

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

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PART I: OVERVIEW

1. Over 25 years ago, this Court identified the overrepresentation of Indigenous people in Canadian prisons as a crisis. This Court called upon sentencing judges to do their part to help alleviate that crisis.¹ Since then, however, Indigenous overrepresentation in custody has only worsened.² The criminal justice system's failure to ameliorate the crisis requires this Court to revisit the sentencing process. For sentencing judges to assist in remedying Indigenous overrepresentation in custody, all aspects of *Gladue* must be applied meaningfully, consistently, and transparently.

2. The CCLA asks this Court to give sentencing judges three directions: (1) to explicitly consider alternatives to custody before identifying prison as the only available sanction; (2) to meaningfully engage with recommendations from community-based sentencing processes like sentencing circles; and (3) to resist the precarious and prevailing logic that deterrence and denunciation can only be met through prison sentences.

3. First, this Court should make clear that sentencing judges have an obligation to explicitly consider and justify rejections to alternative sanctions to imprisonment before sentencing an Indigenous person to prison. This process of drafting considerate reasons will augment transparency in sentencing.

4. Second, community-based sentencing processes, like sentencing circles, deserve weight in the sentencing process. Sentencing circles are often composed of individuals who are closest to the victim, the individual before the court, and the broader community impacted by crime. The recommendations made from this place of proximity warrant attention from judges. Engagement with sentencing recommendations is a demonstration of respect towards community-based sentencing processes.

¹ *R. v. Gladue*, [1999 CanLII 679](#) (SCC), [\[1999\] 1 SCR 688](#) at para [64](#) [*Gladue*]

² See *R. v. Cope*, [2024 NSCA 59](#) at paras [92-94](#); *R. v. Ipeelee*, [2012 SCC 13](#) at para [62](#).

5. Finally, prison sentences are not the only means of achieving the goals of deterrence and denunciation. Alternative sanctions to imprisonment can also achieve those goals. Community-based sentences are not the enemy of deterrence and denunciation merely because they also encourage rehabilitation and restorative justice principles.

PART II: STATEMENT OF THE FACTS

6. The CCLA takes no position on the facts.

PART III: STATEMENT OF ARGUMENT

7. The current legal framework for sentencing Indigenous people is related to the need to end the systemic overincarceration of Indigenous people in Canada. Consistent *Gladue* errors mean that s. 718.2(e) cannot achieve its remedial purpose. The legal principles animating the procedural and substantive framework for sentencing Indigenous people need to be revisited and strengthened.

8. Misapplications of *Gladue* are commonplace. Sentencing judges still err by concluding that a person’s *Gladue* factors do not affect the appropriate sentence because of the importance of denunciation and deterrence.³ Some sentencing judges have created new factors that effectively disentitle Indigenous individuals to *Gladue* protections.⁴ Others give *Gladue* factors less weight where a person had love and support in their upbringing or “success in life”.⁵ Some find that Indigenous people lack a sufficient connection to their heritage such that *Gladue* does not apply.⁶ Finally, some judges engage in a rote application of *Gladue* and fail to meaningfully apply the factors at all.⁷

³ *R. v. Umpherville*, [2024 SKCA 117](#) at para [53](#) [*Umpherville*]; *R. v. Rabbit*, [2023 ABCA 170](#) at paras [52-53](#).

⁴ See: *R. v. Lavallee*, [2022 MBCA 100](#) at paras [32-34](#).

⁵ See: *R. v. Davis*, [2025 BCCA 113](#) at para [9](#); *Umpherville* at para [51-52](#).

⁶ *R. v. Kehoe*, [2023 BCCA 2](#) at para [59](#).

⁷ See: *R. v. Burnouf*, [2023 SKCA 21](#) at para [10](#); *R. v. T.J.H.*, [2022 YKSC 45](#) at paras [30-38](#); *R. v. Phillips*, [2023 ABCA 210](#) at para [22](#).

