McGill Law Journal
Revue de droit de McGill

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Andrew Flavelle Martin

Volume 66, Number 2, December 2020

URI: https://id.erudit.org/iderudit/1084134ar
DOI: https://doi.org/10.7202/1084134ar

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Publisher(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (print)
1920-6356 (digital)

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Cite this article

Martin, A. F. (2020). Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law. *McGill Law Journal / Revue de droit de McGill*, *66*(2), 337–376. https://doi.org/10.7202/1084134ar

Article abstract

As a response to the estrangement and alienation of Indigenous peoples from the Canadian justice system, *Gladue* principles are central to reconciliation in sentencing and other criminal law contexts. However, the role of *Gladue* principles in administrative law more broadly remains uncertain. In this paper, I argue that the factors underlying Indigenous peoples' estrangement and alienation from the justice system indicate estrangement and alienation from the administrative state itself, and thus *Gladue* principles appropriately apply in administrative law contexts. Using the results of a comprehensive search of reported decisions by tribunals and by courts on judicial review, I analyze the reasons given by administrative decision-makers and judges for applying or declining to apply *Gladue* principles. I argue based on this analysis that *Gladue* principles will most clearly apply in decisions about a penalty or a benefit for an Indigenous person, and can also apply—albeit in a way that requires more creativity—where the decision is about neither a penalty nor a benefit. On this basis, I provide recommendations for counsel, administrative decision-makers, judges, legislators, and executive authorities to better realize the potential of *Gladue* principles.

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Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law

*Andrew Flavelle Martin**

As a response to the estrangement and alienation of Indigenous peoples from the Canadian justice system, *Gladue* principles are central to reconciliation in sentencing and other criminal law contexts. However, the role of *Gladue* principles in administrative law more broadly remains uncertain. In this paper, I argue that the factors underlying Indigenous peoples' estrangement and alienation from the justice system indicate estrangement and alienation from the administrative state itself, and thus *Gladue* principles appropriately apply in administrative law contexts. Using the results of a comprehensive search of reported decisions by tribunals and by courts on judicial review, I analyze the reasons given by administrative decision-makers and judges for applying or declining to apply *Gladue* principles. I argue based on this analysis that *Gladue* principles will most clearly apply in decisions about a penalty or a benefit for an Indigenous person, and can also apply—albeit in a way that requires more creativity—where the decision is about neither a penalty nor a benefit. On this basis, I provide recommendations for counsel, administrative decision-makers, judges, legislators, and executive authorities to better realize the potential of *Gladue* principles.

En réponse à la disjonction et à l'aliénation des peuples autochtones du système judiciaire canadien, les principes de *Gladue* sont essentiels à la réconciliation dans la détermination des peines et dans d'autres contextes de droit criminel. Cependant, le rôle des principes de *Gladue* dans le droit administratif plus généralement demeure incertain. Dans cet article, j'avance que les facteurs qui sous-tendent la disjonction et l'aliénation des peuples autochtones du système judiciaire dénotent au même titre la disjonction et l'aliénation de ces peuples de l'État administratif au sens large, et donc que les principes de *Gladue* s'appliquent également et à juste titre au droit administratif. En utilisant les résultats d'une recherche compréhensive des décisions rapportées par les tribunaux et par les cours du contrôle judiciaire, j'analyse les raisons qu'énoncent les décideurs administratifs et les juges du contrôle judiciaire pour appliquer ou refuser d'appliquer les principes de *Gladue*. J'avance sur la base de cette analyse que les principes de *Gladue* s'appliqueront le plus clairement dans les décisions sur une pénalité ou sur un avantage pour un autochtone, et qu'ils peuvent s'appliquer — bien qu'ils nécessitent plus de créativité — lorsque la décision ne concerne ni une pénalité ni un avantage. Ainsi, je formule des recommandations pour des avocats, décideurs administratifs, juges, législateurs et autorités exécutives afin de mieux mettre à profit le potentiel des principes de *Gladue*.

* Of the Ontario Bar; Assistant Professor, Schulich School of Law, Dalhousie University. This research was supported by a 2020 grant from the Canadian Foundation for Legal Research. Thanks to David Barry and Michelle Bérubé for research assistance. Thanks also to Kim Brooks, Sheila Wildeman, and Reagan Seidler for comments on a draft. Special thanks to Amrita Saini at the College of Massage Therapists of Ontario.

Citation: (2020) 66:2 McGill LJ 337 — Référence : (2020) 66:2 RD McGill 337

Introduction

In the words of the Truth and Reconciliation Commission of Canada (TRC), "[v]irtually all aspects of Canadian society may need to be reconsidered" to achieve reconciliation.[1] While there is not an absolute consensus on the meaning of reconciliation, the TRC explains it as being "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."[2] In this article, I focus on a discrete and narrow, yet important, reconsideration of administrative law and the place of Indigenous peoples in the Canadian administrative state. It is unavoidably true that "[r]econciliation will take some time"[3]—but that is no excuse for inaction, as it is equally true that there is no time to waste.

A central component of the work toward reconciliation will be ensuring that the Canadian justice system and the Canadian administrative state acknowledge and incorporate the unique background and situation of Indigenous peoples into all facets of decision-making. Put otherwise, the colonial administrative state needs to demonstrate and explicitly apply its understanding and respect for the uniqueness of Indigenous peoples in all interactions with them.

In this article, I argue that *Gladue* principles constitute a powerful and appropriate mechanism to do so. At their core, *Gladue* principles constitute a recognition of the *legal impact* of the unique history and circumstances of Indigenous peoples in Canada. It is for this reason that reconciliation will require—among many other changes—the proactive, purposive, and creative extension of *Gladue* principles across administrative law.

In *R v. Gladue* and its successor case, *R v. Ipeelee*, the Supreme Court of Canada recognized that the overincarceration of Indigenous people in Canada constituted "a crisis in the Canadian criminal justice system."[4] While Justices Cory and Iacobucci, writing for the Court in *Gladue*, did not explicitly identify colonization as the root of the crisis, they did refer to many of its impacts, including "poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people ... [as

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1 Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Commission of Canada, 2015) at vi [TRC *Final Report*].

2 *Ibid* at 6.

3 *Ibid* at vi.

4 *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*]; *R v Ipeelee*, 2012 SCC 13 at para 58 [*Ipeelee*].

well as] bias against aboriginal people."[5] The Court would correct this omission in *Ipeelee*, directly connecting "the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples."[6] As later recognized by the TRC, "[c]olonialism remains an ongoing process, shaping both the structure and the quality of the relationship between the settlers and Indigenous peoples."[7]

While the Court in *Gladue* recognized explicitly that "[t]here are many aspects of this sad situation which cannot be addressed in these reasons" and restricted itself to criminal sentencing,[8] the approach gave rise to powerful, yet sometimes nebulous, "*Gladue* principles" that over time would nonetheless be extended beyond that context. In criminal sentencing in particular, the Court in *Gladue* explained that section 718.2(e) of the *Criminal Code* embraced: "(a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection."[9] Put more generally, *Gladue* requires judges "to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders."[10] In this way, a careful, deliberate, and honest understanding of the circumstances of Indigenous persons embodies, or at least facilitates, the respect described by the TRC as integral to reconciliation—but to limit this understanding to criminal sentencing would be woefully incomplete.

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5 *Gladue*, *supra* note 4 at para 65.

6 *Ipeelee*, *supra* note 4 at para 60. See also Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*" (2012) 57 SCLR 375 ("[t]he decision [in *Ipeelee*] goes beyond *Gladue* in its analysis, its acknowledgment of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently" at 375).

7 TRC *Final Report*, *supra* note 1 at 45. For examples of recent Indigenous scholarship on colonization relevant to a discussion of *Gladue* principles, see Andrew Flavelle Martin, "*Gladue* at Twenty: *Gladue* Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20 at 20–21. See also note 160 and accompanying text.

8 *Gladue*, *supra* note 4 at para 65.

9 *Ipeelee*, *supra* note 4 at para 59, citing *Gladue*, *supra* note 4 at para 66; *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

10 *Ipeelee*, *supra* note 4 at para 59, citing *Gladue*, *supra* note 4 at para 37.

The extension of *Gladue* principles beyond their origin in criminal sentencing under section 718.2(e) of the *Criminal Code* has been slow and far from steady, and has not achieved the aspirations of the Supreme Court of Canada in *Gladue*.[11] Some of these extensions have come in statute, specifically in: the *Youth Criminal Justice Act*,[12] amendments to the *Code of Service Discipline* within the *National Defence Act*,[13] amendments to the bail provisions of the *Criminal Code*[14] and the Ontario *Correctional Services and Reintegration Act, 2018*,[15] and amendments to the *Corrections and Conditional Release Act*.[16] Most of these extensions, however,

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11 *Supra* note 4.

12 SC 2002, c 1, s 38(2)(d).

13 *An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, SC 2019, c 15, s 63(23), adding subsection c.1 to s 203.3 of the *Code of Service Discipline*, being Part III of the *National Defence Act*, RSC 1985, c N-5. Prior to this amendment, *Gladue* principles were applied notwithstanding the absence of specific statutory direction in *R v Levi-Gould*, 2016 CM 4003 at para 13.

14 *Supra* note 9, s 493.2, as added by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25 ("In making a decision under this Part [Part XVI], a peace officer, justice or judge shall give particular attention to the circumstances of (a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part", s 210). Prior to these amendments there was significant but not uniform case law applying *Gladue* principles to bail. See e.g. *R v Robinson*, 2009 ONCA 205 at paras 13–15; *R v Hope*, 2016 ONCA 648 at paras 9–12; *R v Oakes*, 2015 ABCA 178 at para 11; *R v Louie*, 2019 BCCA 257 at para 35. For an earlier application, see e.g. *R v Wesley*, 2002 BCPC 717 at para 7. Contrast those decisions with *R v Sacobie*, [2001] 247 NBR (2d) 94 at para 8, [2004] NBJ No 511 (QB); *R v Heathen*, 2018 SKPC 29 at paras 12, 47; *R v Jaypoody*, 2018 NUCJ 36 especially at paras 92–93.

15 *Correctional Services and Reintegration Act, 2018*, being Schedule 2 to *Correctional Services Transformation Act, 2018*, SO 2018, c 6 [as of the time of writing, this *Act* is not yet in force] ("The Minister and any person employed in the administration of this Act shall, (a) consider systemic and individual circumstances for First Nations, Inuit or Métis individuals under community supervision and inmates; and (b) when making a decision to limit the liberties of a First Nations, Inuit or Métis individual under community supervision or inmate, consider the individual's unique needs and circumstances, including the impacts of individual, systemic, cultural and historical factors, and take into account culturally appropriate sanctions and options", s 29).

16 SC 1992, c 20, s 79.1(1), as added by *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27, s 23:

> In making decisions under this Act affecting an Indigenous offender, the [Correctional Service of Canada] shall take the following into consideration: (a) systemic and background factors affecting Indigenous peoples of Canada; (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and (c) the Indigenous culture and identity of the offender, including his or her family and adoption history.

have come from decisions of courts in contexts ranging from extradition[17] to civil contempt,[18] the exclusion of evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*),[19] the stay of charges under section 24(1) of the *Charter*,[20] the voluntariness of admissions to police,[21] the withdrawal of a guilty plea,[22] and relief from notice periods in tort claims.[23] Extensions of *Gladue* principles to administrative law contexts have been relatively rare, but they have been invoked in cases of professional discipline[24] and parole.[25]

Perhaps unsurprisingly then, Canadian courts and the Canadian legal literature have largely failed to explain, or even vigorously grapple with, the role and scope of *Gladue* principles in administrative law generally. There is an extensive literature on *Gladue* as it relates to specific matters surrounding criminal law, focused on but not limited to sentencing.[26] But

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See also *ibid*, ss 4(g), 80–84, as discussed in *Ewert v Canada*, 2018 SCC 30 at paras 57–58.

17 See *United States of America v Leonard*, 2012 ONCA 622 [*Leonard*]. But see *R v Anderson*, 2014 SCC 41 at paras 26–28, which narrowed the scope of *Leonard*.

