Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors

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The Gladue decision can be considered a landmark decision by the Supreme Court of Canada that recognized for the first time important duties that are imparted to judges when sentencing Aboriginal offenders. This piece argues that while Gladue remains a partial response to the problem of Aboriginal over-representation in Canadian prisons, expanding its application to other state agencies is a necessary measure to facilitate its remedial aim. Indeed, as an important way forward, this piece argues that the Gladue principle and ethos should be expanded beyond the sentencing stage to apply to all state agencies that can potentially affect the freedom interests of Aboriginal people, particularly in the criminal justice system. Hence, to ensure greater protection and facilitate accountability, it suggests that this principle should be recognized as a principle of fundamental justice under s. 7 of the Charter. As part of this argument, this analysis specifically focuses on the rationales, applicability and implementation of this principle to prosecutors.

La décision rendue par la Cour suprême du Canada dans l'affaire Gladue peut être considérée comme étant une décision historique en ce qu'elle reconnaît pour la première fois les importantes obligations auxquelles les juges sont assujettis lorsqu'ils doivent déterminer la peine à imposer à des contrevenants issus de la communauté autochtone. Dans cet article, l'auteure fait valoir que si l'arrêt Gladue demeure une réponse incomplète au problème de surreprésentation des autochtones dans les prisons canadiennes, l'élargissement de son application à d'autres agences gouvernementales est une mesure qui s'impose afin de faciliter son objectif de réparation. De fait, selon l'auteure, le principe établi dans l'arrêt Gladue et son approche anthropologique ne devraient pas s'appliquer uniquement lors du processus de détermination de la peine, mais également à toutes les agences gouvernementales susceptibles de perturber les droits des peuples autochtones en matière de liberté, tout particulièrement dans le système de justice pénale. Ainsi, afin d'assurer une meilleure protection et d'imposer une obligation redditionnelle, l'auteure propose que ce principe soit reconnu comme un principe de justice fondamentale sous l'article 7 de la Charte. Partie intégrante de cet argumentaire, la

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présente analyse se concentre spécifiquement sur les fondements logiques, l'application et la mise en œuvre de ce principe du point de vue des procureurs de l'État.

1. INTRODUCTION

In Canada, the phenomenon of Aboriginal over-representation in prisons is a reality that has reached disproportionate dimensions and has been characterized as a "national crisis."[1] For instance, in 2010-2011, while forming only 11.9% of the overall population in Saskatchewan, Aboriginal offenders represented 77.6% of the prison population. Further, in Manitoba, while Aboriginal people constituted 12.9% of the overall population, they nevertheless represented 69.1% of the prison population. In Ontario, Aboriginals form 1.8% of the population and 11.4% of the prison population. Finally in Quebec, while Aboriginal people form 1.3% of the population, they represent 4.4% of the prison population. It is worth noting that percentages of Aboriginal offenders in custody may actually be even higher, since these statistics exclude admissions to custody in which Aboriginal identity was unknown.[2]

In light of this reality, the following piece proposes that the ethos of *Gladue*,[3] namely diminishing discrimination and the over-use of imprisonment that have led to the problem of over-representation of Aboriginal people in prisons, should inform the *Gladue* principle as a stand-alone principle of criminal law and a principle of fundamental justice. This stand-alone legal principle would require public agencies to take into account the status of Aboriginal people and their background when making decisions that can affect their liberty interests. Although this principle should apply to all state agencies, including police, and correctional services, this article specifically examines the applicability of *Gladue* to prosecutors during their decision-making process due to time and space constraints. This is particularly important in a context characterized by the ever-increasing powers imparted to prosecutors and their effect on Aboriginal people. This includes the decision to charge individuals or not, the triggering of mandatory minimum sentences of imprisonment, the proposal of sentences in court, and the power exercised by prosecutors during plea bargaining, all of which can seriously affect the freedom interests of Aboriginal people and contribute to the over-representation of Aboriginal people in Canadian prisons. Further, once *Gladue* is expanded to prosecutors and recognized as a principle of fundamental justice, it will create a *Charter* duty upon prosecutors to consider

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1 Jonathan Rudin, "Aboriginal Peoples and the Criminal Justice System" Research paper commissioned by the Ipperwash Inquiry (2007).