9. The answer to the failure of *Gladue* to achieve its purpose is not to back away from principles that can assist in reducing Indigenous overrepresentation in custody. The answer is to once again direct judges to apply fully the principles that govern the sentencing of Indigenous individuals before the court. Transparency, through explicit judicial reasoning, will increase trustworthiness in a criminal justice system with a legacy of institutional discrimination against Indigenous people.⁸

10. The Court should provide redirection to sentencing judges to:

- a. explicitly consider and reject alternatives to prison before identifying prison as the last-resort and only available sanction;
- b. meaningfully engage with recommendations from community-based sentencing processes like sentencing circles; and,
- c. resist the precarious and prevailing logic that deterrence and denunciation can only be met by prison.

A. Before sentencing an Indigenous person to custody, sentencing judges must explicitly identify prison as the only available sanction

11. This Court should clarify that before sentencing an Indigenous person to prison, a sentencing judge must give reasons that demonstrate why the last-resort sanction of imprisonment is the only appropriate sanction. Widespread judicial error in applying s. 718.2(e) has created the need for more transparent application.

12. The statutory language of ss. 718.2(d) and (e) emphasize the principle of restraint, particularly with respect to Indigenous people. In *Gladue*, this Court determined that s. 718.2(e) *directed* sentencing judges to undertake the process of sentencing Indigenous people with a different method of analysis. Given the widespread misapplication of *Gladue*, sentencing judges need a reminder of that analysis.

⁸ See: *Gladue* at paras [59-64](#); *R. v. C.K.*, [2021 ONCA 826](#), at para [62](#); *Ewart v. Canada*, [2018 SCC 30](#) at [57](#).

13. Sentencing judges, through reasons, should demonstrate that they have understood the principle of restraint and its importance in sentencing Indigenous people. Directing judges to be explicit in their reasons not only provides transparency to those affected, but also forces analytical engagement with these long-misapplied principles. The process of written justification encourages decision makers to carefully examine their own thinking and better articulate their analysis – what Justice Sharpe described as the “discipline of reasons.”⁹

14. In *R. v. Antic*, this Court identified the widespread misapplication of the ladder principle as a signal to provide guidance to lower courts on bail.¹⁰ The Court noted a lack of uniformity across the country, and a chronic overreliance on sureties and cash bail. To remedy these inconsistencies, the Court provided guidelines to bail courts across the country. One of these guidelines was confirming that it is an error in law for a judge to impose a more onerous form of release without first considering and justifying the decision to reject a less onerous release.

15. Like it did in *Antic*, this Court must now provide guidelines for the application of *Gladue* sentencing principles. Persistent *Gladue* errors suggest that sentencing judges are similarly too readily skipping over the mandated analytical approach to sentencing Indigenous people. Given the similarities shared between the judicial approach to the ladder principle and *Gladue* principles, sentencing judges should also have to explicitly consider and justify the rejection of less onerous sanctions before imposing a term of imprisonment. This argument does not suggest that the ladder approach and sentencing of Indigenous individuals are the same. However, widespread misapplication of core legal principles is an indication that judges need guidance.

16. The approach in *Antic* provides a useful template for a solution in this case because of shared problems and features between the ladder approach and the *Gladue* framework:

- **Both are Key Frameworks:** the ladder principle is a fundamental part of Canadian bail law. *Gladue* principles are central to Indigenous sentencing. Both the ladder

⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#) at para. [80](#). [*Vavilov*].

¹⁰ *R. v. Antic*, [2017 SCC 27](#), at paras [64-66](#) [*Antic*].

principle and *Gladue* principles have been codified by Parliament in ss. 515 and 718.2(e), respectively.

- **Both are Often Misapplied:** despite codification, the ladder principle was consistently misapplied or applied inconsistently across the country.¹¹ *Gladue* principles, despite their codification, similarly continue to be misapplied or applied inconsistently by sentencing judges.

