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Ipeelee and The Duty To Resist¹

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In this article, the authors take a critical look at s. 718.2(e) of the Criminal Code and how courts have interpreted it after Ipeelee from a legal pluralism standpoint. They suggest that the interpretation given by the Court opens the way to a form of resistance from the judiciary against the problem of Indigenous overrepresentation in the criminal justice system and the hegemonic approach of the Canadian state with respect to Indigenous legal orders. However, based on a thorough analysis of 635 decisions rendered after Ipeelee by trial and appellate courts between 2012 and 2015, the authors conclude that this innovative approach was, in turn, met with significant resistance by judges. The authors finally address the main practical and epistemological hurdles that can explain the limited impact of that approach in sentencing and suggest that this resistance could be overcome by promoting judicial innovation as well as the revitalization of Indigenous legal systems.

Cet article pose un regard critique sur l'art 718.2e) du Code criminel et sur l'interprétation qu'il a reçue de la part des tribunaux après l'arrêt Ipeelee, sous l'angle du pluralisme juridique. Nous suggérons que l'interprétation proposée par la Cour ouvre la porte à une forme de résistance du pouvoir judiciaire à l'égard de la surreprésentation des personnes autochtones dans le système de justice criminelle et de la posture hégémonique de l'État canadien à l'égard des ordres juridiques autochtones. En nous fondant sur une analyse exhaustive de 635 décisions de première instance et d'appel rendues après l'arrêt Ipeelee entre 2012 et 2015, nous concluons toutefois que cette approche innovatrice fait à son tour l'objet d'une grande résistance de la part des juges. Nous discutons ensuite des principaux obstacles d'ordre pratique et épistémologique qui peuvent expliquer l'impact limité de cette approche en matière de détermination de la peine et suggérons que cette résistance pourrait être surmontée en soutenant à la fois l'innovation judiciaire et la revitalisation des systèmes de droit autochtone.

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On April 7, 2015, nearly three years to the day following the ruling by the Supreme Court of Canada in *R. v. Ipeelee*², the Manitoba Court of Appeal upheld the seven-year prison sentence meted out to John Charlette³.

John Charlette is a 30-year old man of Cree ancestry. Born in Flin Flon, Manitoba, he ran away from home at the age of six to Winnipeg where he was picked up and taken in by youth protection services, which placed him in several foster homes. He had no contact with his Native culture as he was growing up. He exhibited suicidal tendencies at several stages in his life⁴.

On the evening of the tragedy, the accused, armed with a knife, took a taxi and travelled several kilometres, making two stops at automatic teller machines to withdraw money, unsuccessfully however. 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 the 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 fired 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”⁵), Mr. Charlette was ultimately found guilty of robbery, of two counts of assault with a weapon against a peace officer and of 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 Mr. Charlette had already been convicted by a court of criminal law forty-one times, it was the first time he was sentenced to custody.

* * *

Canadian colonization and the implementation of various government policies providing for expulsion from the territory, the herding into reservations and the assimilation of the nations that lived on the land had devastating consequences on Indigenous peoples. The Canadian residential school policy, initiated in the 19th century and that lasted until the mid-1980s, and according to which Indigenous children were separated from their families and sent to

² *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4376, [2012] 1 S.C.R. 433, 280 C.C.C. (3d) 265, 91 R.R. (6th) 1.

³ *R. v. Charlette*, 2015 MBCA 32, 2015 CarswellMan 163.

⁴ *Ibid.* at para. 13.

⁵ *Ibid.* at para. 3.

residential schools⁶, inflicted profound multigenerational trauma⁷. This trauma was due to their uprooting but also to the mistreatment and physical, psychological and sexual abuse visited 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”⁸. Hence, they created a significant rift in the imparting of Indigenous law by rendering Indigenous legal systems invisible and denying their existence⁹, which, on the one hand, had the effect of diminishing the self-regulatory ability of Native societies, and, on the other hand, of increasing the dependency of Indigenous on the state justice systems¹⁰.

Classic studies in legal pluralism allow for a description and understanding of the interactions and entanglements between State law and Native law¹¹. The latter can be considered and represented on a continuum, at one end of which one finds *separation*, characterized by the closed-ended nature and complete independence of the legal systems, and, at the other end, *merger* or *subordination*, if one presupposes an imperialist intent to reject the existence of any non-State system, which does not, in this sense, amount to true pluralism¹². Between these two extremes, one finds various

⁶ 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*, Executive Summary of the Final Report of the Commission, 2015, p. 54, 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 1920 amendments to the Indian Act (L-2) (N-3): Library and Archives Canada, RG10, volume 6810, file 470-2-3, volume 7.

⁷ On the concept of multigenerational trauma: Marie-Anick Gagné, “The Role of Dependency and Colonialism in Generating Trauma in First Nations Citizens”, in Y. Danieli, ed., *International Handbook of Multigenerational Legacies of Trauma*, Plenum Press, 1998, 355.

⁸ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, at p. 1.

⁹ Mylène Jaccoud, “La justice pénale et les Autochtones : d’une justice imposée au transfert de pouvoirs” (2002) 17:2 RCDS 107.

¹⁰ Mylène Jaccoud, “Peuples autochtones et pratiques d’accommodements en matière de justice pénale au Canada et au Québec” (2014) 36 *Archives de politique criminelle* 227.

¹¹ Sally E. Merry, “Legal Pluralism” (1988) 22:5 *Law & Soc’y Rev* 869 at p. 872; Jacques Vanderlinden, “Rendre la production du droit aux peuples”, (1996) 62 *Politique africaine* 83 at p. 86.

¹² Mireille Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit*, t 2, Paris, Seuil, 2006 at p. 13; Ghislain Otis, “Rencontre des cultures juridiques dans la toundra subarctique : vers une nouvelle gouvernance foncière au Nunatsiavut” (2009) 15:3 *Telescope* 108 at p.109.

processes of internormativity of varying scope, depending on whether they reveal the existence of a “facial pluralism” or a strictly colonial one, or a true acknowledgement of legal otherness¹³. 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 compete¹⁴. 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 positions¹⁵. However, this struggle does not pit 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, in criminal matters, an imperial position of subordination, whereby it imposed its justice system and denied the existence of the various indigenous legal systems with a view to asserting its sovereignty over the territory¹⁶. This domination, however, was never absolute, being at times tempered by a certain amount of resistance on the part of the Indigenous peoples and, on other occasions, by some concessions or accommodations on the part of the State, by an adjustment in the criminal law practice of the State or as a result of the incorporation of certain elements of Native justice into the criminal justice system. One must acknowledge that these manifestations of legal pluralism too often were no more than expressions of facial pluralism. However, must things necessarily be so? And what is the role that actors within these systems are called upon to play? 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 the Indigenous legal systems?

It is against this backdrop that we propose to take a critical look at paragraph 718.2(e) of the *Criminal Code*, according to which the sentencing judge “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

¹³ Anne Fournier, “L’adoption coutumière autochtone au Québec : quête de reconnaissance et dépassement du monisme juridique” (2011) 41:2 RGD 703 at p. 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.

¹⁴ Boaventura de Sousa Santos, *Towards a New Common Sense. Law, Globalization and Emancipation*, 3rd ed., London, Butterworths – Lexis Nexis, 2002 at p. 472.

¹⁵ See also the concept of social space propounded by Pierre Bourdieu in *Distinction*, Paris, Les éditions de Minuit, 1979.

¹⁶ Mylène Jaccoud, “Cercles de guérison et cercles de sentences : une justice réparatrice?” (1999) 32:1 Criminologie 79 at p. 81. This attitude of denial has also been perpetuated by schools in Canada, including law schools, see Emily Snyder, Lindsay Borrows and Val Napoleon with the collaboration of Hadley Friedland, *Mikomosis and the Wetiko: A teaching guide for Youth, Community, and Post-secondary Educators*, Victoria, Indigenous Law Research Unit, Faculty of Law, University of Victoria, 2014, online: <<http://www.indigenousbar.ca/indigenoulaw/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.”

the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”¹⁷, and, 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. Paragraph 718.2(e) C.C. forms part of a series of measures taken by the State with a view to minimizing the impact of the imposition of Canadian law on Indigenous, to the same extent, for example, as the provision of interpretation and legal support services¹⁹, the establishment of specialized courts in certain provinces²⁰, the implementation of sentencing circles and alternative measures programs developed pursuant to section 717 C.C.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 in the criminal justice system, but 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 thereof²². We will then demonstrate that this innovative approach is, in turn, however, being

¹⁷ This provision was recently amended upon enactment of *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, S.C. 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 *R. v. Ipeelee*, *supra*, note 2.

¹⁹ Since 1978, the federal government has been funding an Indigenous Courtwork Program: <http://www.justice.gc.ca/eng/fund-fina/gov-gouv/acp-apc/index.html>>. For Québec, refer to Native Para-Judicial Services of Québec: <<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 (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: Sébastien April and Mylène Magrinelli Orsi, *Gladue Practices in the Provinces and Territories*, Department of Justice Canada, 2013, online at: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/index.html> at pp. 3-5.

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

²² David Milward and Debra Parkes, “Gladue: Beyond Myth and Towards Implementation in Manitoba” (2011) 35:1 *Man LJ* 84 at p. 107, suggesting that para. 718.2e) may directly contribute to fighting overrepresentation of Indigenous in the Canadian justice system. See also the alternative measures programs

strongly resisted by judges. Based on our exhaustive analysis of 635 trial and appellate decisions handed down after the ruling in *Ipeelee* between March 23, 2012 and October 1, 2015, we will discuss the very limited impact of the proposed approach in the sentencing on Indigenous offenders²³. In other words, and the *Charlette* case is a prime illustration thereof, paragraph 718.2(e) C.C. continues to be a resounding failure in this country, despite a few isolated acts of judicial courage²⁴.