18 See *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534 [*Frontenac Ventures*].

19 See *R v Dreaver*, 2013 SKPC 220 at para 34; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. While *Gladue* principles have also been applied to an application for a stay for delay under section 11(b) of the *Charter*, in that case they were to deny the stay (see *R v Anugaa*, 2018 NUCJ 2 at paras 42–48).

20 See *R v Capay*, 2019 ONSC 535.

21 See *R v Camille*, 2018 BCSC 301 ("[*Gladue*] reminds us that courts must take account of different cultural values and experiences that may shape the world views of indigenous people and their responses as individuals in the criminal justice system" at para 78).

22 See *R v Ceballo*, 2019 ONCJ 612 at paras 10, 12.

23 See *O'Shea v Vancouver (City)*, 2015 BCPC 398 at paras 100–101.

24 See *Law Society of Upper Canada v Terence John Robinson*, 2013 ONLSAP 0018 [*Robinson*].

25 See *Twins v Canada (AG)*, 2016 FC 537. Contrast that case with *John v National Parole Board*, 2011 BCCA 188 at para 43, leave to appeal to SCC refused, 34309 (1 December 2011). For the applicability of *Gladue* principles in a judicial screening of an application for a reduction in parole ineligibility, see *R v Poitras,* 2012 ONSC 5147 at paras 28–31; *R v Purdy*, 2020 BCSC 231 at paras 30–31. Contrast *Purdy* with *R v Abram*, 2019 ONSC 3383 at paras 16–31.

26 See e.g. Jillian Rogin, "*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada" (2017) 95:2 Can Bar Rev 325; Judge ME Turpel-Lafond, "Sentencing Within a Restorative Justice Paradigm: Procedural Implications of *R. v. Gladue*" (2000) 43:1 Crim LQ 34.

there is little, if any, conceptual consideration of *Gladue* principles in administrative law more broadly.[27]

I have argued elsewhere that *Gladue* principles should apply whenever the alienation and estrangement of Indigenous peoples from the Canadian justice system, including but not limited to the criminal justice system, is relevant.[28] My argument was based on a synthesis of appellate decisions, primarily from the Ontario Court of Appeal, extending *Gladue* principles to new contexts, while acknowledging apparent pushback on those extensions by the Supreme Court of Canada.[29] Under my approach, the relevance of *Gladue* principles in administrative law was dependent on how closely a given decision is connected to the justice system. Thus, for example, I argued that *Gladue* principles are relevant in the professional discipline of Indigenous lawyers because lawyers are integrally connected to the justice system and Indigenous lawyers exhibit, yet also mediate or ameliorate, the estrangement from the justice system that *Gladue* principles address. In focusing on the *legal* profession and its connection to the justice system, I did not consider the administrative law context of professional discipline generally as determinative or even relevant. Under my analysis, *Gladue* principles were relevant not because any particular decision was an administrative one, but because the disciplinary action took place in a context of estrangement and alienation from the justice system. Under that approach, for example, *Gladue* principles would not be relevant to professional discipline of an Indigenous health professional, unless that professional was being disciplined for an interaction with the justice system—such as a criminal offence in the course of their practice.

On further reflection, my previous analysis was effective on its own terms but limited—indeed, arbitrarily limited—by the implicit assumption that Indigenous alienation and estrangement from the colonial Canadian justice system could be differentiated or disentangled from Indigenous alienation and estrangement from the likewise colonial Canadian administrative state.

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27 Existing scholarship at the intersection of Aboriginal law and administrative law focuses instead on the duty to consult. See e.g. Robin M Junger & Nika Robinson, "Administrative Law Remedies in the Aboriginal Law Context" (2012) 25:1 Can J Admin L & Prac 55; Janna Promislow, "Irreconcilable?: The Duty to Consult and Administrative Decision Makers" (2013) 26:3 Can J Admin L & Prac 251. But see Martin, *supra* note 7 (for discussion of the application of *Gladue* principles in another administrative law context: lawyers' discipline).

28 See Martin, *supra* note 7.

29 See especially *R v Anderson*, *supra* note 17 cited in Martin, *supra* note 7 at 42–43; *R v Kokopenace*, 2015 SCC 28 [*Kokopenace*], cited in Martin, *supra* note 7 at 39–42.

Here, I make the more comprehensive claim that Indigenous peoples are likewise estranged and alienated from the colonial Canadian administrative state itself.[30] Under this broadened approach, I argue that *Gladue* principles are potentially relevant to any administrative law decision. This is not to say that administrative law cannot be consistent with Indigenous experiences and values, or that there cannot be an Indigenous administrative law.[31] Instead, my premise is that the Canadian administrative state is a colonial one from which Indigenous peoples are estranged and alienated.[32]

In this article, I build on the existing literature, including my own work, by proposing an account of the appropriate role and scope for *Gladue* principles in administrative law. I do so based on a comprehensive search of reported decisions by tribunals and by courts on judicial review. I argue that *Gladue* principles are potentially relevant to any administrative decision concerning an Indigenous person. I separate that universe of administrative decisions into three categories: penalty, benefit, and residual (i.e., neither penalty nor benefit). In general, *Gladue* principles will be most directly and predictably applicable when considering a penalty against an Indigenous person. While the distinction between penalty and benefit can be a fuzzy one, the application of *Gladue* principles when considering a benefit to an Indigenous person tends to be more limited by statute than in the penalty context. Finally, the residual category—where the decision concerns neither a penalty nor a benefit—calls most for ingenuity and creativity by counsel and decision-makers.

This paper is organized in seven parts. I begin in Part I by canvassing the meaning and legal character of *Gladue* principles. I explain that they are best understood as a common law principle that recognizes the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions. In Part II, I examinine why administrative decision-makers, and courts on judicial review of administrative decisions, decline to apply *Gladue* principles. Based on a comprehensive search of such decisions, I argue that there are three main reasons for refusal: that the decision is not similar enough to criminal sentencing; that it is unclear how *Gladue* principles would apply and how they would af-

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30 See below notes 125–134.

31 See e.g. Aaron Dewitt, "Judicial Review as a Limit to Indigenous Self-Governance" (2014) 77:2 Sask L Rev 205 at 217–20.

32 For a detailed account, see Janna Promislow & Naiomi Metallic, "Realizing Aboriginal Administrative Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Toronto: Emond, 2018) 87 at 93–108.

fect the result; and that the statutory criteria or jurisdiction of the decision-maker preclude the application of *Gladue* principles. Then, in Part III, I consider counter-examples, namely decisions where administrative decision-makers, and courts on judicial review, have applied *Gladue* factors. I argue that the common thread in these decisions is a liberty- or wrongdoing-based conception of *Gladue* principles. This leads me in Part IV to analyze the appropriate scope of *Gladue* principles in administrative law. As I have just indicated, I suggest that the application and impact of *Gladue* principles will be relatively straightforward when the decision at issue is about a benefit or penalty for an Indigenous person who is the subject of the decision. But where the decision affects the interests of an Indigenous person who is not the subject of the decision, remoteness must be considered. Additionally, I argue that, where the decision is not about a benefit or a penalty, creativity will be required. In Part V, I consider whether *Gladue* principles must be explicitly invoked and applied by name. While concluding that what is important is the substantive application of *Gladue* principles and not the labelling of those principles, I suggest that the invocation of *Gladue* principles provides a ready shorthand and thus serves as a useful indicator for reviewing courts. Then, in Part VI, I consider the standard of review where a decision-maker fails to consider or declines to apply *Gladue* principles. While the standard of review is presumably reasonableness, failure to consider or to apply *Gladue* principles will generally be unreasonable. Finally, I conclude in Part VII with recommendations for administrative decision-makers, judges on judicial review, counsel, legislators, and executive authorities.

I. The Meaning and Legal Character of *Gladue* Principles

Before I can proceed with the substance of my analysis, I need to first address two open questions in the literature and case law: what "*Gladue* principles" mean and what they are. Despite the many extensions and applications of *Gladue* principles beyond criminal law sentencing, there has yet to be a definitive articulation of what *Gladue* principles mean or an identification of their legal character—be it statutory, common law, quasi-constitutional, constitutional, or some combination thereof. The answers to these underlying questions will inform and potentially limit the role of *Gladue* principles in administrative law. Thus, I must begin by proposing such answers.

First, what do courts mean when they invoke so-called "*Gladue* principles"? I previously defined *Gladue* principles as "a recognition of the unique circumstances of Indigenous persons, particularly their alienation from the criminal justice system, and the impact of discrimination, cul-

tural oppression, dislocation, and poor social and economic conditions."[33] This definition has at least three shortcomings. The first is that my definition does not explicitly recognize that the alienation, discrimination, and other experiences are not only historical but also ongoing, and that the impact of these experiences is likewise both historical and ongoing. The second shortcoming is that the phrase "cultural oppression" minimizes what has been better described as "cultural genocide."[34]

The third shortcoming is of a different type and has particularly important implications for my analysis in this article. The *Gladue* and *Ipeelee* decisions could merely be cited as instances in which the Court recognized the facts of anti-Indigenous bias and racism in Canada. Such a limited application of *Gladue* is consistent with my earlier definition of *Gladue* principles. A better definition of *Gladue* principles is that these factual considerations have a particular legal impact and require a particular kind of legal approach—although the specifics of this approach will vary depending on the circumstances, as I will illustrate through the remainder of my analysis. Thus, for the purpose of this article, I define *Gladue* principles as: a recognition of the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, and the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions.[35]

The proper role and impact of *Gladue* principles, however, is contoured not only by their definition but also by their character as a legal construct within the legal system. Are they statutory, common law, quasi-constitutional, constitutional, or some combination thereof? For present purposes, I argue that *Gladue* principles are a common law principle that may yet be recognized as quasi-constitutional or even constitutional. But they certainly already exceed their statutory origins.

This is not to deny that, in some contexts, *Gladue* principles are a statutory principle. This characteristic is most obvious in criminal sentencing under section 718.2(e) of the *Criminal Code*, but is also true of the other narrow and specific statutory extensions of section 718.2(e) listed above.[36] However, it does not necessarily follow from this that *Gladue* principles are *solely* a statutory principle.

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33 Martin, *supra* note 7 at 24.

34 See e.g. TRC *Final Report*, *supra* note 1 at 133. See also Payam Akhavan, "Cultural Genocide: Legal Label or Mourning Metaphor?" (2017) 62:1 McGill LJ 243.

35 Martin, *supra* note 7 at 24.

36 See notes 12–16, *above*.

As I have traced elsewhere, a line of appellate decisions—mostly from the Ontario Court of Appeal—interprets *Gladue* principles as a common law principle that can apply absent specific statutory direction.[37] The weakness of characterizing *Gladue* principles as a common law legal principle is that they can be overruled or abandoned by subsequent decisions or legislated away by statute.

Indeed, subsequent to those appellate decisions, two decisions from the Supreme Court of Canada appear to push back, at least in part, on this common law characterization of *Gladue* principles.[38] More recently, the original inclusion of *Gladue* principles in the sentencing provisions, but not in the bail provisions, of the *Criminal Code*, led two trial judges—in either faithful execution of their duties or chutzpah or both—to hold that *Gladue* principles did not apply to bail.[39] In doing so, these judges rejected precedents that, while not binding on them—and, in their analysis, not actually persuasive—had nonetheless been uniformly followed. This split in the case law will presumably be resolved by the 2019 addition of *Gladue* provisions to the bail section of the *Criminal Code*.[40]

However, just as the statutory role of *Gladue* principles does not preclude a common law role for such principles, a common law role does not preclude a constitutional role. The most obvious role for constitutionalized *Gladue* principles is as a principle of fundamental justice under section 7 of the *Charter*.[41] The inherent limitation of such a constitutionalization is that such *Gladue* principles would apply only where a section 7 interest—life, liberty, or security of the person—was engaged.[42] In contrast, the recent decision of the Ontario Court of Appeal in *R v. Sharma* takes the intriguing position that restricting the ability of sentencing judges to properly and freely apply *Gladue* principles constitutes unjustifiable discrimination against Indigenous persons under section 15 of the *Charter*.[43] The Court also held that there was a section 7 infringement, but used

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37 See Martin, *supra* note 7 at 34–39. The appellate decisions were *R v Sim* (2005), 78 OR (3d) 183, 201 CCC (3d) 482 (ON CA) [cited to OR] [*Sim*]; *Frontenac Ventures*, *supra* note 18 at para 56; *Leonard*, *supra* note 17 at paras 57–59.

