# The Application of Gladue Principles during NCRMD and Fitness Disposition Hearings

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## ABSTRACT

Since 1999, *Gladue* principles have been applied in a variety of contexts within the Canadian criminal justice system. Some of these contexts, like bail hearings, have been thoroughly discussed by courts and academics. Others have not. To supplement the ongoing discussion of how *Gladue* can be used in new and unique ways, this paper analyzes the application of *Gladue* principles to NCRMD and fitness disposition hearings under s. 672.54 of the *Criminal Code*.

To date, only one appellate court has held that *Gladue* principles apply to NCRMD and fitness disposition hearings. However, according to the Ontario Court of Appeal, that application is limited. While relevant to the rehabilitation and reintegration of an Indigenous accused, *Gladue* principles are not relevant when assessing their dangerousness or mental condition. This paper argues that the current approach by the Ontario Court of Appeal is inappropriate, inconsistently applied, and should not be adopted by Courts and review boards across the country since it ignores the benefits a full *Gladue* analysis can have during s. 672.54 disposition hearings.

***Keywords:*** *Gladue*; Indigenous; NCRMD; Fitness; Disposition; Dangerousness; *Sim*; 672.54; Review Board; Restorative; Mental; Expert; Actuarial.

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## I. Introduction

Indigenous peoples are over-represented at nearly every stage of the Canadian criminal justice system.[1] In 2018-2019, Indigenous adults comprised "approximately 4.5% of the Canadian adult population,... [but] accounted for 31% of admissions to provincial/territorial custody and 29% of admissions to federal custody."[2] Indigenous youth, who represent "8.8% of the youth population in Canada,... [accounted for] 43% of youth admissions to correctional services" in 2018-2019.[3] As the Supreme Court of Canada stated in *R v Gladue*, "[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system."[4] Unfortunately, that crisis has only worsened since 1999. While adult and youth incarceration rates have been declining,[5] "[t]he incarceration numbers for Indigenous people are worsening year by year."[6] To date, legislative and judicial interventions have been unable to stop this crisis.

While the over-representation of Indigenous peoples in custody is well-documented, less attention has been given to the rate at which Indigenous peoples are found not criminally responsible on account of mental disorder ("NCRMD") or unfit to stand trial. The most recent study by Statistics Canada on the NCRMD verdict was published in 2014 and made no reference to the ancestry or ethnicity of people found NCRMD.[7] In 2015, the Department of Justice found that "only 4% of accused within the Review Board system were reported to be Aboriginal, which is relatively consistent with the proportion of

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1 *R v Gladue*, [1999] 1 SCR 688 at para 61, 171 DLR (4th) 385 [*Gladue*].

2 Jamil Malakieh, "Adult and youth correctional statistics in Canada, 2018/2019" (21 December 2020) at 5, online (pdf): *Statistics Canada Juristat* <www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00016-eng.pdf> [perma.cc/369M-F6UX].

3 *Ibid* at 7.

4 *Gladue*, *supra* note 1 at para 64.

5 Malakieh, *supra* note 2 at 3–6.

6 Scott Clark, "Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses" (2019) at 1, online (pdf): *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf> [perma.cc/ALR7-ANEU].

7 See Zonran Miladinovic & Jennifer Lukassen, "Verdicts of not criminally responsible on account of mental disorder in adult criminal courts, 2005/2006-2011/2012" (18 September 2014), online: *Statistics Canada Juristat* <www150.statcan.gc.ca/n1/pub/85-002-x/2014001/article/14085-eng.htm> [perma.cc/2PUT-YHT7].

Aboriginal people in the Canadian population."[8] The review board system includes offenders that are either NCRMD or unfit to stand trial, however this study is unreliable since "Manitoba and Saskatchewan, which both have a high proportion of Aboriginal people within their populations, are missing from the study."[9]

Given the prevalence of mental health concerns among Indigenous populations, it is reasonable to suggest that Indigenous peoples may also be over-represented in the review board system. Resulting from historical and ongoing effects of colonization and assimilationist policies, "Indigenous Peoples have poorer mental health outcomes, including anxiety, depression, and suicide, compared to non-Indigenous peoples in Canada."[10] These poorer outcomes can cause an Indigenous person to become involved with the review board system after being found NCRMD or unfit to stand trial. It is therefore important to ensure all available measures are taken to rectify or prevent the over-representation of Indigenous peoples in this part of the criminal justice system. One way to achieve this is by applying *Gladue* principles to NCRMD and fitness dispositions.

The goal of this paper is to review the current law relating to the application of *Gladue* principles to *Criminal Code* review board disposition hearings. There is currently little judicial and academic consideration of this issue.[11] The most recent and comprehensive article on this topic, which this paper expands on, is Kyle McCleery's "'Resort to the Easy Answer': *Gladue* and the Treatment of Indigenous NCRMD Accused by the British Columbia Review Board," published in 2021. McCleery provides an extensive overview of the history of *Gladue* principles, their application outside of sentencing, and how they have been applied by the British Columbia Review Board. He makes three conclusions: (a) the British Columbia Review Board has not adequately applied *Gladue* principles during disposition hearings, (b) "the legislative framework that governs the Review Board's decision-making process allows little

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8 "The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study" (2015), online: *Department of Justice Canada* <www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr06_1/p3.html#ftn15> [perma.cc/ZR7U-WMGX].

9 *Ibid*.

10 Simon Graham et al, "Mental Health Interventions for First Nations, Inuit, and Métis Peoples in Canada: A Systematic Review" (2021) 12:2 Intl Indigenous Policy J 1 at 2.

11 Kyle McCleery, "'Resort to the Easy Answer': *Gladue* and the Treatment of Indigenous NCRMD Accused by the British Columbia Review Board," (2021) 54:1 UBC L Rev 151 at 152.

opportunity for the application of *Gladue*," and (c) "legislative reform is required."[12]

This paper expands the discussion started by McCleery in three ways. First, it provides a broader analysis of the role of *Gladue* in review board disposition hearings across the country, rather than describing how *Gladue* is applied by the review board of one province. Second, it considers the application of *Gladue* to NCRMD and fitness dispositions, rather than just the former. Third, it argues that legislative reform is not absolutely necessary to resolve the inadequate application of *Gladue* during NCRMD and fitness disposition hearings. There are numerous ways *Gladue* can apply to all factors during a disposition hearing, and courts can extend the application of *Gladue* to these areas without overstepping the judicial role.

Following this introduction, the paper is separated into four more parts. In Part II, the paper provides an overview of s. 718.2(e) of the *Criminal Code* and the Supreme Court of Canada's decisions in *Gladue* and *R v Ipeelee*. This section outlines the unique principles that are applicable to Indigenous peoples in the criminal justice system, as well as the potential to expand the use of *Gladue* principles outside of the sentencing context. In Part III, NCRMD and fitness disposition hearings will be discussed, providing an overview of the types of dispositions available and the conditions that must be met before an individual is released into the public. This includes an analysis of when an individual will be considered a significant threat to public safety, and the weight to be given to the other needs of an accused and their eventual reintegration into society. In Part IV, this paper analyzes the current jurisprudence discussing *Gladue* principles in review board disposition hearings. This includes the decision of the Ontario Court of Appeal in *R v Sim*, as well as review board decisions such as *Kokokopenance, Re*. As these cases demonstrate, *Gladue* principles must be applied to NCRMD and fitness disposition hearings. However, given the emphasis on "dangerousness" in the *Criminal Code*, the application of these principles is limited to issues involving rehabilitation and reintegration. In Part V, this paper concludes by arguing that the applicability of *Gladue* should not be limited during NCRMD and fitness disposition hearings. This position is justified by showing how *Gladue* principles can be relevant when assessing the mental condition of an accused and whether they pose a significant threat to the public. Specifically, this paper analyzes (a) how *Gladue* principles can apply to certain factors a review board considers when assessing dangerousness; (b)

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12 *Ibid* at 153.

how a broad application of *Gladue* principles can assist an Indigenous accused on their path to healing; (c) how the broad application of *Gladue* principles accords with Parliament's new emphasis on restorative justice in the *Criminal Code*, Call to Action 19 of the Truth and Reconciliation Commission Inquiry ("TRC"), and Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"); and (d) how *Gladue* can help supplement expert recommendations and actuarial test results.

