IPEELEE AND THE DUTY TO RESIST[*]

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On 7 April 2015, nearly three years to the day following the ruling by the Supreme Court of Canada in *R v Ipeelee*,[1] the Manitoba Court of Appeal upheld the seven-year prison sentence meted out to John Charlette.[2]

John Charlette is a 30-year old Cree man. Born in Flin Flon, Manitoba, he ran away from home at age six to Winnipeg. There, he was picked up and taken in by youth protection services, which placed him in several foster homes. He had no contact with his Indigenous culture as he was growing up. He exhibited suicidal tendencies at several stages of his life.[3]

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1 *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].

2 *R v Charlette*, 2015 MBCA 32, 2015 CarswellMan 163.

3 *Ibid* at para 13.

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On the evening of the tragedy, the accused, armed with a knife, took a taxi and travelled several kilometres. He made two stops at automatic teller machines in an attempt to withdraw money but was unsuccessful. At the second stop, the taxi driver called the police and asked Charlette to pay the fare. The accused refused and forced the driver to hand over his money by threatening him with his knife. The taxi driver managed to flee and Charlette sought refuge in an alley where he was chased down by two police officers who had arrived on the scene. He threatened them with his knife on several occasions by moving towards them. He told them that he would not surrender and that they would be forced to kill him. One of the police officers shot twice at the accused, who survived.

After a trial in which he stated that he intended to commit suicide by lunging at the police officers that evening ("a suicide by cop"[4]), Charlette was ultimately found guilty of robbery, of two counts of assault with a weapon against a peace officer and possession of a weapon for a dangerous purpose. The judge would have given him a total sentence of eight years' imprisonment, but, applying the totality principle and the *Gladue* factors, he reduced the sentence to seven years. Although Charlette had already been criminally convicted 41 times, he had never been sentenced to the penitentiary.

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Canadian colonization and the implementation of government policies providing for expulsion from home territory, herding into reservations, and assimilation had devastating consequences for Indigenous peoples. The Canadian residential school policy, initiated in the 19th century and lasting until the mid-1980s, dictated that Indigenous children be separated from their families and sent to residential schools,[5] which inflicted profound

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4 *Ibid* at para 3.

5 The official goal was to ensure that there was not "a single Indian in Canada that has not been absorbed into the [white Canadian] body politic": Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*: *Summary of the Final Report* (Ottawa: TRC, 2015) at 54 [TRC Report], referring to a statement made by Duncan Campbell Scott, Deputy Minister of Indian Affairs when testifying before the Special Committee of the House of Commons tasked with considering the

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multigenerational trauma on Indigenous communities.[6] This trauma was due to their uprooting from their families but also due to the mistreatment and physical, psychological, and sexual abuse inflicted on the children from these generations. The colonial policies contributed to the perpetration of a "cultural genocide", namely the "destruction of those structures and practises that allow the group to continue as a group".[7] Hence, they created a significant rift in the imparting of Indigenous law by rendering Indigenous legal systems invisible and denying their existence,[8] which diminished the self-regulatory ability of Indigenous societies and increased their dependence on the state justice systems.[9]

Classical studies in legal pluralism allow for a description and an understanding of the interactions and entanglements between State law and Indigenous law.[10] These interactions can be considered and represented on a continuum, with one end representing *separation*, characterized by the closed-ended nature and complete independence of the legal systems, and the other end representing *merger* or *subordination, which in fact reflects* an imperialist intent to reject the existence of any non-State system and does not amount to true pluralism.[11] Between these two extremes, one finds

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1920 amendments to the *Indian Act* (L-2) (N-3): Library and Archives Canada, RG10, volume 6810, file 470-2-3, volume 7.

6 On the concept of multigenerational trauma: Marie-Anick Gagné, "The Role of Dependency and Colonialism in Generating Trauma in First Nations Citizens", in Yael Danieli, ed, *International Handbook of Multigenerational Legacies of Trauma*, (New York: Plenum Press, 1998) at 355.

7 TRC Report, *supra* note 5 at 1.

8 Mylène Jaccoud, "La justice pénale et les Autochtones: d'une justice imposée au transfert de pouvoirs" (2002) 17:2 CJLS 107.

9 Mylène Jaccoud, "Peuples autochtones et pratiques d'accommodements en matière de justice pénale au Canada et au Québec" (2014) 36 Archives de politique criminelle at 227.

10 Sally E Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869 at 872; Jacques Vanderlinden, "Rendre la production du droit aux peuples" (1996) 62 Politique africaine 83 at 86.

11 Mireille Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit* (Paris: Seuil, 2006) at 13; Ghislain Otis, "Rencontre des cultures juridiques dans la toundra

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various processes of internormativity of varying scopes, depending on whether they reveal the existence of a "facade of pluralism" or a strictly colonial one, or a true acknowledgement of legal otherness.[12] These interactions between the systems are neither permanent nor static. Santos speaks of "contact zones", at the outer reaches of which symbolic universes, types of knowledge and discrete prescriptive principles meet and compete.[13] These contact zones are areas of great conflict where the various legal systems, and their representatives, wage a continuous battle in order to maintain or redefine their respective positions.[14] However, this struggle is not one of opponents vying on equal terms. This is especially the case in a post-colonial setting where there is a power imbalance between the parties. The role played by the actors within each of these legal systems therefore takes on crucial significance.

On this chessboard of legal pluralism, Canada has generally taken an imperial, subordinating position in criminal matters, whereby Canada imposed its justice system and denied the existence of the various Indigenous legal systems with a view to asserting its sovereignty over the territory.[15] However, this domination was never absolute. At times it was

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subarctique: vers une nouvelle gouvernance foncière au Nunatsiavut" (2009) 15:3 *Téléscope* 108 at 109.

12 Anne Fournier, "L'adoption coutumière autochtone au Québec: quête de reconnaissance et dépassement du monisme juridique" (2011) 41:2 RGD 703 at 724. Delmas-Marty distinguishes three interaction processes between legal orders at the heart of this continuum, namely: coordination, which involves the coexistence of the various legal orders; harmonization, which implies some element of convergence between the systems, without setting out to ensure uniformity; and unification, which involves integration of the systems: "Le pluralisme ordonné et les interactions entre ensembles juridiques", speech given at the University of Bordeaux.

13 Boaventura de Sousa Santos, *Towards a New Common Sense. Law, Globalization and Emancipation*, 3rd ed (London: Butterworths, 2002) at 472.

14 See also the concept of social space propounded by Pierre Bourdieu in *Distinction* (Paris: Les éditions de Minuit, 1979).

15 Mylène Jaccoud, "Les cercles de guérison et les cercles de sentence autochtone au Canada" (1999) 32:1 Criminologie 79 at 81. This attitude of denial has also been perpetuated by schools in Canada, including law schools: see Emily Snyder, Lindsay Borrows, & Val Napoleon, *Mikomosis and the Wetiko: A Teaching Guide for Youth,*

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tempered by resistance by Indigenous peoples and, on other occasions, by some concessions or accommodations on the part of the State, through an adjustment in the State's criminal law practice or as a result of the incorporation of certain elements of Indigenous justice into the State's criminal justice system. One must acknowledge that these manifestations of legal pluralism were often no more than expressions of a façade of pluralism. However, must things necessarily be so? And what is the role played by actors within these systems? Are they doomed to repeat the exclusive hegemonic logic of the State criminal justice system or is it possible for them to resist and to innovate by acknowledging and incorporating Indigenous legal systems?

It is against this backdrop that we propose to take a critical look at subsection 718.2(e) of the *Criminal Code* ("*CC*").[16] This subsection states that, the sentencing judges should take into consideration "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders".[17] In particular, we intend to focus on the interpretation this provision has received from Canadian courts since the Supreme Court of Canada's ruling in *Ipeelee*.[18] Subsection 718.2(e) forms part of a series of measures taken by the State with a view to

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Community, and Post-Secondary Educators (Victoria, Indigenous Law Research Unit, Faculty of Law, University of Victoria, 2014), online: <www.indigenousbar.ca/indigenouslaw/wp-content/uploads/2013/04/Mikomosis-and-the-Wetiko-Teaching-Guide-Web.pdf>: "Many mainstream educational materials suggest the stereotype of Indigenous peoples as lawless prior to European contact. This false idea still goes unquestioned, or worse, is being implicitly taught to students today."

16 RSC 1985, c C-46.

17 This provision was recently amended upon enactment of *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, SC 2015, c 13. Between 1996 and 2015, it read as follows: "A court that imposes a sentence shall also take into consideration the following principles: (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders."

18 *Ipeelee*, *supra* note 1.

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minimizing the impact of the imposition of Canadian law on Indigenous people, to the same extent, for example, as the provision of interpretation and legal support services,[19] the establishment of specialized courts in certain provinces,[20] the implementation of sentencing circles and alternative measures programs developed pursuant to section 717.[21]

We suggest that the interpretation proposed by the Court in *Ipeelee* and followed by certain provincial court judges represents a form of resistance by the judiciary. This resistance is directed at excessive sentences and at the overrepresentation of Indigenous people in the criminal justice system, and also at legal monism and state hegemony. It is not the only form of resistance within the state system but is nevertheless an inescapable standard-bearer thereof.[22] We will then demonstrate that this innovative approach is, however, being strongly resisted by judges. Based on our exhaustive analysis of 635 trial and appellate decisions handed down after

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19 Since 1978, the federal government has been funding an Indigenous Courtwork Program, online: <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html>. For Québec, refer to Native Para-Judicial Services of Québec, online: <http://www.spaq.qc.ca/>.

20 Specialized courts can take on various forms depending on the provinces and territories: in some cases, such as in Ontario or Saskatchewan, Gladue courts for Indigenous offenders were specifically established; in other instances, such as in the Yukon, in the Northwest Territories and in Saskatchewan, specialized community courts (domestic violence, drug treatment) incorporate the Gladue principles, and, finally, in other cases, regular courts are used with staff that has been specially trained and made alert to the Gladue principles (See e.g., Nunavut Court of Justice, Nova Scotia Provincial Court). The Department of Justice Canada listed 19 specialized courts at the outset of the 2010s: Department of Justice Canada, *Gladue Practices in the Provinces and Territories*, prepared by Sébastien April and Mylène Magrinelli Orsi, (5 April 2013) at 3–5, online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/index.html>.

21 See e.g. the Public Prosecution Service of Canada Deskbook, online: <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/index.html>.

22 David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 107, suggesting that subsection 718.2(e) may directly contribute to fighting overrepresentation of Indigenous persons in the Canadian justice system. See also the alternative measures programs (section 717) that may be established upstream, pursuant to diversion programs administered by the provinces.

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the ruling in *Ipeelee* between 23 March 2012 and 1 October 2015, we will discuss the very limited impact of the proposed approach in the sentencing of Indigenous offenders.[23] In other words, and the *Charlette* case is a prime illustration of this point, subsection 718.2(e) continues to be a resounding failure in this country, despite a few isolated acts of judicial courage.[24]

We will then attempt to identify the main practical and epistemological hurdles that may explain this state of affairs and that emerge from our analysis of these decisions and of the literature. We will ultimately put forth that the resistance to innovation expressed by an overwhelming majority of judges is also more generally part of a resistance by the legal system to pluralism and a challenge to the monopoly of the Canadian State in matters of punishment.

This resistance could be overcome, in part, by supporting the efforts by certain creative judges, as well as those by Indigenous communities involved in the revitalization of their legal orders, allowing Indigenous peoples to manage the conflicts afflicting them and better coordinate these efforts with the justice system.[25] In other words, in our opinion, subsection 718.2(e) and the interpretation thereof have created a contact zone within

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23 Although we are of the view that the principles set out in *Gladue* and *Ipeelee* are applicable to other fields of law (for example, upon judicial interim release, assignment of counsel pursuant to section 684 of the *CC*, change of security classification of an inmate, publication bans, representativeness of a jury, child protection, bail and extradition), for the purposes of this analysis, we only focussed on sentencing decisions per se. See Kent Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal", (2009) 54:4 Crim LQ 470 at 499.

24 To this end, this paper confirms the earlier findings of several authors on the occasion of the 10th anniversary of *Gladue*: Kent Roach, "Gladue at Ten—Editorial" (2009) 54:4 Crim LQ 411, especially in Québec: Alana Klein, "Gladue in Quebec" (2009) 54:4 Crim LQ 506.

25 See Call to Action 50 of the *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, *supra* note 7 at 221: "In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Indigenous organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Indigenous peoples in Canada". We will revisit this Call to Action.

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which the legal systems can intersect with a view to achieving greater internormativity. Judges have a crucial role to play in this respect. The ultimate goal we seek to achieve is to bring about a dialogue between the state legal system and Indigenous nations in order to provide them both with the tools they need to innovate and better resist state punitiveness and the denial of Indigenous laws.

I. RESISTANCE, ACT I: *IPEELEE*, A FORM OF JUDICIAL RESISTANCE TO EXCESSIVE PUNITIVITY AND TO LEGAL MONISM

The ruling in *Ipeelee* by the SCC was handed down nearly fifteen years after its forerunners, *Gladue*[26] and *Wells*.[27] In this case, Justice LeBel, speaking for the majority, took stock of the fact that the *Gladue* decision and subsection 718.2(e) did not have the anticipated impact within the Canadian criminal justice system, specifically with respect to the representation of the Indigenous population in the prison population. Instead, the situation has worsened.[28]

Justice LeBel first confirmed the analysis propounded in *Gladue*. A sentencing judge must focus his or her attention on two sets of circumstances in which Indigenous offenders find themselves, and that relate to the ultimate issue of determining a fit and proper sentence.[29] These circumstances are:

1. the unique systemic and background factors which may have played a

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26 *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 [*Gladue*].

27 *R v Wells*, 2000 SCC 10, [2000] 1 SCR 207 [*Wells*].

28 *Ipeelee*, *supra* note 1 at paras 59 and 62. According to Statistics Canada, Indigenous adults represented 24% of admissions to provincial and territorial correctional services and 26% of custodial admissions in 2013–2014. In addition, they represented 20% of admissions to custody to federal correctional services. Indigenous women accounted for a higher proportion of female admissions to provincial and territorial sentenced custody than did Indigenous males for male admissions (36%): Statistics Canada, *Adult Correctional Statistics in Canada, 2013-2014*, online: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm>.

29 *Ibid* at para 72.

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part in bringing the particular Indigenous offender before the courts (Step 1);

2. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection (Step 2).[30]

Justice LeBel, however, goes even further by making certain necessary clarifications as to the interpretation of subsection 718.2(e) regarding this provision's relationship to other sentencing principles. In addition, he attempts to respond to the chief concerns voiced in the case law and in the authorities over the past twelve years.

A. Step 1: Background and Systemic Factors

Justice LeBel posits the consideration of the background and systemic factors as forming an inherent part of the proportionality principle.[31] In asserting the fundamental nature of this principle, he specifies that "[w]hatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality".[32] He states that systemic factors may bear on the culpability of the offender to the extent that they shed light on his or her level of moral blameworthiness:[33]

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30 *Ibid* at paras 59 and 72.

31 *Ibid* at para 36. See also *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at para 21, where the Supreme Court stated that the proportionality principle has a constitutional dimension not only pursuant to section 12 of the *Canadian Charter of Rights and Freedoms*, but also pursuant to section 7 thereof. However, it backtracked subsequently in *R v Lloyd*, 2016 SCC 13, 396 DLR (4th) 595, at paras 38–47 and in *R v Safarzadeh-Markhali*, 2016 SCC 14, 396 DLR (4th) 575 at paras 70–71 [*Safarzadeh-Markhali*].

32 *Ipeelee*, *supra* note 1 at para 37. See also *R v Safarzadeh-Markhali*, *supra* note 30 at para 70.

33 *Ibid* at para 73. See also Marie-Eve Sylvestre, "The (Re)Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility" (2013) 63:1 SCLR 461.