2 Statistics Canada, "Aboriginal adult admissions to custody, by province and territory, 2010/2011", Juristat (2012), online: Statcan.gc.ca <http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11715/c-g/desc/desc07-eng.htm>.

3 *R. v. Gladue*, 1999 CarswellBC 778, 1999 CarswellBC 779, [1999] 1 S.C.R. 688, 133 C.C.C. (3d) 385, 23 C.R. (5th) 197 [hereinafter "Gladue"]. In this piece the "ethos" of *Gladue* refers to the rationale and philosophical foundation of the *Gladue* principle.

Aboriginal background and status in prosecutorial decisions that affect the freedom interests of Aboriginal people. This duty would be particularly important in the current context, where accountability for prosecutorial decisions is extremely difficult to achieve and the recognition of the doctrine of abuse of process by courts is difficult to achieve.

This article draws upon a recent related article in which it was argued that a preliminary way forward of achieving justice and fairness for Aboriginal people in the criminal justice system would be to include ethical duties in prosecutorial manuals that explicitly address the role of prosecutors in a context of mandatory minimum sentences and the over-representation of Aboriginal people in Canadian prisons.[4] This rests in part on the argument that as ministers of justice, prosecutors have specific duties to ensure that they discharge their duties with fairness, and must therefore work towards achieving equality by removing discriminatory structures and practices, which threaten this fairness. It was argued that the first step would be to explicitly recognize an ethical obligation that requires prosecutors to consider Aboriginal history and background during decision-making and, consequently, amend prosecutorial guidelines to explicitly include a requirement to consider Aboriginal status when making decisions.[5]

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[4] Marie Manikis, "The Recognition of Prosecutorial Obligations in an Era of Mandatory Minimum Sentences of Imprisonment and Over-representation of Aboriginal People in Prisons" (2015) S.C.L.R. (2d) 269.

[5] Indeed, most prosecutorial guidelines in the federal jurisdiction, as well as provincial prosecutorial guidelines, do not include special duties to consider Aboriginal status when making decisions that can potentially affect prosecutorial interests. Ontario and Nova Scotia remain the exceptions by indicating that prosecutors should consider the unique and systemic or background factors which may have contributed to an aboriginal person's criminal conduct, as well as relevant sanctions. A partial recognition, that remains insufficient, can be found in some guidelines in which prosecutors are directed to consider Aboriginal status for very specific types of offences, namely for sentencing impaired driving (see Department of Justice, Federal Prosecution Service of Canada Deskbook (Ottawa: Government of Canada, 2014) [hereinafter "Federal guideline"]) or domestic violence cases (see The Federal guideline, as well as prosecutorial guidelines in Prince Edward Island and in Newfoundland and Labrador). A notable feature that is worth mentioning is that most provinces in the Prairies, where the issue of Aboriginal over-representation in prisons is the most acute, Aboriginal status is either rarely mentioned or is not mentioned at all. Further, some provinces refer to other mentioned criteria, such as the accused's background, but as highlighted by the Court of Appeal in *Anderson*, an explicit directive should be included that instructs prosecutors to specifically take into account the offender's Aboriginal status. See *R. v. Anderson*, 2014 CSC 41, 2014 SCC 41, 2014 CarswellNfld 166, 2014 CarswellNfld 167, [2014] 2 S.C.R. 167, 311 C.C.C. (3d) 1, 11 C.R. (7th) 1 [hereinafter "Anderson"] at para. 9.