38 See Martin, *supra* note 7 at 39–43. For the Supreme Court's pushback, see *R v Anderson*, *supra* note 17 at paras 27–28 and *Kokopenace*, *supra* note 29 at paras 97–102.

39 See *R v Heathen*, *supra* note 14; *R v Japoody*, *supra* note 14 at paras 73–102.

40 See *Criminal Code*, *supra* note 9, s 493.2.

41 *Supra* note 19. See e.g. Marie Manikis, "Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors" (2016) 21:1 Can Crim L Rev 173.

42 See Martin, *supra* note 7 at 43–44.

43 *R v Sharma*, 2020 ONCA 478 at para 132, Feldman JA for the majority, Miller JA, dissenting [*Sharma*]. Thank you to a reviewer for bringing *Sharma* to my attention.

overbreadth—not *Gladue* principles themselves—as a principle of fundamental justice.[44] The most robust and powerful form of constitutionalization—indeed, the legal realization of the full potential of *R v. Gladue* itself—would be for *Gladue* principles to be recognized as an unwritten principle of the Constitution. This seems unlikely at present, but change may come.

I emphasize here that legal principles can change in form over time. Perhaps the best example, though seemingly distant from this analysis, is solicitor-client privilege. Solicitor-client privilege began as a rule of evidence, but is now not only a substantive right but also a principle of fundamental justice under section 7 of the *Charter*.[45] Indeed, in the leading treatise, Adam Dodek writes that solicitor-client privilege "as it currently exists in Canada is best understood as a *quasi-constitutional* right to communicate in confidence with one's lawyer."[46]

For now, in my view, *Gladue* principles are best understood as a common law principle. To relegate them to a mere statutory role would be to discard and impede the clear aspirations of the Supreme Court of Canada in *Gladue*; to attribute to federal and provincial legislators an unrealistic level of comprehensive awareness, discernment, and deliberation; to create incoherence in the common law; and to limit the ability of administrative decision-makers and judges to do justice in individual cases. While the Supreme Court of Canada has gestured to an interpretation of *Gladue* principles as being merely statutory in *Kokopenace* and *Anderson*, the lower appellate decisions extending the application of *Gladue* principles as a common law principle remain, strictly speaking, undisturbed. Until the Supreme Court of Canada explicitly goes further, lower court judges can in good faith apply *Gladue* principles as a common law principle outside the specific contexts of *Kokopenace* and *Anderson*. However, in my

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44 See *ibid* at para 174.

45 See e.g. *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 ("[f]irst, it is well established that solicitor-client privilege has evolved from a rule of evidence to a rule of substance. Further, ... some even suggest that the Court has granted it a quasi-constitutional status" at para 38 [citations omitted]); *R v McClure*, 2001 SCC 14 ("[s]olicitor-client privilege and the right to make full answer and defence are principles of fundamental justice" at para 41); *Lavallee*, *Rackel & Heintz v Canada (AG)*; *White*, *Ottenheimer & Baker v Canada (AG)*; *R v Fink*, 2002 SCC 61, Arbour J for the majority ("[s]olicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law" at para 49).

46 Adam M Dodek, *Solicitor-Client Privilege* (Toronto: LexisNexis Canada, 2014) at § 2.12 [emphasis added]. For a history of that transformation and evolution, see *ibid* at §§ 2.2–2.12.

view, there is simply too little—if any—existing support to go further and constitutionalize *Gladue* principles, at least at this time.[47]

II. Why Do Administrative Decision-Makers Decline to Apply *Gladue* Principles?

A review of Canadian cases since *R v. Gladue* reveals three main reasons and two ancillary reasons for which administrative decision-makers, and courts on judicial review, decline to apply *Gladue* principles.

First, the most fundamental and conceptual reason for declining to apply *Gladue* principles in administrative law is that the specific context and nature of the decision is not similar enough to criminal sentencing. This reasoning is sometimes conclusory, but is sometimes more elaborate.

A conclusory example comes from *Re Can-Am Urban Native Non-Profit Homes* (*Windsor*) *Inc.*,[48] in which a landlord applied to terminate a tenancy and evict the Indigenous tenant for illegal acts on the rental premises. Counsel for the tenant argued *Gladue* principles, specifically on restorative justice and lesser sentences. The decision-maker rejected this argument on the conclusory basis that "this case is distinguishable from *Gladue* ..., as the Tribunal is considering the tenancy and not a sentencing of the Tenant."[49]

A more developed rationale was given in *Desmoulin v. Criminal Injuries Compensation Board*.[50] *Desmoulin* was a judicial review of a decision denying an Indigenous applicant compensation for injuries at a training school.[51] The denial was based on the applicant's subsequent criminal activity.[52] The court rejected the *Gladue* argument on the basis that even if *Gladue* principles could be properly extended from their original statutory sentencing context, such extensions had only been applied in criminal law contexts where "personal freedom" was at stake—not where the decision

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47 A fascinating and worthwhile legislative option would be to give *Gladue* principles quasi-constitutional character, such as by incorporating them into human rights law or merely codifying that statutory *Gladue* principles prevail over any other statutory provision. These ideas, however, are beyond the scope of this article.

48 2005 CarswellOnt 10450 (WL Can) (Ont Landlord & Tenant Board) [*Re Can-Am*].

49 *Ibid* at para 24, point 3.

50 2015 ONSC 3696 [*Desmoulin*].

51 See *ibid* at para 3.

52 See *ibid*.

under review was a civil matter and not a criminal one.[53] As I will return to below, the court nonetheless held that the applicant's "cultural background" was a relevant factor that the administrative decision-maker had properly considered.[54]

The reasoning in *Moore v. Law Society of British Columbia* is to similar effect.[55] *Moore* was a judicial review of decisions of the law society's credentials committee regarding an Indigenous lawyer transferring from another province.[56] In holding that there was no obligation to consider *Gladue* principles,[57] Justice Watchuk noted that *Gladue* concerned criminal sentencing and that "[a]lthough *Gladue* factors have been applied outside the criminal law context, they have only been applied in relation to the imposition of penalties or disciplinary sanctions."[58] Justice Watchuk also explicitly noted that there was no exact precedent: "There was no reported case before the court where a law society has applied *Gladue* factors in a decision regarding admission to practice."[59]

Similar reasoning is evident in *Resource Development Trades Council of Newfoundland and Labrador v. Muskrat Falls Employers' Association*,[60] a judicial review of a grievance in which the arbitrator refused to reinstate an Indigenous employee involved in an unlawful strike. The court held that termination in a unionized work environment was too dissimilar to, among other things, criminal sentencing for *Gladue* principles to apply: "[t]he authorities referred to by the Union deal with the importance of recognizing and protecting aboriginal culture and heritage in the context of criminal sentencing and child custody and adoption circum-

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53 See *ibid* at paras 29–30. The court relied for this premise—that *Gladue* principles may extend beyond criminal sentencing—on a decision that was vehemently reversed on appeal (see *R v Kokopenace*, 2013 ONCA 389, rev'd *Kokopenace*, *supra* note 29).

54 See *Desmoulin, supra* note 50 at paras 31–32. See also note 148 and accompanying text.

55 *Moore v Law Society of British Columbia*, 2018 BCSC 1084 [*Moore*]. The underlying facts and the alleged failure to consider *Gladue* principles were also the basis for an unsuccessful human rights complaint (see *A v Law Society of British Columbia*, 2018 BCHRT 256, reconsideration denied, 2019 BCHRT 29).

56 See *Moore*, *supra* note 55 at paras 2–8.

57 See *ibid* at para 92.

58 *Ibid* at paras 78–79. "The only case law provided on the use of *Gladue* factors in the law society context is *Robinson*, which involved disciplinary proceedings. These decisions are not such proceedings" (*ibid* at para 92). See also *Robinson*, *supra* note 24.

59 *Moore*, *supra* note 55 at para 79. This was reinforced by the recent decision in *Turner v Law Society of Ontario*, 2020 ONLSTH 95, a good character hearing for an Indigenous lawyer applicant, in which *Gladue* principles were not mentioned in the panel's reasons.

60 2016 NLTD(G) 23.

stances. ... These decisions are not relevant to the contractual environment of a collective agreement and a voluntary employer/employee relationship."[61]

While *Re Can-Am*, *Desmoulin*, *Moore*, and *Muskrat Falls* squarely reject *Gladue* principles, the impact of *Lewis v. Canada (Public Safety and Emergency Preparedness)* on the role of those principles in administrative law is less clear.[62] The Federal Court of Appeal in *Lewis* held that *Gladue* principles did not apply to a deportation decision concerning a non-Indigenous parent with an Indigenous child in Canada.[63] For my purposes, what is important from *Lewis* is that Justice Gleason for the panel appeared—without clear justification, in my view—to limit the extension of *Gladue* principles to contexts where an interest under section 7 of the *Charter* was engaged.[64] In doing so, she rejected precedents extending *Gladue* principles absent such a section 7 interest.[65] Ironically, while appearing to implicitly constitutionalize *Gladue* principles into a principle of fundamental justice under section 7,[66] she simultaneously restricted their potential scope by holding that they have *only* that status and that they do not and cannot apply outside section 7. The impact of *Lewis* for my analysis is even less clear because after rejecting *Gladue* arguments, Justice Gleason nonetheless went on to find that the decision was unreasonable because deportation would isolate the child from her Indigenous heritage.[67]

These decisions—*Re Can-Am*, *Desmoulin*, *Moore*, *Muskrat Falls*, and *Lewis*—span many substantive areas of law, but nonetheless share a reluctance to consider any incremental extension of *Gladue* principles beyond existing precedent. I do not suggest that such reluctance betrays an intellectual laziness or undue risk aversion. But it reveals a very narrow view both of the role and powers of administrative decision-makers and judges on judicial review, and of the aspirations of the Supreme Court of Canada in *Gladue* itself. In particular, Justice Watchuk in *Moore* exem-

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61 *Ibid* at para 41. *Gladue* principles were also argued in a penalty arbitration (see *Weyerhaeuser Canada Ltd v IWA-Canada*, *Local 1-207* (2002), 67 CLAS 137 at para 27, [2002] AGAA No 3), but the arbitrator held that it was unnecessary to consider the argument (see *ibid* at para 37).

62 2017 FCA 130 [*Lewis*].

63 *Ibid*.

64 See *ibid* at paras 66–68.

65 See *ibid* at para 68; *Robinson*, *supra* note 24.

66 See *Lewis*, *supra* note 62 at para 66. See also Manikis, *supra* note 41 (arguing that *Gladue* principles should be recognized as a principle of fundamental justice).

67 See *Lewis*, *supra* note 62 at paras 85–92.

plifies this approach in her reliance on the fact that there was "no reported case" to be precisely followed as exact precedent.[68]

I acknowledge, however, that this caution in extending *Gladue* outside the criminal context is not unique to administrative law. One example is that courts in child protection matters are divided on the application of *Gladue* principles. Thus, the court in *X (Re)* observed that criminal sentencing was "*un contexte extrêmement différent*"[69] and that "*il faut être extrêmement prudents avant de faire des rapprochements entre deux sphères aussi distinctes du droit.*"[70] Likewise, the reasons in *Alberta (Child, Youth and Family Enhancement Act, Director) v. JR* emphasized not only the differences in the statutory regimes—specifically that child protection is protective, not punitive—but also the differences in the "rationale and the remedies."[71] Other child protection courts have nonetheless applied similar considerations to those underlying *Gladue* principles.[72] Another ex-

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68 See *Moore*, *supra* note 55 at para 79. See also note 59 and accompanying text.

69 *X (Re)*, 2002 CanLII 38040 at para 35, (*sub nom K(M-K), Re*) 2002 CarswellQue 1256 (WL Can) (QC CQ) ("an extremely different context" [translated by author]).

70 *Ibid* at para 39 ("[o]ne must be extremely careful before making connections between two such distinct spheres of law" [translated by author]). The court nonetheless took Indigeneity into account (see *ibid* at para 41). Contrast that decision with e.g. *X (Re)*, 2001 CanLII 25881, (*sub nom X (Dans la situation de)*) [2001] QJ No 8159 (QC CQ), by the same judge months earlier ("[a]lthough the Court keeps in mind that this decision [*Gladue*] has been rendered in a criminal context, the Supreme Court has pointed out that a judge should be cautious when taking a decision regarding Aboriginal people, not to contribute to any systematic discrimination" at para 22).