We will then attempt to identify the main practical and epistemological hurdles that may explain this state of affairs and that emerge from the 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 State of Canada 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 and allowing a greater assumption by the latter of responsibility for the conflicts afflicting them and a better coordination of these efforts with the justice system²⁵. In other words, in our opinion, paragraph 718.2(e) C.C. and the interpretation thereof have created a contact zone within which the legal systems can intersect with a view to achieving greater internormativity. The judge actors 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 mutually with the tools enabling them to innovate and better resist.

(s. 717 C.C.) that may be established upstream, pursuant to diversion programs administered by the provinces.

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 s. 684 C.C., change of security classification of an inmate, publication bans, representativity 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 p. 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 8 at p. 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.

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

The ruling in *Ipeelee* by the Supreme Court of Canada was handed down nearly fifteen years after its forerunners *Gladue*²⁶ and *Wells*²⁷. In this case, Justice LeBel, speaking on behalf of the majority, took stock of the fact that the *Gladue* decision and paragraph 718.2(e) C.C. 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: in point of fact, the situation has, on the contrary, worsened²⁸.

Justice LeBel first confirmed the analysis propounded in the first ruling. Hence, a sentencing judge must focus his or her attention specifically on two sets of circumstances in which Indigenous offenders find themselves and that relate to the ultimate issue of determining a fit and proper sentence²⁹:

- (1) the unique systemic and background factors which may have played a 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 paragraph 718.2(e) C.C., and regarding the relation this provision bears to other sentencing principles. In addition, he attempts to respond to the chief concerns voiced in the caselaw and in the authorities over the past twelve years.

²⁶ *R. v. Gladue*, 1999 CarswellBC 779, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 R.R. (5th) 197.

²⁷ *R. v. Wells*, 2000 CSC 10, 2000 CarswellAlta 96, [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368, 30 R.R. (5th) 254.

²⁸ *R. v. Ipeelee*, *supra*, note 2 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%): Adult correctional statistics in Canada, 2013-2014, April 22, 2015: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm>.

²⁹ *Ibid.* at para. 72.

³⁰ *Ibid.* at paras. 59 and 72.

(a) Step 1: Background and Systemic Factors

Significantly and forging new law, Justice LeBel posits the consideration of the background and systemic factors as forming an inherent part of the proportionality principle³¹. In asserting its fundamental nature, 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 these factors may bear on the culpability of the offender to the extent that they shed light on his or her level of moral blameworthiness³³:

“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*.

³¹ In *R. v. Ipeelee*, *ibid.* at para. 36, then in *R. v. Anderson*, 2014 SCC 41, 2014 CarswellNfld 166, 2014 CarswellNfld 167, [2014] 2 S.C.R. 167, 350 Nfld. P.E.I.R. 289, 311 C.C.C. (3d) 1, 11 C.R. (7th) 1, 373 D.L.R. (4th) 577, 60 M.V.R. (6th) 1, 1088 A.P.R. 289, [2014] 3 C.N.L.R. 267, 310 C.R.R. (2d) 197, 458 N.R. 1, [2014] S.C.J. No. 41 (S.C.C.), at para. 21, 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 Liberties, but also pursuant to section 7 thereof. However, it backtracked subsequently in *R. v. Lloyd*, 2016 SCC 13, 2016 SCC 13, 2016 CarswellBC 959, 2016 CarswellBC 960, 334 C.C.C. (3d) 20, 27 C.R. (7th) 205, 396 D.L.R. (4th) 595, 385 B.C.A.C. 1, 482 N.R. 35, 665 W.A.C. 1, [2016] S.C.J. No. 13 (S.C.C.) at paras. 38-47 and in *R. v. Safarzadeh-Markhali*, 2016 SCC 14, 2016 CarswellOnt 5652, 2016 CarswellOnt 5653, 334 C.C.C. (3d) 1, 27 C.R. (7th) 265, 396 D.L.R. (4th) 575, 482 N.R. 90, 347 O.A.C. 1, [2016] S.C.J. No. 14 (S.C.C.) at paras. 70-71.

³² *R. v. Ipeelee*, *ibid.*, at para. 37. See also *R. v. Safarzadeh-Markhali*, *ibid.* at para. 70.

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

³⁴ *R. v. Ipeelee*, *supra*, note 2 at para. 73, quoting *R. v. Skani*, 2002 ABQB 1097, 2002 CarswellAlta 1636, para. 60.

³⁵ *Ibid.* at para. 73.

(b) Step 2: Appropriate Types of Sentencing Procedures and Sanctions

With respect to the second step of the inquiry, Justice LeBel specifies that paragraph 718.2(e) C.C. “does more than affirm existing principles of sentencing”³⁶. Indeed, the latter 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 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 itself⁴⁰.

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

³⁶ *Ibid.*

³⁷ *Ibid.* at para. 74, quoting *R. v. Gladue*, *supra*, note 26 at para. 73.

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

³⁹ *R. v. Ipeelee*, *supra*, note 2 at para. 74.

⁴⁰ *Ibid.* at par. 74.

⁴¹ Gladue reports are a form of pre-sentence reports (s. 721 C.C.). 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 and Paula Maurutto, “Recontextualizing Presentence Reports: Risk and Race”, (2010) 12:3 *Punishment and Society* 262, at pp. 265, 273, 275 and 278.

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

⁴³ *Ibid.* at para. 84.

(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 “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 significant⁴⁷, is the irregular and uncertain application *Gladue* principles to sentencing decisions for serious or violent offences⁴⁸. According to Justice LeBel, the caselaw 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 para. 718.2(e) C.C., 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 be considered ‘serious’”.⁵¹ Also, 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.

⁴⁴ *R. v. Ipeelee*, *supra*, note 2 at para. 80. See also Alana Klein’s findings in respect of Québec, *supra*, note 24 at p. 509 et seq. as well as Kent Roach, *supra*, note 23.

⁴⁵ *Ibid.* at para. 81.

⁴⁶ *Ibid.* at para. 82.

⁴⁷ *Ibid.* at para. 84.

⁴⁸ *Ibid.*

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

⁵⁰ *Ibid.* at para. 85.

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

⁵² *Ibid.* at para. 86.

The third error involves giving precedence to the sentencing parity principle as set out in para. 718.2(b) C.C., which provides the imposition of similar sentences for similar offences committed under similar circumstances, over that set out in paragraph 718.2(e) C.C. Justice LeBel was of the view that sentencing parity could not be construed in such a manner as to undermine the remedial purpose of paragraph 718.2(e) C.C. Incidentally, in the presence of an Indigenous offender, the principle of parity may require the imposition of a different sentence, precisely because of the fact that Indigenous find themselves facing unique circumstances⁵³. 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 *Tableer*. Thus, there is a constitutional imperative to avoiding excessive concern about sentence disparity. »⁵⁴

(d) *Ipeelee*, A Form of Resistance

Hence, para. 718.2(e) C.C. and the interpretation it received in *Ipeelee* represent a significant form of judicial resistance.

First of all, they act as a judicial rampart against resorting to incarceration and to excessive sentences, in particular with regards to Indigenous. Indeed, paragraph 718.2(e) C.C. proposes a principle of criminal moderation that runs counter to modern criminal rationality⁵⁵ as well as to the legislative reforms of the past ten years that have had the effect of multiplying the number of minimum sentences⁵⁶, increasing maximum sentences,

⁵³ *Ibid.* at para. 79.

⁵⁴ *Ibid.* at para. 79, citing Tim Quigley, “Some Issues in Sentencing of Indigenous Offenders”, in Richard Gosse, James Youngblood Henderson and 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 p. 286.

⁵⁵ According to Alvaro Pires, modern criminal rationality (MCR) is a manner of thinking of, and a construct of, the criminal system that creates a necessary association between the crime and the imposition of a punitive sentence. The MCR theory refers to the difficulty faced by the legal system “[TRANSLATION] in conceiving of the crime and the criminal system without applying to these objects the categories of thought derived from, and guaranteed by, criminal rationality in and of itself” and which are chiefly made up 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 p. 184.

⁵⁶ On the impact of mandatory minimum sentences on the increase in overincarceration of Indigenous and para. 718.2(e) C.C., see David M. Paciocco, “The Law of Minimum

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 Indigenous 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 legal monism and to the State monopoly over dispute resolution involving Indigenous, in particular as a result of the second step of the analysis under para. 718.2(e) C.C, namely the possibility of incorporating types of procedures and sanctions that take into account Native heritage. In so doing, it paves the way for internormativity. It requires sentencing judges to undertake this exercise by adopting a different perspective, not only because the sentences imposed are inefficient, but especially due to the fact that the 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 judges⁵⁸, the second step remains the most unknown and least used by the courts, although it may possibly be the most promising.

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

The ruling in *Ipeelee* contains a powerful call to creativity but also to judicial resistance. From an empirical point of view, one observes, however, that the majority of trial and appellate judges are especially reluctant, if not resistant, to the idea of exploiting 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 survey of 635 decisions handed down in the three and a half years since the Court’s ruling in *Ipeelee* (between March 23, 2012 and October 1, 2015⁵⁹) and which deal with the sentencing of an Indigenous, all with the view of determining the level of penetration, down to trial judges of various jurisdictions, of this ruling and of the approach which it sets out. We will first show that several trial judges exhibit not only resistance towards the principles developed in *Gladue* and *Ipeelee*, but also a

Sentences: Judicial Responses and Responsibility” (2015) 19:2 Can. Crim. L. Rev. 173 at pp. 189-192.

⁵⁷ *R. v. Ipeelee*, *supra*, note 2 at para. 59; *R. v. Gladue*, *supra*, note 26 at para. 93.

⁵⁸ See, in particular, Alana 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.

certain level of ignorance. Thereafter, we will focus on this resistance to an appropriate sentencing by distinguishing that which arises in respect of the first step of the analysis as well as 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 creative traits.