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> While this rarely—if ever—attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability . . . Few mortals could withstand such a childhood and youth without becoming seriously troubled.[34] Failing to take these circumstances into account would violate the fundamental principle of sentencing—that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*.[35]

He indicates that, under such circumstances, a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se.

B. Step 2: Appropriate Types of Sentencing Procedures and Sanctions

With respect to the second step of the inquiry, Justice LeBel specifies that subsection 718.2(e) "does more than affirm existing principles of sentencing".[36] Indeed, the existing principles are inappropriate for most Indigenous offenders because "they have frequently not responded to the needs, experiences, and perspectives of Indigenous people or Indigenous communities".[37]

Quoting from the Report of the Royal Commission on Indigenous Peoples, Justice LeBel took cognizance of the "crushing failure" of the Canadian criminal justice system vis-à-vis Indigenous peoples. In his opinion, this was due to "the fundamentally different world views of Indigenous and non-Indigenous people with respect to such elemental issues as the substantive content of justice and the process of achieving

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[34] *Ipeelee*, *supra* note 1 at para 73, quoting *R v Skani*, 2002 ABQB 1097, 2002 CarswellAlta 1636, at para 60.

[35] *Ibid* at para 73.

[36] *Ibid*.

[37] *Ibid* at para 74, quoting *Gladue*, *supra* note 26 at para 73.

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justice".[38] Judges must therefore recognize that, given "these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community".[39] In this sense, the second step relates to the effectiveness of the sentence itself.[40]

The circumstances described in the two steps above must be provided to the judge in the form of a "*Gladue* report"[41]. Judges must take judicial notice of the systemic and background factors; however, case-specific information will come from counsel or from representations by the relevant Indigenous community.[42] In addition, the sentencing judge "may and should in appropriate circumstances and where practicable request that witnesses be called who may testify as to reasonable alternatives".[43]

C. Interpretation "Errors" in the Post-*Gladue* Period

Finally, Justice LeBel observes that over the past few years, the courts have committed a certain number of "errors" and that, as a result, they have

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38 *Ibid* at para 74, citing Canada, Royal Commission on Indigenous Peoples, *Bridging the Cultural Divide: A Report on Indigenous People and Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) at 309.

39 *Ipeelee*, *supra* note 1 at para 74.

40 *Ibid* at para 74.

41 Gladue reports are a form of pre-sentence reports (section 721 of the *CC*). However, they operate under a completely different logical scheme. Whereas pre-sentence reports are generally based on an assessment of certain offenders' recidivism risk factors, Gladue reports allow for a contextualization of the offenders' actions in light of their past experience of abuse and discrimination and, in this respect, contain much more information as to the offenders' personal and family circumstances: Kelly Hannah-Moffat & Paula Maurutto, "Recontextualizing Presentence Reports: Risk and Race" (2010) 12:3 Punishment & Society 262 at 265–78; Paula Maurutto & Kelly Hannah-Moffat, "Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts" (2016) 31:3 Can J Law & Society 451.

42 *Gladue*, *supra* note 26 at para 93 (point 7 of the summary).

43 *Ibid* at para 84.

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"significantly curtailed the scope and potential remedial impact of the provision" and "thwart[ed] what was originally envisioned by *Gladue*".[44]

The first error committed by judges was in erroneously insinuating that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge (the "causal link requirement"[45]). Justice LeBel stated that requiring such a link "displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Indigenous peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*".[46]

The second issue, which, in his view, is the most significant,[47] is the irregular and uncertain application of *Gladue* principles to sentencing decisions for serious or violent offences.[48] According to Justice LeBel, the case law places undue emphasis on a passage in *Gladue*, that was reiterated in *Wells*: "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Indigenous and non-Indigenous will be close to each other or the same, even taking into account their different concepts of sentencing".[49] However, the sentencing judge is *required* to apply subsection 718.2(e), regardless of the offence.[50] In addition, "[s]tatutorily speaking, there is no such thing as a 'serious' offence.... There is also no legal test for determining what should

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44 *Ipeelee*, *supra* note 1 at para 80. See also Alana Klein, *supra* note 24 at 509 with respect to Quebec; Kent Roach, *supra* note 23.

45 *Ipeelee*, *supra* note 1 at para 81.

46 *Ibid* at para 82.

47 *Ibid* at para 84.

48 *Ibid*.

49 *Ibid*, citing *Gladue*, *supra* note 26 at para 79 and *Wells*, *supra* note 27 at paras 42–44.

50 *Ibid* at para 85.

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be considered 'serious'".[51] Further, there is "no sense comparing the sentence that a particular Indigenous offender would receive to the sentence that some hypothetical non-Indigenous offender would receive, because there is only one offender standing before the court".[52]

The third error involves giving precedence to the sentencing parity principle as set out in subsection 718.2(b), which provides the imposition of similar sentences for similar offences committed under similar circumstances, over that set out in subsection 718.2(e). Justice LeBel was of the view that sentencing parity could not be construed in such a manner as to undermine the remedial purpose of subsection 718.2(e). Incidentally, in the context of an Indigenous offender, the principle of parity may require the imposition of a different sentence, precisely because of the fact that Indigenous persons find themselves facing unique circumstances.[53] He concludes by quoting Professor Quigley, according to whom:

> Uniformity hides inequity . . . . It is true that on the surface imposing the same penalty for the nearly identical offence is only fair. That might be closer to the truth in a society that is more equitable, more homogenous and more cohesive than ours. But in an ethnically and culturally diverse society, there is a differential impact from the same treatment. Indeed, that has been recognized in the jurisprudence on equality rights under the Charter. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity.[54]

D. *IPEELEE*, A FORM OF RESISTANCE

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51 *Ibid* at para 86, citing Renée Pelletier, "The Nullification of Section 718.2(e): Aggravating Indigenous Overrepresentation in Canadian Prisons" (2001) 39:3 Osgoode Hall LJ 469 at 479.

52 *Ibid* at para 86.

53 *Ibid* at para 79.

54 *Ibid*, citing Tim Quigley, "Some Issues in Sentencing of Indigenous Offenders" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Indigenous Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 269 at 286.

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Subsection 718.2(e) and the interpretation it received in *Ipeelee* represents a significant form of judicial resistance.

First of all, they act as a judicial defence against resorting to incarceration and excessive sentences, particularly concerning Indigenous persons. Indeed, subsection 718.2(e) proposes a principle of criminal moderation that runs counter to modern penal rationality[55] as well as to the legislative reforms of the past ten years that have had the effect of multiplying the number of minimum sentences,[56] increasing maximum sentences, rendering certain alternative sentences nugatory (such as conditional sentences), and adding aggravating circumstances. Much more than a mere statement of principle, it is "a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing".[57]

Finally, they are forms of resistance to judicial monism and to the State monopoly over dispute resolution involving Indigenous persons, in particular as a result of the second step of the analysis under subsection 718.2(e)—namely, the possibility of incorporating types of procedures and sanctions that take into account Indigenous heritage. In doing so, it paves the way for internormativity. It requires sentencing judges to undertake this exercise by adopting a different perspective, not only because the sentences

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55 According to Alvaro Pires, modern penal rationality (MPR) is a system of autonomous thought that creates a necessary association between crime and the imposition of a punitive sentence. The MPR theory refers to the difficulty faced by the criminal justice system "in conceiving of the crime and the criminal system without applying to these objects the categories of thought derived from, and guaranteed by penal rationality in and of itself" and which are chiefly composed of classic sentencing theory (from retribution to deterrence), to the exclusion of positive or alternative dispute resolution mechanisms: Alvaro Pires, "La rationalité pénale moderne, la société du risque et la judiciarisation de l'opinion publique" (2001) 33 Sociologie et Sociétés 179 at 184 [translated by author].

56 On the impact of mandatory minimum sentences on the increase in overincarceration of Indigenous persons and subsection 718.2(e), see David M Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19:2 Can Crim L Rev 173 at 189–92.

57 *Ipeelee*, *supra* note 1 at para 59; *Gladue*, *supra* note 26 at para 93.

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imposed are inefficient, but especially due to the fact that various Indigenous nations conceive of justice in different manners.

Despite the fact that the two aspects of the *Gladue* analysis have caused, and continue to cause, difficulty for trial judges,[58] the second step remains the most unknown and least used by the courts. However, it is possibly the most promising.

II. RESISTANCE, ACT II: TRIAL JUDGES AND THE REPRODUCTION OF HEGEMONIC POSTURING

The ruling in *Ipeelee* contains a powerful call to creativity but also to judicial resistance. From an empirical point of view, however, the majority of trial and appellate judges are especially reluctant, if not resistant, to exploit its innovative potential. Although the Supreme Court urged judges to intensify their efforts, one can only conclude that practices have not changed considerably since 2012.

In this part, we present the results of our study of 635 decisions handed down in the three and a half years since the Court's ruling in *Ipeelee* (between 23 March 2012 and 1 October 2015) that deal with the sentencing of an Indigenous person, in order to determine the level of penetration of this ruling, and of the approach which it sets out, on trial judges in different jurisdictions.[59] We will first show that many trial judges exhibit not only resistance towards the principles developed in *Gladue* and *Ipeelee*, but also a certain level of ignorance. Next, we will focus on this resistance to appropriate sentencing by distinguishing resistance that arises from the first step of the analysis and from the second. For each of these steps, we will distinguish decisions that exhibit resistance to innovation and to the approach proposed by the Supreme Court in *Ipeelee* from those that demonstrate daring and creativity.

Concerning methodology, some clarification is necessary. We identified and selected these 635 decisions using three search engines and different

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58 See especially Klein, *supra* note 24.

59 The annual breakdown of decisions is as follows: 125 in 2012, 206 in 2013, 196 in 2014 and 108 in 2015.

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key words relating to the sentencing of Indigenous persons, both in English and in French. Once these decisions had been located, they were added to a database and analyzed in order to identify the application of the two steps of the *Gladue* analysis. The database contains 505 trial decisions, representing 80% of the total decisions, and 130 appellate decisions, or 20% of the total. Canada's provinces and regions are not equally represented in our sampling. For example, British Columbia accounts for approximately 20% of the decisions whereas Québec only represents approximately 4%.[60]

Our methodology is also subject to significant and obvious limits. First, a substantial majority of judgments handed down in criminal cases are rendered orally (and thus not embodied in written decisions) and are therefore not covered by our analysis. For example, in 2013–14, courts of criminal jurisdiction in Québec resolved 46,128 cases that resulted in a guilty verdict.[61] Of these, it is difficult to ascertain how many involved Indigenous offenders. In any event, our database only contains 25 decisions originating from Québec over a period of three years. In addition and in the same vein, the case law does not necessarily reflect the unofficial and often innovative practices used by the various actors in the field and that may have escaped the net we cast. Our database also does not take into account the alternative measures programs implemented in various judicial districts. The analysis that follows must, therefore, be completed by interviews to be carried out and representations to be made at a later date.

That said, it appeared to us that an analysis of the written decisions was unavoidable: case law, in particular that of the appellate courts, has an obvious impact on sentencing and especially on the "ranges" of applicable

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60 The following is the breakdown of decisions per province and territory: British Columbia: 131 (20.6%); Ontario: 105 (16.5%); Saskatchewan: 94 (14.8%); Alberta: 72 (11.3%); Manitoba: 68 (10.7%); Yukon: 51 (8%) and Northwest Territories: 49 (7.7%); Québec: 25 (3.9%); Nunavut: 21 (3.3%); Nova Scotia: 10 (1.6%); Newfoundland & Labrador: 7 (1.1%) and New Brunswick: 2., We found no decisions in Prince Edward Island.

61 Statistics Canada, "Adult Criminal Court Statistics in Canada, 2013/2014", prepared by Ashley Maxwell (30 November 2015), online: < www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.htm> at Chart 4. Québec criminal courts decided 62,844 cases in 2013–14. Of those, 73.4% resulted in a guilty verdict.

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sentences, but also on the representations that judges make about the array of possibilities open to them on a daily basis in their interactions with Indigenous offenders. We are seeking to assess the impact of *Ipeelee* on the evolution of the case law in order to better understand the possibilities for innovation.

Finally, note that we have paid special attention to those decisions involving situations of domestic and/or family violence as part of the research project in which this analysis was conducted. Our sampling contained 126 decisions of this type (approximately 20% of the larger sample).

A. When Resistance Amounts to Ignorance?

Before addressing resistance on the part of judges per se, it might be important to recognize the ignorance that some judges demonstrate of the principles set out in *Ipeelee*, or at least the lack of understanding that seems to exist as to these principles' compulsory nature.[62] As such, more than one out of three decisions (227 decisions, or 35.8%) contains no reference to the *Ipeelee* decision and that 8% of the decisions refer neither to *Ipeelee* nor to *Gladue*.[63]

Moreover, we were surprised to observe that 4 out of 10 decisions, or 252 decisions in total, did not refer to subsection 718.2(e). In addition, 61 decisions deemed this provision to be inapplicable or less applicable under the circumstances of the case, including cases of "serious offences", which we will revisit later.

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62 See also Klein, *supra* note 24 at 521.

63 227 decisions do not refer to *Ipeelee* (35.8%). Of those, 50 also do not refer to *Gladue* (7.9% of the total sample) whereas 178 decisions refer to *Gladue* without referring to *Ipeelee* (28%). It should be noted that most of our decisions were identified by using the keyword "*Gladue*". In this respect, there is a certain regional disparity, with Québec and Alberta having the highest rate of decisions referring neither case: Québec: 4/25 (16%); Ontario: 9/105 (8.57%); Manitoba: 5/68 (7.35%); Saskatchewan: 5/95 (5.26%); Alberta: 9/72 (12.5%); British Columbia: 9/131 (6.87%); and Yukon: 6/51 (11.76%).

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B. Resistance to Step 1

Only 66% of the decisions in our database, or 418 in total, refer to the systemic and background factors.[64] In these decisions, we analyzed how judges used these factors. We examine (i) the grounds for exclusion of the background and systemic factors raised; (ii) the satisfactory or unsatisfactory nature of their analysis by the judges; and (iii) the relationship between these factors and the principle of proportionality.

1. Grounds for Exclusion of the Background and Systemic Factors

First of all, we noted that in 15% of the decisions (95), the judge expressly considered the background and systemic factors to be inapplicable or to be less applicable to the matter at hand. Several grounds are advanced. As in the case of the application of subsection 718.2(e), in more than half of these cases (51), the main reason given by the judges is the seriousness of the offence.[65] For example, these factors were dismissed in *R v G(C)*.[66] According to the judge presiding over this case, "the offence could not be more serious".[67] The accused broke into the victim's house, beat her savagely, stabbed her and sexually assaulted her. He wrote "I had fun" on the wall in the victim's blood. Even though the judge considered that "[i]t is apparent that C.G. has been affected by issues relating to domestic violence, alcohol abuse, gangs",[68] he deemed that, under the circumstances, these factors carried no weight in sentencing: "I have concluded that neither this young

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64 Therefore, one third of the decisions (215) do not refer to them.

65 See, e.g., *R v Q (BS)*, 2013 BCPC 332, 2013 CarswellBC 3860; *R v T (E)*, 2012 SKQB 169, 2012 CarswellSask 296; *R v O (TJ)*, 2015 MBQB 143, 2015 CarswellMan 462; *R v McNabb*, 2013 SKPC 208, 2013 CarswellSask 851; *R v Richards*, 2014 ONSC 3866, 2014 CarswellOnt 8883; *R v Gargan*, 2014 NWTSC 62, 2014 CarswellNWT 69.

66 *R v G(C)*, 2013 MBPC 73, 2013 CarswellMan 752.

67 *Ibid* at para 33.

68 *Ibid* at para 34.