## II. S. 718.2(E), *GLADUE*, AND *IPEELEE*

In 1996, Parliament sought to address Indigenous over-representation in the criminal justice system by enacting s. 718.2(e) of the *Criminal Code*. S. 718.2(e) instructs sentencing judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community." It also instructs sentencing judges to pay "particular attention to the circumstances of Aboriginal offenders" when considering alternatives to imprisonment.[13]

The Supreme Court of Canada first interpreted s. 718.2(e) in *R v Gladue*. The appellant, Jamie Tanis Gladue, was appealing "a three-year prison sentence for manslaughter of her common law husband," on the basis "that the trial judge failed to give appropriate consideration to her circumstances as an Indigenous person pursuant to s. 718.2(e) of the *Criminal Code*."[14] The judge had concluded that "there were no 'special circumstances' arising from… Ms. Gladue's Indigeneity"[15] because she lived "off-reserve rather than 'within the aboriginal community.'"[16]

The Supreme Court of Canada allowed Ms. Gladue's appeal and held that s. 718.2(e) "must be considered in <u>every</u> case involving an Indigenous offender."[17] The Court recognized that intergenerational trauma, as well as background and systemic factors "such as poverty, substance abuse, and 'community fragmentation,'" should be considered as part of the s. 718.2(e)

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

14 Benjamin A Ralston, *The Gladue Principles: A Guide to the Jurisprudence* (Saskatoon: University of Saskatchewan Indigenous Law Centre, 2021) at 71.

15 *Ibid*, citing *Gladue*, *supra* note 1 at para 18.

16 *Gladue*, *supra* note 1 at para 18.

17 McCleery, *supra* note 11 at 156, citing *Gladue*, *supra* note 1 at para 88 [emphasis in original].

analysis.[18] To ensure these factors are considered, the Court provided a framework for judges to follow when sentencing an Indigenous offender. Judges must consider:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) [t]he types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[19]

Following *Gladue*, some judges continued to incorrectly apply s. 718.2(e). Specifically, judges were only applying s. 718.2(e) in two situations: when (a) a causal link could be established between an offender's crime, their Indigenous heritage, and systemic factors and (b) the crime was not serious.[20] The frequency of these two legal errors led the Supreme Court to reconsider the principles established in *Gladue* in *Ipeelee*.

In *Ipeelee*, the Supreme Court of Canada reaffirmed that s. 718.2(e) applies to all Indigenous peoples. The Court also implicitly extended the application of *Gladue* to <u>every</u> case involving an Indigenous person.[21] As stated by McCleery, the Court held that:

> [T]he *Gladue* analysis is required in all cases involving the sentencing of an Indigenous person, and that failure to apply [s.] 718.2(e) in <u>any</u> case involving an Indigenous offender, regardless of the severity of the offence or the existence of an obvious connection between the offender's Indigenous identity and the offence, would "result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality."[22]

This statement about the value of applying Gladue principles has led to their implementation in a variety of contexts outside of sentencing. This includes "bail, parole, extradition … dangerous and long-term offender proceedings," as well as NCRMD and fitness disposition hearings. While Gladue principles have been applied in these contexts, its application has been limited during NCRMD and fitness disposition hearings.

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18 David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012) at 27.

19 *Gladue*, *supra* note 1 at para 66.

20 *R v Ipeelee*, 2012 SCC 13 at paras 81, 84 [*Ipeelee*].

21 *Ibid* at para 87.

22 McCleery, *supra* note 11 at 158, citing *Ipeelee*, *supra* note 20 at paras 84–87; Johnathon Rudin, "Aboriginal Over-representation and *R v Gladue*: Where We Were, Where We Are and Where We Might Be Going" (2008) 40:1 SCLR 687 at 376.

## III. The Structure of NCRMD and Fitness Disposition Hearings

Part XX.I of the *Criminal Code* governs NCRMD and fitness dispositions. An NCRMD or fitness disposition refers to a decision made by a court or provincial review board about whether an NCRMD or unfit accused can be released into the public, with or without conditions, or whether continued treatment and monitoring of that individual is required. When a court decides that an accused is either NCRMD[23] or unfit to stand trial,[24] the court "may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing."[25] At this hearing, the court may decide to release or detain the accused "if it is satisfied that it can readily do so and that a disposition should be made without delay."[26] If a court does not make a disposition with respect to an NCRMD or unfit accused, a provincial review board must, barring exceptional circumstances,[27] hold a hearing and make a disposition within 45 "days after the [NCRMD or unfit] verdict was rendered."[28] If a court makes a disposition, other than an absolute discharge, a provincial review board must hold its own hearing and make a disposition within 90 days following the court's disposition.[29] Every NCRMD or fitness disposition made by a provincial review board must be reassessed by that review board within 12 months of the original disposition, "and every… [12] months thereafter for as long as the disposition remains in force."[30] With respect to an

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23 See *Criminal Code*, *supra* note 13, s 16. An accused will be found not criminally responsible on account of mental disorder if, at the time they committed an offence, they were suffering from a mental disorder that rendered them incapable of appreciating the nature and quality of the act or omission or of knowing it was wrong.

24 Section 2 of the *Criminal Code*, *supra* note 13 defines "unfit to stand trial" as an accused's inability, on account of mental disorder, to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel.

25 *Criminal Code*, *supra* note 13, s 672.45(1).

26 *Ibid*, s 672.45(2).

27 *Ibid*, s 672.47(2). If there are exceptional circumstances, the hearing and disposition may be rendered by a review board within 90 days after the initial verdict, rather than 45.

28 *Ibid*, s 672.47(1).

29 *Ibid*, s 672.47(3).

30 *Ibid*, s 672.81(1). Dispositions are not reviewed every 12 months if the accused receives an absolute discharge.

accused found unfit to stand trial, there is an additional obligation placed on the court that has jurisdiction over the accused: that court must hold an inquiry within two years of the unfit to stand trial verdict, "and every two years thereafter until the accused is [either] acquitted," or until the court can "decide whether sufficient evidence can be adduced at that time to put the accused on trial."[31] A review board also has the authority to determine whether "an accused who has been found unfit to stand trial" is fit to stand trial at the time of a disposition hearing.[32] If the review board finds the accused fit, they must "order that the accused be sent back to court, and the court shall try the [fitness] issue and render a verdict."[33]

When a court or provincial review board makes an NCRMD or fitness disposition, the safety of the public "is the paramount consideration."[34] Other relevant considerations include "the mental condition of the accused, the reintegration of the accused into society[,] and the other needs of the accused."[35] Nevertheless, the type of disposition granted largely depends on whether the accused is a significant threat to public safety. An accused will be a significant threat to public safety if they pose "a risk of serious physical or psychological harm to members of the public… resulting from conduct that is criminal in nature but not necessarily violent."[36] The risk of physical or psychological harm must go "beyond the merely trivial or annoying."[37] As stated in by the Supreme Court of Canada in *Winko v British Columbia (Forensic Psychiatric Institute)*, "[a] miniscule risk of a grave harm will not suffice. Similarly, a high risk of trivial harm will not meet the threshold."[38] A court or provincial review board must ask whether an NCRMD or unfit accused is a significant threat to public safety at every disposition hearing.

There are three types of dispositions available under s. 672.54 for someone found NCRMD: an absolute discharge, a conditional discharge, or detention in a hospital.[39] For an unfit accused, s. 672.54 only allows for a conditional discharge or detention in a hospital; an absolute discharge is unavailable since

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31 *Ibid*, s 672.33(1).

32 *Ibid*, s 672.48(1).

33 *Ibid*, s 672.48(2).

34 *Ibid*, s 672.54.

35 *Ibid*.

36 *Ibid*, s 672.5401.

37 *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 62, 175 DLR (4th) 193 [*Winko*].

38 *Ibid* at para 57.

39 *Criminal Code*, *supra* note 13, ss 672.54(a)–(c).

the guilt or innocence of that accused has not been tried.[40] However, if an accused is found permanently unfit and is not a significant threat to public safety, a review board may recommend to a court that an inquiry should be held to "determine whether a stay of proceedings should be ordered" for that accused.[41] It is unconstitutional to indefinitely detain a permanently unfit accused that poses no significant threat to the public.[42] Conversely, an accused found unfit, whether temporarily or permanently, that does pose a significant threat to public safety can be indefinitely detained in a hospital by a court or provincial review board.[43] The same is true for individuals found NCRMD. As stated by McCleery, "[i]f required to safeguard the public, significant restrictions may be placed on the liberty of an NCRMD accused, up to and including indefinite detention in a hospital."[44] Indefinite detention is an extreme option that should only be used when absolutely necessary to safeguard public safety.