- **Both are Designed to Underscore Restraint and Individualization:** the ladder principle was designed to prohibit judges from imposing more onerous forms of release unless the circumstances made it appropriate. Similarly, *Gladue* principles are designed to prohibit sentencing judges from imposing an onerous sentence which does not reflect the unique circumstances of an Indigenous person.

17. Directing judges to explicitly consider and reject alternatives to prison when applying s. 718.2(e) reaffirms the principle of restraint which applies to both Indigenous and non-Indigenous sentencing. Directing judges in this way also reaffirms the commitment this Court has made to addressing the overincarceration crisis. The fundamental starting question a sentencing judge should be asking is not whether a prison sentence should be reduced, but whether prison is an appropriate sanction at all.

B. Sentencing judges must meaningfully consider sentencing circle recommendations

18. When sentencing an Indigenous individual, it is not simply the ultimate sanction imposed that matters, but also the process used to arrive at that result. As this Court stressed in *Gladue*, distinct types of sentencing processes may be more appropriate and meaningful in the case of an Indigenous person.¹² In *Gladue*, this reasoning was based on the belief that restorative justice principles played a primary role in Indigenous conceptions of justice.¹³ But beyond this,

¹¹ *Antic* at para [6](#).

¹² *Gladue* at para [66](#).

¹³ *Gladue* at para [70](#).

community-led sentencing procedures carry a legitimacy and expertise that should be respected by the court ultimately imposing sentence. Implicit in this Court's direction in *Gladue* to consider community-led sentencing procedures where appropriate is a confidence in the ability of community-led sentencing procedures to achieve legitimate, meaningful and appropriate results.

19. Sentencing judges render *Gladue*'s procedural direction meaningless when they dismiss recommendations from sentencing circles without due consideration. Sentencing circle recommendations are owed meaningful consideration for similar reasons that sentencing judges are owed deference. This Court recognized in *M. (C.A.)* that one of the most important reasons sentencing judges are owed a high level of deference is that they normally preside near or within the community that suffers the consequences of a crime. As a result, the sentencing judge has a "strong sense of the particular blend of sentencing goals that will be 'just and appropriate' for the protection of that community."¹⁴ In fact, where a sentencing judge has experience presiding over regions with strong Indigenous connections they are seen to be uniquely situated to determine an appropriate sentence with respect to an Indigenous person.¹⁵ The same applies with equal, if not more force, to sentencing circles. Sentencing circles represent the community that suffers the consequence of an individual's crime. Sentencing circles are also representative of the community that suffers the consequences of disproportionately losing its members to prison.

20. In administrative law, decision making authority is delegated by statute to those who may have specialized knowledge in a particular area.¹⁶ While expertise plays a different role than it did pre-*Vavilov*, the Court nonetheless acknowledged that certain decision makers have the expertise and legitimacy that a court may not enjoy. The Court noted that an outcome that may be puzzling or counterintuitive on its face, may nevertheless reflect a reasonable approach to the practical realities of the administrative context at issue.¹⁷ This Court held that "respectful attention to a

¹⁴ *R. v. M. (C.A.)*, [1996 CanLII 230](#), [\[1996\] 1 SCR 500](#), at para [91](#) [*M. (C.A.)*].

¹⁵ *R. v. J.N.D.*, [2017 ONCA 666](#) at para [10](#).

¹⁶ *Vavilov* at para [93](#).

¹⁷ *Vavilov* at para [93](#).

decision maker’s demonstrated expertise” is therefore important in administrative law to understand why a certain decision was reached.¹⁸

21. The same can be said of sentencing circles. Members of a sentencing circle hold specialized knowledge of their community, the defendant, the victim, and Indigenous conceptions of justice. While a sentencing circle may produce recommendations that look different than what a judge might impose, a sentencing judge should nonetheless give “respectful attention” to these recommendations because of the demonstrated expertise of a particular sentencing circle.¹⁹

C. The need to emphasize deterrence and denunciation does not make prison the only available sentencing outcome

22. Prison terms, and longer prison terms, should not be the inevitable outcome even when deterrence and denunciation are primary considerations in the sentencing matrix.

