and the treatment that those offenders and that particular subset of manslaughter received from trial judges. Those Indigenous offenders who were not in that category were treated more severely by the sentencing courts than similarly-situated non-Indigenous offenders.

The conclusion drawn from these apparent contradictions is that sentencing judges could more readily connect Indigenous offending to the *Gladue* provisions where the circumstances of

the offence were aligned with the prevailing stereotypes about Indigenous people, substance abuse and criminality. The circumstances of the offence in the drug and alcohol category dovetailed with the view of violent Indigenous offending as indelibly linked with alcohol abuse. The circumstances of the offence arising in near murder manslaughters by contrast, were not aligned with those views and so Indigenous offenders were not able to avail themselves of the benefits of the *Gladue* provisions as frequently in that category. The courts could more readily understand the applicability of the provisions where the circumstances of the offence could be connected with substance abuse.

The differential treatment of manslaughters involving drugs and alcohol continued when comparing Indigenous offenders convicted in different categories of manslaughter to one another. Gladue Reports were more prevalent among drug and alcohol cases than near murder cases, appearing in nearly 40% of the former compared with less than 30% of the latter. The difference between these two categories was also apparent in the application of the *Gladue* provisions to sentencing both with respect to the methodologies employed to sentence Indigenous offenders and to the impact of the provisions on sentence outcome. This research identified two distinct types of different methodologies employed in sentencing Indigenous offenders. These were the first principles' methodology, involving the sentencing of an Indigenous offender in a manner concerned principally with their Indigenous heritage rather than the traditional purposes and principles of sentencing, and the Indigenous comparator case methodology, which involved sentencing Indigenous offenders with reference primarily to cases involving similarly-situated Indigenous offenders.

Of the 80 Indigenous offenders in this study, 24 were sentenced according to a different methodology. Eight of these were sentenced according to the first principles' methodology, all of which were drug and alcohol killings. Sixteen were sentenced following the Indigenous comparator cases methodology, of which 11 were drug and alcohol offenders. Only 15% of Indigenous offenders in the near murder category were sentenced according to a different methodology compared with over 40% of offenders in the drug and alcohol category. Drug and alcohol cases represented almost four in five of those sentenced according to a different methodology, while accounting for slightly more than half of all Indigenous offenders in total. Within the categories of different methodologies, the first principles' methodology was entirely composed of drug and alcohol killings as were 70% of the Indigenous comparator cases. Once a

case was sentenced according to one of the two different methodologies, the likelihood that the *Gladue* provisions would impact on the final sentence outcome increased relative to the traditional methodology.

When considering the impact on sentence outcome attributable to the *Gladue* provisions, the drug and alcohol cases were once again more likely to be given a favourable treatment. In drug and alcohol manslaughter cases overall, greater than half of offenders saw the *Gladue* provisions impact on the final sentence outcome. For offenders in the near murder category *Gladue*'s impact on sentence was only seen in a third of cases. Sentencing judges were more likely to see both how a different methodology could be employed and that an impact on sentence would be appropriate for Indigenous offenders convicted in the drug and alcohol category than the near murder category.

It appeared that where judges were able to connect the circumstances of the offence to cultural preconceptions surrounding Indigenous substance abuse and criminality they could more readily see their way both to utilizing a different methodology in sentencing those offenders and in having the *Gladue* provisions impact upon the final sentence outcome. The circumstances of the offence weighed heavily in judicial consideration of the application of *Gladue* despite the similarities in lived experience between those offenders in the drug and alcohol and near murder categories. The influence of alcohol on the commission of serious and violent offences perpetrated by Indigenous offenders facilitated the application of *Gladue* at all stages from the preparation of Gladue Reports to the choice of methodology in sentencing and finally to whether or not the provisions would ultimately impact upon sentence.

If there are real innovative solutions to the problem of *Gladue* and the sentencing of offenders for serious and violent crimes they appear to have escaped the courts as much as they have the author of this paper. This does not mean that *Gladue* has no role to play in sentencing offenders for serious and violent crimes. Evidence drawn from this research suggests that in manslaughter sentencing, some judges are finding a way to connect the *Gladue* provisions to the sentencing of offenders for serious and violent crime and allowing them to impact on sentence. If different methodologies can develop more fully in the trial courts and receive endorsement from the courts of appeal then it is possible that solutions may develop in the future. Such innovations in sentencing practice will need to be coupled with additional resources at every stage of the process from the provision of Gladue Reports to the programming available in the prison system to supports provided to offenders once they have been released. Each of these areas requires more

effort and greater resources to ensure that the application of *Gladue* to the sentencing of offenders for serious and violent crimes can manifest as more than just a reduction in sentence in those cases where the courts deem this appropriate. Long-term solutions to the overincarceration of Indigenous offenders cannot simply proceed on a case-by-case basis.