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man's background nor his consumption of alcohol accounts for the explosion of brutality directed against a completely innocent woman."[69]

These factors were also ruled out in *R v Kayaitok*, a second-degree murder case in a domestic setting: "In sentencing aboriginal offenders, a court must try to give greater weight to the principles of restorative justice and less weight to principles of deterrence and denunciation and separation."[70] However, in *Wells*, the SCC also cautioned that the principles in *Gladue* are less applicable for more violent offences.[71]

The second most important reason why the factors were deemed to be less applicable was the absence of a causal link (40 decisions).[72] The judge was of the view that the accused had too tenuous of a connection with an Indigenous community, that he hadn't been "enough of a victim" of the background and systemic factors or that there was no connection between the Indigenous past of the accused and his or her offence. For instance, in the case of *Sangris*,[73] the judge considered that the background and systemic factors were inapplicable due to the absence of a connection between these factors and the commission of the offence:

> I spent a lot of time considering Mr. Sangris' aboriginal status and in particular his experience in residential school, which can only be described as horrific. As I noted, his childhood was very difficult. Frankly, though, I find it difficult to relate this crime to the Gladue factors. Mr. Sangris' actions do not appear to have been driven by the systemic Gladue factors that courts typically see. The nature of this crime and the circumstances surrounding it lead me to the conclusion that his motivation was not driven by factors like poverty or addiction or homelessness, but rather he

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69 *Ibid* at para 32.

70 *R v Kayaitok*, 2014 NUCJ 11 at para 38, 2014 CarswellNun 9.

71 *Wells*, *supra* note 27 at para 42.

72 See e.g. *R v Willier*, 2013 ABQB 629, 2013 CarswellAlta 2038; *R v Guimond*, 2014 MBPC 37, 2014 CarswellMan 829, aff'd 2016 MBCA 18, 2016 CarswellMan 34; *R v Schmidt-Mousseau*, 2015 MBPC 36, 2015 CarswellMan 391; *R v Long*, 2014 ONSC 38, 2014 CarswellOnt 900; *R v Awashish*, 2014 QCCQ 3303, 2014 CarswellQue 4168; *R v Sangris*, 2014 NWTSC 23, 2014 CarswellNWT 25 [*Sangris*].

73 *Sangris*, *supra* note 71.

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> was driven by sexual gratification. It was planned and deliberate. The victim was lured.[74]

Among the other grounds for which judges deemed the background and systemic factors to be less applicable, we note the cases in which defence counsel made no submissions in this respect or when the judge lacked information in order to apply them (11 cases),[75] the fact that the accused 'chose' a life of crime instead of focusing on education or work (one decision),[76] the fact that the accused had waived these factors (3 decisions),[77] and the necessity for the security of the public to supersede these factors (11 decisions[78]). This latter reason was primarily raised in dangerous or long-term offender cases. For example, in *R v H*,[79] an incest

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74 *Ibid* at para 49.

75 Counsel made no submissions: see e.g., *R v S(W)*, 2012 BCPC 310, 2012 CarswellBC 2711; *R v Bear*, 2012 SKQB 467, 2012 CarswellSask 947; *R v Moosomin*, 2012 SKQB 386, 2012 CarswellSask 651; *R v Pelletier*, 2012 ONCA 566, 291 CCC (3d) 279. The judge was lacking in information: *R v Atkinson*, 2012 YKTC 62, 2012 CarswellYukon 97; *R v McKay*, 2012 BCCA 477, 2012 CarswellBC 3913; *R v McPherson*, 2013 BCPC 250, 2013 CarswellBC 2901; *R v Boyd*, 2015 ONCJ 120, 2015 CarswellOnt 2971; *R v Genest*, 2014 QCCQ 8177, 2014 CarswellQue 9069.

76 *R v Cardinal*, 2013 BCPC 282, 2013 CarswellBC 3142 at para 33, rev'd 2015 BCCA 58, 2015 CarswellBC 318: "I am very much taking into account the offender Cardinal's Aboriginal circumstances, and I am very much trying to abide by what the Supreme Court of Canada says I should do. The history of Aboriginal life in Canada has been dismal. The background of Cardinal in the Aboriginal community has been dreadful. However, he has chosen a life of crime, perhaps to emulate his criminal uncles. He has not taken advantage of educational opportunities that may have presented themselves; he has not chosen to contribute to his community or the general community by way of working. He has instead chosen to live a life as a dangerous criminal."

77 *R v Clark*, 2013 BCPC 143, 2013 CarswellBC 1719; *R v Kauffeldt*, 2013 ONCJ 311, 2013 CarswellOnt 7613; *R v Lewis*, 2012 ONSC 5085, 2012 CarswellOnt 12002.

78 See e.g. *R v Papin*, 2013 ABPC 46, 2013 CarswellAlta 800; *R v Montgrand*, 2014 SKCA 31, 2014 CarswellSask 165; *R v Captain*, 2013 MBPC 61, 2013 CarswellMan 604; *R v Nickerson*, 2014 NSPC 67, 2014 CarswellNS 650; *R v H*, 2012 ONSC 4561, 2012 CarswellOnt 13427.

79 *R v H*, 2012 ONSC 4561, 2012 CarswellOnt 13427.

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case in which the accused was designated as a dangerous offender, the judge asserted:

> I have considered both the principle of less restrictive sanctions and Mr. J.W.H.'s Aboriginal status, through s. 718(e) of the *Criminal Code* and through consideration of the principles set out in *R. v. Gladue.*
>
> I recognize that Mr. J.W.H.'s circumstances "are unique and different from non-Aboriginal offenders." Mr. J.W.H. suffers from severe alcohol abuse issues. As noted, the wider social environment in which Mr. J.W.H. finds himself as an Aboriginal may have had a part in bringing Mr. J.W.H. before the courts. However, the issue remains whether there is a reasonable possibility of eventual control of his risk in the community.[80]

If the reasons stated above are only too familiar, it is because they precisely correspond to the errors identified by Justice LeBel in *Ipeelee*, which goes to show the level of resistance that they attract. Indeed, refusing to apply the systemic and background factors clearly amounts to a reviewable error since *Ipeelee*.[81] The same goes for the imposition of a burden to prove a causal link.[82] Finally, it is worth reminding that *Ipeelee* and its companion case, *Gladue*, specifically involved dangerous and long-term offenders and that this context cannot, therefore, explain the manner in which these cases were decided.[83]

2. Treatment of the Background and Systemic Factors

We then studied the manner in which the background and systemic factors were considered when they were not excluded outright or simply not mentioned (325 cases). We created two categories: satisfactory analysis (128 cases) or unsatisfactory analysis (195 cases).

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80 *Ibid* at paras 93–94.

81 *Ipeelee*, *supra* note 1 at paras 84–85.

82 *Ibid* at paras 81–83.

83 In *Ipeelee*, Justice Rothstein dissented as to the application of the *Gladue* factors to the facts of the cases. See in this respect Nate Jackson, "The Substantive Application of *Gladue* in Dangerous Offender Proceedings: Reassessing Risk and Rehabilitation for Indigenous Offenders" (2015) 20:1 Can Crim L Rev 77 at 80–83.

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We considered to be "unsatisfactory" those decisions where the judge claimed to take the factors into consideration, but in which it was impossible for the reader to understand how these factors had been considered and/or what the impact of this consideration had been on the decision. For example, we included in this category those decisions where the judge stated that he or she "had considered" the factors, but did not specifically apply them to the circumstances of the accused.[84] In one of these judgments that presented a recurring situation in our database, the judge wrote: "Under s. 718.2(e), a sentencing judge must take notice of systemic or background factors which contribute causally to crimes committed by aboriginal offenders. The Supreme Court of Canada, in *R. v. Gladue* . . . requires consideration of such factors in determining whether a custodial sentence is appropriate."[85] However, aside from this passage, the judge did not apply them to the accused's case.

In another example, in *R v C(R)*,[86] the judge stated: "I have taken into account those Gladue considerations. There was not anything unusual, he had a normal childhood in the pre-sentence report. After the parents separated, he moved in with his mother but had good contact with the father, except that he was sexually abused he said by his male cousins when he was six to eight."[87] Hence, despite the fact that sexual abuses occurred over a period of two years, the judge considered that the accused had had a normal childhood. Aside from stating that he had taken the *Gladue* factors into consideration, it is impossible to see how he applied them. Similarly, in *Paul*,[88] the judge only emphasized the seriousness of the offence and, although he mentioned the significance of taking into account the background and systemic factors, their application is not shown. In this

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84 Jackson observed the same circumstances with Indigenous dangerous offenders: the *Gladue* factors are merely referred to at the end of the sentencing process whereas they should lie at the heart of it: *ibid* at 89.

85 *R v Stone*, 2012 SKQB 274, 2012 CarswellSask 558 at para 39.

86 *R v C(R)*, 2013 ONCJ 736, 2013 CarswellOnt 18560.

87 *Ibid* at para 6.

88 *R v Paul*, 2014 BCCA 81, 2014 CarswellBC 519.

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appeal on sentence that was dismissed, the Court of Appeal quoted this excerpt from the trial decision, where we observe that the judge considered that the accused had not experienced a difficult past, despite the murder of his father who was a drug dealer: "Mr. Paul is an aboriginal offender. His circumstances were that he was raised by a father who was a drug dealer and who was murdered. This is not to say that Mr. Paul's upbringing was difficult. On the contrary, the evidence is that he was raised in a loving family."[89]

By contrast, we grouped together those decisions where the reader understands the manner in which the judge considered the factors and their impact in the category of "satisfactory analysis." We stress that the satisfactory nature of the analysis does not depend on an appropriate application of the systemic factors, but on the existence of an analysis enabling us to determine that the judge actually weighed these factors in the sentencing determination. Since this was not always obvious, we interpreted this category liberally and included those judgments in which we could minimally recognize that there had been an application of the factors.

Table 1 (below) sets out the quantitative results:

Table 1: Background and Systemic Factors

Background and Systemic Factors	Number of Decisions (t = 635)	Percentage of Sample (%)
Not referred to	215	33.9
Considered inapplicable or less applicable	95	15.0
Unsatisfactory analysis	196	30.9
Satisfactory analysis	127	20.0
Impossible to determine[90]	2	0.3

89 *Ibid* at para 26.

90 Decisions dealing with the opportunity to refer the matter to a sentencing circle: therefore, there were no substantive decisions on sentencing.

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Hence, the background and systemic factors are only analyzed satisfactorily in one decision out of five (20%).[91] This number drops to 15% when we analyse separately the decisions involving conjugal and/or family violence offences, as reflected in Table 2 below.

Table 2: Background and Systemic Factors and Conjugal and/or Family Violence (CFV)

Background and Systemic Factors (CFV cases only)	Number of Decisions (t = 126)	Percentage of Sample (%)
Not referred to	34	27.0
Considered inapplicable or less applicable	27	21.4
Unsatisfactory analysis	45	35.7
Satisfactory analysis	19	15.1
Impossible to determine[92]	1	0.8

These statistics show that, in conjugal and family violence cases, judges are more inclined to assert that the factors are inapplicable or less applicable (21.42% of the cases as opposed to 14.96%).[93] In more than half of these cases, the judge excluded the factors (incidentally after having weighed them) for reasons relating to the seriousness of the offence or to the protection of the public.[94] In addition, those cases where the factors are satisfactorily analyzed are fewer than in the general sample.

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91 See e.g. *R v Shanoss*, 2013 BCSC 2335, 2013 CarswellBC 3874; *R v Benedict*, 2014 ONSC 6898, 2014 CarswellOnt 16759; *R v Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159; *R v Green*, 2013 ONCJ 423, 2013 CarswellOnt 10710.

92 *Ibid*.

93 See e.g., *R v Donetz*, 2013 ABCA 95, 2013 CarswellAlta 315; *R v Papin*, 2013 ABPC 46, 2013 CarswellAlta 800; *R v Long*, 2014 ONSC 38, 2014 CarswellOnt 900; *R v Inuktalik*, 2013 NWTSC 75, 2013 CarswellNWT 93.

94 17 out of 27. Sixteen cases for seriousness and three for the protection of the public (two decisions referred to seriousness and the protection of the public as reasons). See e.g. *R v Q (BS)*, 2013 BCPC 332, 2013 CarswellBC 3860; *R v C(JAV)*, 2015 BCPC 218, 2015 CarswellBC 2160; *R v Gargan*, 2014 NWTSC 62, 2014 CarswellNWT 69.

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3. Background and Systemic Factors and the Proportionality Principle

Finally, we observe that over half of the decisions make no connection between the fact that the accused is an Indigenous person and the principle of proportionality, or do not even refer to this principle.[95] In fact, only one out of five decisions actually includes the background and systemic factors in the analysis of the proportionality principle (135 decisions, 21.2%).[96] This rate is relatively low considering that it represents the fundamental principle in sentencing.[97]

Moreover, most judges do not appear to appreciate the nature of the analysis to be conducted when considering the principle of proportionality. They sometimes forget that the principle consists of two crucial and separate components: the gravity of the offence *and* the degree of responsibility of the offender, the latter being closely tied to the moral culpability of the person convicted.[98] On occasion, the courts tend to merge the notion of objective gravity and that of the degree of responsibility or to prefer the first element outright over the second.[99]

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95 246 cases make no mention of it, 116 cases do but do not make the connection to the fact that the accused is an Indigenous person.

96 See e.g., *R v Edmonds*, 2012 ABCA 340, 2012 CarswellAlta 1946; *R v Knight*, 2012 MBPC 52, 2012 CarswellMan 348; *R v Knockwood*, 2012 ONSC 2238, 286 CCC (3d) 36; *R v Land*, 2013 ONSC 6526, 2013 CarswellOnt 14710; *R v Bird*, 2014 SKQB 75, 2014 CarswellSask 200, leave to appeal refused 2016 CarswellSask 378 (SCC). In the remainder of the decisions, either the connection between the background and systemic factors and the principle of proportionality is sometimes referred to but not applied, or the judge deems that, in light of the circumstances of the case, that this connection ought not to be made, or the judge deems the principle of proportionality to be less applicable under the circumstances.

97 *Ipeelee*, *supra* note 1 at para 37; *Safarzadeh-Markhali*, *supra* note 32 at para 70.

98 *R v Proulx*, [2000] 1 SCR 61, 140 CCC (3d) 449 at paras 81–83; *R v Lacasse*, 2015 SCC 64, [2015] 3 SCR 1089 at para 12: "the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender."

99 As early as 2002, professors Anne-Marie Boisvert and André Jodouin had already made such an observation: "De l'intention à l'incurie : le déclin de la culpabilité morale", 32 RGD 759. See also Marie-Ève Sylvestre, *supra* note 33. It is also necessary to recognize

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For example, in *R v Payou*, a sexual assault case, the judge asserts the following:

> This was a very serious crime of violence. Mr. Payou's conduct vis-à-vis this young aboriginal woman was despicable. His moral blameworthiness is high. His unique systemic or background circumstances as an aboriginal offender before this Court cannot and does not diminish his moral culpability for this serious crime of violence which is so prevalent in this jurisdiction.[100]

Or, again, in *R v Paul*:[101]

> Nor do I read *Ipeelee* as saying that the seriousness of the crimes before the court are not a proper consideration in a sentencing hearing. While *Ipeelee* says that factor does not create a shortcut to consideration of aboriginal circumstances of an offender, it does not say that the gravity of the offence cannot be considered. Indeed s. 718.1 of the *Criminal Code* requires that a sentence be proportionate to the gravity of the offence, and Justice LeBel refers to proportionality as the *sine qua non* of sentencing, ensuring that a sentence reflects the gravity of the offence.[102]

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that the Supreme Court at times appears to be making a similar blending, and, as a result, has not issued consistent directions in this regard. In the recent decision of *Lacasse*, *supra* note 97 at para 12, Justice Wagner, speaking on behalf of the majority, affirmed that "[t]he more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be." To which Justice Gascon, in dissent, replied at para 129: "My colleague states that the principle of proportionality means that the more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be (para 12). I would qualify this statement somewhat. In my view, an offender's degree of responsibility does not flow inevitably and solely from the gravity of the offence. The gravity of the offence and the moral blameworthiness of the offender are two separate factors, and the principle of proportionality requires that full consideration be given to each of them". Justice Gascon added at para 131 that "[t]he application of the proportionality principle may therefore cause the two factors to conflict, particularly where the gravity of the offence points strongly to a sentence at one end of the range while the moral culpability of the offender points in the other direction".