The more likely outcome is one of the three dispositions available under s. 672.54. If an individual found NCRMD is not a significant risk to public safety, under s. 672.54(a), "the court or [r]eview [b]oard must direct that the accused be discharged absolutely."[45] The court or review board must be certain the NCRMD accused is a significant threat to the safety of the public; if they cannot come to a decision, or there is uncertainty about whether the accused poses a significant risk, the accused must be discharged absolutely.[46] Alternatively, there are two options if a court or review board concludes that an NCRMD or unfit accused is "a significant threat to the safety of the public:"

> It may order that the... accused be discharged subject to the conditions the court or Review Board considers necessary, or it may direct that the... accused be detained in custody in a hospital, again subject to appropriate conditions.[47]

When a court or review board is determining the appropriate type of disposition, they must choose "the least onerous and least restrictive"[48] option

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40 *R v Demers*, 2004 SCC 46 at para 34 [*Demers*].

41 *Criminal Code*, *supra* note 13, s 672.851(1); *Demers*, *supra* note 45 at para 66.

42 *Demers*, *supra* note 40 at para 66.

43 *Criminal Code*, *supra* note 13, s 672.39(1).

44 McCleery, *supra* note 11 at 171.

45 *Winko*, *supra* note 37 at para 48.

46 *Ibid* at paras 49, 62.

47 *Ibid* at para 62.

48 *Ibid* at para 47.

"that is necessary and appropriate in the circumstances."[49] This is also true of any conditions that attach to a conditional discharge or detention order.[50] The appropriate conditions that will be the least onerous and least restrictive will depend on an individualized assessment of the particular needs of the NCRMD or unfit accused. This will entail a consideration of public safety, as well as the other considerations outlined in s. 672.54: "the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused,"[51] including treatment.[52] Thus, while public safety is the predominant concern during disposition hearings, an accused's personal characteristics and treatment needs are still highly relevant to the type of disposition granted and any conditions attached to it. As the Ontario Court of Appeal stated:

> The Board is required to gather and review all available evidence pertaining to the four factors set out in s. 672.54. ...Failure to consider all of the factors when determining the least onerous and least restrictive disposition is an error of law.[53]

In the context of an Indigenous accused that is NCRMD or unfit, consideration of all available evidence requires a full application of *Gladue*. Conditions that might seem the least onerous or least restrictive to a non-Indigenous accused may be inappropriate and impose undue hardship on an

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49 *Criminal Code*, *supra* note 13, s 672.54. I recognize that this may not be an accurate statement of the law. It is, however, a fair interpretation. In 2014, Parliament changed the wording of s. 672.54 of the *Criminal Code*. Prior to 2014, s. 672.54 stated that a Review Board was to make "one of the following dispositions that is the least onerous and least restrictive." Bill C-54, known as *The Not Criminally Responsible Reform Act*, amended s. 672.54. That section no longer contains the terms "least onerous and least restrictive," but instead states "one of the following dispositions that is necessary and appropriate in the circumstances." The Supreme Court of Canada has not considered whether the least onerous and least restrictive standard still applies to s. 672.54. However, I could find no principled reason why this standard would not apply. Application of the least onerous and least restrictive standard would not preclude a review board from ordering a disposition that is necessary and appropriate in the circumstances. Thus, this paper continues under the presumption that the least onerous and least restrictive standard still applies to dispositions made under s. 672.54, as outlined in pre-2014 jurisprudence.

50 *Penetanguishene Mental Health Centre v Ontario (Attorney General)*, 2004 SCC 20 at para 67 [*Penetanguishene*].

51 *Criminal Code*, *supra* note 13, s 672.54.

52 *Penetanguishene*, *supra* note 50 at para 67.

53 *Tompkins (Re)*, 2018 ONCA 654 at para 24, citing *Winko*, *supra* note 37at para 55; *R v Aghdasi*, 2011 ONCA 57 at para 19; *Penetanguishene Mental Health Centre v Magee*, [2006] OJ No 1926, 80 OR (3d) (Ont CA) at paras 59, 65. *Tompkins (Re)* was cited with approval in *R v Denny*, 2019 NSCA 93 at para 20 [*Denny* (NSCA)].

Indigenous accused, depending on their unique circumstances. This could prolong their involvement with the review board system or even prevent their recovery and reintegration into society. It is therefore necessary to consider and apply *Gladue* principles to NCRMD and fitness disposition hearings. To date, *Gladue* principles are only partially applied.

## IV. The Current Role of *Gladue* in NCRMD and Fitness Disposition Hearings

The Ontario Court of Appeal is the only appellate court in Canada that has discussed how *Gladue* principles apply during NCRMD and fitness disposition hearings. In *R v Sim*, the Court held that *Gladue* principles apply to disposition hearings under s. 672.54.[54] That application, however, is limited. A review board only has a positive obligation to "ensure that it has adequate information in relation to the [A]boriginal background of an NCR accused" when the accused's eventual reintegration into society and other needs are "live issues."[55] In other words, when a review board is assessing the mental condition of the accused or the potential threat they pose to public safety, *Gladue* principles do not apply. A *Gladue* report is not required in every case, however a review board has a "legal duty to obtain such information where it would be pertinent and relevant to the disposition it is asked to make."[56] Justice Sharpe, writing for the Court, stated that *Gladue* had a limited role during disposition hearings because:

> [A]boriginal status would ordinarily have little direct bearing upon the dangerousness or the mental condition of the accused. An individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her [A]boriginal status.[57]

The Ontario Court of Appeal has reaffirmed that *Gladue* principles apply during NCRMD and fitness disposition hearings as recently as November 19, 2021. In *R v CK*, Justice Paciocco stated:

> In *Gladue*, the Supreme Court of Canada recognized that the systemic and direct discrimination against Indigenous persons is an omnipresent evil, and that the effect of discrimination on the offender is highly relevant information required to arrive at a fit sentence. In those circumstances, the case law evolved to make it crystal clear that

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54 *R v Sim*, [2005] OJ No 4432, at para 19, 78 OR (3d) 183 [*Sim*].

55 *Ibid* at para 29.

56 *Ibid*.

57 *Ibid* at para 18.

> Indigeneity is so important a consideration in arriving at a fit disposition that judges must be obliged to augment the adversarial system by ensuring that they have the information they need to discharge their existing responsibility to impose a just disposition. Parallel reasoning suggests that anytime courts are discharging their obligation to identify a fit disposition for Indigenous offenders, the same duty should apply. This line of reasoning explains the extension of the original *Gladue* principles to bail hearings, [and] disposition hearings for mentally disordered offenders.[58]

Albeit highly persuasive, the Ontario Court of Appeal's reasons in *Sim* and *CK* have not been consistently followed by courts or review boards across the country. In British Columbia, the provincial review board has applied *Gladue* during some disposition hearings, but not others. In *Alexis, Re*, for example, "the British Columbia Review Board explicitly embraced *Gladue* and applied the *Winko* duty with an eye to *Gladue* in order to ensure that the aboriginality of an NCR accused was properly considered."[59] However, as McCleery states in his analysis of British Columbia disposition hearings, in 2015-2016 the British Columbia Review Board rarely considered *Gladue* principles during disposition hearings: "[i]n the majority of the decisions… there is no acknowledgement of the requirements of *Gladue* and no meaningful consideration of the accused's Indigenous identity."[60]

In Nova Scotia, it is difficult to conclude whether *Gladue* has been consistently applied during disposition hearings since only the dispositions themselves are published, not the Nova Scotia Review Board's reasons.[61] However, by analyzing one Indigenous person's involvement with the provincial review board and various courts in the province, it becomes evident that a failure to consider *Gladue* principles during disposition hearings does not amount to a legal error in Nova Scotia.

Andre Noel Denny is an Indigenous male who "has been the subject of successive disposition hearings pursuant to s. 672.54 [...] since 2012."[62] Mr. Denny "is a member of the Membertou First Nation Reserve near Sydney, Nova

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58 *R v CK*, 2021 ONCA 826 at paras 78–79 [emphasis added].

59 *Sim*, *supra* note 54 at para 28, citing *Alexis, Re*, [2003] BCRBD No 1, 2003 CarswellBC 3702 (BC).