3. Counsel

The Crown has a critical role to play in ensuring that the *Gladue* provisions are applied to Indigenous offenders sentenced for serious and violent crime. This role begins at the policy level with the provincial attorneys general and federal and provincial directors of public prosecutions. At present, among the PPSC and the provincial Crowns surveyed for this research, only Ontario had a substantive practice directive dealing with the prosecution of Indigenous peoples. However, Ontario's direction remains light on details and does not address itself to sentencing. It is incumbent on those organizations that prosecute Indigenous offenders in Canada to begin the consideration of the *Gladue* provisions before the formal sentencing process has begun. This should begin with clear policy directions that govern the sentencing of Indigenous offenders and provide frontline Crown counsel with clear guidelines to ensure their operation. It is insufficient for the Crown to rely on judges to find an appropriate sentence that takes into account an Indigenous offender's heritage. Their sentencing submissions should be tailored to reflect that as well.

Equipped with guidelines from senior management, Crown counsel can approach the sentencing of Indigenous offenders differently. At sentencing itself, Crown counsel's responsibilities should be two-fold. First, they should exercise restraint in making sentencing submissions for Indigenous offenders. Rather than approaching Indigenous offenders in an undifferentiated manner from non-Indigenous ones, the Crown should request sentences that take into account the remedial intentions of the *Gladue* provisions. Where it is appropriate to ask for a lower sentence than might otherwise be submitted were the offender not Indigenous, the Crown should make efforts to do so. This is not innovative, this is already the practice where offenders suffer from a mental illness. This is not to suggest that the *Gladue* considerations are akin to mental illness but it does reflect the reduced moral blameworthiness that the effects of colonialism and cultural and familial dislocation have had on many Indigenous offenders.

Second, the Crown should attempt wherever possible to utilize cases involving Indigenous offenders. In their submissions, the Crown effectively sets the upper end of the sentencing range for consideration by the judge. Evidence from this research suggests that sentence ranges proposed by the Crown for manslaughter in cases involving Indigenous offenders do not tend to differ considerably from those proposed by the Crown for non-Indigenous offenders except in the drug and alcohol category. The leading cases on manslaughter in most jurisdictions deal with non-Indigenous offenders and these set the standard for sentencing submissions. Crown counsel should make efforts to submit cases to the court that involve the sentencing of Indigenous offenders wherever possible and temper their proposed sentence ranges. This is a crucial step in creating an Indigenous-specific sentencing jurisprudence for use by the trial courts.

Crown counsel can also endeavour to take into account the Indigenous heritage of offenders in plea negotiations. Evidence suggests that Indigenous offenders are more likely to plead guilty than non-Indigenous ones. This affords an opportunity for the application of the *Gladue* provisions by Crown and defence counsel. Crown counsel can negotiate sentences that take into account the remedial aims of the *Gladue* provisions where there has been a guilty plea. There is no requirement that such considerations be taken into account in the process but given the degree of deference afforded to joint submissions by trial judges, this is fertile ground for the application of *Gladue* to sentence. In this way, the Crown can aid in ensuring that Parliament's directive to reduce the overincarceration of Indigenous peoples is carried out.

Defence counsel are restrained to a certain degree by the actions of the Crown. If the Crown is proposing a lengthy penitentiary term for an offender, defence counsel may feel bound to propose a sentence that is closer to that proposed by the Crown in order for their proposal to appear more reasonable. Defence counsel and the Crown should make efforts to propose cases for consideration that involve other Indigenous offenders. If the defence concentrates on tying the lower sentences they propose to the Indigenous heritage of the offenders, they can advance the creation of Indigenous-specific bodies of jurisprudence for manslaughter and other serious and violent crimes in their jurisdictions.

Unfortunately, there is no shortage of cases involving Indigenous offenders sentenced for manslaughter and other serious and violent crimes in virtually all jurisdictions in Canada. Both Crown and defence counsel have access to wide bodies of cases dealing with Indigenous offenders many of whom are likely to have lived lives substantially similar to the offender being sentenced.