2. THE RATIONALES BEHIND THE *GLADUE/IPEELEE* PRINCIPLE AND ITS IMPORTANCE IN THE CRIMINAL JUSTICE CONTEXT

(a) The *Gladue* principle in sentencing

In 1996, as part of a comprehensive set of amendments to the *Criminal Code,* the legislator adopted s. 718.2(e) of the *Criminal Code*, which was meant to be a remedial mechanism to the over-representation of Aboriginal people in prisons. This provision was interpreted in *Gladue*[6] and *Ipeelee*[7] as creating a separate and specific framework for sentencing Aboriginal offenders. This regime requires sentencing courts to take into account the Aboriginal status of the offender. More specifically, this framework requires that when sentencing Aboriginal offenders, judges take into account "the distinct situation of Aboriginal peoples in Canada" including:

(a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(b) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection

If the unique systemic or background factors related to Aboriginal peoples have played a part in bringing the particular Aboriginal offender before the court, this would reduce his or her level of blameworthiness and, accordingly, mitigate the sentence. Further, in this context, alternative sanctions to imprisonment must be considered as much as possible to reach equality. As reiterated in *Ipeelee*, "the *Gladue* approach does not amount to reverse discrimination but is, rather, an acknowledgement that to achieve real equity, sometimes different people must be treated differently."[8] In the event that this obligation is forgotten or ignored by the sentencing judge, the interested party can appeal his or her sentence on the basis that the judge erred in law by failing to abide by the s. 718.2(e) framework.

It is worth noting that despite this legislative duty, the presence of mandatory minimum sentences does not allow for judges to find alternatives to incarceration or to go below the legislated minimum — effectively denying judges the ability to adequately take into account specific background factors as a mitigating factor. These provisions are in direct conflict with one another and therefore cannot logically coexist within a coherent and principled sentencing regime.[9]

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6 *Gladue*, *supra* note 3.

7 *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4376, 2012 CarswellOnt 4375, [2012] 1 S.C.R. 433, 280 C.C.C. (3d) 265, 91 C.R. (6th) 1 [hereinafter "Ipeelee"].

8 *Ibid.*, at para. 71.

9 In this respect, it will be interesting to see, in light of the section 12 analysis recently confirmed in *R. v. Nur*, 2015 CSC 15, 2015 SCC 15, 2015 CarswellOnt 5038, 2015 CarswellOnt 5039, [2015] 1 S.C.R. 773, 322 C.C.C. (3d) 149, 18 C.R. (7th) 227 whether

(b) The expansion of *Gladue* to other responsible state agencies/decision-makers

Although the decision in *Gladue* specifically applied to judges at the sentencing stage of the criminal process, the Supreme Court in this decision made clear that sentencing innovation cannot by itself remove the causes of aboriginal offending, the greater problem of aboriginal alienation from the criminal justice system as well as the unbalanced ratio of imprisonment. The over-incarceration of Aboriginal people "arises from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders."[10] Indeed, this inclination towards punitivity and discrimination is an institutional issue that is not only caused by judges, but all decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system.

In addition, in order to support this shared commitment and responsibility towards these principles, the Court in *Gladue* referred to the Aboriginal Justice Inquiry of Manitoba, which commissioned a great deal of research on the criminal justice system and Aboriginal people, and found that Aboriginal over-representation in prison is attributable to a series of decisions by different actors of the criminal justice system. It noted:

> Aboriginal over-representation is the end point of a series of decisions made by those with decision-making power in the justice system. An examination of each of these decisions suggests that the way that decisions are made within the justice system discriminates against Aboriginal people in virtually every point.[11]

More recently, the case of *Leonard*[12] clarified that the *Gladue* principle should guide all agencies that have the potential to limit the freedom and liberty interests of Aboriginal people. Indeed, in *Leonard,* the Minister of Justice signed separate extradition surrender orders for two Aboriginal offenders so that they could face trial in the United States on drug charges, where their Aboriginal background would not be taken into account in sentencing and where the

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failure by a sentencing judge to adequately apply *Gladue* would lead to a cruel and unusual punishment, or whether it would only give rise to mere disproportionality instead of the gross disproportionality required to meet the cruel and unusual punishment section 12 standard.

10 *Gladue*, *supra* note 3, at para. 65.

11 Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People. *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, *vol. 1* (Winnipeg: Public Inquiry into the Administration of Justice and Aboriginal People, 1991) [hereinafter "Manitoba Inquiry"].