23. The belief that deterrence and denunciation can only be expressed through prison terms, or longer prison terms, is a fallacy. There is widespread consensus that imprisonment has not been successful in achieving some of the traditional goals of sentencing, including deterrence and denunciation.²⁰ Incarceration generally has failed to rehabilitate and reintegrate individuals.²¹ The failure to rehabilitate demonstrates that a prison sanction does not effectively deter or denounce criminal activity. The failure is particularly acute when it comes to Indigenous people. Given their “unique systemic and background factors [Indigenous people are] more adversely affected by incarceration and less likely to be ‘rehabilitated’ thereby”.²²

24. The objectives of deterrence and denunciation can be met using sentences other than custody. The consequences of a criminal conviction and alternative sanctions to imprisonment can and do have a deterrent or denunciatory effect. Courts have recognized that a “sentence focussed

¹⁸ *Vavilov* at para [93](#).

¹⁹ *Vavilov* at para [93](#).

²⁰ *Gladue* at para [57](#), *R. v. Proulx*, [2000 SCC 5](#) at [20](#) [*Proulx*].

²¹ *Proulx* at para [20](#).

²² *Gladue* at para [68](#).

on restorative justice is not necessarily a ‘lighter’ sentence”.²³ Consequences of non-carceral sanctions such as shame from one’s community, losing employment, the negative impact on reputation or impact on one’s family are all capable of denouncing and deterring.²⁴ This was articulated in both *Proulx* and *Jacko*.²⁵ Justice Watt noted that conditional sentences can carry substantial stigma, “especially in a smaller, tightly knit community where everybody knows everybody else and their business”.²⁶

25. Indigenous communities engaging in a different approach to sentencing does not mean that those communities are neglecting the fundamental relevance of deterrence and denunciation.²⁷ Rather, sentencing circles and other community led sentencing processes are well positioned to evaluate the potential sanctions that will denounce an offence, deter the individual and best protect the greater community.

PART IV: ORDER REQUESTED

26. The CCLA takes no position on the disposition of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 12th DAY OF SEPTEMBER,
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²³ *Gladue* at para [72](#).

²⁴ See: *Proulx* at para [22](#), *R. v. Bunn*, [2000 SCC 9](#), at para [23](#), *R. v. H. (B. D.)*, [2003 MBCA 28](#), at para [7](#).

²⁵ *Proulx* at para 22, *R. v. Jacko*, [2010 ONCA 452](#) at para [72](#). [*Jacko*]

²⁶ *Jacko* at para [72](#)

²⁷ See: *R. v. Wells*, [2000 SCC 10](#) at para [42](#).

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<i>Ewart v. Canada</i> , 2018 SCC 30	9
<i>R. v. Antic</i> , 2017 SCC 27	14, 16
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<i>R. v. J.N.D.</i> , 2017 ONCA 666	19
<i>R. v. Kehoe</i> , 2023 BCCA 2	8
<i>R. v. Lavallee</i> , 2022 MBCA 100	8
<i>R. v. M. (C.A.)</i> , 1996 CanLII 230 , [1996] 1 SCR 500	19
<i>R. v. Phillips</i> , 2023 ABCA 210	8
<i>R. v. Proulx</i> , 2000 SCC 5	23, 24
<i>R. v. Rabbit</i> , 2023 ABCA 170	8
<i>R. v. T.J.H.</i> , 2022 YKSC 45	8
<i>R. v. Umpherville</i> , 2024 SKCA 117	8
<i>R. v. Wells</i> , 2000 SCC 10	24

SCHEDULE "B"**RELEVANT LEGISLATIVE PROVISIONS**

LEGISLATIVE PROVISION	SECTION
<i>Criminal Code</i> , RSC 1985, c C-46	718.2(d) (e) ; 515
<i>Code criminel</i> , LRC 1985, c C-46	718.2(d) (e) ; 515