Both in submissions before the court and in plea negotiations, counsel on both sides can make efforts to ensure that an Indigenous-focused jurisprudence begins to emerge. After all, it is most often counsel that supplies the cases upon which the judge will ultimately base their determination of sentence.

4. Trial Courts

The judiciary represents the indispensable avenue for ensuring that the *Gladue* provisions are applied in practice. At the end of the day, the Supreme Court has directed judges to ensure that the provisions are applied. As suggested above, counsel on both sides should make efforts to propose sentences that reflect the Indigenous heritage of an offender and to focus on comparator cases dealing with other Indigenous offenders. Even without those tools, judges can be more mindful of an offender's Indigenous status. Trial judges should avoid reflexively resorting to the notion that the offender and offence before them are precisely the sort to which the Supreme Court referred when it remarked that some Indigenous offenders will receive sentences that are closer to or the same as non-Indigenous offenders. Most judges have moved beyond this idea but some continue to resort to it, perhaps as much from frustration caused by a lack of real alternatives as an opposition to what might be seen as discounted sentencing.

Likewise, judges should not feel bound by the submissions of counsel. The determination of a just sanction for the offender and offence before the court is the prerogative of the presiding justice. Submissions of counsel serve to guide the judge in their determination but judges are ultimately free to impose the sentence they determine to be appropriate. For a judge to suggest that, but for the submissions of counsel, they would impose a more lenient sentence on an offender is, with respect, a pretext. Where a sentencing judge believes that the submissions of counsel do not reflect the appropriate sentence for the offence, they should make that clear. The judge may decide on the appropriate sentence themselves or they may call upon counsel to provide additional cases. Such a scenario could afford an opportunity for a sentencing judge to suggest to counsel that they provide the court with cases dealing with other Indigenous offenders so they can craft a sentence that properly accounts for this.

As this research has indicated, the impact of *Gladue* upon sentence will not necessarily be a reduction in length. Some judges have pointed to the supports available in prison as the best means of ensuring that offenders are given the tools necessary to avoid reoffending. More often

than not, it was suggested by the courts that those resources are to be found in the federal correctional system as opposed to the provincial or territorial ones. Even if no satisfactory approach impacting upon sentence outcome can be found, trial judges can nonetheless attempt to approach the sentencing of Indigenous offenders using a different methodology. This paper has suggested that there were two distinct variations of a different methodology that were used by trial courts in Canada. While the first principles' approach may not be appropriate for all offenders to whom the provisions have been found to apply, the use of Indigenous comparator cases frequently will be. Trial judges should encourage counsel to provide them with cases that speak to the Indigenous heritage of the offender in order to make their determination on sentence. The more frequently that the trial courts use such cases, the more frequently they will make their way before the courts of appeal.

5. Courts of Appeal

Most jurisdictions examined in this study had some ranges established for manslaughter by their courts of appeal. However, British Columbia was alone in having an established range for Indigenous offenders convicted for manslaughter, specifically younger Indigenous offenders.¹ Appeal courts should concentrate on developing a body of jurisprudence that deals with Indigenous offenders and work to establish sentencing ranges that reflect a body of Indigenous comparator cases. Courts of appeal have shown a willingness to establish sentencing ranges that take into account aggravating factors in manslaughter, such as spousal violence, they should also entertain a willingness to take into account the *Gladue* factors in determining appropriate ranges for Indigenous offenders. Developing such a jurisprudence would serve to guide trial courts in their attempts to identify appropriate sentencing considerations for those Indigenous offenders that come before them. These ranges may be substantially similar to or the same as those employed to sentence non-Indigenous offenders but they could be crafted in such a way that they take into account the unique circumstances that so frequently affect Indigenous offenders that come before the courts.

Given the striking similarities between offences and offenders that are frequently found in manslaughter cases involving Indigenous offenders, developing an Indigenous-specific

¹ *R v Pop*, 2013 BCCA 160.

jurisprudence would not prove an insurmountable obstacle for appeal courts. There remains a concern, as there has always been with the *Gladue* provisions, that such a practice runs the risk of creating controversy with the public. Despite these concerns, there is a solid legal foundation for doing so in the decisions of the Supreme Court. The directive of the Court in *Wells* to sentence Indigenous offenders according to a different methodology would allow the development of bodies of case law dealing with Indigenous offenders in particular categories of crime. Even if the courts of appeal and the trial courts manage to produce such a body of cases, the resources available to sentencing judges remain limited.