As far as methodology goes, some clarification is necessary. We identified and selected these 635 decisions using three search engines and different key words relating to the sentencing of Indigenous, both in English and in French. Once these decisions had been located, they were included in a database and analysed in order to identify the application of the two steps of the *Gladue* analysis. The databank contains 505 trial decisions, representing 80% of the decisions, and 130 appellate decisions, or 20%. Canada's provinces and regions are not equally represented in our sampling. For instance, 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, the very great majority of judgments handed down in criminal cases are not embodied in a written decision and are therefore not covered by our analysis. For example, in 2013-2014, courts of criminal jurisdiction in Québec resolved 46,128 cases that resulted in a guilty verdict⁶¹. Of these, it is difficult to ascertain how many involved Indigenous offenders. In any event, our databank only contains 25 decisions originating from Québec over a period of three years. In addition and in the same vein, the caselaw 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: caselaw, and, in particular, that of the appellate courts, has an obvious impact on sentencing and especially on the "ranges" of applicable sentences,

⁶⁰ Here is the breakdown of decisions per province and territory: Alberta: 72 (11.34%), British Columbia: 131 (20.63%), Manitoba: 68 (10.71%), New Brunswick: 2, Nova Scotia: 10 (1.57%), Ontario: 105 (16.53%), Québec: 25 (3.94%), Saskatchewan: 94 (14.80%), Newfoundland: 7 (1.1%), Nunavut: 21 (3.31%), Yukon: 51 (8.03%), and Northwest Territories: 49 (7.72%). We found no decision in Prince Edward Island.

⁶¹ Ashley Maxwell, *Adult Criminal Court Statistics in Canada, 2013-2014*, Statistics Canada, 2015: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.htm>, Table 4. Québec criminal courts decided 62,844 cases in 2013-2014. Of those, 73.4% resulted in a guilty verdict.

but also on the representations that judges make of 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 this caselaw in order to better understand the possibilities for innovation.

Finally, note that those decisions involving situations of domestic and/or family violence were separately analysed as part of the research project in which this analysis was conducted. Our sampling to this end contained 126 decisions.

(a) When Resistance Amounts to Ignorance?

Before addressing resistance on the part of judges per se, we believe that one must first take cognizance of the ignorance of some regarding the principles set out in *Ipeelee*, or at least the lack of understanding that seems to exist as to their compulsory nature⁶². Indeed, from the outset, let us observe that more than one decision out of three (227 decisions, or 35.75%) 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 see that 4 decisions out of 10, or 252 decisions, did not refer to para. 718.2(e) C.C. In addition, 61 decisions deemed this provision not to be applicable or less applicable under the circumstances of the case, including cases of “serious offences”, which we will revisit later.

(b) Resistance to Step 1

Only 66% of the decisions in our databank, namely 418 decisions, refer to the systemic and background factors⁶⁴. In these decisions, we analysed how judges used these factors. We examined (i) the grounds for exclusion of the systemic and background factors that were stated; (ii) the satisfactory or unsatisfactory nature of the analysis thereof by the judges; and (iii) the relation between these factors and the principle of proportionality.

⁶² See the similar finding by Alana Klein, *supra*, note 24 at p. 521.

⁶³ 227 decisions do not refer to *Ipeelee* (35.75%). Of those, 50 also do not refer to *Gladue* (7.87% of the total sampling) whereas 178 decisions refer to *Gladue* without referring to *Ipeelee* (28.03%). One should note that most of our decisions were identified by using the keyword “*Gladue*”. In this respect, there is a certain regional disparity, Québec and Alberta posting the highest rate of decisions referring neither to *Gladue*, nor to *Ipeelee*: 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%).

⁶⁴ Hence, one third of the decisions (215) do not refer thereto.

(i) *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 not to be applicable or to be less applicable in the matter at hand. Several grounds are advanced. As in the case of the application of paragraph 718.2(e) C.C., in more than half of these cases (51), the main reason given by the judges is the seriousness of the offence⁶⁵. By way of example, these factors were dismissed in *R. v. G. (C.)*⁶⁶. According to the judge presiding 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 if 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 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*⁷⁰, a second-degree murder case in a domestic setting: “In sentencing Indigenous offenders, a court must try to give the greater weight to the principles of restorative justice and less weight to principles of deterrence and denunciation and separation. However, in *R. c. Wells*, 2000 SCC 10, 2000 CarswellAlta 96, [2000] 1 S.C.R. 207, 141 C.C.C. (3d) 368, 30 R.R. (5th) 254, the Supreme Court of Canada 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 decisions⁷²). The judge was of the view that the accused had too tenuous of a connection with an Indigenous

⁶⁵ See, e.g., *R. v. Q. (B.S.)*, 2013 BCPC 332, 2013 CarswellBC 3860; *R. v. T. (E.)*, 2012 SKQB 169, 2012 CarswellSask 296; *R. v. O. (T.J.)*, 2015 MBQB 143, 2015 CarswellMan 462; *R. v. McNabb*, 2013 SKPC 208, 2013 CarswellSask 851; *R. v. Richards*, 2014 ONSC 3866, 2014 CarswellOnt 8883 (S.C.J.); *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.

⁶⁹ *Ibid.* at para. 32.

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

⁷¹ *Ibid.* at para. 43.

⁷² See, e.g., *R. v. Willier*, 2013 ABQB 629, 2013 CarswellAlta 2038; *R. v. Guimond*, 2014 MBPC 37, 2014 CarswellMan 829, affirmed 2016 MBCA 18, 2016 CarswellMan 34, 26 R.R. (7th) 295; *R. v. Schmidt-Mousseau*, 2015 MBPC 36, 2015 CarswellMan 391; *R. v. Long*, 2014 ONSC 38, 2014 CarswellOnt 900 (S.C.J.); *R. v. Awashish*, 2014 QCCQ 3303, 2014 CarswellQue 4168; *R. v. Sangris*, 2014 NWTSC 23, 2014 CarswellNWT 25.

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 were not applicable due to the absence of connection between the latter and the commission of the offence:

"I spent a lot of time considering Mr. Sangris' Indigenous 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 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 fact that counsel for the defence made no submissions in this respect or the judge lacked information in order to apply them (11 cases⁷⁵), the fact that the accused chose a life of crime instead of focussing on education or work (1 decision⁷⁶), the fact that the accused had waived these factors (3 decisions⁷⁷) and the necessity for the security of the public to supersede these factors (11 decisions⁷⁸). This latter reason was primarily argued in dangerous or long-term offender cases. For example, in

⁷³ *R. v. Sangris*, 2014 NWTSC 23, 2014 CarswellNWT 25.

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, 2012 CarswellOnt 10665, 291 C.C.C. (3d) 279. The judge was lacking in information: *R. c. 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, reversed 2015 BCCA 58, 2015 CarswellBC 318: "I am very much taking into account the offender Cardinal's Indigenous circumstances, and I am very much trying to abide by what the Supreme Court of Canada says I should do. The history of Indigenous life in Canada has been dismal. The background of Cardinal in the Indigenous 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 (S.C.J.).

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. H.*⁷⁹, an incest case in which the accused was designated as a dangerous offender, the judge made the following assertion:

“I have considered both the principle of less restrictive sanctions and Mr. J.W.H.’s Indigenous status, through s. 718(e) of the *Criminal Code* and through consideration of the principles set out in *R. c. Gladue*.

I recognize that Mr. J.W.H.’s circumstances “are unique and different from non-Indigenous 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 Indigenous 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 grounds stated appear to be quite familiar, it is because they specifically match the “errors” identified by Justice LeBel in *Ipeelee*, which goes to show the level of resistance that they are attracting. 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 link⁸². Finally, let us recall that *Ipeelee* and its companion case, *Ladue*, specifically involved dangerous and long-term offenders and that this context cannot, therefore, explain the manner in which these cases were decided⁸³.

(ii) *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 referred to (325 cases). We created two categories: satisfactory analysis (128 cases) or unsatisfactory analysis (195 cases).

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 instance, 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

R. v. Nickerson, 2014 NSPC 67, 2014 CarswellNS 650; *R. v. H.*, 2012 ONSC 4561, 2012 CarswellOnt 13427 (S.C.J.).

⁷⁹ *R. v. H.*, 2012 ONSC 4561, 2012 CarswellOnt 13427 (S.C.J.).

⁸⁰ *Ibid.* at paras. 93-94.

⁸¹ *R. v. Ipeelee*, *supra*, note 2 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 pp. 80-83.

circumstances of the accused⁸⁴. For example, in one of these judgments that recurred 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 Indigenous 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 case of the accused.

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 abuse occurred over a period of two years, the judge considered that the accused had had a normal childhood. Aside from stating that he took 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 stated the significance of taking into account the background and systemic factors, the application thereof is not shown. In this 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 Indigenous 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 way of contrast, we grouped together under the category of “satisfactory analysis” those decisions where the reader understands the manner in which the judge considered the factors and their impact. 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 exercise. Since this was not always obvious, we interpreted this category loosely and included those judgments in which we could minimally recognize that an application of the factors had taken place.

Table 1 below sets out the quantitative results:

⁸⁴ The author Nate 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 p. 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 p. 6.

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

⁸⁹ *Ibid.* at para. 26.

TABLE 1. BACKGROUND AND SYSTEMIC FACTORS

Background and Systemic Factors	Number of Decisions (t = 635)	Percentage of Sampling
Not referred to	215	33.9%
Considered inapplicable or less applicable	95	15.0%
Satisfactory analysis	196	30.9%
Unsatisfactory analysis	127	20%
Impossible to determine ⁹⁰	2	0.3%

Hence, the background and systemic factors are only analysed satisfactorily in one decision out of five (20%)⁹¹. This total drops to 15% when one analyses separately those decisions involving domestic and/or family violence offences as reflected in Table 2 below.