71 *Alberta (Child, Youth and Family Enhancement Act, Director) v JR*, 2018 ABPC 258 at para 52 [*JR*]. See also *Child Youth and Family Enhancement Act*, RSA 2000, c C-12; *Alberta (Child, Youth and Family Enhancement Act, Director) v CL*, 2020 ABPC 23 (" 'Gladue factors' do not apply to family matters. ... Serious consideration must be given to how society can now break the cycle of poverty, family violence, and drug and alcohol abuse and resolve issues of housing, poverty, and intergenerational trauma ... However, the question for the Court in this case is 'what is in the best interest of the Children at this time?'. Gladue principles do not help with that decision" at paras 184–85). But see *Alberta (Child, Youth and Family Enhancement Act, Director) v JSA*, 2019 ABPC 32 ("I agree with his distinction [in *JR*] between sentencing on criminal matters and child protection matters but the factors described in *Gladue* may be an appropriate consideration with respect to the Director's obligation to provide services, insofar as it is reasonably practicable, to assist the family and to work with the family to alleviate the concerns pursuant to s. 2(e)(i) and s. 2(j)" at para 68).

72 See e.g. *CFS Western MB v NRM and KM-S*, 2019 MBQB 127 ("[t]he Supreme Court of Canada, within the sentencing context in criminal proceedings has instructed judges to consider certain factors in the sentencing of Indigenous offenders. ... Similar considerations should apply in child protection hearings" at paras 99–100 [citations omitted]). See also *New Brunswick (Minister of Social Development) v A(M)*, 2014 NBQB 130 at para 83. Contrast that approach with e.g. *Kawartha-Haliburton Children's Aid Society v R(J)*, 2015 ONSC 2054 ("Native heritage is very important to children, but it cannot override other needs that each specific child has; these children must be protected from

ample of this caution is *Armstrong v. McCusker*, a motion to change child support paid by an Indigenous parent to another Indigenous parent for the benefit of an Indigenous child.[73] In declining to apply *Gladue* principles, the court in *Armstrong* emphasized the difference between support and sentencing: "[T]he payor's liberty interest is not at stake, nor is the Indigenous payor facing punitive state action ... Very importantly, there are other individuals whose interests are at stake here, in particular Indigenous children and Indigenous mothers."[74]

The second reason for declining to apply *Gladue* principles is less conceptual and more pragmatic: that the decision-maker cannot determine how *Gladue* principles properly apply in the particular context or matter, that is, what impact they should have on the decision. Consider for example the decision of the Ontario Consent and Capacity Board in *DB (Re)*, reviewing an Indigenous person's capacity to consent to treatment and the imposition of a community treatment order: "Assuming without deciding that the board had jurisdiction to consider *Gladue* principles, it was not clear to the Board as to how or in what way the Board was to take that into consideration."[75] Like the first reason, this second reason perhaps suggests a lack of imagination or ingenuity, but more importantly it reveals that *Gladue* is not a self-executing magic word whose mere invocation changes the outcome of a case.

The third and most intractable reason for declining to apply *Gladue* principles is that there are statutory constraints that limit the jurisdiction of decision-makers, the factors that they may consider, or the reme-

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a volatile and unstable future so that the traumas of the past are not repeated. Regrettably, the application of '*Gladue* principles' would not accomplish the security that each needs" at para 257); *CM v Children's Aid Society of the Regional Municipality of Waterloo*, 2015 ONCA 612 ("we are not persuaded that *Gladue* principles affect the determination of whether an access order would be appropriate in this case ... Under these circumstances, an access order was not available under the CFSA [*Child and Family Services Act*, RSO 1990, c C.11]—and *Gladue* principles did not in any way assist in making that determination" at paras 7, 18). But see *Children's Aid Society of the Regional Municipality of Waterloo v CT*, 2017 ONCA 931 ("[c]ourts recognize the pervasive effects of the historical and continuing harms to First Nations families. This does not, however, automatically exempt Indigenous children from the access provisions for Crown wards under the *Act*. The legislation makes clear that the circumstances of *each individual child* must be considered in their entire context. A parallel can be drawn with the court's approach to the sentencing of Indigenous offenders ... While *Gladue* principles do not directly apply to access to a Crown ward, the Supreme Court's comments about *context* and the need for *case-specific* evidence are instructive" at paras 53–55 [citations omitted, emphasis in original]).

73 See *Armstrong v McCusker*, 2018 ONCJ 620 [*Armstrong*].

74 *Ibid* at paras 135–36.

75 *DB (Re)*, 2017 CanLII 58736 (Ont Consent and Capacity Board) at 14 [*DB (Re)*].

dies or benefits that they may order. While there appear to be no enabling statutes that explicitly preclude the application of *Gladue* principles (and such preclusion would be a red flag for the prospects of reconciliation[76]), there are many that reach the same result by their facially neutral terms. For example, the applicant for Ontario Disability Support in *1710-08668 (Re)* submitted a *Gladue* report which recommended, among other things, "access to traditional healing and wellness support services, indigenous specific mental health counselling, as well as access to any and all physical health support services of the Appellant's choice."[77] The Tribunal noted that under its enabling statute, it lacked jurisdiction to order these benefits.[78] A similar outcome occurred in *Anonyme — 181108* and *Anonyme — 181109*, reviews of two denials of legal aid in which "[*l*]'*avocat invoque les arrêts* Gladue *et* Ipeelee *afin de justifier la couverture du service demandé*."[79] The Committee, making no further mention of *Gladue*, held that the applicant did not meet the mandatory or discretionary criteria in the relevant statute and thus refused to order that legal aid be provided to her.[80] Similarly, recall that the Consent and Capacity Board in *DB (Re)* suggested that even if *Gladue* principles could somehow be applied, it might not have the jurisdiction to do so.[81] This third reason is intractable insofar as *Gladue* principles are a common law principle and not constitutionalized.

Like the first reason, this third reason for declining to apply *Gladue* principles is not unique to administrative law. Consider for example *On-*

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76 I acknowledge the possible argument that explicitly barring the consideration of *Gladue* principles may engage section 15 of the *Charter*, but that argument is beyond the scope of my analysis.

77 *1710-08668 (Re)*, 2019 ONSBT 431 at para 16 (Social Benefits Tribunal).

78 See *ibid* ("[t]he Tribunal's jurisdiction is granted to it by the *ODSPA*. That legislation does not confer on the Tribunal the authority to order remedies such as those recommended by the Gladue report. The Tribunal therefore lacks the jurisdiction to make any rulings related to the Appellant's access to treatment and support services. Accordingly, these matters were not considered further by the Tribunal in this appeal" at para 17); *Ontario Disability Support Program Act, 1997*, SO 1997, c 25, Schedule B.

79 *Anonyme — 181108*, 2018 QCCSJ 1108 at para 6 (Legal Services Commission Review Committee) [*181108*]; *Anonyme — 181109*, 2018 QCCSJ 1109 at para 6 [*181109*] (Legal Services Commission Review Committee) ("[c]ounsel relies on *Gladue* and *Ipeelee* to justify coverage of the service requested" [translated by author]).

80 See *181108*, *supra* note 79 at paras 10–11; *181109*, *supra* note 79 at paras 10–11. Conversely, see *Anonyme — 21337*, 2021 QCCSJ 337 at paras 6, 11 (Legal Services Commission Review Committee), where *Gladue* principles were argued but the Committee, making no further mention of *Gladue*, held that the applicant met one of the discretionary criteria in the relevant statute.

81 See *DB (Re)*, *supra* note 75 ("[a]ssuming without deciding that the Board had jurisdiction to consider *Gladue* principles, it was not clear to the Board as to how or in what way the Board was to take that into consideration" at 14).

tario (Director, Family Responsibility Office) v. McMurter, an application for enforcement of a spousal support order.[82] In granting the application, the court held that the statutory scheme precluded a role for *Gladue* principles.[83]

A fourth potential reason is that *Gladue* principles or *Gladue* arguments are unnecessary to determine the matter, (i.e., that the decision or the judicial review can be determined on other grounds). For example, on judicial review of the revocation of an Indigenous person's statutory release by the Parole Board of Canada, the court in *Joly v. Canada (Attorney General)* held that the matter could be determined on procedural fairness grounds and thus it was unnecessary to consider the failure to apply *Gladue* principles.[84] It is worth emphasizing here that even where *Gladue* principles are strictly unnecessary to decide the matter, declining to consider them in the alternative creates gaps for a court on judicial review or on an appeal from judicial review.

A fifth potential reason for declining to apply *Gladue* principles is that there is insufficient relevant evidence before the decision-maker. Consider

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[82] *Ontario (Director, Family Responsibility Office) v McMurter*, 2017 ONCJ 947 [*McMurter* ONCJ]. See also *McMurter v Director, FRO*, 2017 ONSC 3662, where a stay pending appeal was denied.

[83] See *McMurter* ONCJ, *supra* note 82 ("[t]he underlying factors in *Gladue* such as systemic discrimination, social and economic deprivation, and historical dislocation may have relevance to an indigenous payor's ability to pay. However once he or she is found to have the resources necessary to pay a support obligation, the Court must make those orders only within the context of the statutory framework of the *FRSAEA* ... I find that the application of *Gladue* is not required in this proceeding as to whether there shall be an order of committal" at paras 55, 65); *Family Responsibility and Support Arrears Enforcement Act, 1996*, SO 1996, c 31. The decision in *McMurter* also reveals the first kind of reason for failing to apply *Gladue* principles, namely that the context is distinguishable from criminal sentencing. See *McMurter* ONCJ, *supra* note 82 ("[h]owever, support enforcement proceedings under the *Act* are not criminal proceedings with a '*true penal consequence*'. There is no information sworn, no criminal record is created, and incarceration is not imposed where there is an inability to pay. As its object, a committal order in the context of a default of a support enforcement order is to ensure compliance with Court ordered support obligations with no culpability or blameworthiness of the support payor determined by the Court" at paras 53–54).

[84] See *Joly v Canada (AG)*, 2014 FC 1253 at para 104. See also *Blacksmith v Canada (AG)*, 2017 FC 605; *Rain v Canada (Parole Board)*, 2015 ABQB 639 (where the court declined to consider the habeas corpus application and thus it was unnecessary to consider the merits, including a *Gladue* argument); *Earhart v Canada (AG)*, 2015 ONSC 5218 at paras 45–46 (a habeas corpus application where the court held that it was unnecessary to decide whether *Gladue* principles were applicable in prisoner reclassification and transfer decisions, though the decision-maker had explicitly considered them). Contrast this approach with *Lorne Snooks c Giordano*, 2019 QCCS 1766 at paras 77–78, and *Germa c Tremblay*, 2019 QCCS 1764 at paras 98–99 (where the habeas corpus applications were denied on the basis that *Gladue* principles had been properly considered in the transfer and reclassification decisions).

here *Tuckanow v. Bowden Penitentiary*, reviewing the decision to transfer an Indigenous inmate to a higher-security institution: "While I could not say that *Gladue* would never apply within the context of corrections decisions, there is no reason on the basis of these facts to find that it does."[85] To similar effect is *Law Society of Alberta v. Willier*, about the applicability of *Gladue* principles to costs orders in disciplinary proceedings involving Indigenous lawyers. In that decision, the panel did not rule out the application of *Gladue* principles to penalty or costs determination, but held that there was no relevant evidence before it.[86] This fifth potential reason relates to legal uncertainty over the proper scope of judicial notice and the need for specific evidence about the circumstances of the particular Indigenous person who is the subject of the decision.[87]

I acknowledge here that *Gladue* principles may not change the result in every case—especially where the decision is a binary one, such as in the determination of eligibility for a benefit. That is, it is necessary to dis-

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85 *Tuckanow v Bowden Penitentiary*, 2014 ABQB 563 at para 49 [*Tuckanow*]. *Tuckanow* is also about uncertainty over what impact *Gladue* principles could have in the particular circumstances: "Mr. Tuckanow suggests that rather than being transferred, alternative measures should have been taken in his case. No suggestions have been made as to what those alternatives would have been in light of the concerns giving rise to his reclassification" (*ibid*). See also *Gunner (Re)*, [2017] ORBD No 3001 ("[a]lthough moot considering the above Disposition, the Board found that there was no evidence directly related to the evidential foundation necessary to consider the *Gladue* principles" at para 19).