6. Governments

On paper the federal correctional system has made strides to establish programs in penitentiaries designed to aid Indigenous offenders with their healing and rehabilitation. However, the Correctional Service of Canada itself admits that these programs are chronically underfunded and understaffed. As noted in chapter two, the elders program of Corrections Canada has trouble maintaining staffing levels and healing lodges are few and far between. The correctional system requires more resources to ensure that those programs that have been established to aid Indigenous offenders are more widely available and receive adequate funding and resources.

The same will be necessary within the provincial and territorial correctional systems. This research dealt with some cases in which the judge handed down a sentence that lay on the federal side of the two-year divide because the resources geared toward Indigenous offenders, limited though they are, were at least present in the federal correctional system in a way they are not in many provinces. Provincial correctional institutions should take measures to provide Indigenous-specific programming wherever possible in order to allow judges to send Indigenous offenders to those institutions with the knowledge that they will have the option of participating in culturally-relevant programming.

Both levels of government will need to make increased funding available in order to provide programming that is suitable for Indigenous prisoners and to further fund institutions like healing lodges to give sentencing judges more options in crafting sentences geared towards the Indigenous heritage of offenders. Along with increased funding, both levels of government will need to build relationships and provide resources to Indigenous communities, rural and urban, to ensure that the provision of services continues after Indigenous offenders are released. It was

vanishingly rare in the decisions examined for this paper to find judicial reference to particular programs and services available to offenders upon release. One reason for this is the limited nature of these programs, an issue exacerbated by the underfunding of the Department of Justice Aboriginal Justice Strategy. Where such programs exist, they are not provided sufficient funding to offer comprehensive programming and the uncertainty of funding limits the ability of those organizations to plan for the future and to build their capacities.

7. Conclusions

Without investing money in the correctional system and post-release support infrastructure, reduced sentences arising from the impact of *Gladue* will only serve to limit the time an Indigenous offender serves in prison for the crime for which they were sentenced. It will not necessarily provide that offender with the tools they require to prevent them from falling back into the patterns of behaviour that landed them before the courts in the first place. The *Gladue* provisions were never meant to serve as a panacea for the crisis of overrepresentation in the prison system. Despite this, the provisions continue to be asked to do much of the heavy lifting in this respect and receive considerable criticism for their failure to alleviate the crisis.

Each stage of the sentencing process requires that greater efforts be made by the actors involved from Crown and defence counsel, to trial judges and the courts of appeal, to the correctional system itself. Such efforts should be geared first towards the development of Indigenous-specific sentencing methodologies for offenders. By treating Indigenous offenders in the same manner as non-Indigenous offenders, the *Gladue* provisions risk becoming at best another mitigating factor to be considered when determining sentence. Developing distinctive sentencing methodologies for Indigenous offenders is not a guarantee that previously unimagined approaches to sentencing will arise, however, it does provide a first step in the process of changing how the criminal justice system treats Indigenous offenders. If courts can begin to view Indigenous offenders as a distinct category requiring distinct approaches, it is possible that the jurisprudence can begin to develop more fruitfully. Without a concerted effort to do so, we continue to risk having the provisions founder.

In order to allow the *Gladue* provisions to have an effect on as many offenders as possible, it is essential that trial judges see their way to applying them more broadly, both with respect to methodology and to sentence impact. If the *Gladue* provisions are understood as applying only to

those offenders whose crimes are seen to fit the model of an Indigenous offence, that is one defined by the abuse of alcohol, then there is little hope that they will fulfill the remedial mandate envisioned by Parliament. The courts must recognize that most Indigenous people who come before the criminal courts in Canada have been affected to one degree or another by the *Gladue* factors. The experiences of colonialism, residential schools and the intergenerational trauma produced by both serve to mark the lives of a great many Indigenous people in this country. Where the sentencing of offenders for serious and violent crime is concerned, the circumstances of the offence cannot weigh too heavily in the calculus of *Gladue* application to the exclusion of those of the offender. The provisions exist to govern the sentencing of Indigenous offenders, not merely those Indigenous offenders who have acted under the influence of alcohol.

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