TABLE 2. BACKGROUND AND SYSTEMIC FACTORS AND DOMESTIC AND/OR FAMILY VIOLENCE (DFV)

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

These statistics bear out that, in domestic and family violence cases, judges are more inclined to assert that the factors do not apply or apply less⁹³ (21.42% of the cases as opposed to 14.96%). In more than half of these cases, the judge excluded the factors (incidentally after having weighed them) based on

⁹⁰ Decisions dealing with the appropriateness of referring the matter to a sentencing circle: therefore, there was no substantive decision on sentencing.

⁹¹ See, e.g., *R. v. Shanoss*, 2013 BCSC 2335, 2013 CarswellBC 3874; *R. v. Benedict*, 2014 ONSC 6898, 2014 CarswellOnt 16759 (S.C.J.); *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 (S.C.J.); *R. v. Inuktalik*, 2013 NWTSC 75, 2013 CarswellNWT 93.

grounds relating to the seriousness of the offence or to the protection of the public⁹⁴. In addition, those cases where the factors are satisfactorily analysed are fewer than in the general sampling.

(iii) *Background and Systemic Factors and the Proportionality Principle*

Finally, we observe that more than half of the decisions make no connection between the fact that the accused is an Indigenous and the principle of proportionality or do not even refer to this principle⁹⁵. In point of fact, only one out of five decisions actually included the background and systemic factors in the analysis of the proportionality principle (135 decisions, 21.23%)⁹⁶. This rate is relatively low when one considers that it represents the fundamental principle in sentencing⁹⁷.

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 latter includes two crucial and separate components: the seriousness of the offence and the degree of responsibility of the offender, the latter being closely tied to the moral culpability of the person convicted⁹⁸. The courts on occasion tend to merge the notion of objective seriousness and that of the degree of responsibility or to prefer the first component outright over the second⁹⁹.

⁹⁴ 17 out of 27. 16 cases for seriousness and 3 for the protection of the public (2 decisions referred to seriousness and the protection of the public as grounds). See, e.g., *R. v. Q. (B.S.)*, 2013 BCPC 332, 2013 CarswellBC 3860; *R. v. C. (J.A.V.)*, 2015 BCPC 218, 2015 CarswellBC 2160; *R. v. Gargan*, 2014 NWTSC 62, 2014 CarswellNWT 69.

⁹⁵ 246 cases make no reference to it, 116 cases do but do not relate to the fact that the accused is an Indigenous.

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, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.); *R. v. Land*, 2013 ONSC 6526, 2013 CarswellOnt 14710 (S.C.J.); *R. v. Bird*, 2014 SKQB 75, 2014 CarswellSask 200, leave to appeal refused 2016 CarswellSask 378 (S.C.C.). In the remainder of the decisions, either the connection between the historical and systemic factors and the principle of proportionality is sometimes referred to but not applied, or the judge deemed, in light of the circumstances of the case, that this connection ought not to be made, or the judge deemed the principle of proportionality to be less applicable under the circumstances.

⁹⁷ *R. v. Ipeelee*, *supra*, note 2 at para. 37; *R. v. Safarzadeh-Markhali*, *supra*, note 31 at para. 70.

⁹⁸ *R. v. Proulx*, 2000 CSC 5, 2000 CarswellMan 33, [2000] 1 SCR. 61, 140 C.C.C. (3d) 449, 30 R.R. (5th) 1 at paras. 81-83; *R. v. Lacasse*, 2015 CSC 64, 2015 CarswellQue 11715, [2015] 3 SCR. 1089, 333 C.C.C. (3d) 450, 24 R.R. (7th) 225 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 R.G.D. 759. See also Marie-Ève Sylvestre, *supra*, note 33. One must also recognize 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 *R. v. Lacasse*, *ibid.*, Justice Wagner, at para. 12, speaking on behalf of the majority, stated as follows: “[t]he more serious the crime and its consequences, or the greater the offender’s degree of responsibility, the heavier the sentence will be”.

For example, in *R. v. Payout*¹⁰⁰, a sexual assault case, the judge asserts the following: “This was a very serious crime of violence. Mr. Payout’s conduct vis-à-vis this young Indigenous woman was despicable. His moral blameworthiness is high. His unique systemic or background circumstances as an Indigenous 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.”

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 Indigenous 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

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 accused¹⁰⁴, this despite the fact that she had had a “horrible” past¹⁰⁵, marred by violence. Her mother was an addict and had problems with violence and crime. Called upon to intervene, youth protection

To which Justice Gascon, in dissent, replied as follows in 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 then added in 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. Payout*, 2012 NWTSC 29, 2012 CarswellNWT 34.

¹⁰¹ *R. v. Paul*, 2014 BCCA 81, 2014 CarswellBC 519.

¹⁰² *Ibid.* at para. 34.

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.

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 environment¹⁰⁶: she had witnessed several scenes of domestic violence, she was neglected and physically and sexually abused when she was living in the family home¹⁰⁷. At the age of 5 or 6, she was sexually assaulted by three men during a party at her parents' house¹⁰⁸. She lived in several foster homes between the ages of 6 and 8. 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, after having already perpetrated several offences, a psychiatrist had reached the conclusion that his child was so wounded that quite possibly no treatment would work. 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 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 Indigenous 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 Indigenous 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" aspect and considered the degree of responsibility to be an aggravating circumstance:

"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

¹⁰⁶ *Ibid.* at para. 22.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.* at para. 206.

¹¹⁰ *Ibid.* at paras. 207-208.

We therefore observe that the “gravity” component is as frequently present 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 in respect of which the analysis was deemed to be satisfactory deserve to be underscored. They are the exception to the rule, but could nevertheless be touted as models¹¹². For example, in *R. v. G. (D.)*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 the assessment of his degree of moral culpability:

“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 Indigenous 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 into consideration the background and systemic factors in the analysis of the principle of proportionality even where the offence is serious and the accused is dangerous. In this case, the court designated the accused as a “dangerous offender” following a sexual assault and sentenced him to an indeterminate term of incarceration:

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. (L.L.)*, 2012 MBCA 106, 2012 CarswellMan 604, 292 C.C.C. (3d) 486; *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.); *R. v. Kawapit*, 2013 QCCQ 5935, 2013 CarswellQue 6159; *R. v. Cloud*, 2014 QCCQ 464, 2014 CarswellQue 742, 8 R.R. (7th) 364, varied 2016 QCCA 567, 2016 CarswellQue 8570, 28 R.R. (7th) 310, reversed 2016 QCCA 567, 2016 CarswellQue 8570, 28 R.R. (7th) 310. Also noteworthy: *R. v. Charlie*, 2014 YKTC 17, 2014 CarswellYukon 40, affirmed 2015 YKCA 3, 2015 CarswellYukon 6, 320 C.C.C. (3d) 479; *R. v. Samson*, 2014 YKTC 33, 2014 CarswellYukon 59, affirmed 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. c. G. (T.)*, 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 (S.C.J.); *R. v. Thorpe* (July 3, 2012), Clements J., [2012] O.J. No. 6303 (S.C.J.); *R. v. Snowboy*, 2014 QCCQ 2420, 2014 CarswellQue 3665; *R. v. Benedict*, 2014 ONSC 6898, 2014 CarswellOnt 16759 (S.C.J.).

¹¹³ *R. v. G. (D.)*, 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. c. Shanoss*, 2013 BCSC 2335, 2013 CarswellBC 3874.

“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 Indigenous 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 Indigenous 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 are poorly aware of, and/or do not 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 “degree of responsibility” appears to be problematic in particular. We will revisit this issue when discussing cognitive and epistemological hurdles. Finally, judges have shown a complete lack of understanding of the colonial context, of intergenerational trauma resulting therefrom and its impact on social problems plaguing the communities, which we will also tackle a little later.

(c) Resistance to Step 2

While one must conclude that trial judges are resisting the application of the first step of the analysis, what can one say as to the second step, except that it has barely garnered their attention? Yet, this second step represents an open door to legal pluralism and to the possibility of rethinking sentencing, in keeping with the teachings of *Ipeelee*. However, one also observes great resistance from an empirical point of view.

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

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

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 a custodial sentence to be served intermittently in 17 cases¹¹⁹, or less than 3% of the decisions, and that an insignificant number of decisions report having imposed a sanction with a view to treating the “underlying causes” of the criminal behaviour as suggested by Justice LeBel¹²⁰.

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

¹¹⁸ This category refers to decisions in respect of 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. (T.A.)*, 2013 ONSC 797, 2013 CarswellOnt 2424 (S.C.J.), varied 2014 ONCA 141, 2014 CarswellOnt 2131, 307 C.C.C. (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. (R.R.G.)*, 2014 BCPC 170, 2014 CarswellBC 2269; *R. v. Dustyhorn*, 2014 ABPC 47, 2014 CarswellAlta 430; *R. v. P. (T.A.)*, 2014 ONCA 141, 2014 CarswellOnt 2131, 307 C.C.C. (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 (S.C.J.); *R. v. B. (M.A.)*, 2014 ABPC 293, 2014 CarswellAlta 2642; *R. v. Mainville*, 2015 ONSC 1931, 2015 CarswellOnt 4185 (S.C.J.), leave to appeal refused 2015 ONCA 319, 2015 CarswellOnt 6662; *R. v. Schinkel*, 2014 YKTC 42, 2014 CarswellYukon 72, varied 2015 YKCA 2, 2015 CarswellYukon 3, 320 C.C.C. (3d) 366; *R. v. Schinkel*, 2015 YKCA 2, 2015 CarswellYukon 3, 320 C.C.C. (3d) 366.

¹²⁰ *R. v. Ipeelee*, *supra*, note 2 at para. 73. See, for example: *R. v. Sinclair*, 2014 MBPC 13, 2014 CarswellMan 134; *R. v. Fleming*, 2014 ONCJ 290, 2014 CarswellOnt 8292, 14 R.R. (7th) 187; *R. v. Swanson*, 2013 ONSC 3287, 2013 CarswellOnt 7623 (S.C.J.).

In decisions involving domestic and/or family violence, the percentage of decisions where incarceration was ordered is slightly higher, equal this time to 4.5 decisions out of 5, as shown in Table 4.