86 *Law Society of Alberta v Willier*, 2018 ABLS 22 at para 35 [*Willier*].

87 See e.g. *Robinson, supra* note 24 at para 32, as described and cited in Martin, *supra* note 7 ("[w]hile the hearing panel held that the lawyer's Indigeneity was not a mitigating factor, citing 'the lack of evidence['] ... or 'case-specific information,'" the appeal panel—holding that there was such evidence—[reversed and] substituted a suspension of one year" at 30). See also e.g. *Willier*, *supra* note 86 ("[s]uch individualized evidence is required by *Gladue* and related cases in the criminal sentencing context" at para 35). More recently, see *Law Society of Ontario v Loder*, 2021 ONLSTH 66 at paras 52–61, especially para 58 [citation omitted]: "Law Society counsel submitted that Mr. Loder failed to show how his [Indigenous] background may have played a role in the professional misconduct as found and, accordingly, that his background should not properly be seen as a mitigating circumstance. We agree with this submission. Absent some demonstrated connection between his background and the proven misconduct, there is no basis from which to conclude that his background provides a mitigating circumstance as claimed." In the criminal sentencing context, see e.g. *R v Monckton*, 2017 ONCA 450 ("[t]he problem lies in the vagueness of the information concerning the appellant's attitude towards his Aboriginal status. The court was merely provided with general information from the appellant's father about his son's interest in his heritage. Of course, the appellant is not required to draw a straight line between his Aboriginal roots and the offences for which he is being sentenced ... However, more is required than the bare assertion of an offender's Aboriginal status. ... In the materials placed before us, there is no information *from* the appellant, or *about* the appellant, that lifts his life circumstances and Aboriginal status from the general to the specific" at paras 114–17). Thank you to a reviewer for bringing *Monckton* to my attention.

tinguish between a decision-maker who declines to apply *Gladue* principles and a decision-maker whose application of *Gladue* principles does not change the outcome of the case.

III. Counter-Examples: Why Do Administrative Decision-Makers Apply *Gladue* Principles?

In this part, I provide some counter-examples, that is, decisions where administrative decision-makers or courts on judicial review apply *Gladue* principles. These decisions reveal a coherent basis for counteracting or responding to some of the reasons discussed in Part II, particularly a reluctance to extend *Gladue* principles beyond criminal sentencing.[88] As I will return to below, the decisions that I examine in Part III are all fundamentally decisions about penalty, although at first glance they mostly involve liberty.

The least surprising extension of *Gladue* principles to administrative law is to decisions of the provincial review boards regarding not criminally responsible (NCR) accused under the *Criminal Code*. While these dispositions are not sentences, they resemble sentences and indeed are an integral part of the criminal justice system. Justice Sharpe in *R v. Sim* gave several reasons for applying *Gladue* principles in this context.[89] The most important for my purposes are, first, that NCR dispositions, like sentences, are relevant to estrangement and overincarceration;[90] and second, that *Gladue* principles are relevant to the statutory criteria that review boards must apply.[91] While *Sim* concerned NCR accused, review boards have also applied *Gladue* to dispositions for accused unfit to stand trial.[92]

While *Sim* was the first decision in which a court confirmed that review boards must apply *Gladue* principles to Indigenous NCR accused, a dissenting member of the British Columbia Review Board in *Alexis (Re)* had done so before *Sim*.[93] That dissenting member noted that, "for this particular accused, it is not only entirely appropriate, but indeed neces-

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88 As indicated in the footnotes that follow, in this Part, I draw heavily on Martin, *supra* note 7.

89 See *R v Sim*, *supra* note 37. See also Martin, *supra* note 7 at 35–36.

90 See *R v Sim*, *supra* note 37 at paras 15–16. See especially *ibid* ("I do not think that the principles underlying *Gladue* should be limited to the sentencing process and I can see no reason to disregard the *Gladue* principles when assessing the criminal justice system's treatment of NCR accused" at para 16).

91 See *R v Sim*, *supra* note 37 at paras 17–24.

92 See e.g. *Chickite (Re)*, [2008] BCRBD No 11 at para 39, 2008 CarswellBC 3953.

93 See *Alexis (Re)*, [2003] BCRBD No 1, 2003 CarswellBC 3702.

sary to include in the analysis the unique, historic, cultural, political, and systemic components of his aboriginal heritage and traditions ... Mr. Alexis' circumstances are unique and different from those of other NCRMD [NCR on account of mental disorder] accused."[94] While the dissenting member noted that *Gladue* originated in sentencing provisions of the *Criminal Code*, he held that "[s]uch considerations would also appear entirely consistent with and correspond to or further the criteria in s. 672.54 [the *Criminal Code* provision on dispositions for NCR accused]."[95]

Perhaps the least surprising extension of *Gladue* principles to judicial review beyond matters under the *Criminal Code* is to extradition. Extradition is fundamentally about overriding the individual's liberty interest for the purpose of criminal proceedings, albeit proceedings in another jurisdiction. Justice Sharpe in *United States v. Leonard*, overturning the minister's surrender decision on judicial review, held that *Gladue* principles are relevant for decision-makers, judges or otherwise, "whenever an Aboriginal person's liberty is at stake in criminal and related proceedings."[96] While it is clear from the reasoning in *Leonard* that *Gladue* principles should apply if liberty is engaged in "criminal and related proceedings," which Justice Sharpe did not define further, this holding does not necessarily mean that *Gladue* principles can *only* apply in such circumstances (i.e., that such circumstances are requirements for the application of *Gladue* principles).[97] I will return to this scope issue below.[98]

Leonard was followed in *Sheck*, in which the majority of the British Columbia Court of Appeal held that *Gladue* principles—or at least the "historical context" underlying them[99]—were relevant when the extradi-

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94 *Ibid* at para 80.

95 *Ibid* at para 82.

96 *Leonard*, *supra* note 17 at para 85.

97 See Martin, *supra* note 7 ("*Leonard* leaves open, however, the scope of 'related proceedings' and whether engagement of the liberty interest is necessary, not just sufficient, for the application of *Gladue* principles. ... [T]here is nothing in the reasoning of Sharpe JA in *Leonard* to suggest that *Gladue* principles cannot apply where the liberty interest is not engaged, or that that was his intention. Indeed, if he had purported to decide that *Gladue* principles apply only where the liberty interest is engaged, that holding would have been *obiter*, as that question was not at issue on the facts of the case" at 38, 44).

98 See note 123 and accompanying text.

99 See *Sheck v Canada (Minister of Justice)*, 2019 BCCA 364 [*Sheck*] ("[i]t cannot be said that the best interests of the children will be meaningfully considered if the Indigenous status of the children and their parent is not taken into account. To take this into account, one has to appreciate the same historical context that underlies the *Gladue* factors" at para 77). I consider below in Part 4 whether this distinction—between *Gladue* principles and something different that shares the same "historical

tion of an Indigenous parent would separate him from his Indigenous children:

> The impact on Mr. Sheck and his Indigenous children of the Canadian history of separating Indigenous parents and children, and the resultant destruction of Indigenous communities, which, in some ways, may have contributed to Mr. Sheck's alleged criminality, were important factors in informing the Minister's view.[100]

Sheck is thus important insofar as it applies *Gladue* principles both to the interests of the subject of the decision and to the interests of other persons directly affected by the decision.

As unsurprising as *Leonard*, although perhaps more important, is the extension of *Gladue* principles to parole in *Twins*. Parole is intrinsically linked to sentences, if not sentencing. After reviewing other cases in which *Gladue* had been extended—in both matters under the *Criminal Code* (bail and review board decisions) and outside of it (extradition and sentencing for civil contempt)[101]—Justice Southcott held that the determinative factor was Indigenous overincarceration and estrangement, and that *Gladue* principles would thus apply in "a range of circumstances in which Aboriginal peoples interact with the justice system," including parole revocation.[102]

Gladue principles have similarly been applied to inmate segregation decisions.[103] In reviewing one such decision in *Hamm v. Canada (Attorney General)*, the Alberta Court of Queen's Bench emphasized the similarity to criminal sentencing and the engagement of liberty in its discussion of *Gladue* principles: "Given Parliament's focus on the objectives of the sentencing system, and thus of the correctional system, in relation to aboriginal offenders, it is unreasonable for a correctional institution to deny transparency in relation to its decisions concerning whether, and how, and where, aboriginal offenders should be further deprived of liberty."[104] Likewise, in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, the British Columbia Supreme Court partly based its holding that the use of administrative segregation infringes the section 15

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context"—is a meaningful one. Thanks to Rob Currie for bringing *Sheck* to my attention.

100 *Ibid* at para 103. I note here that *Sheck* seems to recognize a greater role for *Gladue* principles in extradition decisions than that required by the narrower characterization of *Leonard* in the intervening decision by the Supreme Court of Canada in *R v Anderson*, *supra* note 17 (see *Sheck*, *supra* note 99 at paras 74–75).

101 See *Twins*, *supra* note 25 at paras 53–56.

102 *Ibid* at para 57.

103 See also *Correctional Services and Reintegration Act, 2018*, *supra* note 15, s 29.

104 *Hamm v Canada (AG)*, 2016 ABQB 440 at para 106.

Charter rights of Indigenous inmates on the superficial application of *Gladue* principles to segregation decisions: "There is a box to be ticked on a form and it is ticked. Meaningful results have not followed."[105] Though the section 15 infringement was successfully appealed, the underlying factual finding of a failure to meaningfully apply *Gladue* principles was not questioned on that appeal.[106] While this case was not, strictly speaking, a judicial review of the underlying decisions, it is nonetheless illustrative for my purposes.

Perhaps the most surprising extension of *Gladue* principles (i.e., the extension to the context most unlike criminal sentencing) has been to the professional discipline of Indigenous lawyers. In *Law Society of Upper Canada v. Terence John Robinson*, the appeal panel of the Law Society of Upper Canada (as it then was) acknowledged that professional discipline has four relevant differences from criminal law sentencing: the lawyer's liberty interest is not engaged, the *Criminal Code* provision underlying *Gladue* does not apply, lawyer discipline does not relate to the problem of Indigenous overincarceration, and lawyer discipline has a different purpose than criminal sentencing.[107] However, these differences meant only that *Gladue* principles applied differently.[108] What was determinative was that factors relevant to criminal sentencing were also relevant to determination of disciplinary penalties, particularly "the seriousness of misconduct or conduct unbecoming and circumstances that offer aggravation or mitigation[,] ... the culpability or moral blameworthiness of the licensee[,] ... [and] the character of the licensee,"[109] and to the purpose of discipline itself, "to enhance respect for, and confidence in our profession and the self-regulation of all of its members."[110] While the conduct at issue in *Robinson* was itself criminal, *Robinson* has been followed in one decision in which the underlying conduct was not criminal.[111]

Similar to the decision in *Robinson* was *Police Ethics Commissioner v. Ross*.[112] In *Ross*, the Comité de Déontologie Policière considered, and ap-

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105 *British Columbia Civil Liberties Association v Canada (AG)*, 2018 BCSC 62 at paras 483, 489, rev'd in part 2019 BCCA 228.