60 McCleery, *supra* note 11 at 182.

61 Every published disposition of the Nova Scotia Review Board is available at "Criminal Code Review Board – Disposition" online: *Government of Nova Scotia* <novascotia.ca/just/ccrb/ccrb_disposition.asp> [perma.cc/633U-RVKM]. After searching CanLII, Westlaw, and Lexis Advance Quicklaw, I was unable to locate decisions by the Nova Scotia Review Board.

62 *R v Denny*, 2016 NSSC 76 at para 13 [*Denny* (NSSC)]; Denny (NSCA), *supra* note 53 at para 2.

Scotia," but occasionally resided "at the Eskasoni First Nation Reserve" on Cape Breton Island.[63] He has received at least seven dispositions since 2014, and is currently detained at the East Coast Forensic Hospital.[64]

Mr. Denny became involved with the review board system after being found NCRMD on January 9, 2012, "on a charge of assault causing bodily harm." He was granted a conditional discharge. Five days later, he left the East Coast Forensic Hospital "without permission," "consumed some alcohol and crack cocaine," and got into an argument outside of a bar. This resulted in Mr. Denny killing a stranger by punching him two times, kicking him in the head, and "repeatedly hit[ting] his face into the pavement." Mr. Denny was in a state of psychosis at the time and was under the influence of alcohol and cocaine.[65] He was convicted of manslaughter.

A *Gladue* report was produced at Mr. Denny's sentencing hearing. It stated, among other things, that (a) Mr. Denny was exposed to "episodes of domestic violence and substance abuse" at the age of four; (b) showed interest in "[A]boriginal ways and culture, including, 'the traditional medicines'" that he was taught about as an adolescent; (c) has been living with "schizophrenia since he was approximately in his mid teens;" and (d) continues to abuse substances – a behaviour which he began in early adolescence.[66]

Despite this history and Mr. Denny's personal circumstances, this was the only time his Indigeneity was explicitly referenced in published materials. None of the seven dispositions published by the Nova Scotia Review Board mention that Mr. Denny is Indigenous, nor do any contain conditions that might benefit an Indigenous person found NCRMD, such as culturally appropriate treatment. This is in spite of the fact that prior to committing manslaughter, Mr. Denny had tried to enter "the Mi'kmaw Native Friendship Centre" in Halifax but was unable to do so because it was closed.[67]

Even the Nova Scotia Court of Appeal, when reviewing a Crown appeal from a 2018 Review Board disposition, failed to acknowledge that Mr. Denny was Indigenous. The Crown had appealed a decision to increase Mr. Denny's privileges within the East Coast Forensic Hospital. The Nova Scotia Court of

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63 *Denny* (NSSC), *supra* note 62 at para 13.

64 *Andre Denny Disposition Order* (7 December 2020), online (pdf): NSRB <novascotia.ca/just/ccrb/disposition/DENNY,%20Andre%20-%20Disposition%20-%20December%202020.pdf> [perma.cc/8L75-GFWA].

65 *Denny* (NSSC), *supra* note 62 at para 13.

66 *Ibid* at paras 74, 77, 86.

67 *Ibid* at para 13.

Appeal dismissed the appeal and stated that, "[a]bsent any error in law, I am unable to conclude the decision was unreasonable."[68] The review board in 2018 had considered medical evidence "which spoke to Mr. Denny's ongoing progress with treatment compliance and abstinence,... his efforts toward reintegration," his level of insight into his medical history, and his personal opinions about being permitted greater circulation in the community.[69] However, Mr. Denny's Indigeneity was seemingly not considered during the disposition hearing, including his prior interest in traditional medicines. Nevertheless, the Nova Scotia Court of Appeal found there was no error of law and dismissed the appeal.

The disregard for *Gladue* principles in British Columbia and Nova Scotia disposition hearings directly contradicts the approach outlined in *Sim*. As Justice Sharpe stated for the Court:

> Without actual evidence directing the mind of the decision-maker to the [A]boriginal circumstances of the accused, there is a serious risk that the decision-maker will simply assume that the needs of the [A]boriginal accused are the same as those of the non-[A]boriginal accused. This, it seems to me, is the very sort of systemic discrimination that *Gladue* seeks to eliminate.[70]

Unfortunately, the Ontario Review Board also fails to consistently apply *Gladue* principles following the decision in *Sim*. On the one hand, there are numerous examples of *Gladue* principles being considered, *Gladue* reports being ordered, or more fulsome *Gladue* reports being requested by the Ontario Review Board. In *L(E), Re*, for example, an Indigenous male was "found not criminally responsible on one count of second degree murder."[71] This individual was diagnosed with "Schizophrenia; Substance Abuse (Cannabis and Alcohol); Antisocial Personality Disorder; [and] Alcohol Related Neurodevelopmental Disorder" and had a mild intellectual disability.[72] No *Gladue* report was prepared,[73] but the Ontario Review Board did emphasize the individual's background when deciding whether he could be transferred to a less secure facility.

Specifically, the Review Board noted the following: the accused (a) "was raised in Grassy Narrows First Nation," (b) "suffered *in utero* exposure to

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68 *Denny* (NSCA), *supra* note 53at para 29.

69 *Ibid* at para 23.

70 *Sim*, *supra* note 54 at para 24.

71 *L(E), Re*, 2017 CarswellOnt 14082 at para 1.

72 *Ibid* at para 27.

73 *Ibid* at para 80.

alcohol," (c) had his mother pass "away when he was five years old due to… alcohol," (d) was "physically and emotionally abused" by his grandparents, (e) "was involved with the Anishinaabe Abinogii Family Services" between the ages of six to eleven, (f) became involved with "gang-related activities on [his First Nation] Reserve," and (g) was "heavily abusing substances, including alcohol, by age 14."[74] The Review Board also recognized the importance of maintaining L(E)'s weekly meetings with an Aboriginal Healer, who was able to "provide some one-on-one substance abuse counselling."[75] These personal circumstances are exactly what would be outlined in a *Gladue* report, and by factoring them into their reasons, the Ontario Review Board met its legal duty to consider all available evidence that is pertinent and relevant to the disposition it had to make.[76]

In *Oakes, Re* and *Kokokopenance, Re*, the Ontario Review Board also fulfilled its legal duty by requesting an initial *Gladue* report in the former case and a more extensive *Gladue* report in the latter. In *Oakes,* the Review Board was considering a variation to Mr. Oakes' disposition order that would allow for greater community access. Mr. Oakes "was found unfit to stand trial on account of mental disorder on charges of mischief" under $5000, breaking and entering, and four counts of breaching a release order.[77] He is Indigenous and a member of the Akwesasne Mohawk Nation.[78] There was no *Gladue* report. A doctor who testified "acknowledged that Mr. Oakes' connection with his Mohawk heritage is important and that arrangements should and could be made for him to participate more."[79] However, without the benefit of a *Gladue* report, it was difficult for the Review Board to determine exactly how more community access could increase Mr. Oakes' connection to his Indigenous heritage. The Review Board decided to "order a *Gladue* Report, as this could be helpful, if not fundamental, to the direction that Mr. Oakes' life takes with regard to his Indigenous heritage."[80]

Similarly, in *Kokokopenance*, the Review Board requested "a more fulsome *Gladue* Report" as part of their duty to seek out pertinent and relevant

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74 *Ibid* at paras 12, 13, 16.

75 *Ibid* at para 100.

76 *Sim*, *supra* note 54 at para 29.

77 *Oakes, Re*, 2020 CarswellOnt 16371 (ON) at para 1.

78 *Ibid* at para 14.

79 *Ibid* at para 27.

80 *Ibid* at para 44.

information.[81] After considering the evidence available at the time of the disposition hearing, the Review Board concluded that:

> [F]urther information both with respect to Mr. Kokokopenance's [A]boriginal background and the resources which may be available to assist him in his home community as well as the Southern Ontario Community pending his transfer to the Northwest would be of great assistance to the treatment team both in treating him and in finding a residence which could meet his needs.[82]

Although these decisions show *Gladue* being applied to the "reintegration" and "other needs of the accused" factors in s. 672.54, there have been instances where the Ontario Review Board either failed to consider *Gladue* principles or outright declined to consider them, contrary to *Sim*. In *Ootoova, Re*, for example, the Ontario Review Board refused to do a *Gladue* analysis because, in those circumstances, their decision would be the same with or without the analysis.[83] This is an error of law. To reiterate, the Ontario Court of Appeal held in *Sim* that a review board has a legal duty to obtain information that would be pertinent and relevant to its decision. By refusing to conduct a *Gladue* analysis, the Ontario Review Board neglected this duty.