TABLE 4. SENTENCES AND DOMESTIC AND/OR FAMILY VIOLENCE (DFV)

Primary Sentence (DFV cases only)	Number of Decisions (t = 126)	Percentage of Sampling
Incarceration	113	89.7%
• Less than 2 years	49	43.5%
• Two years or more	62	54.9%
• Impossible to determine ¹²¹	2	1.8%
Probation	5	4.0%
Fine	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 para. 718.2(e) C.C. does not receive all the attention it deserves. On the contrary, incarceration appears to be the sentence of predilection where the offender is Indigenous¹²².

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.

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 Adult Criminal Court 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 (S.C.J.); *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 para. 718.2(e) C.C. 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 para. 718.2(e) C.C. 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, in particular: *R. v. Prevost*, 2015 BCPC 186, 2015 CarswellBC 1730; *R. v. Simms*, 2013 YKTC 60, 2013

Next, we only identified some thirty decisions applying principles of restorative justice¹²⁴, despite Justice LeBel's emphasis on this aspect.

Further, the caselaw shows only little 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 Native heritage of the accused¹²⁵. Of these seven decisions, we only identified three in which the judge called upon a sentencing circle in order to make a decision¹²⁶ and one in which the judge referred to accused's file to a sentencing circle in order for the latter to prepare recommendations¹²⁷. However, we also identified two decisions in which the judge rejected the accused's application for access to a sentencing circle¹²⁸. Finally, in some twenty decisions, the judge expressed the wish that the accused to be incarcerated have access to programs adapted to Indigenous culture¹²⁹.

In the caselaw, therefore, there are only a few isolated cases where the court incorporates components related to Native heritage either through certain orders (probation, suspended sentence) or by resort to institutions, actors and processes that are Indigenous, or hybrid, that is to say partly made up of Indigenous, 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

CarswellYukon 60; *R. v. Knott*, 2012 MBQB 105, 2012 CarswellMan 171; *R. v. Cloud*, 2014 QCCQ 464, 2014 CarswellQue 742, 8 R.R. (7th) 364, varied 2016 QCCA 567, 2016 CarswellQue 2745, 28 R.R. (7th) 310, reversed 2016 QCCA 567, 2016 CarswellQue 2745, 28 R.R. (7th) 310.

¹²⁴ See, e.g., *R. v. G. (D.)*, 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] O.J. No. 6303 (S.C.J.).

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.

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. (M.D.)*, 2014 BCPC 56, 2014 CarswellBC 921; *R. v. Mathers*, 2012 BCSC 1980, 2012 CarswellBC 4138.

driving¹³¹. The justice and healing committee of the community had 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 on the accused. The report states that the sentencing circle contributed to re-establishing a connection between the individuals affected by the situation and to restoring balance¹³². 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 of working on his self-esteem or to embarking 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 killed¹³³. Ultimately, the court imposed a two-year sentence of probation the terms of which were identical to those suggested by the justice committee¹³⁴.

This decision is an exception in the caselaw. 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, dissatisfied with the fact that the decision met the requirements prescribed by paragraph 718.2(e) C.C. 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 deterrence¹³⁵. In addition, the judge insisted on stating that she was not bound by these recommendations¹³⁶

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

¹³¹ Flight causing bodily harm, subs. 249.1(3), para. 249.1(4)(a) C.C.; impaired driving causing bodily harm, subs. 255(2) C.C. and two counts of operation while impaired, para. 253(1)(a) and subs. 255(1) C.C.

¹³² *Supra*, note 130 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 (\$ 1,000 fine).

¹³⁵ *R. v. Kawapit*, *supra*, note 130 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 sentencing circle on all charges. It is self-evident that the recommendations, once received, are not binding upon the Court.”

and that, while she accepted them, she was not thereby showing indulgence towards the accused. She issued a reminder that “a sentence focussed 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 recommendations, the court maintained the subordination of indigenous law to State law. On the other hand, the judge also resorted to prescriptive incorporation by incorporating Cree objectives (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. There is, therefore, an openness therein 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 paragraph 718.2(e) C.C. is received and treated. Let us recall that 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 *undue* 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 factors¹³⁸, whereas in 9 cases out of 16 (56.25%), the Court of Appeal affirmed the trial decision (and, therefore, upheld the consideration given)¹³⁹.

By way of 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

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

¹³⁸ See, e.g., *R. v. Crazyboy*, 2012 ABCA 228, 2012 CarswellAlta 1269, 288 C.C.C. (3d) 459; *R. v. Popowich*, 2013 ABCA 149, 2013 CarswellAlta 450; *R. v. Bauer*, 2013 ONCA 691, 2013 CarswellOnt 15520.

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, 2014 CarswellYukon 85, 316 C.C.C. (3d) 44.

¹⁴⁰ See, e.g., *R. v. Campbell*, 2014 BCCA 235, 2014 CarswellBC 2160; *R. v. Ahmassay*, 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, 2014 CarswellMan 343, 314 C.C.C. (3d) 57.

to have been insufficiently considered in only 21.65% of the cases (21)¹⁴¹.

These results give rise to certain queries. 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 offenders¹⁴². Furthermore, appellate courts must show great deference and 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 undue 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 really 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, in particular in certain provinces¹⁴⁴, 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 reviewed¹⁴⁵.

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 (S.C.J.); *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) C.C. 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 s. 813 C.C. Regarding dangerous and long-term offenders, subs. 759(1) C.C. 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 subs. 759(2) C.C. Of the 98 decisions appealed by the defence, 14 were appeals by the accused of his or her dangerous or long-term offender designation. 12 of these appeals were denied.

¹⁴³ *R. v. Lacasse*, *supra*, note 98 at para. 51; *R. v. M. (L.)*, 2008 CSC 31, 2008 CarswellQue 4418, (*sub nom. R. v. L.M.*) [2008] 2 S.C.R. 163, (*sub nom. R. v. M. (L.)*) 231 C.C.C. (3d) 310, 56 R.R. (6th) 278 (S.C.C.) at para. 14.

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

¹⁴⁵ André Jodouin and 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 p. 564.

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

(a) Legislative Hurdles

Let us underscore from the outset the significance of legislative hurdles owing to the contradictory messages sent to judges. Indeed, to counterbalance the *Ipeelee* judgment and paragraph 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 compulsory minimum sentences in relation to several offences, 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 useful to mention that paragraph 718.2(e) C.C. was amended by the conservative government after the ruling in *Ipeelee* was handed down¹⁴⁶.

(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 caselaw 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. From the outset, let us observe that 15 years after the *Gladue* decision was handed down, only one decision out of three states that a *Gladue* report was prepared with a view to the sentencing of an Indigenous, as shown in Table 5:

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

TABLE 5. *GLADUE* REPORTS

Existence of a <i>Gladue</i> report	Number of Decisions (t = 635)	Percentage
No reference to a <i>Gladue</i> report	409	64.4%
Reference to a <i>Gladue</i> report	226	35.6%
Impossible to determine ¹⁴⁷	2	0.3%

One must acknowledge that the situation varies considerably depending on the provinces and territories concerned¹⁴⁸. Hence, judges from Saskatchewan and the Northwest Territories stated that they had had the benefit of a *Gladue* report in only 5 and 6% of the cases, respectively, whereas judges in British Columbia and Yukon referred thereto in half of the decisions analysed, the judges in Ontario in nearly 60% of cases and those in Nova Scotia in 80% of cases. In Québec, slightly more than a quarter of the decisions analysed reported the existence of a *Gladue* report. Yet, even in the provinces where judges had greater access to a *Gladue* report, there remains great uncertainty in respect thereof 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 finding was also made in British Columbia¹⁵⁰. Finally, let us stress that no *Gladue* report was filed in New Brunswick and in Nunavut. On the other hand, we observe that the courts in Nunavut and the Northwest Territories consider themselves to be, to a certain extent, specialized courts interacting on a majority, if not exclusive, basis with Indigenous persons and that they possess more exhaustive general knowledge of the communities in question. These courts have also established various practices enabling the incorporation of components of indigenous law: for example, we know that

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

¹⁴⁸ Here are the detailed statistics per 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; N.S.: 8 out of 10 (80%); N.B.: 0 out of 2; Newfoundland: 1 out of 7 (14.29%); P.E.I.: no decision found.

¹⁴⁹ *Yukon Gladue: research & resource identification project*, Council of Yukon First Nations, 2015 at p. 8.

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

some courts of justice sit with elders in attendance and that the latter participate in the handing down of the sentence.

Certain judges openly complain about the difficulty in obtaining a *Gladue* report. Justice Monnin of the Manitoba Court of Appeal described as follows 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 reports¹⁵². Whereas some judges only raise awareness of the problem¹⁵³, others sometimes take steps themselves to ensure that a proper report is prepared¹⁵⁴ or reduce the sentence outright¹⁵⁵.

The *Knockwood*¹⁵⁶ case is an excellent example thereof. In this matter, the accused pleaded guilty on August 10, 2011 to a charge of importation of cocaine and the Court requested that a *Gladue* report be drawn up. Although a period of six to eight weeks is usually allowed for the preparation of a regular presentence report, the judge

¹⁵¹ *R. v. G. (L.L.)*, 2012 MBCA 106, 2012 CarswellMan 604, 292 C.C.C. (3d) 486 at para. 35.