106 See *ibid* at para 90.

107 See *Robinson*, *supra* note 24 at para 72. See also Martin, *supra* note 7 at 30.

108 See *Robinson*, *supra* note 24 at para 74. See also Martin, *supra* note 7 at 30.

109 See *Robinson*, *supra* note 24 at para 72. See also Martin, *supra* note 7 at 30.

110 See *Robinson*, *supra* note 24 at para 73. See also Martin, *supra* note 7 at 30.

111 See *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214. See also Martin, *supra* note 7 at 32.

112 2003 CanLII 57340, AZ-50207635 (SOQUIJ) (Qc CDP) [*Ross*] (determining penalty for the decision on the merits in *Commissaire à la déontologie policière v Ross*, 2003 Can-

pears to have applied, *Gladue* principles in the discipline of Indigenous police officers. The uncertainty over whether the committee applied *Gladue* principles arises because of the reviewing court's use of the phrase "*a examiné*": "*Le comité en imposant une rétrogradation plutôt qu'une suspension de 60 jours* a examiné *les principes de l'arrêt* Gladue*. Cet arrêt, tenant compte de la surpopulation carcérale d'autochtones préconise une détermination de peine selon une approche corrective*."[113] The committee itself did not explain why or if *Gladue* principles applied. However, it did note the submissions of the officers that *Gladue* principles should apply.[114]

Similar to *Robinson* and *Ross* was the decision of the Discipline Committee of the College of Massage Therapists of Ontario in *Alana Grace Nahdee, RMT*.[115] The Committee in *Nahdee* held that the circumstances of Nahdee, as an Indigenous professional, were "unique."[116] As an alternative to a longer suspension, the Committee applied *Gladue* principles to shorten the suspension and instead required Nahdee to make a presentation "regarding the importance of increasing the number of aboriginal persons working in healthcare in Ontario, and discussing her journey in overcoming her personal difficulties to become an RMT [Registered Massage Therapist]."[117]

What do these decisions have in common? In contrast to the decisions analyzed in the previous part, these decisions demonstrate a willingness to incrementally extend *Gladue* principles beyond narrow and strict prec-

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LII 57332, AZ-50189016 (SOQUIJ) (Qc CDP)), rev'd in part *Isaac c Commissaire à la déontologie policière*, 2005 CanLII 26460, [2005] JQ no 9834 (CQ (Civ Div)) [*Isaac*].

113 *Isaac*, *supra* note 112 ("[t]he committee, in imposing a demotion rather than a 60-day suspension, *examined* the principles of the Gladue decision. This ruling, which takes into account the overpopulation of aboriginal people in prisons, calls for a sentencing according to a corrective approach" at para 177 [emphasis added, translated by author]).

114 See *Ross*, *supra* note 112 at para 24. See also Martin, *supra* note 7 at 22, n 12.

115 See *Alana Grace Nahdee, RMT* (26 October 2015), Ottawa (Discipline Committee of the College of Massage Therapists of Ontario) [on file with author], official summary available online (pdf): *College of Massage Therapists of Ontario* <cmto.com> [perma.cc/2ZC6-23JE] [*Nahdee*]. Thanks to Benjamin Ralston for bringing *Nahdee* to my attention.

116 *Ibid* (the official summary elaborates: "The unique circumstances considered in this case related to the request to consider *R v. Gladue* (1999). This was a landmark decision by the Supreme Court of Canada that advises that lower courts should consider an Aboriginal offender's background and make sentencing decisions accordingly. In keeping with these principles, the Panel believed that the length of suspension, as well as the requirement for Ms. Nahdee to present within the Aboriginal community, was in keeping with the *R v. Gladue* (1999) principles" at 4).

117 *Ibid* at 3.

edents and without explicit statutory signalling. They focus on a connection to sentencing, criminal law, or liberty more broadly. At a deeper level, this difference in approach is a disagreement about the role of decision-makers and courts on judicial review and the constraints of precedent and statute.

The decision-makers in *Robinson*, *Ross*, and *Nahdee* go furthest by interpreting the scope of *Gladue* principles as transcending liberty. What is different about *Nahdee*, as compared to *Robinson* and *Ross*, is that *Robinson* and *Ross* are about persons within the justice system, namely lawyers and police. The alienation and estrangement from the justice system that forms the core of *Gladue* is most obviously relevant to lawyers and police as persons within that system. *Nahdee* is instead about a health professional, for whom alienation and estrangement from the justice system is not directly relevant. Instead, as I will discuss further below, *Nahdee* suggests that *Gladue* principles are more broadly relevant to estrangement not only from the justice system *per se*, but the administrative state itself.

Before proceeding, I distinguish tribunal decisions that cite *Gladue* merely as support for a recognition of anti-Indigenous bias and racism. Consider for example the human rights decision in *Commission des droits de la personne et des droits de la jeunesse (Régis et autres) c. Blais*, in which the tribunal cited *Gladue* as support for the proposition that judges may take judicial notice of "*des facteurs systématiques et historiques généraux touchant les Autochtones, notamment le fait qu'ils soient victimes de préjugés raciaux*."[118] Such application of *Gladue* is not properly understood as an application of *Gladue* principles. While that factor in *Blais* contributed to the quantum of damages, that is qualitatively different from the idea that I introduce in the next Part of *Gladue* principles increasing a benefit.

IV. The Scope of *Gladue* Principles in Administrative Law

In this Part, I combine my analysis in Parts II and III to determine the appropriate scope of *Gladue* principles in administrative law. I start by considering the scope of the reasons in *Gladue* itself. I then group the existing cases that have applied *Gladue* principles. I characterize them as cases about penalty, though they may often appear to be about liberty. I then argue that there are three levels at which *Gladue* principles can ap-

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[118] *Commission des droits de la personne et des droits de la jeunesse (Régis et autres) c Blais*, 2007 QCTDP 11 ("the general systematic and historical factors affecting Aboriginal people, including the fact that they are victims of racial prejudice" at para 111 [translated by author]).

ply, of which penalty is the first and least controversial: *Gladue* principles can apply to increase the threshold for a penalty to be applied, decrease a penalty, or substitute alternative penalties. The second level, which is the counterpart to penalty but one step further, is benefit: *Gladue* principles can apply to decrease the threshold for a benefit to be provided or to increase a benefit. The third level, and admittedly the most ambitious, difficult, and amorphous, is a residual level that is neither penalty nor benefit.

A. Context: R v. Gladue *Itself*

In determining the appropriate limits of the extension of *Gladue* principles, the reasons in *Gladue* must be considered. While the extent envisioned in *Gladue* itself is not necessarily determinative, it does provide a natural starting point and arguably a minimum extent to which *Gladue* principles should be applied.

While *Gladue* itself was about the sentencing of an Indigenous offender, Justices Cory and Iacobucci for the Court were explicit that the root problem was not overincarceration alone. Instead, overincarceration was just one highly visible indicator of a broader estrangement: "the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned."[119] The reasons in the following paragraphs then refer back twice to the "criminal justice system": to "a crisis in the Canadian criminal justice system"[120] and to "the greater problem of aboriginal alienation from the criminal justice system."[121] On their own, these references may be read as limiting the scope of the problem—or reflexively, the scope of *Gladue* principles as a response to that problem—to matters involving the criminal justice system.

But this second reference situates that overincarceration and alienation in the broader social context, "including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people ... [as well as] bias against aboriginal people."[122] Moreover, Justices Cory and Iacobucci explicitly recognize that "[t]here are many aspects of this sad situation which cannot be addressed in these reasons."[123] The impact of these socio-economic factors extend beyond involvement with the criminal justice system, and there is no reason to think that this bias is

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[119] *Gladue*, *supra* note 4 at para 61.

[120] *Ibid* at para 64.

[121] *Ibid* at para 65.

[122] *Ibid*.

[123] *Ibid*.

restricted to the criminal justice system. Thus, the reasons in *Gladue* in no way preclude—indeed, may be read as calling for—the extension of *Gladue* principles beyond criminal law.

I have suggested elsewhere that *Gladue* principles are necessary and appropriate wherever Indigenous estrangement from the justice system, including but not limited to the *criminal* justice system, is at issue.[124] What this approach would mean for administrative law depends on whether the colonially imposed Canadian administrative state is fundamentally different than, and separable from, the colonially imposed Canadian justice system. The answer would seem to be that it is not. Granted, there are few if any available quantitative indicators of alienation and estrangement from the administrative state that parallel levels of Indigenous overincarceration. The closest analogue is likely the disproportionate involvement of Indigenous children in the child protection system.[125] In contrast, no statistics are available on the eviction rates of Indigenous tenants as compared to tenants overall, for example.[126] Similarly, there is no quantitative evidence that professional regulators over-investigate or over-discipline Indigenous professionals,[127] although Indigenous lawyers disproportionately practice in settings that tend to attract more investiga-

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[124] See Martin, *supra* note 7. See also the reasoning of the judges in *R v Sim*, *supra* note 37 at para 16; *Frontenac Ventures*, *supra* note 18 at para 56; *Leonard*, *supra* note 17 at paras 57–59.

[125] See e.g. TRC *Final Report*, *supra* note 1 at 138, 139. More recently, see e.g. Ontario Human Rights Commission, *Interrupted Childhoods: Over-Representation of Indigenous and Black Children in Ontario Child Welfare* (Toronto: OHRC, 2018) at 38, Table 1, online (pdf): <www.ohrc.on.ca> [perma.cc/U6KE-LH57]. Given courts' primary role in child protection, this is arguably not squarely a matter of pure administrative law.

[126] For the recognition of the need for such data, see Canada Mortgage and Housing Corporation, *National Housing Conference: 2018 Report*, by Julie Markovich (Ottawa: CMHC, 2018), online (pdf): <www.cmhc-schl.gc.ca> [perma.cc/V9RA-3ZXQ] ("[b]etter data collection on who is evicted (noting over-representations by race, ethnicity and Indigeneity; gaps remaining by sex) and the reasons for evictions were also identified as important in the ongoing evolution of the NHS [National Housing Strategy]" at 17). In the absence of quantitative data, see e.g. Ontario Human Rights Commission, *Right at Home: Report on the Consultation on Human Rights and Rental Housing in Ontario* (Toronto: OHRC, 2008) at 15, 22–23, online (pdf): *OHRC* <www.ohrc.on.ca> [perma.cc/H27S-QLN5] (on discrimination against Indigenous people, especially Indigenous women, in housing). See also e.g. *Smith v Mohan (No 2)*, 2020 BCHRT 52 (a successful human rights claim against a landlord for discriminatory attempts to evict an Indigenous tenant).

[127] On discrimination against Indigenous lawyers generally, see e.g. Law Society of British Columbia, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers*, by the Aboriginal Law Graduates Working Group (Vancouver: LSBC, 2000), online (pdf): <www.lawsociety.bc.ca> [perma.cc/NM55-T27A]; Law Society of Upper Canada, *Final Report: Aboriginal Bar Consultation*, by the Equity Initiatives Department (Toronto: LSUC, 2009), online (pdf): <www.lso.ca> [perma.cc/4VXP-M387].

tions and discipline.[128] Moreover, the under-representation of Indigenous persons in the legal profession itself suggests estrangement.[129] Perhaps another acknowledgement or indication that the regulatory apparatus of the administrative state is ill-suited to Indigenous professionals is the fact that the Ontario *Regulated Health Professions Act* does not apply to traditional "aboriginal healers" and "aboriginal midwives" practicing in Indigenous communities.[130]

Nonetheless, there is little reason to believe that the estrangement and alienation of Indigenous peoples from the colonial Canadian criminal justice system, and the bias against them within that system, can be disentangled from the estrangement and alienation from, and bias within, the colonial Canadian administrative state. Indeed, the impacts of colonialism recognized in *Gladue*—"poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people ... [as well as] bias against aboriginal people"[131]—apply beyond the criminal justice system. Perhaps the most powerful historical indicators of alienation and estrangement are the automatic loss of Indian status for Indigenous people who became doctors or lawyers (or clergy) and the historical prohibition on bands retaining lawyers.[132] Recent examples are only somewhat less disconcerting. A powerful example here is *Anonyme*, where an Indigenous person was denied legal aid—a denial that exacerbates estrangement via a missed opportunity to assist in the navigation of the criminal justice system.[133] More recently, the Ontario Health Professions Appeal and Review Board has held that the College of Physicians and Surgeons

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[128] See Martin, *supra* note 7 at 27.

[129] See e.g. *ibid* at 25.

[130] See *Regulated Health Professions Act, 1991*, SO 1991, c 18, s 35.

[131] *Gladue*, *supra* note 4 at para 65.

[132] See *Indian Act*, SC 1876, c 18, s 86(1); *Indian Act*, RSC 1927, c 98, s 141.