At one point in their reasons, the Review Board stated that a *Gladue* analysis would provide "an additional lens and… might support transfer."[84] The fact that such an analysis "might" support the very disposition the Review Board granted means it was relevant. Evidence that is relevant "must simply tend to 'increase or diminish the probability of the existence of a fact in issue.'"[85] As Justice Paciocco (as he then was), Palma Paciocco, and Lee Stuesser explain in *The Law of Evidence*,

> Evidence is relevant where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence.[86]

In *Ootoova*, the issue before the Review Board was whether it was in the best interests of Mr. Ootoova, and the public, to transfer him from the Secure Forensic Unit of Providence Care Hospital in Kingston, Ontario, to the

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81 *Kokokopenance, Re, 2018 CarswellOnt 1731* at para 38.

82 *Ibid* at para 38.

83 *Ootoova, Re*, 2021 CarswellOnt 3867 (ON) at para 60 [*Ootoova*].

84 *Ibid*.

85 *R v Arp*, [1998] 3 SCR 339 at 38, 166 DLR (4th) 296.

86 David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law Inc, 2020) at 35.

Royal Ottawa Mental Health Centre. Mr. Ootoova opposed the transfer.[87] Mr. Ootoova is an Inuit man who was "found unfit to stand trial on a charge of murder" in 2019.[88] The alleged murder occurred in Ottawa, where Mr. Ootoova had been living since 2011. The deceased was his mother. The Review Board reasoned that, in relation to Mr. Ootoova's Inuit ancestry, their decision to transfer Mr. Ootoova to Ottawa was the most culturally appropriate disposition. This was because "[t]here are more cultural services in Ottawa and more citizens of Inuit heritage living there."[89]

At first glance, it might appear as if the Review Board's decision to refuse a *Gladue* analysis was appropriate because his needs as an Inuit person would be best met in Ottawa. This is incorrect. The Ontario Review Board simply assumed that Mr. Ootoova's individual needs would be better met in Ottawa without actually analyzing whether there were personal circumstances related to his Indigeneity that might oppose the transfer. Mr. Ootoova himself preferred to stay in Kingston, and this "blanket-assumption" reasoning used by the Ontario Review Board is the exact type of injustice the Ontario Court of Appeal cautioned against in *Sim*:

> Failure to advert to the unique circumstances of [A]boriginal offenders when making decisions relating to their reintegration into the community falls squarely within the category of systemic problems identified in *Gladue* as contributing to the failure of the criminal justice system to respond to the particular circumstances and needs of [A]boriginal peoples.[90]

Therefore, it was an error for the Ontario Review Board to simply assume that a transfer was in Mr. Ootoova's best interests without considering his unique circumstances, as outlined during a *Gladue* analysis. Even if a *Gladue* analysis would have supported a transfer to Ottawa, the Review Board was still under a legal duty to consider *Gladue* factors since they were relevant to the decision.

This section has shown that *Gladue* principles are inconsistently applied during NCRMD and fitness disposition hearings. In British Columbia and Nova Scotia, *Gladue* is rarely considered, and review boards are not bound by *stare decisis* to consider *Gladue* when making dispositions. Alternatively, the Ontario Review Board must consider *Gladue* principles when pertinent and relevant to their decision. The application of those principles is limited, and

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87 *Ootoova*, *supra* note 83 at para 57.

88 *Ibid* at para 1.

89 *Ibid* at para 58.

90 *Sim*, *supra* note 54 at para 23.

even though consideration of *Gladue* is a requirement in Ontario, it is still misapplied or neglected entirely. The easiest way to address this problem is to outline why a full *Gladue* analysis might be beneficial during NCRMD and fitness disposition hearings that involve an Indigenous accused.

## V. Expanding the Use of *Gladue* in NCRMD and Fitness Disposition Hearings

As stated above, the Ontario Court of Appeal in *Sim* limited the application of *Gladue* principles during NCRMD and fitness disposition hearings. The Court held that *Gladue* need only be considered when an individual's reintegration into society and other needs are at issue. According to the Court, *Gladue* has no role when evaluating the mental condition of an accused or the risk they pose to the public. The Court stated that "[a]n individual will not be more or less dangerous, nor will an individual be more or less mentally ill, because of his or her [A]boriginal status."[91] This final section outlines different ways *Gladue* can be relevant to risk assessments and the mental condition of an accused.

### A. The Relationship Between *Gladue* and "Significant Threat to Public Safety"

#### *1. Bail Hearings and s. 515(10)(b) of the Criminal Code*

An NCRMD or unfit accused will be a significant threat to the public if they pose "a [foreseeable] risk of serious physical or psychological harm to members of the public… resulting from conduct that is criminal in nature but not necessarily violent."[92] As stated above, the risk cannot be "merely trivial or annoying."[93] Instead, "the threat must be 'significant' and must relate to the commission of a 'serious criminal offence.'"[94] This concept of risk assessment is not unique to NCRMD and fitness disposition hearings – it can be seen, with slight modifications, in parole hearings, dangerous offender designations,

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91 *Ibid* at para 18.

92 *Criminal Code*, *supra* note 13, s 672.5401; *Winko*, *supra* note 37 at para 62.

93 *Winko*, *supra* note 37 at para 62.

94 Joan Barrett & Riun Shandler, *Mental Disorder in Canadian Criminal Law* (Toronto: Thomson Reuters Canada, 2019) at 9-12.

sentencing principles, and bail hearings. Since *Gladue* principles apply to each of these components of the criminal justice system, it is necessary to analyze what value *Gladue* has when assessing dangerousness in these different contexts. Since this topic can be an entire research article on its own, this subsection focuses solely on how *Gladue* is applied during bail and whether similar reasoning is transferable to NCRMD and fitness disposition hearings.

S. 515(10) of the *Criminal Code* outlines the primary, secondary, and tertiary grounds that justify pre-trial detention of an accused. The concept of dangerousness is contained in s. 515(10)(b), often referred to as the "secondary grounds." This section allows an accused to be detained in custody if:

> [T]he detention is necessary for the protection or safety of the public... having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.[95]

Although "[t]he Supreme Court of Canada has yet to provide any guidance on how the *Gladue* principles ought to impact bail decisions,"[96] the Ontario Court of Appeal provided an explanation of the relevance of *Gladue* during bail in *R v Robinson*. The Court stated that the application of *Gladue* principles during bail hearings:

> [W]ould involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular [A]boriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary, and tertiary grounds for release.[97]

By limiting *Gladue*'s relevance to the types of conditions necessary to alleviate public safety risks under s. 515(10)(b), it is not immediately evident how the application of *Gladue* during bail might be relevant to assessing dangerousness during NCRMD and fitness dispositions. During bail hearings, the application of *Gladue* to public safety concerns is twofold: (a) what unique background and systemic factors brought that Indigenous person before the court and (b) due to these factors, what, if any, conditions are available that can alleviate public safety concerns. In other words, *Gladue* is applied during bail hearings both before and after conditions are considered. As outlined by Benjamin A. Ralston, this approach was used in *R v Magill*, *R v DD(P)*, and *R v*

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95 *Criminal Code*, *supra* note 13, s 515(10)(b).

96 Ralston, *supra* note 14 at 300.

97 *R v Robinson*, 2009 ONCA 205 at para 9.

*Duncan*.[98] Alternatively, during an NCRMD disposition hearing, an individual's dangerousness is assessed before conditions are considered. This is because conditions will only be part of an NCRMD disposition under s. 672.54 when the individual poses a significant threat to the public. It is at this stage that the reasoning used during bail hearings might be transferable to disposition hearings – specifically, what background and systemic factors may have brought that Indigenous person before the court.

A *Criminal Code* review "[b]oard is a court of competent jurisdiction."[99] An accused found NCRMD will only be in front of that review board if they are a significant threat to the public.[100] Background and systemic factors that contribute to the dangerousness of an Indigenous person found NCRMD can therefore be relevant, since it is the dangerousness itself that causes their continued appearance in front of the review board. For an unfit Indigenous accused, dangerousness is still a consideration when determining appropriate conditions.[101] However, since an absolute discharge is unavailable to unfit individuals, it is their lack of fitness to stand trial that causes continued hearings before a review board, not their dangerousness. The background and systemic factors that contribute to an Indigenous accused's unfitness would be relevant in this situation.