100 *R v Payou*, 2012 NWTSC 29, 2012 CarswellNWT 34 at para 36.

101 2014 BCCA 81, 2014 CarswellBC 519.

102 *Ibid* at para 34.

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In other cases, the judges considered the degree of responsibility to be an aggravating circumstance and could quite simply not conceive of how nor why the application of the background and systemic factors could diminish the moral culpability of the accused.

For example, in *Papin*,[103] the judge asserted that no factor lessened the moral responsibility of the accused[104] despite the fact that she had had a "horrible" past,[105] marred by violence. Her mother was an addict and had problems with violence and crime; when called upon to intervene, youth protection services had characterized her as a psychopath due to her violent and abusive behaviour. The mother died of a heroin overdose when the accused was 13. Her father was incarcerated on several occasions. Mrs. Papin lived in an extremely unhealthy environment:[106] she had witnessed several scenes of domestic violence, she was neglected and physically and sexually abused when she was living in the family home.[107] At the age of five or six, she was sexually assaulted by three men during a party at her parents' house.[108] She lived in several foster homes between the ages of six and eight. At 10, she was residing in a treatment centre for sexually abused children. A psychological assessment conducted when she was 11 stated that she was completely emotionally detached. At the age of 12, a psychiatrist had reached the conclusion that the accused, after having already perpetrated several offences, was so disturbed that quite possibly no treatment would be effective. At 13, she was injecting drugs intravenously and suffered her first overdose. She was then admitted on numerous occasions to a detention centre. Although the court stated that "a significant number of Gladue

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103 *R v Papin*, 2013 ABPC 46, 2013 CarswellAlta 800.

104 *Ibid* at para 195: "The psychiatric evidence makes it clear that the Offender suffers from no mental illness. Nor are there any other factors present which would diminish her moral culpability."

105 *Ibid* at para 206.

106 *Ibid* at para 22.

107 *Ibid*.

108 *Ibid*.

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factors are directly applicable to the offender",[109] the judge minimized the impact of these factors on sentencing:

> Even though many significant Gladue factors are present in this case, the actual impact that those factors will have on the ultimate sentence is slight. . . . there is "no automatic sentencing discount" for aboriginal offenders particularly where the conduct of the offender was violent and where protection of the public is paramount. . . . while I recognized the hardships that the Offender has experienced as a result of her aboriginal background and her horrific upbringing, this has very little impact in the ultimate sentence which must be imposed in this case.[110]

The judge then emphasized the "gravity of the offence" and considered the degree of responsibility to be an aggravating factor:

> In this case, I conclude that the gravity of the offence is at the high end of the spectrum. The stabbing resulted in three puncture wounds to the chest of the victim and a significant loss of blood. It was only through happenstance that the knife did not puncture any vital organs and that death or serious injury did not result. I also conclude that the degree of responsibility of the offender is at the high end of the spectrum. The psychiatric evidence makes it clear that the Offender suffers from no mental illness. Nor are there any other factors present which would diminish her moral culpability.[111]

We therefore observe that the gravity of the offence is as frequently considered where the judgments conduct a satisfactory analysis of the background and systemic factors as when the latter are cast aside or deemed to be less applicable.

That said, some decisions involving a satisfactory analysis of background and systemic factors deserve to be recognized. They are the exception to the rule, but could nevertheless be touted as models.[112] For example, in *R v*

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109 *Ibid* at para 206.

110 *Ibid* at paras 207–08.

111 *Ibid* at para 195.

112 The following decisions from our sampling, in our view, are the most interesting: *R v Tom*, 2012 YKTC 55, 2012 CarswellYukon 65; *R v G(D)*, 2014 BCCA 84, 2014 CarswellBC 531; *R v Campbell*, 2013 MBPC 19, 2013 CarswellMan 136; *R v G(LL)*,

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D(G),[113] the British Columbia Court of Appeal, the same court that had decided the *Paul* case, reversed the sentence determined by the trial court due to the fact that the trial judge had not taken into consideration the moral culpability of the appellant in assessing his degree of criminal responsibility:

> The fundamental principle of sentencing is proportionality (s. 718.1), which requires an assessment of the moral blameworthiness of the offender. The historic and individual circumstances of an Aboriginal offender are highly relevant to the assessment of moral blameworthiness—an assessment that cried out to be performed in this case, but was not considered by the sentencing judge.[114]

Similarly, in *R v Shanoss*,[115] the judge stressed the importance of taking the background and systemic factors into consideration in evaluating the proportionality of a sentence even where the offence is serious and the accused is dangerous. In this case, the court designated the accused as a

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2012 MBCA 106, 2012 CarswellMan 604, 292 CCC (3d) 486; *R v Knockwood*, 2012 ONSC 2238, 286 CCC (3d) 36 ; *R v Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159; *R v Cloud*, 2014 QCCQ 464, 2014 CarswellQue, varied 2016 QCCA 567, 2016 CarswellQue 8570, rev'd 2016 QCCA 567, 2016 CarswellQue 8570. See also, *R v Charlie*, 2014 YKTC 17, 2014 CarswellYukon 40, aff'd 2015 YKCA 3, 320 CCC (3d) 479; *R v Samson*, 2014 YKTC 33, 2014 CarswellYukon 59, aff'd 2015 YKCA 7, 2015 CarswellYukon 18; *R v Hansen*, 2014 BCSC 625, 2014 CarswellBC 1141; *R v Joseph*, 2013 BCPC 199, 2013 CarswellBC 2263; *R v McCook*, 2015 BCPC 1, 2015 CarswellBC 143; *R v First Charger*, 2013 ABPC 193, 2013 CarswellAlta 1436; *R v Friday*, 2012 ABQB 371, 2012 CarswellAlta 965; *R v T(G)*, 2012 ABPC 251, 2012 CarswellAlta 1626; *R v Gabriel*, 2013 MBCA 45, 2013 CarswellMan 249; *R v Green*, 2013 ONCJ 423, 2013 CarswellOnt 10710; *R v Land*, 2013 ONSC 6526, 2013 CarswellOnt 14710; *R v Thorpe* (July 3, 2012), Clements J, [2012] OJ No 6303 (SCJ); *R v Snowboy*, 2014 QCCQ 2420, 2014 CarswellQue 3665; *R v Benedict*, 2014 ONSC 6898, 2014 CarswellOnt 16759.

113 *R v D (G)*, 2014 BCCA 84, 2014 CarswellBC 531.

114 *Ibid* at para 32. See also the findings of the judge at para 39: "The sentencing judge . . . did not assess a proportional sentence in light of his moral blameworthiness."

115 *R v Shanoss*, 2013 BCSC 2335, 2013 CarswellBC 3874.

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"dangerous offender" following a sexual assault and sentenced him to an indeterminate term of incarceration:

> In my view, it would be an error to limit the application of the *Gladue* factors in a dangerous offender proceeding in order to prioritize protection of the public as a sentencing objective. The unique circumstances of the Aboriginal offender must be given careful consideration in every sentencing. The fundamental principles of sentencing in s. 718.1 and s. 718.2 apply with equal force to a dangerous offender proceeding. The moral blameworthiness of the offender is a fundamental consideration and the Aboriginal heritage of an offender often has a direct and substantial impact on their moral culpability for the offence. A person who grows up in a culture of alcohol and drug abuse is less blameworthy than a person who commits a crime despite a positive childhood and upbringing.[116]

Aside from these promising, yet rare, decisions, we are of the view that judges fail to acknowledge and comply with the constitutional obligations set out in *Ipeelee* and repeat rather generally the same errors in law as those specifically decried by Justice LeBel. The application of the principle of proportionality and the consideration of the offender's "degree of responsibility" appears to be particularly problematic. We will revisit this issue when discussing cognitive and epistemological hurdles. Further, judges have shown a complete lack of understanding of the colonial context, of intergenerational trauma resulting from it, and its contribution to social problems plaguing Indigenous communities, which we will also tackle later.

C. Resistance to Step 2

While the case law demonstrates that trial judges are resisting the application of the first step of the analysis, it appears that the second step has barely garnered judicial attention. Yet, this second step represents an open door to legal pluralism and to the possibility of rethinking sentencing, in keeping with the holdings of *Ipeelee*. However, one also observes great resistance from an empirical point of view.

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[116] *Ibid* at para 164. See also at para 183, where the judge asserts that as a result of these factors, the moral culpability of the accused is lessened.

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First of all, the type of penalty imposed does not appear to have changed since *Ipeelee*. As shown in Table 3, incarceration is ordered in 87.7 percent of cases. Moreover, in more than 60% of cases, long-term sentences (two or more years) were imposed, as shown in Table 3 (below).

Table 3: Sentences

Primary Sentence	Number of Decisions (t = 635)	Percentage of Sampling
Incarceration	557	87.7%
• Less than 2 years	218	39.1%
• Two years or more	336	60.3%
• Impossible to determine[117]	3	0.5%
Conditional Sentence	37	5.8%
Probation	18	2.8%
Fine	4	0.6%
Discharge	9	1.4%
Impossible to determine[118]	10	1.6%

Note as well that the judges only imposed an intermittent custodial sentence in 17 cases,[119] or less than 3% of the decisions. An insignificant

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[117] Appellate decisions ordering a term of incarceration but not specifying the length thereof.

[118] This category refers to decisions in which the sentence is not specified or the decisions relate to an appeal of a dangerous offender designation or an application for a referral to a sentencing circle.

[119] *R v Simms*, 2013 YKTC 60, 2013 CarswellYukon 60; *R v P (TA)*, 2013 ONSC 797, 2013 CarswellOnt 2424, varied 2014 ONCA 141, 307 CCC (3d) 506; *R v Sowden*, 2013 ONCJ 746, 2013 CarswellOnt 18652; *R v Allen*, 2012 YKTC 36, 2012 CarswellYukon 47; *R v Grandbois*, 2013 ABPC 253, 2013 CarswellAlta 1870; *R v Hansen*, 2014 BCSC 625, 2014 CarswellBC 1141; *R v Auger*, 2013 ABPC 180, 2013 CarswellAlta 1164; *R v Myette*, 2013 ABCA 371, 2013 CarswellAlta 2191; *R v S (RRG)*, 2014 BCPC 170, 2014 CarswellBC 2269; *R v Dustyhorn*, 2014 ABPC 47, 2014 CarswellAlta 430; *R v P(TA)*, 2014 ONCA 141, 307 CCC (3d) 506; *R v Ambury*, 2014 BCPC 344, 2014 CarswellBC 4125; *R v Daniels*, 2014 SKPC 197, 2014 CarswellSask 715; *R v Doxtator*, 2015 ONSC 4228, 2015 CarswellOnt 10051; *R v B (MA)*, 2014 ABPC 293, 2014 CarswellAlta 2642; *R v Mainville*, 2015 ONSC

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number of decisions report having imposed a sanction with a view to treating the "underlying causes" of the criminal behaviour as suggested by Justice LeBel.[120]

In decisions involving domestic and/or family violence, the percentage of decisions where incarceration was ordered is slightly higher at nearly 90%, as shown in Table 4.

Table 4: Sentences and Conjugal and/or Family Violence

Primary Sentence (CFV cases only)	Number of Decisions (t = 126)	Percentage of Sampling
Incarceration	113	89.7%
• Less than 2 years	49	43.4%
• Two years or more	62	54.9%
• Impossible to determine[121]	2	1.8%
Conditional Sentence	5	4.0%
Probation	5	4.0%
Discharge	2	1.6%
Impossible to determine	1	0.8%

These staggering statistics clearly show that the principle of moderation prescribing a resort to sanctions other than imprisonment in subsection 718.2(e) does not receive all the attention it deserves. On the contrary, incarceration appears to be the sentence of predilection where the offender is Indigenous.[122]

1931, 2015 CarswellOnt 4185 (SCJ), leave to appeal refused 2015 ONCA 319, 2015 CarswellOnt 6662; *R v Schinkel*, 2014 YKTC 42, 2014 CarswellYukon 72, varied 2015 YKCA 2, 320 CCC (3d) 366; *R v Schinkel*, 2015 YKCA 2, 320 CCC (3d) 366.

120 *Ipeelee*, *supra* note 1 at para 73. See e.g. *R v Sinclair*, 2014 MBPC 13, 2014 CarswellMan 134; *R v Fleming*, 2014 ONCJ 290, 2014 CarswellOnt 8292; *R v Swanson*, 2013 ONSC 3287, 2013 CarswellOnt 7623.

121 Appellate decisions ordering a term of incarceration but not specifying the length thereof.

122 Despite the fact that these sentences are not representative of all the sentences imposed in Canada due to the small sampling size, we observe that prison sentences are not the most frequently imposed sentence in our justice system. Only 36% of adults tried before criminal courts were sentenced to a term of imprisonment in 2013-2014 and the median length of said prison term was 30 days. Ashley Maxwell, Adult Criminal Court

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By way of contrast, the principle of moderation was put forth and applied satisfactorily by the judges in one decision out of five (130 decisions).[123] We only identified some thirty decisions applying principles of restorative justice,[124] despite Justice LeBel's emphasis on this aspect.

Further, the case law shows only limited openness to Indigenous culture and its various legal orders from a procedural standpoint. Decisions to this effect are practically non-existent. We only identified seven decisions in which the judge attempted to adapt the type of sanction and the procedure to the Indigenous heritage of the accused.[125] Of these seven decisions, we only identified three in which the judge called upon a sentencing circle in

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Statistics in Canada, 2013-2014, Statistics Canada, 2015: http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.htm.

123 See e.g., *R v Gambler*, 2012 SKPC 60, 2012 CarswellSask 264; *R v Childforever*, 2014 ONSC 1067 (SCJ); *R v Green*, 2013 ONCJ 423, 2013 CarswellOnt 10710; *R v Tororak*, 2013 CarswellNfld 391 (Prov Ct); *R v Colton*, 2013 NWTSC 41, 2013 CarswellNWT 47. We considered to be satisfactory those decisions where the judge put forth the principle of restraint set out in subsection 718.2(e) and in which it is possible for the reader to understand how this principle was applied. We considered to be unsatisfactory those decisions in which subsection 718.2(e) was mentioned, without the judge, however, providing any explanation as to its application. Among these satisfactory decisions, some stand out for the creativity exhibited by the judge in giving a particular scope to this principle; see especially *R v Prevost*, 2015 BCPC 186, 2015 CarswellBC 1730; *R v Simms*, 2013 YKTC 60, 2013 CarswellYukon 60; *R v Knott*, 2012 MBQB 105, 2012 CarswellMan 171; *R v Cloud*, 2014 QCCQ 464, 2014 CarswellQue 742, 8 RR (7th) 364, var'd 2016 QCCA 567, 2016CarswellQue 2745, rev'd 2016 QCCA 567, 2016 CarswellQue 2745.

124 See e.g. *R v D (G)*, 2014 BCCA 84, 2014 CarswellBC 531; *R v First Charger*, 2013 ABPC 193, 2013 CarswellAlta 1436; *R v Gabriel*, 2013 MBCA 45, 2013 CarswellMan 249; *R v Meechas*, 2012 MBPC 53, 2012 CarswellMan 391; *R v Clillie*, 2013 NWTSC 21, 2013 CarswellNWT 26; *R v Thorpe* (July 3, 2012), Clements J, [2012] OJ No 6303 (SCJ).