[133] See *181108*, *supra* note 79 at paras 10–11; *181109*, *supra* note 79 at paras 10–11. See also e.g. *Moose Family v Manitoba (AG) and Provincial Court Judge Heinrichs*, 2013 MBPC 35, regarding funding for counsel at a death inquest ("[t]hat estrangement by aboriginal people has clearly carried over into other areas of Canadian law" at para 33); *ibid* ("[o]ur overcrowded jails are filled with a disproportionate number of aboriginal people. Donald Moose was one of them and he died while in custody. His family had requested funding from the Department of Justice, under their new Policy for funding for legal representation at an inquest. That request was denied on the basis that the public interest and the interest of the Moose family are very similar. While that may be a sound rational conclusion, it does nothing to satisfy the estrangement the Moose family—and other aboriginal people—and how they feel in relation to the justice system ... There is a financial cost in having the Government pay for legal costs of the Moose family; however, there may be a greater cost in not doing so" at paras 45, 47).

of Ontario inadequately investigated an Indigenous parent's complaint of bias in her daughter's treatment.[134]

It is on this basis that I argue there are three levels at which *Gladue* principles can appropriately apply in administrative decision-making. I describe these as levels because the first level is the least controversial, the second is more controversial, and the third is the most controversial.

That *Gladue* principles apply at up to three levels does not mean they apply the same way in every context. Indeed, this is the subtle brilliance of the extension of *Gladue* principles to the discipline of Indigenous lawyers in *Robinson*: *Gladue* principles apply in contexts different from criminal sentencing; they just apply differently.[135] At the same time, I acknowledge the concern that *Gladue* principles must have some limits if they are to remain meaningful. Under my approach, those limits are contiguous with the estrangement and alienation of Indigenous peoples from the Canadian administrative state.

B. Level One: Penalty

The first and least controversial level at which *Gladue* principles can apply is penalty: *Gladue* principles can apply to increase the threshold for a penalty to be applied, decrease a penalty, or substitute alternative penalties—with a broad conception of "penalty." Indeed, penalty—in its myriad forms—is directly analogous to criminal sentencing itself. As the Supreme Court of Canada confirmed in *Ipeelee*, section 718.2(e) of the *Criminal Code* is necessary to achieve the predominant sentencing principle of proportionality by properly assessing a person's "moral blameworthiness."[136] To the extent that moral blameworthiness is at least partially relevant to penalty determinations outside criminal sentencing, *Gladue* principles serve the same function as section 718.2(e) itself.

This level neatly connects the existing extensions of *Gladue* principles in administrative law as discussed in Part II. At first glance, most of these existing extensions of *Gladue* principles appear to be about liberty. However, *Moore* suggests that these are better understood as being about

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[134] See *AD-S v NMN*, 2020 CanLII 67103 especially at paras 34–35 (Ont HPARB). Thank you to a reviewer for bringing this decision to my attention. But see *SP v JVF*, 2020 CanLII 26459 at para 43 (Ont HPARB).

[135] See *Robinson*, *supra* note 24 ("[c]riminal sentencing judges will apply the *Gladue* principles in different ways than hearing panels. After all, they have different tools available to them, as well as a different range of sanctions, including imprisonment. But that simply explains why the *Gladue* principles may be applied differently in discipline proceedings than in criminal proceedings. The principles still apply" at para 74).

[136] *Ipeelee*, *supra* note 4 at 37, 73. See also Rudin, *supra* note 6 at 377–78.

a penalty for wrongful or undesirable or otherwise problematic conduct.[137] Such a characterization should be interpreted generously and beyond these existing extensions of *Gladue* principles. For example, the eviction in *Re Can-Am* and the compensation refusal in *Desmoulin* were, despite their characterization in the respective reasons as non-criminal matters, fundamentally about consequences for criminal conduct. For that matter, so were the disciplinary decision in *Robinson* and the termination in *Muskrat Falls*.

Indeed, characterizing liberty as the unifying determinative factor among these cases as to whether *Gladue* principles apply is problematic given *DB (Re)*. Involuntary treatment unquestionably engages the liberty interest, as well as the security of the person and potentially life where the treatment is dangerous. Nonetheless, *Gladue* principles were not extended to this context—perhaps because compulsory treatment is not a penalty, and thus it sits awkwardly with the existing precedents.

Similarly, the language in decisions such as *Leonard*—that "the *Gladue* factors are not limited to criminal sentencing but that they should be considered by all 'decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system' ... whenever an Aboriginal person's liberty is at stake in criminal and related proceedings"[138]—is not necessarily limiting. This language, while reinforcing that *Gladue* principles apply in "criminal and related proceedings," leaves "related proceedings" undefined. Moreover, it cannot preclude the extension of these principles beyond these boundaries.[139]

While *Robinson* and *Ross* might suggest that *Gladue* principles apply to professional discipline in only some contexts, I argue that, as in *Nahdee*, those principles apply to any disciplinary penalty imposed on any Indigenous professional. *Robinson* and *Ross* were about disciplinary penalties for professions intricately linked to the justice system (lawyers and police, respectively), and *Robinson* was about disciplinary consequences for criminal conduct. Thus, they might support a conception of *Gladue* principles that applies only where alienation and estrangement from the justice system is directly relevant. However, under my broader approach, where *Gladue* principles apply to alienation and estrangement not just from the justice system but also from the administrative state it-

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[137] See *Moore*, *supra* note 55 ("[a]lthough *Gladue* factors have been applied outside the criminal law context, they have only been applied in relation to the imposition of penalties or disciplinary sanctions" at para 79). See also *Armstrong*, *supra* note 73 (*Gladue* principles apply where "the Indigenous person's liberty is at stake or the person is facing punitive state action" at para 134).

[138] *Leonard*, *supra* note 17 at para 85 [citation omitted].

[139] See note 97 and accompanying text.

self, these are not limiting factors. In this spirit, consequences such as an eviction, an employment termination, and a denial of compensation for victims of crime would all qualify as penalties even if the underlying conduct was not criminal.

Under this approach, *Gladue* principles properly apply to mitigate penalties in decisions such as those discussed above—eviction (*Re Can-Am*), compensation (*Desmoulin*), and employment termination (*Muskrat Falls*), as well as professional discipline (*Robinson* and *Nahdee*).

Moreover, using alienation and estrangement from the administrative state as the test, *Gladue* principles would also apply to costs orders against Indigenous persons in administrative proceedings.[140] I have argued elsewhere that costs orders in disciplinary proceedings against Indigenous professionals do not invoke alienation and estrangement from the justice system in the same way as disciplinary penalties themselves.[141] Therefore, using that as the test for the scope of *Gladue* principles, it is unclear whether those principles apply to costs orders.[142] However, costs orders are a fundamental aspect of the administrative state. *Gladue* principles should thus apply in costs contexts.

I acknowledge here that the application of *Gladue* principles is more contestable in contexts such as *Lewis* where an Indigenous person is not the subject of the penalty decision, but will be directly affected by that decision. The less direct the effect, the less obvious the application of *Gladue* principles.

C. Level Two: Benefit

Outside of proceedings which involve the imposition of penalties for unlawful or otherwise problematic conduct, existing extensions of *Gladue* principles are uninformative and it remains unclear how *Gladue* principles should affect outcomes in administrative decisions.

I argue that a second level at which *Gladue* principles should apply in administrative law is in relation to a benefit. As a parallel or converse to penalty, *Gladue* principles can apply to decrease the threshold for provision of a benefit or to increase a benefit. Penalty and benefit are linked and the line between them is not always clear. For example, the applicant in *Desmoulin* was seeking a benefit but was denied compensation essentially as a penalty for his subsequent conduct. It would be arbitrary and

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[140] See e.g. *Willier*, *supra* note 86 (where a panel recognized that *Gladue* principles could potentially apply to cost awards in disciplinary proceedings).

[141] See Martin, *supra* note 7 at 47.

[142] See *ibid.*

unprincipled for the application and impact of *Gladue* principles to be contingent on a fuzzy and manipulatable distinction between penalty and benefit.

From the cases reviewed in Parts II and III, it seems that the legal criteria for a penalty tend to be more open-ended and thus more amenable to the consideration of *Gladue* principles than the legal criteria for a benefit, which tend to be specified in statute and closed. Recall here that *Gladue* principles did not apply in the legal aid and disability support decisions mentioned above, because of the language of the relevant statutes. However, there are benefit contexts—such as victims' compensation in *Desmoulin*—in which open-ended statutory criteria could allow *Gladue* principles to be incorporated.[143] Legislative amendments allowing decision-makers to apply an open-ended list of considerations would increase the potential for *Gladue* principles to be applied in this "benefit" level of decisions.

As with penalty, I argue that *Gladue* principles are not just applicable where alienation and estrangement from the justice system is relevant, such as the legal aid benefits at issue in *Anonyme*. Instead, they are applicable to any administrative decision on benefits because their applicability stems from alienation and estrangement from the colonial administrative state itself.

At the same time, I acknowledge the argument that the extension of *Gladue* principles beyond sentencing-like contexts distorts or at least dilutes their meaning. That is, the extension either introduces a concept originated in criminal law to contexts with no relation to criminal law, or it disconnects the principles from their roots such that they retain no inherent meaning. Nonetheless, on balance, I believe that these extensions of *Gladue* principles remain firmly anchored in the alienation and estrangement of Indigenous peoples and thus retain a clear and meaningful content and function as a common law legal concept—even when they go beyond penalty.

D. Level Three: Residual (Neither Penalty Nor Benefit)

The two levels of penalty and benefit will encompass the majority of administrative law proceedings. But there will be some that remain, and these I identify as being a third residual level that is neither penalty nor

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[143] See *Compensation for Victims of Crime Act*, RSO 1990, c C.24 [*CVCA*] ("In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his or her injury or death", s 17(1)); *Desmoulin*, *supra* note 50 at paras 29–31.

benefit. The best example of this level is consent and capacity to medical treatment, as in *DB (Re)*.

The capacity and consent context is difficult because, unlike the other kinds of decisions that I have considered, it is not about the imposition of a penalty (such as professional discipline or an eviction) or the provision of a benefit (such as social assistance, legal aid, or compensation for victims of crime). While involuntary treatment may surely seem like a penalty to a patient, that perspective is instructive but incomplete and not determinative. Unlike a penalty or a benefit, it is not obvious how the test for capacity could incorporate a patient's Indigeneity. It is in such contexts, even more so than in penalty or benefit determinations, that a careful examination of the historical and social context will be particularly necessary. Counsel's submissions would likewise need to be both creative and responsive by considering how alienation and estrangement of Indigenous peoples from the administrative state, and pervasive bias against Indigenous peoples within the administrative state, manifest in the specific context and how they can best be acknowledged and counteracted.

Given the history of involuntary treatment and experimentation on Indigenous persons in Canada,[144] especially within the context of discriminatory healthcare in residential schools as documented by the TRC,[145] a higher evidentiary and legal threshold could be warranted. However, insofar as involuntary treatment is indeed for the protection and the benefit of the individual in question—a loaded question well beyond the scope of this paper—a higher threshold is not in the interests of patients generally. Moreover, to the extent that involuntary treatment is in the public interest, a higher threshold is at some level contrary to that public interest. Any such changes would require legislative amendment.

What other kinds of decisions would fit within this residual level? Consent and capacity for medical treatment may well be unique. Recall however the motion to vary child support in *Armstrong*.[146] While outside

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144 See e.g. Ian Mosby, "Administering Colonial Science: Nutrition Research and Human Biomedical Experimentation in Aboriginal Communities and Residential Schools, 1942-1952" (2013) 46:91 Soc History 145. See also David Carrigg, "Three Former 'Indian Hospitals' in B.C. Part of Recently Certified Class-Action Lawsuit", *Vancouver Sun* (1 February 2020), online: <www.vancouversun.com> [perma.cc/WDY8-JGQK]; *Hardy v Canada (AG)*, 2020 FC 73; Affidavit, Professor Mary-Ellen Kelm, online (pdf): <callkleinlawyers.com> [perma.cc/XR67-2EY4] ("[f]or doctors and health scientists associated with the Indian hospitals, Indigenous people then offered important opportunities for research"). For general cruelty, see Catherine Carstairs & Ian Mosby, "Colonial Extractions: Oral Health Care and Indigenous Peoples in Canada, 1945–79" (2020) 101:2 Can Historical Rev 192.