¹⁵² See, e.g., *R. v. Stewart*, 2012 YKSC 75, 2012 CarswellYukon 139.; *R. v. B. (D.K.D.)*, 2013 BCSC 2321, 2013 CarswellBC 3884; *R. v. L. (D.R.M.)*, 2012 BCPC 184, 2012 CarswellBC 2215; *R. v. Florence*, 2013 BCSC 194, 2013 CarswellBC 298, affirmed 2015 BCCA 414, 2015 CarswellBC 2822; *R. v. L. (K.L.)*, 2012 BCPC 273, 2012 CarswellBC 2430; *R. v. Lawson*, 2012 BCCA 508, 2012 CarswellBC 3956, 294 C.C.C. (3d) 369; *R. v. Lewis*, 2014 BCPC 93, 2014 CarswellBC 1386; *R. v. McCook*, 2015 BCPC 1, 2015 CarswellBC 143; *R. v. Paul*, 2014 BCCA 81, 2014 CarswellBC 519; *R. v. Corbiere*, 2012 ONSC 2405, 2012 CarswellOnt 5931 (S.C.J.); *R. v. Long*, 2014 ONSC 38, 2014 CarswellOnt 900 (S.C.J.); *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.); *R. v. Land*, 2013 ONSC 6526, 2013 CarswellOnt 14710 (S.C.J.); *R. v. Raymond*, 2014 ONCS 6845, 2014 CarswellOnt 17173(S.C.J.); *R. v. Stoneham* (November 29, 2012), Doc. 11-1254, [2012] O.J. No. 6447 (C.J.); *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. (D.K.D.)*, 2013 BCSC 2321, 2013 CarswellBC 3884 ; *R. v. L. (D.R.M.)*, 2012 BCPC 184, 2012 CarswellBC 2215; *R. v. Florence*, 2013 BCSC 194, 2013 CarswellBC 298, affirmed 2015 BCCA 414, 2015 CarswellBC 2822; *R. v. Lawson*, 2012 BCCA 508, 2012 CarswellBC 3956, 294 C.C.C. (3d) 369 ; *R. v. Lewis*, 2014 BCPC 93, 2014 CarswellBC 1386 ; *R. v. Paul*, 2014 BCCA 81, 2014 CarswellBC 519; *R. v. Gruben*, 2013 NWTSC 59, 2013 CarswellNWT 72.

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*, 2012 ONSC 2405, 2012 CarswellOnt 5931 (S.C.J.); *R. v. Long*, 2014 ONSC 38, 2014 CarswellOnt 900 (S.C.J.); *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.); *R. v. Land*, 2013 ONSC 6526, 2013 CarswellOnt 14710 (S.C.J.).

¹⁵⁵ See, e.g., *R. v. Stoneham* (November 29, 2012), Doc. 11-1254, [2012] O.J. No. 6447; *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.); *R. v. G. (L.L.)*, 2012 MBCA 106, 2012 CarswellMan 604, 292 C.C.C. (3d) 486.

¹⁵⁶ *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.).

afforded the services in question 12 weeks in order to prepare an adequate *Gladue* report¹⁵⁷. 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 October 25, 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 although the accused, who was an anglophone, had no command of this language. The Court requested that the report be translated, which it was on November 9, 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 acknowledged¹⁵⁹. 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 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 March 6, 2012, 7 months after Mrs. Knockwood’s plea.

Visibly outraged at this situation¹⁶⁰, Justice Hill of the Ontario Superior Court who was presiding the sentencing hearing — which was finally held on April 10, 2012 — did not hesitate to level accusations of misconduct at the Province of Québec¹⁶¹. He stated that, while there may be disparities between the various regions as to the *quantum* of the sentences, paragraph 718.2(e) C.C. and the principles set out in the *Gladue* decision were applicable throughout Canada¹⁶². 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 her 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, let us observe, as other authors have done, that it is crucial to prepare *Gladue* reports using actual *Gladue* components

¹⁵⁷ *Ibid.* at para. 7.

¹⁵⁸ *Ibid.* at para. 8.

¹⁵⁹ *Ibid.* at para. 70.

¹⁶⁰ *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.) 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.

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 question¹⁶³. This logic does not coincide well with that which 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 perspective¹⁶⁴. Finally, while *Gladue* reports generally contain information regarding the background and systemic factors, one observes that there is very little information on the procedures and the type of sanctions appropriate to the accused's Indigenous heritage¹⁶⁵.

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 Native communities, their legal orders and resources available therein than it is to obtain information on the negative impact of colonization, which says a lot¹⁶⁶. 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, which finding was confirmed by the Auditor General of Canada¹⁶⁸. In some cases, judges go as far as

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

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

¹⁶⁵ According to Hadley Friedland, *Gladue* reports in their current form are focussed nearly exclusively on historical and systemic factors. In this author's view, although the acknowledgement thereof 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: "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." Indigenous Law Research Unit (Faculty of Law, University of Victoria), *Aseniwuche Winewak Justice Project Report: Creating a Cree Justice Process using Cree Legal Principles*, by Hadley Friedland, Research Coordinator, October 2015 at p. 32.

¹⁶⁶ Alana Klein, *supra*, note 24 at pp. 514 et seq., 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, reversed 2006 QCCA 536, 2006 CarswellQue 3571.

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

¹⁶⁸ Canada, Office of the Auditor General of Canada, *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 p. 18.

relying on correctional institutions to offer services, although it is obvious that this is not their primary mission and they are also underfunded in this respect.¹⁶⁹

Other practical constraints put a damper on attempts at innovation. For instance, the volume of files handled is one. 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 inhabitants¹⁷¹. 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 in the hiring of permanent staff¹⁷². This lack of funding and resources for justice committees 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 system¹⁷³, and the actors’ shirking of responsibilities that results therefrom¹⁷⁴. Some judges seem to consider that, if counsel have not provided them with the requisite information, they are not required to take any steps to this end¹⁷⁵, whereas

¹⁶⁹ *R. v. Sikyea*, 2013 NWTSC 13, 2013 CarswellNWT 14 at para. 27, affirmed 2015 NWTCA 6, 2015 CarswellNWT 39. See also Jonathan Rudin, “Commentary on *R. v. Gladue*”, Commentary (1999), online at: <<http://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*, Barreau du Québec, 2015 at p. 6.

¹⁷¹ *Ibid.*

¹⁷² In 2017, in Québec, the budget for all the 26 Justice Committees (who are present within 7 of the 11 nations in Quebec and in Montreal) was 1,5 millions, which makes a little less than 58 000\$ per Justice Committees (funding might not be equally distributed between all 25 committees). This includes the contribution of the federal government (the part of Quebec was 600 000\$). 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*, June 13, 2017, online: <https://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 each justice committee must, with this scarce funding, lease space, pay bills (including, for some, the substantial Internet rates charged in the Great North) in addition to paying a salary to the members of the justice committee. If they want their community to benefit from an Alternative measure program, they have to sign an agreement in that matter with the Ministry of Justice. The preparation of that program and agreement have to be done with this 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 demotivating for few, and we always risk losing staff.” Lyne St-Louis, Nunavik Community Justice Program, 2015 [unpublished]

at p. 6. For these reasons, a lot of Justice Committees are always in the process of searching for more funding through donators, cities, etc. In comparison, the three Circuit court deserving 4 nations (28 communities) in Quebec cost between 3,5 and 4 millions to the Government of Quebec (see the Testimony of Yan Paquette).

¹⁷³ Sébastien April and Mylène Magrinelli Orsi, *Gladue Practices in the Provinces and Territories, supra*, note 20 at p. 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. (D.T.)*, 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. (K.L.)*, 2012 BCPC 273, 2012 CarswellBC 2430; *R. v. McKay*, 2012 BCCA 477, 2012 CarswellBC 3913; *R. v. McPherson*, 2013 BCPC 250, 2013 CarswellBC 2901; *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 C.C.C.

others deem that it is just as incumbent on counsel for the prosecution and for the defence as it is on judges to ensure that sufficient information is available as to the specific circumstances of the accused¹⁷⁶. Hence, these judges consider it to be their duty to apply appropriate sentencing principles and will take all necessary steps to this end¹⁷⁷. Conversely, some judges are of the opinion that responsibility lies primarily with the prosecutor¹⁷⁸ while others rely on the defence¹⁷⁹. Many judges, incidentally, explicitly express a certain degree of exasperation towards lawyers who do not, in their opinion, submit sufficient evidence with respect to these principles, and they would like the latter to show more creativity in this respect¹⁸⁰.

(3d) 76; *R. v. Kennedy*, 2012 MBPC 60, 2012 CarswellMan 584; *R. v. Boyd*, 2015 ONCJ 120, 2015 CarswellOnt 2971; *R. v. D. (M.)*, 2014 NLTD(G) 101, 2014 CarswellNfld 267; *R. v. Kanayok*, 2014 NWTSC 75, 2014 CarswellNWT 90.

¹⁷⁶ See, e.g., *R. v. Tom*, 2012 YKTC 55, 2012 CarswellYukon 65 at para. 76: “[T]he onus of ensuring sufficient information about an Indigenous individual’s particular circumstances 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*, 2014 QCCQ 464, 2014 CarswellQue 742, 8 R.R. (7th) 364, varied 2016 QCCA 567, 2016 CarswellQue 2745, 28 R.R. (7th) 310, reversed 2016 QCCA 567, 2016 CarswellQue 2745, 28 R.R. (7th) 310 where the judge sent the defence lawyer back to prepare his representations on two occasions or *R. v. G. (D.)*, 2014 BCCA 84, 2014 CarswellBC 531 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 For instance, in the decision of *R. v. Swanson*, 2013 ONSC 3287, 2013 CarswellOnt 7623 (S.C.J.) at paras. 24-25, 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*, 2013 ONCJ 423, 2013 CarswellOnt 10710 at para. 22: “The Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4376, [2012] 1 S.C.R. 433, 280 C.C.C. (3d) 265, 91 R.R. (6th) 1 devotes considerable time and effort to assist those who actually chose to read the case, in making sense of Indigenous sentencing.”

(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 renewal¹⁸².

In this respect, several authors have shown the extent to which judges find it difficult to conceive of a sentence in other than punitive terms, and in connection with classical sentencing theories (retribution, deterrence, denunciation and rehabilitation in a closed environment), which amount to what Pires calls modern criminal rationality¹⁸³. For example, to borrow the words of the Supreme Court in *Wells* (which words were however disavowed in *Ipeelee*), several judges indicated that one must not think that Indigenous do not believe in denunciation and deterrence¹⁸⁴ or that the objectives of denunciation and deterrence could be served otherwise than by the imposition of a prison term¹⁸⁵.