125 *R v Simms*, 2013 YKTC 60, 2013 CarswellYukon 60; *R v Tom*, 2012 YKTC 55, 2012 CarswellYukon 65; *R v Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159; *R v McCook*, 2015 BCPC 1, 2015 CarswellBC 143; *R v McNabb*, 2014 MBPC 10, 2014 CarswellMan 94; *R v Elliot*, 2014 NSPC 110, 2014 CarswellNS 1011; *R v Knight*, 2012 MBPC 52, 2012 CarswellMan 348.

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order to make a decision[126] and one in which the judge referred the accused's file to a sentencing circle in order for the latter to prepare recommendations.[127] However, we also identified two decisions in which the judge rejected the accused's application for access to a sentencing circle.[128] Finally, in some twenty decisions, the judge expressed the wish that the accused have access to programs adapted to Indigenous culture during his or her incarceration.[129]

In the case law, there are only a few isolated cases where the court incorporates sentencing conditions related to Indigenous heritage either through certain orders (such as probation orders or suspended sentences) or by resort to institutions, actors and processes that are Indigenous or "hybrid"—that is to say, partly made up of Indigenous persons, but supervised by the State of Canada.

The case of *R v Kawapit*[130] is a good example. In this matter, Mr. Kawapit was charged with several counts of impaired driving.[131] The justice and healing committee of the community held a sentencing circle (the "Circle") bringing together members of the committee, the accused, his family and the victim. Following this Circle, recommendations were made as to the sentence to be imposed. The report states that the sentencing circle contributed to re-establishing a connection between the individuals

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126 *R v Tom*, 2012 YKTC 55, 2012 CarswellYukon 65; *R v Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159; *R v McNabb*, 2014 MBPC 10, 2014 CarswellMan 94.

127 *R v Elliot*, 2014 NSPC 110, 2014 CarswellNS 1011.

128 *R v McDonald*, 2012 SKQB 245, 2012 CarswellSask 579, varied 2013 SKCA 38, 2013 CarswellSask 210; *R v K (K)*, 2015 NWTTC 16, 2015 CarswellNWT 59.

129 See e.g. *R v Friday*, 2012 ABQB 371, 2012 CarswellAlta 965; *R v Cote*, 2013 BCSC 2424, 2013 CarswellBC 3973, varied 2014 BCCA 475, 2014 CarswellBC 3951; *R v S (MD)*, 2014 BCPC 56, 2014 CarswellBC 921; *R v Mathers*, 2012 BCSC 1980, 2012 CarswellBC 4138.

130 *R v Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159.

131 Flight causing bodily harm, subsection 249.1(3), paragraph 249.1(4)(a) of the *CC*; impaired driving causing bodily harm, subsection 255(2) of the *CC* and two counts of operation while impaired, paragraph 253(1)(a) and subsection 255(1) of the *CC*.

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affected by the situation and to restoring balance.[132] It also states that the participants in the Circle considered that imprisonment would only heighten the accused's isolation and would not lessen the risk that he would relapse, since Mr. Kawapit would then not have the opportunity to work on his self-esteem or to embark upon a healing process. The report recommended measures be taken in this respect instead. Each of these measures was accompanied by annotations explaining the reasons why the measure was relevant for the accused and in keeping with the Cree vision of justice. For example, it was suggested that the accused spend some time in the forest to hunt with his family and a member of the justice committee and that, upon his return, he prepare a traditional meal with the game he had killed.[133] Ultimately, the court imposed a two-year sentence of probation the terms of which were identical to those suggested by the justice committee.[134]

This decision is truly an exception in the case law. Yet, beyond the findings made by the judge in this matter, it is useful to revisit some of the aspects that clearly demonstrate the degree of resistance to legal pluralism by the courts. First of all, not satisfied with the fact that the decision met the requirements prescribed by subsection 718.2(e) and the Supreme Court in *Ipeelee*, the judge and the justice committee both emphasized that the recommendations made by the Circle were not only satisfactory for the participants and the community, but that they were also in compliance with sentencing objectives and principles and, in particular, with the objectives of denunciation and deterrence.[135] In addition, the judge insisted on stating that she was not bound by these recommendations[136] and that, while she

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132 *R v Kawapit, supra* note 131 at para 26.

133 *Ibid*.

134 *Ibid* at paras 26 and 99. This two-year probation was handed down regarding the count of "flight causing bodily harm", the three other charges carrying a mandatory minimum sentence, and the judge ordered the mandatory minimum sentence in respect of each count ($1000 fine).

135 *R v Kawapit*, *supra* note 131 at para 26.

136 See also *R v Elliot*, 2014 NSPC 110, 2014 CarswellNS 1011 at para 64: "Under all of these circumstances, for the reasons stated, I am prepared to refer the matter to a

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accepted them, she was not thereby showing indulgence towards the accused. She issued a reminder that "a sentence focused on restorative justice is not necessarily a 'lighter' punishment".[137]

Hence, it appears clear to us that, in asserting the paramountcy of the sentencing principles and objectives set out in the *Criminal Code* and in stating that it was not bound by the Circle's recommendations, the court maintained the subordination of Indigenous law to State law. On the other hand, the judge resorted to normative incorporation by incorporating Cree objectives (i.e., redress, healing, balance) and legal principles in the probation order, which tends to acknowledge in part the existence and legitimacy of Indigenous legal orders. As far as the Justice Committee was concerned, it was able to implement a process in accordance with Cree law while attempting to justify it within the State prescriptive framework. Therefore, there is an openness to the recognition of the coexistence of different constructs of justice in a plural state.

D. Resistance at the Appellate Level

Appellate courts are directly responsible for the manner in which subsection 718.2(e) is received and treated. As mentioned earlier, there are 130 appellate decisions in our databank. Among those, we identified 16 cases where the appeal was filed by the prosecutor because the latter deemed that the trial judge had given *excessive* consideration to the sentencing principles applicable to Indigenous offenders. In 7 cases out of 16 (43.75%), the appellate courts sided with the prosecutor and reversed the trial decision, deeming that there had been an excessive consideration of the factors,[138] whereas in 9 cases out of 16 (56.25%), the Court

sentencing circle on all charges. It is self-evident that the recommendations, once received, are not binding upon the Court."

137 *Ibid* at para 92, citing *Gladue*, *supra* note 26 at para 72.

138 See e.g., *R v Crazyboy*, 2012 ABCA 228, 288 CCC (3d) 459; *R v Popowich*, 2013 ABCA 149, 2013 CarswellAlta 450; *R v Bauer*, 2013 ONCA 691, 2013 CarswellOnt 15520.

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of Appeal affirmed the trial decision (and therefore upheld the consideration given).[139]

By contrast, we identified 97 decisions where the appeal was filed by the defence that considered the trial judge to have taken insufficient account of the principles. The appellate courts upheld the trial decision and deemed the principles to have been sufficiently considered in 78.35% of the cases (76 decisions),[140] whereas they reversed the trial decision and deemed the principles to have been insufficiently considered in only 21.65% of the cases (21 decisions).[141]

These astounding results raise certain questions. Indeed, both the prosecutor and the defence are subject to the same criteria for securing leave to appeal the sentence, except in respect of dangerous and long-term offenders.[142] Furthermore, appellate courts must show great deference and

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139 See e.g., *R v Awashish*, 2012 QCCA 1430, 2012 CarswellQue 8133; *R v Mikkigak*, 2014 NUCJ 24, 2014 CarswellNun 18; *R v Chambers*, 2014 YKCA 13, 316 CCC (3d) 44.

140 See e.g., *R v Campbell*, 2014 BCCA 235, 2014 CarswellBC 2160; *R v Ahnassay*, 2015 ABCA 134, 2015 CarswellAlta 640; *R v Bigsorrelhorse*, 2012 ABCA 327, 2012 CarswellAlta 1929; *R v Brookwell*, 2012 ABCA 226, 2012 CarswellAlta 1241; *R v Onnignak*, 2013 QCCS 6937, 2013 CarswellQue 14401; *R v Pepin*, 2013 ONCA 168, 2013 CarswellOnt 2969; *R v Harp*, 2015 ONCA 589, 2015 CarswellOnt 13112; *R v Osborne*, 2014 MBCA 73, 314 CCC (3d) 57.

141 See, e.g., *R v Cochrane*, 2013 BCCA 93, 2013 CarswellBC 1430; *R v Lagimodiere*, 2013 BCCA 174, 2013 CarswellBC 1017; *R v Courtorielle*, 2013 ABCA 317, 2013 CarswellAlta 1767; *R v Gabriel*, 2013 MBCA 45, 2013 CarswellMan 249; *R v Nowegejick*, 2012 ONSC 3463, 2012 CarswellOnt 7546 (SCJ); *R v Alasuaq*, 2012 QCCA 1999, 2012 CarswellQue 11849; *R v Pop*, 2013 BCCA 160, 2013 CarswellBC 1668; *R v Gouda*, 2013 ABQB 121, 2013 CarswellAlta 221.

142 Paragraphs 675(1)(b) and 676(1)(d) of the CC set out the accused's and the prosecutor's rights of appeal in respect of indictable offences. As for summary conviction offences, these rights are set out in section 813 of the *CC*. Regarding dangerous and long-term offenders, subs. 759(1) of the *CC*. provides that an offender who is found to be a dangerous offender or a long-term offender may appeal from this decision on any ground of law or fact or mixed law and fact. The Attorney General has an automatic right of appeal only on a ground of law as provided for in subsection 759(2) of the *CC*. Of the 98 decisions appealed by the defence, 14 were appeals by the

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cannot vary the sentence imposed at trial unless it is "demonstrably unfit".[143] Yet, it appears that the appellate courts are more likely to intervene (and, hence, to run afoul of the principle of judicial deference) where the appeal is filed by the prosecutor and the latter is of the view that the trial judge placed excessive consideration on the application of the principles developed in *Gladue* and *Ipeelee*.

Considering the frosty treatment trial judges have given to the two steps in the *Ipeelee* analysis, this conservative reaction on the part of the appellate courts is highly instructive. These courts ought instead to be urging application of the law and support for the innovation proposed in *Ipeelee*. Their hesitation to do so, particularly in certain provinces,[144] has very significant systemic consequences, especially on the definition of the "corridor" or the "range" by which sentences must abide. In addition, the message thereby sent by some appellate courts can influence trial judges who, on an individual basis, are faced with the possibility that their decisions will be appealed and reviewed.[145]

III. OBSTACLES TO INNOVATION

The analysis set out in the previous section shows that the resistance proposed by the Supreme Court in *Ipeelee* to the overrepresentation of Indigenous people in the criminal justice system and to State hegemony is itself largely subject to resistance on the part of trial judges and appellate courts. The latter appear generally to be closed to the idea of a true recognition of legal otherness and seem to find it difficult to imagine sentencing in any other way when faced with Indigenous offenders. We

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accused of his or her dangerous or long-term offender designation. 12 of these appeals were denied.

143 *Lacasse*, *supra* note 98 at para 51; *R v LM(L)*, 2008 SCC 31, [2008] 2 SCR 163 at para 14.

144 There is a certain regional disparity, as Kent Roach identified in 2009, *supra* note 23 at 498.

145 André Jodouin & Marie-Ève Sylvestre, "Changer les lois, les idées, les pratiques: réflexions sur l'échec de la réforme de la détermination de la peine" (2009) 50 Cahiers de droit 519 at 564.

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have attempted to better understand the reasons underlying this resistance to innovation and have identified three broad categories of obstacles, namely legislative hurdles, practical and systemic hurdles, and cognitive and epistemological hurdles.

A. Legislative Hurdles

We should underscore from the outset the significance of legislative hurdles owing to the contradictory messages sent to judges. Indeed, to counterbalance the *Ipeelee* judgment and subsection 718.2(e), one finds a series of other judgments and provisions promoting individual responsibility and the need to denounce and deter crime. Such is the case, in particular, of the addition of mandatory minimum sentences in relation to several offences and of amendments made to the victim surcharge and to conditional sentences that have had a direct impact on judges' discretion and their ability to innovate. It is also noteworthy that subsection 718.2(e) was amended by the Conservative government after the ruling in *Ipeelee* was handed down.[146]

B. Practical and Systemic Hurdles

Under the auspices of practical and systemic hurdles, we intend to group all justifications related to the lack of resources, the practices of the actors and the real difficulties encountered by judges in the field when they attempt to implement the principles set out in *Ipeelee*. The case law is replete with these types of hurdles, which take on quite a significance in the eyes of the judicial actors.

The primary constraints mentioned are those relating to the existence, preparation and quality of *Gladue* reports. 15 years after the *Gladue* decision was handed down, only one out of three decisions states that a *Gladue* report was prepared with a view to the sentencing of an Indigenous person, as shown in Table 5:

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[146] An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts, SC 2015, c 13, s 24. This amendment came into force on 22 July 2015.

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Table 5: *Gladue* Reports

Existence of a *Gladue* Report	**Number of Decisions (t = 635)**	**Percentage**
No reference to a *Gladue* report	409	64.4%
Reference to a *Gladue* report	226	35.6%
Impossible to determine[147]	2	0.3%

It is important to acknowledge that the situation varies considerably depending on the provinces and territories concerned.[148] Judges from Saskatchewan and the Northwest Territories stated that they had had the benefit of a *Gladue* report in only five and six percent of cases, respectively, whereas judges in British Columbia and Yukon referred to them in half of the cases analyzed, nearly 60% of cases in Ontario, and 80% of cases in Nova Scotia. In Québec, slightly more than a quarter of the analyzed decisions reported the existence of a *Gladue* report. Yet even in the provinces where judges have greater access to a *Gladue* report, there remains great uncertainty with respect to their use as indicated by the Council of Yukon First Nations: "At present, there is a high level of uncertainty around the provision of Gladue reports for Yukon Courts despite the fact that it is an Indigenous person's legal right to have Gladue information provided to the court and a demonstrated demand for Gladue Reports."[149] A similar

147 Very short appellate decisions in which no reference is made to the existence of a *Gladue* report.

148 Here are the detailed statistics for each province and territory on the existence of a *Gladue* report: Québec: 7 decisions out of 25 (28%); Ontario: 60 out of 105 (57.14%); Manitoba: 27 out of 68 (39.7%); Saskatchewan: 5 out of 94 (5.32%); Alberta: 23 out of 72 (31.94%); British Columbia: 64 out of 131 (48.85%); Yukon: 26 out of 51 (50.98%); NWT: 3 out of 49 (6.12%); Nunavut: 0 out of 21; NS: 8 out of 10 (80%); NB.: 0 out of 2; Newfoundland: 1 out of 7 (14.29%); PEI: no decision found.

149 Council of Yukon First Nations, *Yukon Gladue Research & Resource Identification Project* (2015), online: <https://www.lawsocietyyukon.com/pdf/YukonGladueReport 2015.pdf> at 8.

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finding was also made in British Columbia.[150] Finally, let us stress that no *Gladue* report has been filed in New Brunswick or in Nunavut. On the other hand, the courts in Nunavut and the Northwest Territories consider themselves to be, to a certain extent, specialized courts interacting with a largely, if not exclusively, Indigenous population and to possess more general knowledge of the communities in question. Some of these courts have also incorporated some components of Indigenous law or process: for example, some courts of justice sit with elders in attendance and the elders participate in the handing down of the sentence.

Certain judges openly complain about the difficulty in obtaining *Gladue* reports. Justice Monnin of the Manitoba Court of Appeal described the frustration experienced by many: "There is presently in this province either a concerning disregard or a systemic impossibility to provide what is required for judges to comply with the dictates of the Supreme Court."[151] Other judges wonder about the quality and objectivity of the reports.[152] Whereas some judges only raise awareness of the problem,[153] others

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150 Sébastien April & Mylène Magrinelli Orsi, *Gladue Practices in the Provinces and Territories*, *supra* note 20 at 9.

151 *R v G(LL)*, 2012 MBCA 106, 292 CCC (3d) 486 at para 35.