145 See TRC *Final Report*, *supra* note 1 at 90–99.

146 *Supra* note 73.

administrative law, child support is an example of a duty or an obligation that is not "punitive,"[147] that is, it is perhaps not properly understood as a penalty.

Legislative guidance will be appropriate and sometimes necessary in these residual contexts to indicate how *Gladue* principles apply and how this difficult balance should be struck.

V. *Gladue* By Any Other Name?

There is an important caveat to my analysis in the previous Parts. The fact that a decision-maker or court explicitly declines to apply *Gladue* principles, or that *Gladue* principles are not explicitly invoked, does not necessarily mean that *Gladue*-like considerations are not being applied. For example, the Divisional Court in *Desmoulin*, after holding that *Gladue* principles did not apply, nevertheless held that the board had properly considered the applicant's Indigeneity:

> This is not to say that the Board should not consider the impact of the cultural background and travails of our aboriginal population in considering the role that a criminal record should play in undertaking the balance outlined in s. 17(1) of the *Compensation for Victims of Crime Act* or that the Board failed to do so in this case. ... In any event, the Board was aware of [the] cultural background of Frank Desmoulin.[148]

Similarly, while the applicant in *Sheck* framed his argument in *Gladue* principles,[149] the majority in *Sheck* observed that "one has to appreciate the same historical context that underlies the *Gladue* factors"[150]—seemingly suggesting that *Gladue* principles themselves might not be strictly applicable. Does the terminology used, and the *Desmoulin* distinction between criminal-related and non-criminal-related matters, make a difference?

Likewise, consider the reasons of the British Columbia Supreme Court in *Inglis v. British Columbia (Minister of Public Safety)*.[151] *Inglis*, although framed as a *Charter* action, was essentially a judicial review of the cancellation of a program that allowed mothers in provincial jails, many of them Indigenous, to keep their babies with them.[152] The court in

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147 *Ibid* at para 135.

148 *Desmoulin*, *supra* note 50 at paras 31–32; *CVCA*, *supra* note 143. As of the time of writing, legislation repealing the *CVCA* has yet to come into force (see *Protecting What Matters Most Act* (*Budget Measures), 2019*, SO 2019, c 7, Schedule 11, s 4).

149 See *Sheck*, *supra* note 99 at para 73.

150 *Ibid* at para 77.

151 2013 BCSC 2309.

152 See *ibid* at paras 1–2.

Inglis relied on *Gladue* itself only to establish that Indigenous persons are a historically disadvantaged (and overincarcerated) group for the purpose of an analysis under section 15 of the *Charter*.[153] However, the decision at issue in *Inglis*, in its application to Indigenous inmates, could likely have been characterized as unreasonable under *Gladue* principles absent *Charter* arguments.

At a substantive level, the importance is in the considerations applied and not in the terminology used. At the same time, *Gladue* has become a helpful shorthand for a complex problem and a family of approaches to that complex problem.[154] Courts on judicial review should ask whether *Gladue* principles have been substantively applied, whether or not they are explicitly accepted or rejected—or even explicitly mentioned—by name. However, the explicit mention of *Gladue* principles, and their purported application or rejection, will be a helpful indicator to courts. As in *Robinson*, *Gladue* principles can be applied in different ways in different contexts. The adoption of *Gladue* terminology does not, and should not, require that the underlying principles are being applied in the same way as in criminal sentencing.

The question of whether extending *Gladue* principles beyond penalty erodes their meaning and functionality is, at one level, a question of terminology. We could alternatively substitute another term for *Gladue* principles in benefit determination—for example, *Desmoulin* principles—and another term in residual contexts. These would remain, however, a family of principles related by their anchors in Indigenous alienation and estrangement. Retaining them as *Gladue* principles emphasizes that alienation and estrangement, rather than the criminal justice context.

VI. Standard of Review

Given the three levels I have identified in which *Gladue* principles can apply, what is the standard of review a court will use to assess such decisions?

Following the recent restatement of the standard of review analysis by the Supreme Court of Canada in *Canada (Minister of Citizenship and*

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153 See *ibid* at paras 576–80.

154 See e.g. *Sheck*, *supra* note 99 ("[t]he first question to determine is whether the Minister ought to have considered the Indigenous heritage of Mr. Sheck and his children when assessing his family circumstances and the best interests of his children. While Mr. Sheck refers to these factors as '*Gladue* factors', this reference is a short-form way of referring to the historical and present-day factors affecting Indigenous persons in Canada, and should not be confused with mandatory sentencing principles" at para 73).

Immigration) v. Vavilov,[155] whether *Gladue* principles are applicable is a question of law that will be reviewable on a standard of reasonableness—except if there is a statutory right of appeal, in which case the standard of review will be correctness.[156] The application of *Gladue* principles to the individual circumstances of a particular decision will be a question of mixed fact and law for which the standard of review will be reasonableness. Again, the question is not whether the decision-maker mentioned or rejected *Gladue* by name,[157] but whether substantive *Gladue* principles were applied.

The majority in *Vavilov* established "a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions."[158] That presumption is rebuttable where the legislation states otherwise, either explicitly or by creating an appeal to a court, and "where the rule of law requires that the standard of correctness be applied[:] ... constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies."[159]

Gladue principles, despite their extension over time, remain—at least at present—a common law principle and not a constitutional principle. Whether or not they properly apply in a specific context is neither a constitutional question, a question of central importance to the legal system, nor a question about jurisdictional boundaries. Thus, the reasonableness presumption of *Vavilov* is not rebutted.

Naiomi Metallic has argued that deference in administrative law reinforces statutory and policy regimes that do not recognize the interests of Indigenous peoples.[160] Arguably, a reasonableness standard for the review of the decision to apply *Gladue* principles is problematic for similar reasons.

Nonetheless, under my analysis, given the ever-present alienation and estrangement of Indigenous peoples from the administrative state, it will almost always be unreasonable to fail to consider applying *Gladue* principles, and it will generally be unreasonable to decline to apply *Gladue*

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155 2019 SCC 65 [*Vavilov*].

156 See *ibid* at paras 23, 36–37.

157 See e.g. *Desmoulin*, *supra* note 50 ("[t]here is nothing to suggest that the Board erred in principle by failing to refer specifically to the so-called *Gladue* principles. Any such failure is not an error of law" at para 32).

158 *Vavilov*, *supra* note 155 at para 16.

159 *Ibid* at para 17.

160 See Naiomi Metallic, "Deference and Legal Frameworks Not Designed By, For or With Us" (2018) Can J Admin L & Prac: Special Issue 153.

principles, where the person who is the subject of the decision is Indigenous and the enabling statute does not preclude their application. Where the person who is the subject of the decision is not Indigenous, but an Indigenous person is directly affected by the decision, it may be unreasonable to fail or decline to apply *Gladue* principles. However, it is not necessarily unreasonable for a decision-maker to apply *Gladue* principles but determine that they do not affect the result in the particular matter.

VII. Recommendations

The above analysis supports the following recommendations for counsel, administrative decision-makers, and judges on judicial review. There is also an important role for legislators and executive authorities.

Administrative decision-makers should consider *Gladue* principles in any decision about the interests of an Indigenous person, particularly where that person is not represented by counsel. It will be important to invite the person or their counsel to identify what the effect of *Gladue* principles should be, especially where the decision is not about a penalty or a benefit and thus falls into my third or "residual" level. Judges on judicial review of any decision about the interests of an Indigenous person should likewise invite submissions on how *Gladue* principles should apply. Moreover, where declining to apply *Gladue* principles, decision-makers and reviewing judges should resist the conclusory assertion that the context of the decision is too different from criminal sentencing. And with respect to Justice Watchuk in *Moore*, the absence of an exact precedent should not be given excessive weight; decision-makers and judges should be open to incrementally extending *Gladue* principles to new situations as they would for any other common law doctrine. Moreover, given the potential for judicial review of an administrative decision, or an appeal of a judicial review, both administrative decision-makers and judges would be wise to address *Gladue* principles in the alternative even when doing so is strictly unnecessary to decide the matter.

Counsel should argue *Gladue* principles in any decision about the interests of an Indigenous person and any judicial review of such a decision—but they should demonstrate clearly in their submissions how *Gladue* principles would apply and how their application would change the result. Where the decision is about a benefit or penalty, *Gladue* principles may lower the threshold for a benefit or increase a benefit, or increase the threshold for a penalty or decrease a penalty, if the relevant statutory framework allows it. However, where the decision is not about a benefit or penalty, the potential role for *Gladue* principles is unclear and particular creativity and responsiveness by counsel will be necessary. More specifically, counsel should carefully consider how the alienation and estrangement of Indigenous peoples from the administrative state, as

well as the pervasive bias against Indigenous peoples within the administrative state, are manifested in the specific context, and how that alienation and bias can best be acknowledged and counteracted. As a foundation for these arguments, and particularly to the extent that there remains uncertainty over the proper scope of judicial notice and the need for specific evidence about the circumstances of the particular Indigenous person who is the subject of the decision, counsel should introduce such evidence where available.

Moreover, *Gladue* principles might properly apply when the decision directly affects the interests of an Indigenous person who is not a party, or the interests of that party are a relevant consideration, such as the Indigenous child of the non-Indigenous parent whose deportation was at stake in *Lewis*. Decision-makers, judges, and counsel must turn their minds to remoteness here.

Parliament and the legislatures should carefully consider whether *Gladue* principles are relevant to each of the administrative decision-makers that operate under their statutory authority and, if so, then amend the enabling statutes to allow—or, better, require—*Gladue* principles to be considered and specify how they apply. This will be most important in contexts where enabling statutes implicitly disallow the consideration of *Gladue* principles. Likewise, executive authorities should ensure that regulations and substatutory guidance for decision-makers take *Gladue* principles into account.

Conclusion

In this article, I have argued that there is a role, indeed a powerful role, for *Gladue* principles in administrative law. By discarding the anemic view that *Gladue* principles are solely a statutory principle, and by recognizing a legitimate ability, if not a duty, of administrative decision-makers to engage in incremental but creative extension of those principles to new contexts, administrative law can be transformed from a barrier into a gateway toward reconciliation. While I certainly do not argue that *Gladue* principles are a panacea for reconciliation, they are nonetheless a feasible component that does not require wholesale redesign of the legal system, just a re-energization of traditional legal creativity. Indeed, the omission of *Gladue* principles from administrative law—in fact, anything other than their zealous adoption—hamstrings those principles' ability to achieve their intended purposes across a wide swath of the legal system and the administrative state.

True and successful reconciliation requires, among other things, the acknowledgement of the estrangement and alienation of Indigenous peoples not only from the colonial Canadian criminal justice system or the justice system more broadly, but also from the colonial Canadian admin-

istrative state itself. In terms of the conception of reconciliation adopted by the TRC, the administrative state must respectfully—and thus, honestly and deliberately—engage with the unique circumstances of Indigenous persons. As the TRC put it: "Reconciliation is not an Aboriginal problem; it is a Canadian one."[161] It is in this respect that the proper application of *Gladue* principles in administrative law is essential. This application, particularly in decisions that are not about penalties or benefits, will require creativity and responsiveness not only from counsel but also from administrative decision-makers, reviewing courts, and even legislatures and executive authorities themselves. While it is easy to blame decision-makers for rejecting *Gladue* principles out of hand, as demonstrated for example in *Re Can-Am*, counsel share an obligation to help illustrate how those principles properly apply in specific circumstances, particularly where there is no exact precedent on which to rely.

While the standard of review for failing to consider or declining to apply *Gladue* principles will be reasonableness, such failure to do so will rarely be reasonable, particularly if the decision under review concerns a benefit or a penalty for an Indigenous person—assuming the enabling statute does not preclude their application.

Indeed, I emphasize in closing that legislators have a critical role in ensuring that enabling statutes do not inadvertently or covertly preclude the application of *Gladue* principles. As I have demonstrated above, this tends to be true where a benefit is at issue. Some legislation will need to be amended, whether merely to allow decision-makers to consider all relevant factors or ideally to specifically direct them to consider *Gladue* principles where applicable. There is an immediacy and urgency to this legislative project. Going forward, legislative counsel should add *Gladue* principles to the parameters they establish when receiving drafting instructions.

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[161] TRC *Final Report*, *supra* note 1 at vi.