See also *R. v. Cloud*, *supra*, note 177 at para. 6: "I should add that neither party was aware of the 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 p. 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 pp. 428-429. 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*, Master's in Law thesis, Université of Ottawa, 2015 [unpublished].

¹⁸³ Alvaro Pires, *supra*, note 55. Richard Dubé, Margarida Garcia and 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*, 2014 BCCA 81, 2014 CarswellBC 519; *R. v. W. (R.L.)*, 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.

¹⁸⁵ See, e.g., *R. v. Schinkel*, 2014 YKTC 42, 2014 CarswellYukon 72, varied 2015 YKCA 2, 2015 CarswellYukon 3, 320 C.C.C. (3d) 366; *R. v. Carlson*, 2015 BCSC 1032, 2015 CarswellBC 1657; *R. v. C. (J.A.V.)*, 2015 BCPC 218, 2015 CarswellBC 2160; *R. v. Kelly*, 2014 BCSC 2147, 2014 CarswellBC 3409; *R. v. McCook*, 2015 BCPC 1, 2015 CarswellBC 143; *R. v. Neel*, 2014 BCSC 1989, 2014 CarswellBC 3130; *R. v. H. (R.J.)*, 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.

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 (25.35%), 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.

The matter of *R. c. Jacko*¹⁸⁷ is a good example of the pervasiveness of this concept. The judge’s recital of the facts clearly demonstrates the gravity which 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 point of fact, become an aggravating factor for the accused.

In this case, the accused was found guilty of battery 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 claiming to be HIV-positive and to have hepatitis¹⁸⁸. 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 the needs of her addictions. She was ultimately placed in intermittent care in youth centres until her majority and ended up homeless. Mrs. Jacko had a criminal record spanning the years from 1981 to 1997. However, as of 1997, “[TRANSLATION] her criminal activity calmed down”, which date coincided with her meeting her spouse who died in 2009. During this relationship, she stopped drinking and ceased using drugs, she found a job, she completed Grade 11 and a session of collegiate studies. Following the death of her spouse, Mrs. 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: “[TRANSLATION] We are dealing here with a deprived woman who hung on to an unhealthy lifestyle characterized by

¹⁸⁶ We limited our analysis to a specific reference to seriousness rather than count 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 assessment by the actors themselves. *Ipeelee*, *supra*, note 2 at para. 86.

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

¹⁸⁸ *Ibid.* at paras. 10-11.

¹⁸⁹ *Ibid.* at para. 17.

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 “[TRANSLATION] criterion among many others” and that “[TRANSLATION] 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 non-Indigenous”¹⁹¹ Nevertheless, the offence in question is very serious indeed in his opinion: “[TRANSLATION] 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.

He ultimately concluded that, owing to this gravity and to the fact that “[TRANSLATION] 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: “[TRANSLATION] 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 10-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 culpability¹⁹⁵. However, on 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 it influenced her degree of dangerousness¹⁹⁶.

Having observed the impact of the “*Gladue* factors” in the handling of applications for a dangerous offender designation regarding Indigenous offenders, the author Nate Jackson reached the same conclusion¹⁹⁷: the *Gladue* factors are harmful to offenders. The latter underscored that, as far as dangerous offenders were concerned, the courts, when deciding whether or not to impose an indeterminate sentence, are primarily informed by two

¹⁹⁰ *Ibid.* at para. 15.

¹⁹¹ *Ibid.* at para. 30.

¹⁹² *Ibid.* at para. 13.

¹⁹³ *Ibid.* at para. 31.

¹⁹⁴ *Ibid.*

¹⁹⁵ *R. v. Gladue, supra*, note 26 at para. 69.

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

¹⁹⁷ *Ibid.*

variables: the risk of repeating the offence and the possibilities for rehabilitation¹⁹⁸. 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 disease, criminal history, current substance abuse, active psychoses, instability, reaction to treatment, stress, level of anger, hostility²⁰⁰. All 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 involved²⁰¹. The difficult reality faced by Indigenous is such that it would be difficult to imagine that the latter would achieve “good” results on these tests. Indigenous are, therefore, automatically at a disadvantage²⁰².

Similarly, the potential for rehabilitation is significantly affected by “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 has followed, his potential for rehabilitation will be considered small²⁰⁴. Consequently, Indigenous offenders receive more indeterminate sentences due to the damage caused by colonialism, since this harm ends up becoming a decisive factor to justify such decisions handed down by the courts. According to Jackson, broad knowledge of colonialism and its devastating effects must be brought to bear in order to challenge the initial assumptions as to dangerousness²⁰⁵.

Another significant epistemological and cognitive hurdle relates to the issue of individual responsibility²⁰⁶. Judges generally tend to gloss over the historical and systemic background that afflicts Indigenous by stating that the latter chose to commit offences and must be held accountable. Hence, they persist in burdening them with the onus of proving a causal link between the background factors and the commission of the offence in approximately 6% of the decisions contained in our database or they refuse to

¹⁹⁸ Nate Jackson, *supra*, note 83 at p. 84.

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

²⁰⁰ Nate Jackson, *supra*, note 83 at p. 85.

²⁰¹ *Ibid.* at p. 86.

²⁰² *Ibid.*

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

²⁰⁴ Nate Jackson, *supra*, note 83 at p. 88.

²⁰⁵ *Ibid.* at p. 91.

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

consider the specific socio-economic and cultural context in the sentencing phase. However, in our view, the 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

Finally, some judges voice the concern that “sentences that appear to be reduced for Indigenous offenders could lead some to believe that Indigenous victims are less deserving of protection”²⁰⁸, referring here to a principle of formal equality that presupposes that Indigenous victims are effectively better protected by the criminal justice system, which is truly not the case²⁰⁹.

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

²⁰⁷ See also *R. v. Charlie*, 2014 YKTC 17, 2014 CarswellYukon 40, affirmed 2015 YKCA 3, 2015 CarswellYukon 6, 320 C.C.C. (3d) 479; *R. v. L. (D.R.M.)*, 2012 BCPC 184, 2012 CarswellBC 2215; *R. v. Bird*, 2014 SKQB 75, 2014 CarswellSask 200, leave to appeal refused 2016 CarswellSask 378 (S.C.C.); *R. v. Knockwood*, 2012 ONSC 2238, 2012 CarswellOnt 4286, 286 C.C.C. (3d) 36 (S.C.J.).

²⁰⁸ See, e.g., *R. v. C. (S.D.)*, 2013 ABCA 46, 2013 CarswellAlta 144, 303 C.C.C. (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 Indigenous offenders might lead some (including victims) to conclude that Indigenous victims are less worthy of protection.”

²⁰⁹ The Indigenous prison population in Canada has continually increased since the 1960s, *R. v. Ipeelee*, *supra*, note 2 at para. 57. At the same time, Indigenous are more likely to be victims of a crime than non-Indigenous, Statistics Canada, *Violent Victimization of Indigenous People in the Canadian Provinces, 2009*, by Samuel Perreault, Catalogue No. 85-002-X, Ottawa, Statistics Canada, March 11, 2011 at pp. 7-9.

shoulders on 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 involves a certain level of violence, and, in a great majority of the cases, the actions were voluntary and can be attributed to offenders who were found guilty. However, in an Indigenous setting, violence has deep roots and is first and foremost the product of colonialism, of the residential schools policy and of the state of inferiority in which the *Indian Act* keeps them. The violence also pervades the interpersonal, intercommunity and intergenerational dynamics where victim and perpetrator become interchangeable. The criminal justice system is also an integral part of the problem. As a result of its lack of cultural understanding, of its disregard for history and its perpetuation of shame, humiliation and culpability among Indigenous peoples, it contributes directly to the cycle of violence²¹⁰.

While the Supreme Court in *Ipeelee* is clear on a certain number of principles, it is true 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 appears obvious to us 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 explanations²¹¹. 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 party(ies)²¹². Faced with these contradictions, some judges simply include the expression “*Gladue* factors” among the mitigating circumstances²¹³, or, failing anything better, lean towards a reduction of the sentence handed down²¹⁴.

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. (E.H.)*, 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 Indigenous 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. c. Gladue*, 1999 CarswellBC 779, [1999] 1 R.C.S. 688, 133 C.C.C. (3d) 385, 23 R.R. (5th) 197, *R. c. Ipeelee*, 2012 CSC 13, 2012 CarswellOnt 4376, [2012] 1 R.C.S. 433, 280 C.C.C. (3d) 265, 91 R.R. (6th) 1 and *R. c. W. (R.L.)*, 2013 BCCA 50, 2013 CarswellBC 268 while considering my decision in this case.”

²¹² See Geneviève Beausoleil-Allard on this issue.

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

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

4. CONCLUSION

Despite the enthusiasm generated by *Ipeelee*²¹⁵, one must acknowledge that, three years later, resistance comes from a handful of judges. The majority, for its part, is rather showing resistance to innovation.

The Charlette case appearing in the introduction is a tragic example thereof. In this matter, a *Gladue* report was filed, but the judge appears to have treated it like a regular pre-sentence report and to have focussed in particular 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 also 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 an analytical framework and radically different frame of reference. Indeed, it is even possible to state that Charlette was a victim of discrimination in this matter, having received a sentence in the very high range of sentences with total disregard for the most elementary sentencing principles, such as the gradation of punishments. Finally, the judge in no way considered the second step of the analysis or an alternate process or sanction.