12 *United States of America v. Leonard*, 2012 ONCA 622, 2012 CarswellOnt 11578, 291 C.C.C. (3d) 549, 97 C.R. (6th) 111, leave to appeal refused 2013 CarswellOnt 2474, 2013 CarswellOnt 2475, [2013] 1 S.C.R. v (note), leave to appeal refused 2013 CarswellOnt 2449, 2013 CarswellOnt 2450 (S.C.C.) [hereinafter "Leonard"].

mandatory minimums for the crimes committed would have been drastically longer than the sentences they would have faced in Canada. These individuals had disadvantaged backgrounds caused by Canada's history of discrimination and neglect towards Aboriginal people. Indeed, both had family members who were survivors of the residential school system and from a young age, lived in homes where drug and alcohol addiction were present.

The issue in this case was whether the Minister erred in law with respect to the *Gladue* principle by failing to adequately consider the defendants' Aboriginal status when surrendering the defendants. It was argued that surrender would be "unjust or oppressive" under s. 44 of the *Extradition Act* and would "shock the conscience" under s. 7 of the *Charter*. In this respect, the Court in *Leonard* made clear that the *Gladue* principle would apply not only to sentencing judges, but to a multitude of situations where Aboriginal people generally "interact with the justice system", including when a Minister of Justice exercises his or her discretion. As such, the Minister needs to consider the severity of the sentence the accused is likely to receive in each jurisdiction when exercising their discretion.[13] Finally, it recalled that the *Gladue* factors are not limited to criminal sentencing by judges, but that they need to be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the criminal justice system"[14] and particularly whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.

Finally, the recent recommendations made by the Truth and Reconciliation Commission seem to point towards this direction by calling upon the federal, provincial and territorial governments to "commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade and to issue detailed annual reports that monitor and evaluate progress in doing so".[15] Hence, since the over-representation of Aboriginal people in prison is a systemic reality for which different agencies are responsible, it follows that the *Gladue* principle would apply to all actors of the criminal justice system whose decisions have the power to restrict the freedom interests of Aboriginal people, including prosecutors. This shared commitment to the *Gladue* principle seems fundamental to the way in which the legal system ought to fairly operate.

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[13] In this respect "Gladue clearly has a bearing on the question of the severity of the sentence the accused is likely to receive in each jurisdiction. Any reasonable evaluation of the severity of the likely sentence in each jurisdiction must take into account the possible effect of *Gladue*" (*Leonard*, *ibid*., at para. 84).

[14] *Gladue*, *supra* note 3, at para. 65.

[15] Report of the Truth and Reconciliation Commission of Canada. *Honouring the Truth, Reconciling for the Future,* Recommendation 30 (Ottawa: Truth and Reconciliation Commission of Canada, 2015).

(c) *Anderson*: constitutional insulation of prosecutors and the definition of the principle of proportionality

Despite the ethos of *Gladue* and the application of the *Gladue* principle in *Leonard,* the Supreme Court of Canada recently decided in *Anderson* that consideration of Aboriginal status was not a principle of fundamental justice that applies to prosecutors. To reach its decision, it relied on the division of roles between prosecutors and judes and framed the principle of *Gladue* as part of the proportionality framework that applies to judges only. Before discussing the rationales behind this decision and the issues behind equating proportionality to the *Gladue* framework, a case history and summary is worth mentioning.

In *Anderson,* Mr. Anderson, an Aboriginal person, was charged with impaired driving under s. 255 of the *Criminal Code*, which provided the Crown with the discretion to trigger a mandatory minimum sentence in cases where the accused had previous similar convictions by notifying the accused of its intention to seek greater punishment prior to any plea.[16] The Crown filed the appropriate Notice to Anderson of its intention to seek a greater punishment because of his four previous impaired driving convictions. This triggered a mandatory minimum sentence of not less than 120 days imprisonment.