During bail hearings, the background and systemic factors considered under the secondary grounds are not always causally linked to an accused's risk of reoffending. Requiring such a causal link would be an error of law, as outlined in *Ipeelee*.[102] However, there are still situations in bail where a causal link is established between risk of reoffending and background and systemic factors. In *R v Duncan*, for example, a *Gladue* analysis showed that the Indigenous accused had "a history of personal and intergenerational addictions and poverty linked to broader systemic and background factors."[103] The accused had a long criminal record that included numerous convictions for breaking and entering.[104] The causal link between poverty and break and enters is self-explanatory. The Court in *Duncan* ultimately imposed strict release conditions

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98 Ralston, *supra* note 14at pp 306–08.

99 *R v Conway*, 2010 SCC 22 at para 84.

100 This is true except in the case of an individual found NCRMD that was granted an absolute discharge at their initial disposition hearing.

101 *Demers*, *supra* note 40 at para 10.

102 *Ipeelee*, *supra* note 20 at para 84.

103 Ralston, *supra* note 14 at 307, citing *R v Duncan*, 2020 BCSC 590 [*Duncan*].

104 Ralston, *supra* note 14 at 307, citing *Duncan*, *supra* note 103 at para 32.

on the accused, including participation in a residential treatment program, that were considered "a culturally responsive and appropriate application of the *Gladue* factors."[105] Since a causal link can be established between an accused's background and systemic factors and their risk of reoffending, as shown *Duncan*, it is reasonable to conclude that a similar causal link can be identified by a *Gladue* analysis during a review board's assessment of dangerousness. The question then becomes, however, whether this type of analysis has any value. There are at least four reasons why it might.

### *2. The Analytical Value of Applying Gladue Principles to Assessments of Dangerousness*

First, the Ontario Court of Appeal was correct in *Sim* when they stated that "[a]n individual will not be more or less dangerous… because of his or her [A]boriginal status."[106] To conclude otherwise would be to invoke the same prejudicial thinking *Gladue* sought to erase. However, an individual may be less dangerous due to the location they live in because of their Indigenous status. In *Winko*, the Supreme Court of Canada outlined relevant factors a review board should consider when determining "whether the accused meets [the] threshold test of dangerousness."[107] These factors are non-exhaustive and include: "the nature of the harm that may be expected; the degree of risk that the particular behaviour will occur; the period of time over which the behaviour may be expected to manifest itself and the number of people who may be at risk."[108] Therefore, an Indigenous accused who ordinarily resides in a First Nation community may be considered less dangerous if the population is small and access to that community is difficult.

Additionally, the concept of risk in this *Winko* factor is not conclusively defined. This potential ambiguity leads to two observations. First, the number of people who may be at "risk" incorporates, at least implicitly, a geographic and proximity analysis into assessments of dangerousness. There will be more people at risk if an accused is absolutely discharged into downtown Toronto, for example, than there would be if they were absolutely discharged into a remote fly-in community such as Moose Factory, Ontario. While it must be acknowledged that the mobility rights of an accused absolutely discharged are

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105 *Duncan*, *supra* note 103 at para 38, cited in Ralston, *supra* note 14 at 308.

106 *Sim*, *supra* note 54 at para 18.

107 Barrett & Shandler, *supra* note 94 at 9-13.

108 *Winko*, *supra* note 37 at para 141 [emphasis added], cited in Barrett & Shandler, *supra* note 94 at 9-13.

not affected due to a lack of conditions, in the context of Indigenous offenders, the remoteness and personal ties an individual accused has to their community will be relevant when analyzing how many people they will be exposed to upon release. Some may have remained exclusively within their First Nations community prior to a disposition hearing, while others may have few ways of leaving due to transportation limitations. Both possibilities could be discovered in a *Gladue* analysis. Second, it can be argued that the risk an individual poses varies based on who they are in proximity to. For example, an accused that exhibits violent behaviour during a period of psychosis may be more of a risk if surrounded by children than they would be if surrounded by police officers. Albeit a far-fetched example, there is some merit to this type of reasoning. Although a non-dangerous NCRMD accused would not be subject to conditions, the types of voluntary services, supports, and supervision available in their community could be relevant considerations. Access to an Elder and traditional medicines, for example, might assist with risk management if this type of relationship is of personal, cultural, and/or spiritual significance to the particular Indigenous accused. Similarly, if an Indigenous NCRMD accused has a close relationship with a trustworthy individual, this could mitigate the risk the accused poses to the public. Similar to the supervisory role of a surety in the bail context, if there is a responsible person who is regularly near the accused, such as a relative or roommate, the likelihood of the accused committing a serious criminal offence may be reduced. Of course, this individual would not be obligated to perform a supervisory role like a surety would be, but their potential to manage any risk the accused poses to the public is still relevant. Therefore, community characteristics, the relationship of the accused to their community, and the relationship of the accused to members of that community are all relevant factors when assessing the dangerousness of the accused. For an Indigenous accused, the only way to ensure these factors are considered in a culturally appropriate manner is through a *Gladue* analysis.

Second, the application of *Gladue* principles requires more than just a cursory analysis of why an Indigenous accused is before the courts and what types of sanctions or conditions are appropriate given the accused's Indigenous background. As stated by Professor Andrew Martin, it can also include "a recognition of the legal implications of the unique circumstances of Indigenous persons, past and present, particularly their alienation from the criminal justice system, the impact of discrimination, cultural genocide, dislocation, and poor

social and economic conditions."[109] Applying this broader definition of *Gladue* principles during an assessment of dangerousness may allow a review board to give effect to Parliament's "emphasis upon the goals of restorative justice" and reconciliation with Indigenous peoples.[110]

Restorative justice is a difficult concept to define. Central to the concept, however, is healing damaged relationships between an accused, victim, and community. The Supreme Court of Canada, for example, stated that:

> Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community.[111]

As this definition shows, restorative justice "involves the principles of repairing harm, healing, restoring relationships, accountability, community involvement, and community ownership."[112] There is at least one way Professor Martin's definition of *Gladue* principles can contribute to a restorative justice approach during a review board's assessment of dangerousness.

Restoring and healing relationships requires judicial recognition of the fact that an Indigenous accused may only pose a significant threat to the public because of the harms inflicted on them by colonization and assimilationist polices. By examining "the impact of discrimination, cultural genocide, dislocation, and poor social and economic conditions,"[113] a review board can consider the underlying causes of an Indigenous individual's dangerousness. A review board can then, depending on the individual circumstances, determine whether dangerousness was caused completely, or in part, by the actions of the Canadian government. Instead of simply labelling an Indigenous NCRMD or unfit accused as a significant threat to the public, a review board can also recognize this is not entirely the accused's fault. This apportionment of

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109 Andrew Flavelle Martin, "Creative and Responsive Advocacy for Reconciliation: The Application of *Gladue* Principles in Administrative Law" (2020) 66:2 McGill LJ 337 at 346.

110 *R v Proulx*, 2000 SCC 5 at para 19 [*Proulx*].

111 *Ibid* at para 18.

112 J Wilton Littlechild, "Commission on First Nations and Métis Peoples and Justice Reform: 2003 Interim Report and 2004 Final Report" in WD McCaslin, ed, *Justice as Healing: Indigenous Ways* (Minnesota: Living Justice Press, 2005) at 328.

113 Martin, *supra* note 109 at 346.

accountability can (a) assist that Indigenous accused with their healing by providing them with a greater understanding of the causes for their actions; (b) restore the relationship between the accused, their community, and possibly the Canadian government by recognizing the past harms that contributed to their conduct; and (c) allow the accused to take accountability for their actions in a manner that is proportionate to their level of blameworthiness, if any. Thus, to give effect to Parliament's emphasis on restorative justice, a broad application of *Gladue* principles is required when assessing whether an Indigenous accused is a significant threat to the public.

Third, applying *Gladue* principles in this manner is consistent with the purpose of the review board system, Canada's international obligations under UNDRIP, and the duty to respond to systemic problems outlined by the TRC. As stated in *R v Demers*, "[t]he pith and substance of Part XX.1 [of the *Criminal Code*] is revealed by its twin goals of protecting the public and treating the mentally ill accused fairly and appropriately."[114] To treat a mentally ill Indigenous accused fairly and appropriately, a review board must recognize that, as per Article 24(2) of UNDRIP, "Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health."[115] For an Indigenous NCRMD or unfit accused, the highest attainable standard of mental heath may only be reached if the unique systemic and backgrounds factors that contribute to the accused's dangerousness are canvassed and understood by that individual. This can be achieved through a broad application of *Gladue* principles, as outlined above.