Of course, several hurdles, of a practical, legislative or epistemological nature, lie in the path of judges. In point of fact, what *Ipeelee* appeared to want to suggest is a complete paradigm shift. In these two steps, this ruling is pushing the justice system into a corner. Regarding the first step, the systemic and background factors, it is forcing us to

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 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. (D.A.)*, 2012 BCPC 390, 2012 CarswellBC 3375; *R. v. Sauls*, 2013 BCSC 2445, 2013 CarswellBC 4001; *R. v. Seidel*, 2014 BCPC 230, 2014 CarswellBC 3057; *R. v. C. (W.A.)*, 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, varied 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.

question the fundamental principle of individual responsibility, to contextualize it, to identify the collective origins of conflicts. Under the second step, it is challenging the universalism of state criminal justice, forcing it to reconsider the possibility, but also 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. One must stop speaking of subordination or adaptation or accommodation within the justice system, and speak instead of true coordination or of an agreed-to separation²¹⁶. Judges, governments and prosecution services can contribute to this by paving the way towards the autonomy of Indigenous law systems. First by seriously engaging in the accommodations that they can put into place, who are, as an example, through the second part of the *Gladue* analysis and the use of Alternative measure programs and section 717 of the *Criminal code*, a step towards autonomy. Then, by acknowledging the existence of Indigenous laws.

With respect to the first step, judges could make sure to put the background and systemic factors at the center of their analysis. Our analysis of the caselaw shows that there has been no improvement in the resort to 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, those 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, namely a rate below the average for all of the decisions (87%).

²¹⁶ See, e.g., Val Napoleon, “Tsilhqot’in Law of Consent” (2015) 48 UBC L Rev 873. This paper is, in point of fact, an exercise in application of the 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 CarswellBC 1815 (*sub nom.* *Tsilhqot’in Nation v. British Columbia*) [2014] 2 S.C.R. 257.

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 (0.5%)
Satisfactory analysis (127 cases)	89 (70.1%)	20 (15.8%)	9 (7.1%)	4 (3.2%)	5 (3.9%)	0

Hence, the 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, of individual responsibility in the evaluation of the gravity of the offence and of the dangerousness of the offender²¹⁸. As well, it is relevant to underline that the negation of Indigenous laws and the fact that an Indigenous person is being judge by a *common law* tribunal is a background and systemic factor on itself. Judges can also try to apply *Gladue* and *Ipeelee* at other procedural steps than simply sentencing²¹⁹.

While this analysis is necessary, it will, however, be insufficient to reverse the deep-set trends that plague our justice system when interfacing with Indigenous offenders. To achieve this, one must turn towards Step 2, which invites the State of Canada to recognize the existence of indigenous legal orders. The latter were strongly discredited and rendered invisible during Canadian colonization and need to be revitalized. Rich and complex²²⁰, they represent complete and plural legal systems with their set of values and

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

²¹⁸ Marie-Ève Sylvestre, *supra*, note 33; Nate 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), decision under s. 672.54 of the *Criminal code* (*R v Sim* [2005] OJ No 4432), extradition (*United States v Leonard*, 2012 ONCA 622), parole hearings (*Twins c Canada (Procureur général)*, 2016 CF 537), etc.

²²⁰For 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.

principles, their rules and legitimate authorities, as well as their dispute resolution processes. By putting forth different conceptions of justice, however, they seek to respond to fundamentally universal problems of security and peace²²¹. Supported by researchers, in particular from the Indigenous Law Research Unit headed by Val Napoleon and her team at the University of Victoria, several communities in Canada have embarked upon such a process²²². They now have the support of the United Nations, through the United Nations Declaration on the Rights of Indigenous Peoples²²³, 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 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”²²⁴

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

“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 Vance have already underscored, the recognition of the fact that judges must take judicial notice of the background and systemic factors is a double-edged sword²²⁶. It might lead judges to believe that they are 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 teachings of the Supreme Court in *Ipeelee*, the courts ought to require that *Gladue* reports contain not only 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

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

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

- ²²³ United Nations Declaration on the Rights of Indigenous people, s. 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 s. 4.
- ²²⁴ See Call to Action 50 of the *Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, *supra*, note 8 at p. 221.
- ²²⁵ The Final Report of the Truth and Reconciliation Commission of Canada, vol. 6, *Canada’s Residential Schools: Reconciliation*, at p 45. 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, amongst others, more clearly in *R v Van der Peet*, [1996] 2 SCR 507 and *Mitchell v MNR*, 2001 SCC 33.
- ²²⁶ See also Patrick Healy and WJ Vancise, “Judicial Notice in Sentencing”, (2002) 65 Saskatchewan LR 97. The authors are of the view that the Indigenous context is too complex to be subject to strict judicial notice.

amenable thereto, the judges may ask witnesses to be called that are liable to support them in this respect²²⁷. Indeed, when imposing a sentence in accordance with the process and the dispute resolution principles of the 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 it 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 amount to a distortion and a bad application of these laws and their concepts²²⁹.

Furthermore, the necessary translation from a First Nation language to English or French of Indigenous laws to a judge wanting to impose a sentence in accordance to these laws poses two risks. First, as it is the case in French or English²³⁰, 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 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 As an example, this poses a problem in courts being held within Inuit communities, where an Inuk person can answer “yes” to a question where an English or French person would have answered “no” with the same meaning in mind²³³.

Finally, when judges develop innovative practices and respond to alternative sanctions, it is crucial to document it in a written judgment in order to contribute to the development of another caselaw.

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 criminal innovation. In this respect, there are in Québec extremely positive examples of consultation and collaboration between State justice and the Indigenous legal systems in a field related to criminal law. The Atikamekw, for example, have established a *système d'intervention d'autorité atikamekw* (Atikamekw Authority Response System)²³⁴ in matters of youth protection that has enabled them since 2001 to manage, with the assent of the State, problems of parental neglect and youth protection²³⁵. To achieve this, the Atikamekw apply the *Youth Protection Act* and they protect their children against abuse and parental neglect, however their approach, their processes and their results are quite different and, on the whole, deemed to be more respectful of their legal system. A good starting point

would then be for judges to familiarize themselves with the research work under way within the relevant communities by their activities and to acquire better knowledge of the resources available within these communities²³⁶.

As Silbey and Ewick have asserted, “resistance requires a consciousness of opportunity”²³⁷. Or, to quote the French philosopher Jean Salem drawing on Lucretia: “[TRANSLATION] When a crowd pushes me in 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”²³⁸. We, therefore, call upon judges from Québec and Canada. The acknowledgement

²²⁷ *R. v. Gladue*, *supra*, note 26 at para. 84.

²²⁸ The Final Report of the Truth and Reconciliation Commission of Canada, vol. 6, *Canada’s Residential Schools: Reconciliation*, at p 46.

²²⁹ When concepts are brought upon courts, courts tend to interpret these concepts in connection with other concepts of their law system. Hence, the person, expert or other, who brought this new concept in court might not recognize it in the decision of the judge. 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 language.

²³¹ The Final Report of the Truth and Reconciliation Commission of Canada, vol. 6, *Canada’s Residential Schools: Reconciliation*, at p 74.

²³² John Borrows, « Sovereignty’s Alchemy: An Analysis of *Delgamuukw v. British Columbia* » (1999) 37 Osgoode Hall LJ 537 at 554-555.

²³³ Commentary of Jean-François Arteau, lawyer of the Saturviit Inuit Women’s Association of Nunavik, drawing on the testimony of Annie Baron, board member of the Association and court translator from Inuktituk to English, at the *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, September 28, 2017, online: <https://www.cerp.gouv.qc.ca/index.php?id=59&L=1%27&tx_cspqaudiences_audiences%5Baudiences%5D=26&tx_cspqaudiences_audiences%5Bvpartie%5D=2&tx_cspqaudiences_audiences%5Baction%5D=show&tx_cspqaudiences_audiences%5Bcontroller%5D=Audiences&cHash=6b29b1a83e6669e731472bf4de67a41c> : “Concerning the double negation [...], we will say, for instance: “You are not coming with me?” To that question, us, non-inuit people, we will answer “No, I will not come with you”, while an Inuk person will answer “Yes, I will not come with you”.” [translation]. Within the same testimony, Pascale Laneuville, project director of the same Association added: “Sometimes it is very hard for an interpreter to really understand lawyers because they play a lot with the sense of words when they ask their questions, as do judges. Sometimes the answer is not the good one.”[translation]

²³⁴ For more information, see the Website of the Système d’intervention d’autorité atikamekw (French only) online at: <http://www.atikamekw.sipi.com/systeme_siaa>.

²³⁵ Anne Fournier, “De la *Loi sur la protection de la jeunesse* au système d’intervention en autorité atikamekw (SIAA) — La prise en charge d’une nation pour assurer le bien-être de ses enfants”, (2016) 24 *Enfances, Familles, Générations* (to be published).

²³⁶ Several communities have established community justice programs. For example, there is a community justice program (CJP) within the atikamekw community of

Wemotaci. See also, e.g., on the Cree legal culture the document entitled *Accessing Justice and Reconciliation: Cree Legal Summary*, *supra*, note 220. 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: <<http://www.indigenousbar.ca/indigenoulaw/>>.

²³⁷ Patricia Ewick and Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press, 1998 at p. 183.

of failure of the decisions in *Gladue* and *Ipeelee* must not be perceived as an end in and of itself. Resistance and innovation first require consultation and *Ipeelee* must be seen as an opportunity to tackle the problem once again, but differently, more astutely and in conjunction with the research community and Indigenous peoples.

²³⁸This is how Jean Salem, a French philosopher, puts in layman's terms the vision of liberty propounded by Lucretia 100 B.C. in *De rerum natura*, Book II: Aude Lancelin and Marie Lemonnier, "Pourquoi je suis épicurien", *Le nouvel Observateur* (August 7, 2008) 16. See also Jean Salem, *Les Atomistes de l'Antiquité : Démocrite, Épicure, Lucrèce*, Paris, Flammarion, 2013 at p. 211; Jean Salem, *La mort n'est rien pour nous : Lucrèce et l'éthique*, Paris, Librairie Philosophique J. Vrin, 1990 at pp. 67-92.