152 See e.g. *R v Stewart*, 2012 YKSC 75, 2012 CarswellYukon 139; *R v B(DKD)*, 2013 BCSC 2321, 2013 CarswellBC 3884; *R v L(DRM)*, 2012 BCPC 184, 2012 CarswellBC 2215; *R v Florence*, 2013 BCSC 194, 2013 CarswellBC 298, aff'd 2015 BCCA 414, 2015 CarswellBC 2822; *R v L(KL)*, 2012 BCPC 273, 2012 CarswellBC 2430; *R v Lawson*, 2012 BCCA 508, 2012 CarswellBC 3956, 294 CCC (3d) 369; *R v Lewis*, *2014 BCPC 93, 2014 CarswellBC 1386* ; *R v McCook*, *supra* note 112; *R v Paul*, *supra* note 88; *R v Corbiere*, 2012 ONSC 2405, 2012 CarswellOnt 5931; *R v Long*, *supra* note 72; *R v Knockwood*, *supra* note 98; *R v Land*, *supra* note 96; *R v Raymond*, 2014 ONCS 6845, 2014 CarswellOnt 17173; *R v Stoneham* (29 November 2012), Guelph 11/1254 (Ont Ct J), [2012] OJ No 6447; *R v Weizineau*, 2014 QCCQ 8283, 2014 CarswellQue 9228; *R v Gruben*, 2013 NWTSC 59, 2013 CarswellNWT 72.

153 See e.g., *R v D(M)*, 2014 NLTD(G) 101, 2014 CarswellNfld 267 and *R v Kanayok*, 2014 NWTSC 75, 2014 CarswellNWT 90. See also *R v B(DKD)*, *supra* note 152; *R v L(DRM)*, *supra* note 152 ; *R v Florence*, *supra* note 152; *R v Lawson*, *supra* note 152; *R v Lewis*, *supra* note 152; *R v Paul*, *supra* note 90; *R v Gruben*, *supra* note 152.

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sometimes take steps themselves to ensure that a proper report is prepared,[154] or otherwise reduce the sentence outright.[155]

The *Knockwood* case[156] is an excellent example. In this matter, the accused pleaded guilty on 10 August 2011 to a charge of importation of cocaine, and the Court requested that a *Gladue* report be drawn up. Although a period of 6 to 8 weeks is usually allowed for the preparation of a regular pre-sentence report, the judge granted 12 weeks in order to prepare an adequate *Gladue* report.[157] Counsel for the prosecution and the defence received word thereafter that the Province of Québec was not equipped to prepare *Gladue* reports, so they jointly agreed to the preparation of a pre-sentence report with a "*Gladue* component".[158] On 25 October 2011, the Court finally received a "pre-sentence report" from the *Ministère de la Sécurité publique du Québec*. The four-and-a-half-page report was drafted entirely in French, even though the accused, who was an Anglophone, had no command of this language. The Court requested that the report be translated, which it was on 9 November 2011. That very day, counsel for the defence requested an adjournment: the accused felt that the author of the report had been hurried, that she was being punished for insisting on obtaining a *Gladue* report, and that the report provided did not really contain a "*Gladue* component", which the Court incidentally acknowledged.[159] Worried about not being treated fairly, the accused enlisted the help of a paralegal advisor who told her that the only way to secure an adequate report would be for her to pay someone herself to draw one up. Finally, the Ontario Ministry of Community Safety and

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154 See e.g. *R v Karau*, 2014 ONCJ 207, 2014 CarswellOnt 5601; *R v Derion*, 2013 BCPC 382, 2013 CarswellBC 4091; *R v Corbiere*, *supra* note 155; *R v Long*, *supra* note 73; *R v Knockwood*, *supra* note 98; *R v Land*, *supra* note 98.

155 See e.g. *R v Stoneham*, *supra* note 155; *R v Knockwood supra* note 98; *R v G(LL)*, *supra* note 112.

156 *R v Knockwood*, *supra* note 98.

157 *Ibid* at para 7.

158 *Ibid* at para 8.

159 *Ibid* at para 70.

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Correctional Services entered into an agreement with a Toronto-based Indigenous legal services organization to have the latter prepare the *Gladue* report for the accused. The report was filed on 6 March 2012, 7 months after Mrs. Knockwood's plea.

Visibly outraged at this situation,[160] Justice Hill of the Ontario Superior Court who was presiding the sentencing hearing—which was finally held on 10 April 2012—did not hesitate to level accusations of misconduct at the Province of Québec.[161] He stated that, while there may be disparities between the various regions as to the *quantum* of the sentences, subsection 718.2(e) and the principles set out in the *Gladue* decision were applicable throughout Canada.[162] Justice Hill reduced the accused's sentence from eight to six years' incarceration contrary to the joint suggestion of the parties, due to the fact that the background and systemic factors had had a strong impact on the accused's moral culpability, but also and especially due to state negligence.

Furthermore, there is reason to question the contents of those *Gladue* reports that are drawn up. First, we observe, as other authors have, that it is crucial to prepare *Gladue* reports using actual *Gladue* components rather than regular pre-sentence reports. Indeed, pre-sentence reports are often drawn up in response to specific public security and risk assessment requirements posed by the offenders in question.[163] This logic does not coincide well with what must be prevalent in the analysis of the background and systemic factors, and does not take into account the need to think about sentencing from a different perspective.[164] Finally, while *Gladue* reports generally contain information regarding background and systemic

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160 *Ibid* at para 71: "The outrageousness of this story is self-evident. A shameful wrong. Contempt for the rights of Indigenous Canadians. A denial of equality."

161 *Ibid* at para 57.

162 *Ibid* at para 56.

163 See Nate Jackson, *supra* note 83 at 90.

164 Hannah-Moffat and Maurutto, *supra* note 41 at 264.

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factors, there is very little information on the procedures and the type of sanctions appropriate to the accused's Indigenous heritage.[165]

Incidentally, the lack of resources is also raised as a hurdle preventing the imposition of sentences dealing with the underlying causes of the criminal behaviour and the potential for alternative sentences to be served within the community. It is sometimes more difficult for judges to obtain information regarding Indigenous communities, their legal orders, and the resources available within them than it is to obtain information on the negative impact of colonization, which is telling.[166] This led the Council of Yukon First Nations to issue the following opinion: "The lack of resources to support offenders, particularly in communities outside Whitehorse, is perhaps one of the biggest challenges facing the Yukon justice system".[167] This finding was confirmed by the Auditor General of Canada.[168] In some cases, judges go as far as relying on correctional institutions to offer services,

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[165] Hadley Friedland, *Aseniwuche Winewak Justice Project Report: Creating a Cree Justice Process using Cree Legal Principles* (October 2015) [unpublished, on file with the University of Victoria Indigenous Law Research Unit and the Aseniwuche Winewak Nation]. According to Friedland, *Gladue* reports in their current form are focused almost exclusively on historical and systemic factors. In her view, although that acknowledgement represents a valid objective, *Gladue* reports currently pay no attention to the other chief objective of the *Gladue* decision, which is to use Indigenous legal traditions. She notes at 32:

> The imperative of a *Gladue* analysis has largely been reduced, unquestioningly to "*Gladue* Reports", which still focus primarily on social context evidence, such as common historical experiences and social disadvantages, or even simply adding "*Gladue* factors", upon request, to standard pre-sentencing reports, and is rife with practical problems of the costs, skills and time to complete them. It is arguable that a Cree justice process that applies Cree legal principles to sentencing cases would more effectively and efficiently fulfill the intent behind the *Gladue* imperative.

[166] Klein, *supra* note 24 at 514, referring in particular to *R v Amitook*, 2006 QCCQ 2705, 2006 CarswellQue 3067; *R v Diamond*, 2006 QCCQ 2252, 2006 CarswellQue 2535 and *R v Pépabano*, 2005 CarswellQue 11839, rev'd 2006 QCCA 536, 2006 CarswellQue 3571.

[167] Council of Yukon First Nations, *supra* note 149 at 48.

[168] *Report of the Auditor General of Canada to the Yukon Legislative Assembly—2015: Corrections in Yukon—Department of Justice* (Ottawa: Public Works and Government Services, 2015) at 18.

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although it is obvious that this is not their primary mission and they are also underfunded in this respect.[169]

Other practical constraints stifle attempts at innovation. The volume of files handled is one such constraint. The Barreau du Québec (Québec Bar) recently reported that, in the community of Salluit in Northern Québec, 2,249 criminal files were opened between 2003 and 2013.[170] However, in 2013, this community only had 1,380 inhabitants.[171] In the same vein, the instability of justice committees in Nunavik is problematic; the sparse funding for the operation of these committees represents a hurdle to hiring permanent staff.[172] This lack of funding and resources for justice committees

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169 *R v Sikyea*, 2013 NWTSC 13, 2013 CarswellNWT 14 at para 27, aff'd 2015 NWTCA 6, 2015 CarswellNWT 39. See also Jonathan Rudin, "Commentary on *R v Gladue*", Commentary (1999), online: <web.net/alst/Gladcom.htm>, which, as early as 1999, already stated that courts would need resources in order to become better acquainted with non-custodial penalty options.

170 *Rapport sur les missions du Barreau du Québec auprès des communautés autochtones du Grand Nord québécois* (Montréal: Barreau du Québec, 2015) at 6.

171 *Ibid.*

172 In 2017, in Québec, the budget for all the 25 Justice Committees (which are present within 7 of the 11 nations in Québec and in Montréal) was $1.5 million, meaning a little less than $58,000 per justice committee (funding might not be equally distributed between all 25 committees). This includes the contribution of the federal government on top of Quebec's contribution of $600,000. See the testimony of Yan Paquette, Assistant Deputy Minister with the Ministry of Justice, at the *Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec: Listening, Reconciliation and Progress* (2017), online: <www.cerp.gouv.qc.ca/index.php?id=57&tx_cspqaudiences_audiences%5Baudiences%5D=9&tx_cspqaudiences_audiences%5Bvpartie%5D=2&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=7fdee73318b2325c891047a8f18c8173>. This means that, with this scarce funding, each justice committee must lease space and pay bills (including, for some, the substantial Internet rates charged in the North), in addition to paying the salaries of the members of the justice committee. If the committee wants their community to benefit from an alternative measure program, they have to sign an agreement with the Ministry of Justice. The preparation for such a program and agreement must be made using the same funding. This situation led Lyne St-Louis, who is in charge of justice matters at the Makivik Corporation, to make the following observation: "Coordinators are on contract basis temporary employees with no benefits. The precarious status offered is

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prevents them from developing "procedures and sanctions appropriate to the accused's Indigenous heritage", or from developing alternative measures programs. This could explain why *Gladue* reports, which are often (but not exclusively) written by these justice committees, focus mainly on background and systemic factors. In our view, the significant volume of files in these communities cries out for the adoption of alternative measures programs developed by the communities.

Finally, the lukewarm response to the principles set out in *Ipeelee* may also reflect the compartmentalization of, and confusion as to, roles within the justice system,[173] and the resulting shirking of the actors' responsibilities.[174] Some judges seem to believe that, if counsel have not provided them with the requisite information, they are not required to take any steps to this end,[175] whereas others deem that it is equally incumbent on prosecution and defence counsel as it is on judges to ensure that sufficient information is available as to the specific circumstances of the accused.[176]

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demotivating for few, and we always risk losing staff": Lyne St-Louis, Nunavik Community Justice Program, 2015 [unpublished] at 6. For these reasons, many justice committees are always in the process of searching for more funding from donations, cities, etc. In comparison, the three Circuit court deserving four nations (28 communities) in Quebec cost between $3.5 and $4 million to the Government of Québec (see the Testimony of Yan Paquette).

173 April & Orsi, *supra* note 20 at 10.

174 We stress that it should be acknowledged that the lack of resources affects not only judges, but also prosecution and defence lawyers who are often restricted in the performance of their duties.

175 See e.g. *R v Smarch*, 2013 YKTC 85, 2013 CarswellYukon 130; *R v Beaulieu*, 2015 BCSC 354, 2015 CarswellBC 578; *R v G(DT)*, 2013 BCPC 156, 2013 CarswellBC 1887; *R v Isbister*, 2014 BCPC 324, 2014 CarswellBC 4046; *R v R(J)*, 2012 BCPC 240, 2012 CarswellBC 2190; *R v L (KL)*, *supra* note 152; *R v McKay*, *supra* note 75; *R v McPherson*, *supra* note 75; *R v White*, 2013 BCCA 44, 2013 CarswellBC 262; *R v Naistus*, 2014 SKQB 333, 2014 CarswellSask 691; *R v Choken*, 2012 MBPC 44, 2012 CarswellMan 425; *R v Harry*, 2013 MBCA 108, 2013 CarswellMan 715, 309 CCC (3d) 76; *R v Kennedy*, 2012 MBPC 60, 2012 CarswellMan 584; *R v Boyd*, *supra* note 75; *R v D(M)*, *supra* note 153; *R v Kanayok*, *supra* note 153.

176 See e.g., *R v Tom*, *supra* note 115 at para 76:

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These latter judges consider it to be their duty to apply appropriate sentencing principles and will take all necessary steps to this end.[177] Conversely, some judges are of the opinion that responsibility lies primarily with the prosecutor[178] while others rely on the defence.[179] Incidentally, many judges explicitly express a certain degree of exasperation towards lawyers who do not, in their opinion, submit sufficient evidence with respect to these principles—they would like such lawyers to show more creativity.[180]

> [T]he onus of ensuring sufficient information about an Indigenous individual's particular circum- stances rests on all of us, Crown, defence, and the sentencing judge. In the absence of a true Gladue Report, it is critical that pre-sentence reports contain some details about an offender's Indigenous status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence.

177 See e.g., *R v Cloud*, *supra* note 112, where the judge sent the defence lawyer back to prepare his representations on two occasions. See also *R v G(D)*, *supra* note 112 at para 10:

> The sentencing judge had a pre-sentence report and a psychological assessment, and although he requested a *Gladue* report, none was provided. After the submissions, he sent a memorandum to counsel asking if the First Nation wished to add anything to the proceedings, but both counsel declined to provide further information. The sentencing judge stated that it was not his place to direct the proceeding and opined that such information would have been very helpful for him to craft a restorative sentence rather than the "conventional sentencing options addressed in your submissions". I note that the sentencing judge has the power to order, on his own motion, the production of evidence that would assist in determining the appropriate sentence (s. 723(3) of the *Criminal Code*).

178 See e.g. *R v Swanson*, *supra* note 122 at paras 24–25, where the judge stated that the responsibility for addressing the underlying causes of crime during the sentencing process, and not just the symptoms thereof, rested primarily on the shoulders of counsel for the prosecution since it was a matter of justice.

179 See e.g. *R v Joamie*, 2013 NUCJ 19, 2013 CarswellNun 23 at para 50: "It falls upon defense counsel, not the Court, to find a sentencing alternative to custody for citizens of diminished responsibility. It falls upon defense counsel, not the Court, to identify the resources needed to address the offender's special needs."

180 See e.g. *R v Green*, *supra* note 91 at para 22: "The Supreme Court of Canada in *R v Ipeelee* [citations omitted] devotes considerable time and effort to assist those who actually chose to read the case, in making sense of Indigenous sentencing." See also *R v Cloud*, *supra* note 112 at para 6: "I should add that neither party was aware of the

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C. Cognitive and Epistemological Hurdles

While practical and systemic constraints are a significant burden on a daily basis, they do not explain everything. Cognitive and epistemological hurdles, within the meaning defined by Bachelard, also stand in the judges' way. In his work entitled *La formation de l'esprit scientifique*,[181] Bachelard explains that there are several "intellectual habits" that obstruct scientific activity and creation. Hence, the ideas used most often tend to become "unduly valuable" and to create obstacles to their renewal.[182]

In this respect, several authors have shown the extent to which judges find it difficult to conceive of a sentence in anything other than punitive terms, and in connection with classical sentencing theories (retribution, deterrence, denunciation and rehabilitation in secure custody), which amount to what Pires calls modern penal rationality.[183] For example, to borrow the words of the Supreme Court in *Wells* (which were disavowed in *Ipeelee*), several judges indicated that one must not think that Indigenous peoples do not believe in denunciation and deterrence[184] or that the

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requirements of *Ipeelee* and accordingly neither had prepared for a hearing to comply with the requirements imposed by it."