Similarly, the highest attainable standard of mental health would be a standard that accurately reflects the dangerousness of an Indigenous individual. Further detention in a hospital based solely on an inaccurate analysis of dangerousness may exacerbate mental health issues, particularly if the needs of that individual are better met in the community. Again, as outlined above, dangerousness may only be accurately assessed if a review board considers the number of people an accused poses a significant risk to. For an Indigenous NCRMD accused, this consideration requires the application of *Gladue* principles.

Finally, at Call to Action 19, the TRC "called upon the federal government to 'close the gap in health outcomes between Aboriginal and non-Aboriginal

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114 *Demers*, *supra* note 40 at para 18, citing *Winko*, *supra* note 37 at para 20.

115 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess (2007) (UNDRIP), Article 24(2).

communities,' including mental health."[116] One argument advanced above outlined the potential healing benefit associated with identifying the root causes of dangerousness. By virtue of being a benefit, the potential healing provided by a robust *Gladue* analysis may help close the gap in health outcomes identified by the TRC. It is also possible to argue that, due to this potential benefit, a review board must apply *Gladue* principles during dangerousness assessments to satisfy Call to Action 19. Although this Call to Action specifically calls on the federal government, the Supreme Court of Canada has recognized that Parliament placed a greater emphasis on achieving the goals of restorative justice through the enactment of s. 718.2(e) of the *Criminal Code*.[117] In other words, the concept of healing, which is a goal of restorative justice, was given greater weight due to the legislative actions of the federal government. *Gladue* principles arose from an interpretation of s. 718.2(e) and can provide a potential healing benefit if applied to dangerousness assessments during NCRMD and fitness disposition hearings. Since this healing benefit can potentially close the gap in health outcomes between Aboriginal and non-Aboriginal communities, as outlined above, a review board must apply *Gladue* principles to dangerousness assessments if seeking to act in accordance with Call to Action 19. A review board in this situation would be giving effect to government conduct that established principles, through statutory interpretation, capable of providing a healing benefit. That healing benefit can address the gap in health outcomes between Aboriginal and non-Aboriginal communities and can only arise in this specific situation if a review board applies *Gladue* principles during dangerousness assessments. Therefore, *Gladue* principles must be applied to dangerousness assessments during NCRMD and fitness disposition hearings.

Although this argument is difficult to make and certainly subject to challenge, it further emphasizes the main point of this section – that there is a potential benefit to applying *Gladue* principles when determining whether an individual poses a significant threat to the public. This section focused on how *Gladue* could be incorporated into a legal analysis of dangerousness, and how that information may be "pertinent and relevant to the disposition" a review board "is asked to make."[118] The next section focuses on how *Gladue* can be used to analyze a medical assessment of dangerousness.

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116 Graham et al, *supra* note 10 at 3.

117 *Proulx*, *supra* note 110 at para 19.

118 *Sim*, *supra* note 54 at para 29.

## B. *Gladue* and Forensic Psychiatry: Indigeneity Considerations During Medical Evaluations of Dangerousness

During a disposition hearing under s. 672.54, there is no presumption of dangerousness and no burden on an NCRMD or unfit accused to prove they are not a significant threat to the public.[119] That "legal and evidentiary burden" rests solely on the court or review board making the disposition.[120] To meet this burden, a review board exercises inquisitorial powers.[121] The review board will consider a number of factors when exercising these powers. In addition to the four non-exhaustive factors from *Winko* outlined in Part V(a)(ii), other relevant evidence may include "the recommendations of experts who have examined the NCR accused,"[122] and "the accused's actuarial test results."[123] Relevant actuarial tests include the Hare Psychopathy Checklist-Revised ("PCL-R"), the Violence Risk Appraisal Guide ("VRAG"), and the Sex Offender Risk Appraisal Guide ("SORAG").[124] A *Gladue* analysis may help uncover different ways this evidence can cause a review board to incorrectly conclude that an Indigenous offender is a significant threat to the public.

### *1. Expert Recommendations*

The Supreme Court of Canada has recognized that "the assessment of whether… [an accused's] mental condition renders him a significant threat to the safety of the public calls for significant expertise."[125] In fact:

> To make these difficult assessments of mental disorders and attendant safety risks, the [Review] Board is provided with expert membership and broad inquisitorial powers. While the chairperson is to be a federally appointed judge, or someone qualified for such an appointment, at least one of the minimum of five members must be a qualified psychiatrist. If only one member is so qualified, at least one other member must "have training and experience in the field of mental health," and be entitled to practise [*sic*] medicine or psychology.[126]

Since "[t]he recommendations of experts who have examined the accused are generally accorded significant weight when assessing the accused's

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119 *Winko*, *supra* note 37 at para 46.

120 *Ibid* at para 54.

121 *R v Owen*, 2003 SCC 33 at para 29 [*Owen*].

122 Barrett & Shandler, *supra* note 94 at 9-16, citing *Winko*, *supra* note 37 at para 61.

123 Barrett & Shandler, *supra* note 94 at 9-18.

124 *Ibid*.

125 *Owen*, *supra* note 132 at para 30.

126 *Ibid* at para 29.

dangerousness,"[127] expert recommendations can detrimentally affect an Indigenous accused if their examination of dangerousness is not conducted in a culturally appropriate way. An accused's mental disorder, available treatment options, and the effectiveness of those treatment options are all factors a review board may consider when assessing dangerousness.[128] They also, by necessity, require input from an expert to be properly evaluated. Therefore, the diagnostic tools used by experts to diagnose mental disorders should be analyzed through a *Gladue* lens to ensure they do not discriminate against an Indigenous accused.

The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* ("*DSM-V*") is the diagnostic tool used by psychiatrists to diagnose mental disorders. As stated by Dr. Roberto Lewis-Fernandez and colleagues, "[c]ulture affects the clinical encounter for every patient, not only underserved minority groups, and cultural formulation therefore is an essential component of any comprehensive assessment."[129] The *DSM-V* recognizes the impact of culture on the diagnostic process through implementation of the Cultural Formulation Interview ("CFI"). The CFI "consists of a core 16-item questionnaire supplemented by 12 modules for further assessment as well as an informant version to obtain material from care-givers."[130] Generally speaking, the CFI allows a health practitioner to obtain "clinical information in four domains: (1) cultural identity of the individual, (2) cultural explanations of illness, (3) cultural interpretation of psychosocial stressors, supports, and levels of functioning, and (4) cultural elements of the patient-clinician relationship."[131] This information helps inform a clinician's diagnosis of a mental disorder, if any.

This individualized assessment of the relationship between culture and mental disorder diagnoses is similar to information that could be revealed by a *Gladue* analysis. Albeit similar, there is one important difference: within the context of diagnosing a mental disorder, the cultural factors deemed relevant, and the methods used to evaluate those factors, were created from a medical perspective, not legal. Alternatively, a *Gladue* analysis is strictly legal. Since the mental condition of an accused is relevant when assessing dangerousness, the diagnosis of a mental disorder can have legal implications. The *DSM-V* may

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127 Barrett & Shandler, *supra* note 94 at 9-16, n 48.

128 *Ibid* at 9-16 to 9-18.

129 Roberto Lewis-Fernandez et al, "Culture and Psychiatric Evaluation: Operationalizing Cultural Formulation for *DSM-5*" (2014) 77:2 Psychiatry 130 at 131.

130 *Ibid* at 131.

131 *Ibid* at 133. These domains originated from the "Outline for Cultural Formulation" (OCF), which was the predecessor to the CFI.

specify certain treatments for a particular mental disorder, for example, and thereby affect the "treatment-compliance" consideration in a dangerousness assessment.

One way that *Gladue* could supplement this assessment is by providing a different perspective to view cultural factors that are assessed during a mental disorder diagnosis. This additional perspective is especially important since the *DSM-V* recognizes "difficulties in judging illness severity or impairment" as one of "five main situations when assessment of cultural factors may be especially relevant for patient care."[132] Specifically, *Gladue* can be used to compare and contrast evidence obtained through the CFI to the evidence outlined in a *Gladue* Report. If there are discrepancies between the two, a review board can then assess whether any information missing affected the diagnosis of an Indigenous accused. If it did, the review board can then consider whether this improper or tainted diagnosis has any bearing on the risk the accused poses to the public. This way, a review board can be satisfied that the dangerousness of an accused is completely analyzed, both from a medical and legal perspective.