The Crown policy manual in Newfoundland and Labrador, to which the prosecutor presumably referred, directs Crown Attorneys to request greater punishment under s. 255 except in certain cases. It also states that prosecutors *may* exercise their discretion not to pursue an enhanced penalty if all the prior convictions occurred more than five years before the current offence, as was the case for Anderson. The policy then lists a list of factors for Crown to consider when making this discretionary decision, but does not explicitly mention Aboriginal status. In this situation, before sentencing, Anderson challenged ss. 255 and 727(1) arguing that Crown prosecutors were constitutionally required under se. 7 to consider the Aboriginal status of the accused when making decisions that limit the sentencing options available to judges, in this case, a mandatory minimum. More specifically, the argument highlighted that the principle of proportionality of sentences was a principle of fundamental justice under s. 7 of the *Charter* and this principle also applied to prosecutors in a context where a provision (in this case mandatory minimums) reduced the sentencing options available to judges in the sentencing of Aboriginal offenders.[17] The Crown argued that there was no such obligation and that the terms "the background and circumstances of the offender" included Aboriginal status.

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[16] *Criminal Code*, R.S.C. 1985, c. C-46 at ss. 255(1)(a)(iii) and 721(1).

[17] Mr. Anderson also argued that the statutory scheme violated s. 15(1) of the Charter because it deprived an Aboriginal person of the opportunity to argue for a non-custodial sentence in an appropriate case. Although this argument was accepted by the Provincial Court of Newfoundland and Labrador, it was not presented at the higher instances.

The Provincial Court of Newfoundland and Labrador accepted Anderson's argument and highlighted that in order to ensure compliance with s. 7, the Crown must in all cases, including those involving non-Aboriginal offenders, provide justification for relying on the Notice. Having determined that he was not bound by the mandatory minimum, the judge sentenced Anderson to a 90-day intermittent sentence followed by two years' probation and a five-year driving prohibition.

Similarly, the Court of Appeal rejected the Crown's appeal and all members of the court held that where the Crown tenders the Notice at the sentencing hearing without considering the accused's Aboriginal status, this renders the sentencing hearing fundamentally unfair, leading to a s. 7 breach. Interestingly, the Court noted that there would not be a breach of s. 7 if the Crown's policy manual regarding the decision to tender the Notice included a *specific* direction to consider the offender's Aboriginal status. The fact that it referred to the "background and circumstances of the offender" was not sufficient and therefore the lack of clear direction coupled with the lack of explanation on the part of the Crown for its decision to tender the Notice in this case, led the court to conclude that s. 7 of the *Charter* had been breached.

The Supreme Court of Canada disagreed with these judgments. Despite the fact that prosecutors trigger mandatory minimum sentences which limit judges' sentencing options and in effect, transfer sentencing powers to prosecutors, the Court made clear on the constitutional question, that prosecutors have no constitutional duty under s. 7 of the *Charter* to consider Aboriginal status when making these decisions.

First, the Court emphasized that the role of prosecutors is distinct from the role of judges and that there is no legal basis to support equating their roles in the sentencing process. To preserve the division of functions, it made clear that "it is the judge's responsibility, within the applicable legal parameters, to craft a proportionate sentence. If a mandatory minimum regime requires a judge to impose a disproportionate sentence, the regime should be challenged."[18] Hence, according to the Court, proportionality is not something the prosecutor needs to consider when deciding to trigger a mandatory minimum.

Second, the Court argued that the claim that prosecutors must consider proportionality — which includes the Aboriginal status of the accused prior to making decisions that limit a judge's sentencing options — does not meet the test that governs principles of fundamental justice,[19] more specifically the second

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[18] *Anderson*, *supra* note 5, at para. 25.

[19] This test was reiterated in *R. v. B. (D.)*, 2008 SCC 25, 2008 CarswellOnt 2708, 2008 CarswellOnt 2709, [2008] 2 S.C.R. 3, 231 C.C.C. (3d) 338, 56 C.R. (6th) 203 which stated at paragraph 46 that in order to be recognized as a principle of fundamental justice, a principle must (1) be a legal principle; (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

requirement, which requires a consensus that a principle is fundamental to the way in which the legal system ought to fairly operate. It highlighted that recognizing such a principle in the present case would instead be contrary to the long-standing and deeply rooted division of responsibility between the Crown prosecutor and the courts by expanding the scope of judicial review.