[181] Gaston Bachelard, La formation de l'esprit scientifique — Contribution à une analyse de la connaissance objective (Paris, 1934) reproduced in Les classiques des sciences sociales at 19.

[182] Margarida Garcia, "De nouveaux horizons épistémologiques pour la recherche empirique en droit: décentrer le sujet, interviewer le système et "désubstantialiser" les catégories juridiques" (2011) 52:3-4 C de D 417 at 428–29. For an application of this concept to criminal law, see Marie-Andrée Denis-Boileau, Droit et science: le point de vue de la Cour suprême du Canada sur l'expertise psychiatrique, (LLM Thesis, Université of Ottawa, 2015) [unpublished].

[183] Pires, *supra* note 55. Richard Dubé, Margarida Garcia & Maira Rocha Machado, eds., *La rationalité pénale moderne: Réflexions théoriques et explorations empiriques* (Ottawa, University of Ottawa Press, 2013).

[184] See e.g. *R v Paul*, *supra* note 88; *R v W(RL)*, 2013 BCCA 50, 2013 CarswellBC 268; *R v Peters*, 2014 MBPC 28, 2014 CarswellMan 292; *R v Lee Gabriel*, 2012 QCCS 6026, 2012 CarswellQue 12909; *R v Bourque*, 2013 NWTSC 37, 2013 CarswellNWT 43.

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objectives of denunciation and deterrence could be served otherwise than by the imposition of a prison term.[185]

In addition, as we stressed during the analysis of the background and systemic factors, the concept of the gravity of the offence is by far what prevents judges from giving full effect to the prescriptions of the Supreme Court. Our analysis indeed showed that trial and appellate judges continue to set aside the *Gladue* principles when faced with "serious" offences. Across the board, we identified 161 decisions out of 635, or a quarter of the decisions (25.4%), in which judges expressly relied on the concept of "gravity" as a hindrance to the analysis of the principles set out in *Ipeelee*.[186] In addition, they resorted, to a great extent, to terms of imprisonment, especially in situations of violence.

R v Jacko[187] is a good example of the pervasiveness of this concept. The judge's recitation of the facts clearly demonstrates the gravity that he attributes to the actions of the accused, followed by the rejection of certain sentencing principles, in particular the consideration of the background and systemic factors and the pursuit of sanctions other than imprisonment. These background and systemic factors, in fact, become an aggravating factor for the accused.

In this case, the accused was found guilty of assault on a peace officer and uttering death threats or threats of bodily harm after she insulted and threatened two peace officers and spit in their eyes, nose and mouth while

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185 See e.g. *R v Schinkel*, *supra* note 119; *R v Carlson*, 2015 BCSC 1032, 2015 CarswellBC 1657; *R v C(JAV)*, 2015 BCPC 218, 2015 CarswellBC 2160; *R v Kelly*, 2014 BCSC 2147, 2014 CarswellBC 3409; *R v McCook*, *supra* note 112; *R v Neel*, 2014 BCSC 1989, 2014 CarswellBC 3130; *R v H(RJ)*, 2013 BCPC 139, 2013 CarswellBC 1723; *R v S(R)*, 2014 BCPC 227, 2014 CarswellBC 3077; *R v Merasty*, 2012 SKQB 268, 2012 CarswellSask 486; *R v Dick*, 2014 MBQB 187, 2014 CarswellMan 585, affirmed 2015 MBCA 47, 2015 CarswellMan 226; *R v Bernard*, 2014 NSSC 463, 2014 CarswellNS 1054.

186 *Ipeelee*, *supra* note 1 at para 86. We limited our analysis to a specific reference to seriousness rather than counting the instances of crimes that we deemed to be "serious or violent" and in which the judges refused to apply the principles, in order to focus on the subjective assessments of the actors themselves. *Ipeelee*, *supra* note 1 at para 86.

187 *R v Jacko*, 2013 QCCQ 931, 2013 CarswellQue 1290.

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claiming to be HIV-positive and to have hepatitis.[188] The trial judge underscored a few personal details. The accused was 50 years old. As a child, she had been sent to an orphanage and adopted in her tender years by a mother who gave her a rigid upbringing. At 14, she dropped out of school to "engage in fun activities in the company of men who were older than her".[189] She then developed an addiction to alcohol and psychotropic drugs and "offered sexual favours in order to satisfy her need of drugs". She was ultimately placed in intermittent care in youth centres until she reached the age of majority and ended up homeless. Ms. Jacko had a criminal record spanning the years from 1981 to 1997. However, as of 1997, "her criminal activity calmed down", which coincided with her meeting her spouse who died in 2009. During this relationship, she stopped drinking and ceased using drugs, she found a job, and she completed Grade 11 and a session of collegiate studies. Following the death of her spouse, Ms. Jacko started using drugs again: having no family or friends to turn to, she stated that she had lost her way. Ignoring a period of stability of more than twelve years, the judge described the situation in the following manner:

> We are dealing here with a deprived woman who hung on to an unhealthy lifestyle characterized by the abuse of ethyl alcohol and being in the company of criminal and marginalized elements. Following the death of her spouse, she led an idle life and reverted to her unhealthy lifestyle. She has been described as impulsive and having loose morals. She has trouble managing her anger. Reports also indicate that she has a tendency to be self-abusive. The officer goes so far as to say she exhibits certain traits akin to anti-social personality. She spends her time continually testing limits. She is said to be dependent.[190]

Upon handing down his sentence, the judge asserted that the accused's difficult life (without referring to the background and systemic factors) was only one "criterion among many others" and that "this feature did not automatically result in a lesser sentence. The more serious the offence, the more the sentence handed down will be akin to that given to a

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188 *Ibid* at paras 10–11.

189 *Ibid* at para 17.

190 *Ibid* at para 15.

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non-Indigenous [person]".[191] In his opinion, the offence in question is very serious indeed: "Spitting on someone goes beyond violence, it shows a total lack of respect, contempt and hatred, besides being disgusting in the highest degree. Our Court of Appeal has already asserted that spitting on someone where there are no consequences is a shameful and contemptible behaviour".[192]

The judge ultimately concluded that, owing to this gravity and to the fact that "the accused represents a danger to the community due to the elevated risk of becoming a repeat offender as a result of her addiction to alcohol and due to the lack of support around her",[193] a conditional sentence would not be appropriate: "It is not as a result of a few visits to the friendship house or to several other mildly restrictive resources that the accused will be able to end her addiction".[194] The judge therefore handed down a ten-month prison term, despite the obvious presence of background and systemic factors that influenced the Mrs. Jacko's dangerousness and were liable to diminish her moral culpability.[195] However, in this set of circumstances, rather than being presented in the form of a *Gladue*-style analysis, the presence of these factors undermined the accused since they influenced her degree of dangerousness.[196]

Having observed the impact of the *Gladue* factors in the handling of applications for a dangerous offender designation regarding Indigenous offenders, Nate Jackson reached the same conclusion:[197] the *Gladue* factors are harmful to offenders. Jackson underscored that, as far as dangerous offenders are concerned, the courts, when deciding whether or not to impose an indeterminate sentence, are primarily informed by two variables:

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191 *Ibid* at para 30.

192 *Ibid* at para 13.

193 *Ibid* at para 31.

194 *Ibid.*

195 *RGladue*, *supra* note 26 at para 69.

196 See Nate Jackson, *supra* note 83 at 85.

197 *Ibid.*

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the risk of repeating the offence and the possibility of rehabilitation.[198] However, the risk of recidivism is substantially influenced by "unique systemic or background factors, which may have played a part in bringing the particular Indigenous offender before the courts".[199] Indeed, several tools are used to determine risk. These assess the degree of education, employment, mental illness, criminal history, current substance abuse, active psychoses, instability, reaction to treatment, stress, level of anger, and hostility.[200] All of these risk assessment tools operate by comparing the subject to a statistical baseline. However, this statistical baseline is determined according to a premise of ethnic and racial neutrality, which makes it debatable when minorities are involved.[201] The difficult reality faced by Indigenous persons is such that it may be unlikely that they would achieve "good" results on these tests. They are, therefore, automatically at a disadvantage.[202]

Similarly, the potential for rehabilitation is significantly affected by the "types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Indigenous heritage or connection."[203] If an offender has never received appropriate treatment and has therefore failed the multiple treatments he or she has undergone, the potential for rehabilitation will be considered small.[204] Consequently, Indigenous offenders receive more indeterminate sentences due to the damage caused by colonialism, since such damage ends up becoming a decisive factor in justifying the decisions handed down by the courts. According to Jackson, broad knowledge of colonialism and its

198 *Ibid* at 84.

199 *Gladue*, *supra* note 26 at para 66.

200 See Jackson, *supra* note 83 at 85.

201 *Ibid* at 86.

202 *Ibid*.

203 *Gladue*, *supra* note 26 at para 66.

204 Jackson, *supra* note 83 at 88.

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devastating effects must be brought to bear in order to challenge the initial assumptions as to the danger posed by an individual Indigenous person.[205]

Another significant epistemological and cognitive hurdle relates to the issue of individual responsibility.[206] Judges generally tend to gloss over the historical and systemic background that afflicts Indigenous persons by stating that they chose to commit offences and must be held accountable. Hence, judges either persist in burdening Indigenous accuseds with the onus of proving a causal link between the background factors and the commission of the offence, as is apparent in approximately 6% of the decisions contained in our database, or they refuse to consider the specific socio-economic and cultural context in the sentencing phase. However, in our view, this principle of individual responsibility ought to be challenged by taking into account the responsibility incumbent upon the State in this context. In this respect, we note what the judge asserted in the case of *R v Land*:

> One of the factors relied on by the Crown in asserting that the period of parole ineligibility should be lengthened to 15 years is the moral culpability of Mr. Land in brutally and relentlessly attacking Mr. Doyon, an unsuspecting person who was minding his own business while on his own couch in his own home. There is no doubt that such a crime cries out for strong denunciation and forceful deterrence. However, surely society writ large must share some of the moral culpability associated with this terrible crime. How can we expect someone to be able to follow societal norms when they, and their parents and grandparents, have so clearly not been the beneficiaries of those same societal norms? How can someone who, as a child, suffered the trauma just described, be expected to behave in the same way as someone who never suffered such trauma? How can we expect a child raised in an environment of alcohol and drug abuse, physical and sexual violence, neglect, poverty, hunger, and instability to grow into a psychologically healthy adult with good impulse control and judgment?[207]

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205 *Ibid* at 91.

206 Marie-Ève Sylvestre, "Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity and the Logic of Practice" (2010) 55:4 McGill LJ 771.

207 2013 ONSC 6526 at 83. See also *R v Charlie*, 2014 YKTC 17, 2014 CarswellYukon 40, aff'd 2015 YKCA 3, 2015 CarswellYukon 6; *R v L (DRM)*, 2012 BCPC 184, 2012

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Finally, some judges voice the concern that imposing reduced sentences for Indigenous offenders could send the message that Indigenous victims are less deserving of protection.[208] This statement refers to a principle of formal equality that seems to assume that Indigenous victims are effectively better protected by the criminal justice system, which is truly not the case.[209]

Yet, as long as judges will be unable to overcome the hurdle of the "gravity" of offences and will continue to lay blame for the social problems plaguing our communities on the shoulders of the accused, we will continue to see an increase in the number of Indigenous persons before the courts and incarcerated in Canada. Indeed, a large proportion of criminal offences perpetrated in this context is made up of "serious" offences or involve a certain level of violence, and, in a great majority of the cases, the actions are voluntary and can be attributed to offenders who were found guilty. However, in the context of Indigenous persons, violence has deep roots and is first and foremost the product of colonialism, of the residential school policy and of the state of inferiority the *Indian Act* imposes on them. Moreover, violence is often grounded in interpersonal, intercommunity and intergenerational dynamics in which the status of victims and perpetrators become interchangeable. The criminal justice system is finally an integral part of the problem. As a result of its lack of cultural understanding, of its disregard for

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CarswellBC 2215; *R v Bird*, 2014 SKQB 75, 2014 CarswellSask 200, leave to appeal ref'd 2016 CarswellSask 378 (SCC); *R v Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 CCC (3d) 36.

208 See e.g. *R v C(SD)*, 2013 ABCA 46, 303 CCC (3d) 336 at para 31: "The sentencing judge observed that the victim of the offence was also Métis . . . He expressed concern that perceived reduced sentences for aboriginal offenders might lead some (including victims) to conclude that aboriginal victims are less worthy of protection."

209 The Indigenous prison population in Canada has continually increased since the 1960s: *Ipeelee*, *supra* note 1 at para 57. At the same time, Indigenous persons are more likely to be victims of a crime than non-Indigenous persons: Statistics Canada, *Violent Victimization of Indigenous People in the Canadian Provinces, 2009*, by Samuel Perreault, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 11 March 2011) at 7–9.

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history and its perpetuation of shame, humiliation and culpability among Indigenous peoples, it contributes directly to the cycle of violence.[210]

While the Supreme Court in *Ipeelee* is clear about a certain number of principles, we ought to acknowledge that it provides little indication as to how to implement them. Hence, upon a reading of these judgments and in light of the stubborn refusal of judges to avoid the "errors" identified in *Ipeelee*, it seems clear that several judges simply do not know how to operationalize the factors set out in *Gladue* and *Ipeelee*. Incidentally, some judges expressly say so in their decision: they would like to have more explanations.[211] Furthermore, the Supreme Court states that one is not to grant an automatic reduction in the sentence, yet it appears to come to this result in *Ipeelee* by reducing the terms of imprisonment of the principal parties.[212] Faced with these contradictions, some judges simply include the expression "*Gladue* factors" among the mitigating circumstances in their judgments,[213] or, failing anything better, lean towards a reduction of the sentence handed down.[214]

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210 We draw these preliminary findings from our interviews with Atikamekw people as part of our research project.

211 See e.g. *R v S(EH)*, 2013 BCPC 48, 2013 CarswellBC 646 at para 36: "I return, then, to the question of how to factor in the issue of the Defendant's aboriginal status, as I am required to do. I must confess that I have always found this issue to be elusive indeed, and no less so now that I have read and re-read the decisions in *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.), *R. v. Ipeelee*, 2012 SCC 13 (S.C.C.) and *R. v. W. (R.L.)*, 2013 BCCA 50 (B.C. C.A.) while considering my decision in this case.").

212 *Ipeelee*, *supra* note 1, paras 93, 97.

213 For instance, in the decision of *R v Engel*, 2013 SKPC 215, 2013 CarswellSask 924, there are practically no details mentioned as to the "*Gladue* factors", although the expression "*Gladue* factor" is listed as one of the mitigating circumstances applicable in the matter.

214 See e.g., *R v Sauls*, 2013 BCSC 2445, 2013 CarswellBC 4001 at para 26: "In keeping with *R. v. Gladue*, it is incumbent upon me to use all available sanctions other than imprisonment that are reasonable in the circumstances. That does not mean in this case that jail time is not appropriate, not at all. A significant period of incarceration, in my view, is necessary. But because of the Gladue factors, I am going to impose a lesser

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In our opinion, one must not understand subsection 718.2(e) and the teachings of the Court as propounding one sentencing principle among others, amongst which one may pick and choose according to the circumstances, but rather as an invitation to rethink not only the punishment, but the entire sentencing process.

IV. CONCLUSION

Despite the enthusiasm generated by *Ipeelee*,[215] one must acknowledge that, three years later, only a handful of judges have shown judicial creativity. Instead, the vast majority of judges have shown resistance to Ipeelee principles.