### *2. Actuarial Test Results*

Unlike the *DSM-V*, actuarial tests such as the PCL-R, VRAG, and SORAG do not contain cultural considerations. The PCL-R, for example, "is a 20-item symptom rating scale of psychopathic personality disorder intended for use in forensic settings."[133] It focuses solely on symptoms – such as "pathological lying," "poor behavioural controls," and "impulsivity"[134] – and provides a rating based on the frequency of those symptoms throughout an individual's life.[135] When researchers conducted a cross-cultural analysis of PCL-R test results across North America and Europe, they concluded that "[o]verall, the findings indicated the presence of a significant culture bias in PCL-R ratings."[136] This culture bias resulted in certain symptoms being "more useful [at assessing psychopathic personality disorder] in North America as compared with Europe."[137]

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132 *Ibid* at 145.

133 David J Cooke et al, "Searching for the Pan-Cultural Core of Psychopathic Personality Disorder" (2005) 39 Personality and Individual Differences 283 at 284.

134 *Ibid* at 289.

135 *Ibid* at 284.

136 *Ibid* at 283.

137 *Ibid* at 292.

Similarly, the VRAG attributes a score to certain events in a person's life, such as prolonged separation from biological parents and a "history of alcohol or drug problems."[138] These scores are then used to assess an individual's "risk of criminal violence after release [in]to the community."[139] The SORAG operates in a similar way and assesses an individual's risk of committing sexual offences. However, neither of these actuarial tests consider the cultural context surrounding past life events. For example, the VRAG does not consider the effects of community and familial fragmentation caused by the Residential School System, the Sixties Scoop, or provincial child welfare systems when assessing an Indigenous person's separation from their biological parents. Since these test results may be considered by a review board during an assessment of dangerousness, there is a possibility that, due to the lack of cultural considerations, the threat posed by an Indigenous accused will be overestimated. Different courts across Canada have already recognized this risk associated with actuarial test results.

In *Ewert v Canada*, for example, the Supreme Court of Canada commented on the use and validity of actuarial tests when assessing the risk posed by Indigenous offenders in the correctional system. In that case, "the [Correctional Service of Canada's ("CSC")] reliance on certain psychological and actuarial risk assessment tools" was challenged by Mr. Ewert, a Métis offender, "on the ground that the validity of the tools when applied to Indigenous offenders has not been established through empirical research."[140] Three of the actuarial risk assessment tools Mr. Ewert challenged were the PCL-R, the VRAG, and the SORAG.[141] Benjamin A. Ralston provides a clear summary of the Court's decision:

> The Court held that the risk that these actuarial tools may overestimate the risk posed by Indigenous people[s] could unjustifiably contribute to disparities in correctional outcomes in a variety of areas where Indigenous peoples are already disadvantaged, potentially leading to harsher prison conditions, higher security classifications, unnecessary denial of parole, reduced access to rehabilitative opportunities, and reduced access to Indigenous-specific programming. As a result, <u>any</u> overestimation of the risk posed by Indigenous people would not only undermine the promotion of

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138 Melanie Dougherty, "VRAG-R Scoring Sheet" (n.d.) at pp 1-2, online (pdf): *VRAG-R Official Website* <www.vrag-r.org/wp-content/uploads/2016/12/VRAG-R-scoring-sheet-1.pdf> [perma.cc/4DA2-BMPZ].

139 Marnie E Rice, Grant T Harris & Carol Lang, "Validation of and Revision to the VRAG and SORAG: The Violence Risk Appraisal Guide – Revised (VRAG-R)" (2013) 25:3 Psychological Assessment 951 at 951.

140 *Ewert v Canada*, 2018 SCC 30 at para 4 [*Ewert*].

141 *Ibid* at para 11.

> substantive equality if correctional outcomes for Indigenous inmates, it would also frustrate the CSC's statutory purposes of providing humane custody, and assisting in rehabilitation of offenders and their reintegration in the community as well.[142]

Although the decision in *Ewert* was reached in the context of correctional services, the Court still recognized that the actuarial tests relied on in NCRMD and fitness disposition hearings may overestimate the risk posed by Indigenous peoples. This overestimation of risk can, like it does in the correctional setting, frustrate Parliament's emphasis on rehabilitation and reintegration in s. 672.54 of the *Criminal Code*. Application of *Gladue* principles may help counteract this overestimation of risk. For example, in *R v George*, the "British Columbia Court of Appeal stated that, "seemingly neutral considerations in the assessment of an individual's risk and dangerousness could disproportionately impact some Indigenous individuals due to systemic and background factors."[143] These systemic and background factors could include the fact that Indigenous peoples are disproportionately overrepresented in the child welfare system and therefore more likely to be separated from their biological parents.[144] It could also include the fact that trauma caused by the Residential School System "continue[s] to have long-term and intergenerational effects on health… including higher rates of depression, mental distress, [and] substance misuse."[145] The actuarial tests listed above do not recognize that these systemic and background factors can contribute to higher test scores and thus an overestimation of risk. This creates a possibility of "systemic discrimination" that courts and review boards "need to be alive to."[146] A *Gladue* analysis can outline how systemic and background factors affected a particular Indigenous accused, and therefore challenge the validity of actuarial test results relied on to assess dangerousness during disposition hearings.[147]

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142 Ralston, *supra* note 14 at 146 [emphasis in original], citing *Ewert*, *supra* note 140 at para 65.

143 Ralston, *supra* note 14 at 330, citing *R v George*, [1998] BCJ No 1505, 1998 CanLII 5691 (CA) at para 18.

144 Nico Trocmé, Della Knoke & Cindy Blackstock, "Pathways to the Overrepresentation of Aboriginal Children in Canada's Child Welfare System" (2004) 78:4 Soc Service Rev 577 at 577-578.

145 Graham et al, *supra* note 10 at 2.

146 Ralston, *supra* note 14at 330.

147 For a recent discussion about using actuarial tests to assess the risk posed by an Indigenous accused, see *R v Natomagan*, 2022 ABCA 48: "[a]fter examining the evidence on actuarial assessment methodology in some depth, we conclude it is prone to overestimating the risk posed by Indigenous offenders by failing to consider or to account for past discrimination, thereby potentially contributing to custodial over-representation" at para 13.

There are undoubtedly other ways *Gladue* can apply to assessments of dangerousness. The reasoning above may also be transferable to a review board's consideration of the mental condition of the accused under s. 672.54. However, the purpose of this section was not to canvass every possible application of *Gladue* principles. Rather, the purpose of this section was to show that *Gladue* principles can be relevant to assessments of dangerousness in a manner not considered by the Ontario Court of Appeal in *Sim*. It is an important analysis a review board should consider when dealing with an Indigenous accused.

## V. CONCLUSION

As the Honourable Mary Ellen Turpel-Lafond (as she then was) once said:

> The reasoning in the *Gladue* decision is not of the sort that is narrowly confined to one specific component of the administration of justice, or criminal procedure. It is broad and of vast significance. Presumably, it will be introduced in a variety of contexts in the future with interesting results.[148]

This paper has outlined one of those new contexts – NCRMD and fitness disposition hearings under s. 672.54 of the *Criminal Code*. As the Ontario Court of Appeal held in *Sim*, *Gladue* applies to disposition hearings under s. 672.54 when the accused's eventual reintegration into society and other needs are live issues. Although a *Gladue* report might not be required in every case, a review board has an obligation to obtain such information when it would be pertinent and relevant to the disposition it must make. This could include information such as the spiritual significance a community healing circle might have for an individual, or the way an Elder might assist a particular accused with their treatment.

As shown by decisions such as *Ootoova* and *Denny*, courts and review boards still fail to correctly apply *Gladue* principles during disposition hearings. This needs to change. *Gladue* marked a revolutionary shift in the way the criminal justice system treats Indigenous peoples, and, as the Supreme Court of Canada stressed in *Ipeelee*, *Gladue* principles apply to every case involving an Indigenous person. Although situations may arise where a *Gladue* analysis is truly unnecessary, there are still numerous ways *Gladue* can apply during a disposition hearing. Whether it provides greater insight into the number of

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148 (Hon) ME Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue" (2000) 43 CLQ 34 at 40.

people at risk from an accused or ensures that all relevant cultural factors are considered when assessing dangerousness, a *Gladue* analysis can be a valuable resource at all stages of a disposition hearing. It is time the review board system recognizes this.