The *Charlette* case cited in the introduction is one tragic example. In that case, a *Gladue* report was filed, but the judge appears to have treated it like a regular pre-sentence report. He focused on the very high risk that the accused would be a repeat offender rather than on the rather obvious links between his past and his profound need for social services and mental health care. The judge does not appear to have attributed much significance to the systemic factors: he did not attach much importance to the fact that Charlette left his hometown at the age of six, and that he exhibited profound signs of uprooting and acculturation, insisting instead that he had grown up without any ties to Indigenous culture, thereby seemingly insinuating that the accused was perhaps not "sufficiently Indigenous". Then, he granted an automatic one-year sentence reduction, applying a purely mathematical formula rather than following a radically different analytical framework. Indeed, it is even possible to suggest that Charlette was a victim of discrimination in this matter, having received a relatively

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period of incarceration than would otherwise be the case if Mr. Sauls were not an Indigenous offender." See also *R v Mathers*, 2012 BCSC 1980, 2012 CarswellBC 4138; *R v P(DA)*, 2012 BCPC 390, 2012 CarswellBC 3375; *R v Seidel*, 2014 BCPC 230, 2014 CarswellBC 3057; *R v C(WA)*, 2012 SKQB 415, 2012 CarswellSask 919; *R v Atkinson*, 2014 MBQB 17, 2014 CarswellMan 34, leave to appeal refused 2014 MBCA 116, 2014 CarswellMan 770, var'd 2015 MBCA 2, 2015 CarswellMan 2.

[215] Jonathan Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in *R. v. Ipeelee*" (2012) 57 SCLR 375.

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high sentence with total disregard for the most elementary sentencing principles, such as the gradation of sentences. Finally, the judge in no way considered the second step of the analysis, or an alternate process or sanction.

Of course, judges face several hurdles of a practical, legislative or epistemological nature. Yet, what *Ipeelee* appeared to suggest is a complete shift of paradigm. Through two steps, this ruling is pushing the justice system to its limits. The first step, the systemic and background factors, is forcing us to question the fundamental principle of individual responsibility, to contextualize it, and to identify the collective origins of conflicts. The second step is challenging the universalism of state criminal justice, forcing us to reconsider the possibility—and the legitimacy—of punishing certain persons a certain way. In so doing, it is forcing us to reconsider our processes for the administration of conflicts, our objectives, and our range of sanctions.

However, all is not lost—quite the contrary. *Ipeelee* creates a contact zone where innovation and internormativity become possible. In order to achieve this, we must, in our view, go and seek out legal otherness. We must stop speaking of subordination, or even adaptation or accommodation within the justice system, and speak instead of true coordination, or a collaborative separation.[216] Judges, governments, and prosecution services can contribute to this by paving the way towards the autonomy of Indigenous legal systems. They can do so in two ways. First, they must seriously engage in accommodations, either through the second step of the *Gladue/Ipeelee* analysis and/or the use of Alternative measure programs in section 717 of the *Criminal Code* in order to increase the autonomy of Indigenous legal systems. Secondly, they must start acknowledging the existence of Indigenous laws.

With respect to the first step, judges should make sure to place the background and systemic factors at the center of their analysis. Our analysis

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[216] See e.g. Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873. This paper is an exercise applying Tsilhqot'in legal principles to the conflict settled by the Supreme Court in the judgment of *Xeni Gwet'in First Nations v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257.

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of the case law shows that there has been no improvement in the choice of sanctions other than imprisonment between 2012 and 2015—the level of incarceration remaining stable, from 87% in 2012 to 88% in 2014 and 86% in 2015. On the other hand, when one compares the decisions in which the judges took into consideration the background and systemic factors (decisions which we deemed to be "satisfactory" in our database) with those in which the judges deemed them to be "inapplicable", did not refer to them, or did not analyse them (decisions which we deemed to be "unsatisfactory" in our database), the results are very interesting. Indeed, as shown in Table 6 below, judges who did not refer to these factors, who deemed them to be inapplicable or who conducted an unsatisfactory analysis, resorted to incarceration in 87%, 97%, and 96% of the cases respectively, whereas those judges who proceeded to conduct a satisfactory analysis thereof only resorted to incarceration in 70% of the cases, a rate below the average for all of the decisions (87%).

Table 6: Incarceration and Background and Systemic Factors

Background and Systemic Factors	Prison	Conditional Sentence	Probation	Fine	Discharge	Other[217]
Not referred to (215 cases)	187 (87%)	12 (5.6%)	5 (2.3%)	0	4 (1.9%)	7 (3.3%)
Deemed inapplicable or less applicable (95 cases)	92 (96.8%)	1 (1.1%)	2 (2.1%)	0	0	0
Unsatisfactory analysis (196 cases)	189 (96.4%)	4 (2%)	2 (1%)	0	0	1
Satisfactory analysis (127 cases)	89 (70.1%)	20 (15.8%)	9 (7.1%)	4 (3.2%)	5 (3.9%)	0

[217] Decisions on the dangerous or long-term offender designation or decisions in which the sentence is not specified.

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Hence, an analysis of background and systemic factors allows judges to innovate more in respect of the sanctions imposed. To this end, judges must clearly understand the teachings of the Supreme Court in *Ipeelee*, namely that these factors are closely tied to the principle of proportionality of sentences, and that this analysis of proportionality ought to require a consideration of the background and systemic factors as mitigating circumstances in the assessment of the degree of responsibility of the convict, and not as an additional risk factor. This analysis could lead judges to question the very foundations of our justice system, from individual responsibility to the gravity of the offence, and the dangerousness of the offender.[218] Additionally, it is relevant to underline that the negation of Indigenous laws, and the fact that an Indigenous person is being judged by a *common law* tribunal, is a background and systemic factor in itself. Judges should also try to apply *Gladue* and *Ipeelee* principles at other stages of the criminal process.[219]

While this analysis is necessary, it will be insufficient to reverse the deep-set trends that plague our justice system when interfacing with Indigenous offenders. To achieve this, it is necessary to turn towards Step 2, which invites the Canadian state and justice system to recognize the existence of Indigenous legal orders. Indigenous legal orders were strongly discredited and rendered invisible during Canadian colonization and need to be revitalized. Rich and complex,[220] they are complete and plural legal systems with their own sets of values and principles, rules and legitimate

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218 See Sylvestre, *supra* note 33; Jackson, *supra* note 83.

219 The application of *Gladue* and *Ipeelee* at other stages of the procedure is acknowledged in the case law, including for instance: bail (*R v Robinson*, 2009 ONCA 205), decisions under section 672.54 of the *Criminal Code* (*R v Sim*, [2005] OJ No 4432), extradition (*United States v Leonard*, 2012 ONCA 622), parole hearings (*Twins v Canada (Procureur général)*, 2016 CF 537), etc. See also Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, tabled for first reading on 29 March 2018, imposing a Gladue-like principle at bail (s 212 of the Act, proposing to add a s 493.2 to the Criminal Code).

220 For instance, in addition to the principles of mutual assistance and harmony, Cree law as referred to in the case of *Kawapit* in Part II also includes exclusive practices.

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authorities, and dispute resolution processes. By putting forth different conceptions of justice, they seek however to respond to fundamentally universal problems of security and peace.[221] Supported by researchers, in particular from the Indigenous Law Research Unit headed by Val Napoleon, Hadley Friedland and their team at the University of Victoria and the University of Alberta, several communities in Canada have embarked upon such a process.[222] They now have the support of the United Nations, through the United Nations Declaration on the Rights of Indigenous Peoples,[223] and of the Truth and Reconciliation Commission, which recommends the following:

> In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada[224]

This is a revitalization process that is only getting started. Aware and mindful that it must occur by taking into account multiple voices (men and women, youth and elders, etc.), the communities create spaces for exchange and deliberation on issues of concern to them. As they pursue this journey, these communities might count on the support of judges. As the Truth and Reconciliation Commission points out:

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221 See Indigenous Law Research Unit, *Accessing Justice and Reconciliation: Cree Legal Summary*, online: <indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/cree_summary.pdf> at 19–20.

222 For more information, refer to the Indigenous Law Research Unit website, online: <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit>.

223 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, 2 October 2007, UN Doc A/RES/61/295, art 34: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." See also art 4.

224 See Summary of the Final Report of the Truth and Reconciliation Commission of Canada, supra note 7 at 260 (Call to Action 50).

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> All Canadians need to understand the difference between Indigenous law and Aboriginal law. Long before Europeans came to North America, Indigenous peoples, like all societies, had political systems and laws that governed behaviour within their own communities and their relationships with other nations. Indigenous law is diverse; each Indigenous nation across the country has its own laws and legal traditions. Aboriginal law is the body of law that exists within the Canadian legal system. The Supreme Court of Canada has recognized the pre-existence and ongoing validity of Indigenous law.[225]

This applies to Canadian judges, governments, and prosecution services. A certain number of concrete measures could be contemplated. First, it is essential to approach Indigenous issues with a certain dose of humility. As Healy and Vancise have already underscored, the recognition of the fact that judges must take judicial notice of the background and systemic factors is a double-edged sword.[226] It should not lead judges to believe that they are necessarily well aware of the Canadian colonial context and its consequences: after all, they are also the product of this same colonialism. Thereafter, in accordance with the decision of the Supreme Court in *Ipeelee*, the courts ought to require that *Gladue* reports not only contain information on the negative impact of the background and systemic factors, but also that they serve to document the process and the dispute resolution principles of the relevant community. Where the circumstances are amenable thereto, judges may ask witnesses to be called that are liable to support them in this respect.[227] Indeed, when imposing a sentence in accordance with the process and the dispute resolution principles of the

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[225] *Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Kingston: TRC, 2016) at 45 [*Final TRC Report*, vol 6]. As for the Supreme Court's recognition of the pre-existence and validity of Indigenous laws, it is possible to find traces of this amongst many decisions, particularly clearly in *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 and *Mitchell v MNR*, 2001 SCC 33, [2001] 1 SCR 911.

[226] See also Patrick Healy & WJ Vancise, "Judicial Notice in Sentencing", (2002) 65:1 Saskatchewan L Rev 97. The authors are of the view that the Indigenous context is too complex to be subject to strict judicial notice.

[227] *Gladue*, *supra* note 26 at para 84.

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relevant community (Indigenous laws), judges may defer the decision to the relevant people of the community and try to take their recommendation as a whole, remembering that they come from complex systems and that taking only a part of the legal order could distort its sense: "As with the common law and civil law systems, Indigenous law is learned through a lifetime of world".[228] Trying to understand and apply Indigenous laws through civil or common law lenses could lead to distortion and poor application of these laws and their concepts.[229]

Furthermore, the necessary translation of Indigenous laws from a First Nation language to English or French for a judge wanting to impose a sentence in accordance with these laws poses two risks. First, as it is the case in French or English,[230] some concepts are embedded in language: "Indigenous legal concepts related to apology, restitution, and reconciliation are embedded in First Nations, Inuit, and Métis languages. The words contain standards about how to regulate our actions and resolve our disputes in order to maintain or restore balance to individuals, communities, and the nation."[231] Second, cultural differences pose a risk of wrongly interpreting the testimony of an Indigenous person:

> Non-Aboriginal judges do not usually share the same language and relationships as Aboriginal peoples. Variations between these groups help encode the same facts with different meanings depending on the culture. Therefore, the cultural specificity of facts may make it difficult for people from different cultures to concur. This discrepancy creates an enormous

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228 *Final TRC Report*, vol 6, *supra* note 225 at 46.

229 When concepts are brought up in courts, courts tend to interpret them in connection with other concepts of their legal system. Hence, the person, expert or other, who brought this new concept into court might not recognize it within the judge's decision. As an example, the concept of "mental disorder" in the Supreme Court of Canada's jurisprudence does not have much in common with the same concept in psychiatry (Marie-Andrée Denis-Boileau, *supra* note 182). Therefore, bringing concepts of Indigenous laws into a *common law* tribunal poses a real threat of distortion and misappropriation.

230 As an example, the concept of "crime" or "lawyer" does not exist in many First Nations languages.

231 *Final TRC Report*, vol 6, *supra* note 225 at 74.

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> risk of misunderstanding and lack of recognition when one culture submits its facts to another culture for interpretation. In litigation, this problem is especially acute because factual determinations can vary significantly between judicial interpreters according to the judge's language, cultural orientation, and experiences. In such circumstances, common law judges have had an especially difficult time understanding and acknowledging the meanings Aboriginal peoples give to the facts they present.[232]

Finally, when judges develop innovative practices and respond to alternative sanctions, it is crucial to document them in written judgments in order to contribute to the development of case law.

On their end, the provinces and their prosecutorial services should also steadfastly engage in entering into coordination agreements with Indigenous nations without excluding from the outset cases involving "serious offences" since, in so doing, they contribute to fostering the type of epistemological and cognitive obstructions that hinder judicial innovation. In this respect, there are, in Québec, extremely positive examples of consultation and collaboration between State justice and the Indigenous legal systems in fields related to criminal law. The Atikamekw, for example, have established a *Système d'intervention d'autorité atikamekw* (Atikamekw Authority Response System)[233] in matters of youth protection that has enabled them to manage, with the assent of the State, problems of parental neglect and youth protection since 2001.[234] To achieve this, the Atikamekw apply the *Youth Protection Act* and protect their children against abuse and parental neglect. However, their approach, processes, and results are quite different and, on the whole, deemed to be more respectful of their legal system. A good starting point, then, would be for judges to familiarize

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[232] John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall LJ 537 at 554–55.

[233] For more information, see the website of the Système d'intervention d'autorité atikamekw (French only), online: <www.atikamekwsipi.com/systeme_siaa>.

[234] Anne Fournier, "De la *Loi sur la protection de la jeunesse* au système d'intervention en autorite' atikamekw (SIAA) — La prise en charge d'une nation pour assurer le bien-être de ses enfants", (2016) 25 Enfances, Familles, Générations. Online October 4, 2016: URL: <http://journals.openedition.org/efg/1152>. The Atikamekw nation obtained full autonomy on January 29, 2018.

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themselves with the research under way within relevant communities and to acquire better knowledge of the resources available within these communities.[235]

As Silbey and Ewick have asserted, "resistance requires a consciousness of opportunity".[236] Or, to quote the French philosopher Jean Salem drawing on Lucretius: "When a crowd pushes me is a certain direction, I can always put my shoulder down and attempt to resist it. This is, in my view, a rather perfect definition of liberty. Each person always has the opportunity to do so".[237] We, therefore, call upon judges from Québec and Canada. The acknowledgement of the failure of the decisions in *Gladue* and *Ipeelee* must not be perceived as an end in and of itself. Resistance and innovation first require cooperation, and *Ipeelee* must be viewed as an opportunity to tackle the problem once again—but differently, more astutely, and in conjunction with the research community and Indigenous peoples.

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235 Several communities have established community justice programs. For example, there is a community justice program (CJP) within the Atikamekw community of Wemotaci. See also, on Cree legal culture, *Accessing Justice and Reconciliation: Cree Legal Summary*, *supra* note 221. The website of the "Accessing Justice and Reconciliation Project", pursuant to a partnership between the Indigenous Law Research Unit, the Indigenous Bar Association and the Truth and Reconciliation Commission, is accessible at the following address: <www.indigenousbar.ca/indigenouslaw>.

236 Patricia Ewick & Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (Chicago: University of Chicago Press, 1998) at 183.

237 This is how Jean Salem, a French philosopher, puts in layman's terms the vision of liberty propounded by Lucretius in *De rerum natura*, Book II: Aude Lancelin and Marie Lemonnier, "Pourquoi je suis épicurien", *Le nouvel Observateur* (August 7, 2008) 16 [translated by author]. See also Jean Salem, *Les Atomistes de l'Antiquité: Démocrite, Épicure, Lucrèce* (Paris: Flammarion, 2013) at 211; Jean Salem, *La mort n'est rien pour nous: Lucrèce et l'éthique* (Paris: Librairie Philosophique J. Vrin, 1990) at 67–92.

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