Accordingly, since the constitutional argument was centred around the principle of proportionality, the Court decided that prosecutors and judges have separate duties, and that judges are the only ones who are responsible for applying this principle as part of sentencing. Indeed, the principle of proportionality that *Anderson* referred to is traditionally recognized in sentencing theory and practice, and has therefore been associated with judges within the sentencing stage of the process. Proportionality in sentencing theory is imbedded in notions of fairness and posits that the severity of the offence must be proportionate to the gravity of the offence and to the level of blameworthiness of the offender.[20] Accordingly, the relevant aggravating and mitigating factors need to be considered under this theory.

In Canada, some of the components of *Gladue* have been considered as part of the principle of proportionality in sentencing. Indeed, as highlighted earlier, it was made clear in *Ipeelee* that Aboriginal background can indeed affect a person's level of moral blameworthiness, and for this reason can effectively be considered as a mitigating factor within the proportionality framework.[21] Arguably, the level of blameworthiness of the offender is merely one component of the *Gladue* principle. However, this principle goes much further and would be undermined if it were only considered as part of the proportionality test in sentencing. Indeed, the *Gladue* principle's rationale goes beyond merely considering the level of blameworthiness of the offender in sentencing, and actually serves a wider *remedial* purpose of reducing the overall Aboriginal prison population by recognizing the historical and current systemic discriminatory practices by state agencies against Aboriginal people that continue to plague the criminal justice process. In order to reach this remedial objective, this principle needs to be applied beyond sentencing and recognized as a stand-alone principle that also applies to all decision-making processes by criminal justice agencies that have the power to restrict an Aboriginal person's liberty.

The following section argues that the *Gladue* principle should be expanded and considered as a stand-alone principle to apply to other decisions made by

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[20] Mirko Bagaric, "Proportionality in Sentencing: its Justification, Meaning and Role" (2000) 12 Current Issues Crim. Just. 143; Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005). In Canada, it is considered a fundamental principle of sentencing in s. 718.1 *Criminal Code of Canada;* Its exact definition and breadth has developed differently in the different common law jurisdictions. For further details on this point see Marie Manikis, *supra* note 4.

[21] *Ipeelee*, *supra* note 7 at paras 37-39 and 73.

agencies that have the power to restrict the freedom of Aboriginal people. This principle should be framed as a separate principle of fundamental justice than the principle of proportionality. Based on the *Gladue* framework in sentencing, it should be defined as the requirement for public agencies to take into account the status of Aboriginal people and their background when making decisions that can affect their liberty interest in order to limit as much as possible options that would result in incarceration.

3. RECOGNIZING THE *GLADUE* PRINCIPLE AS A PRINCIPLE OF FUNDAMENTAL JUSTICE

From the onset, it is worth noting that the Charter is not a panacea, but rather a starting point for further work and progress in a specific area. As Paciocco highlighted, the recognition of a Charter right can be significant for various reasons, including symbolically, to underline a right's central importance to the political and legal construct of the country. It can also give permanent recognition to a principle that a statute cannot offer, especially in situations where a vulnerable group would need protection from a majority or the state.[22] As suggested from this analysis, Aboriginal people have indeed been systemically discriminated for years and thus the recognition of an expanded *Gladue* principle would be a step forward in the criminal justice process.

(a) Criteria for recognition of a principle of fundamental justice

In *Anderson*, the Court found that proportionality and its component of considering Aboriginal status is not a principle of fundamental justice that applies to prosecutors, and they therefore do not have a constitutional duty to take into account Aboriginal status when rendering decisions that reduce judicial sentencing options. As highlighted above, framing the *Gladue* principle as part of the principle of proportionality has its limits.

Conceptualizing the *Gladue* principle as more than just a component of proportionality allows for recognition that the duty to consider Aboriginal status imparts on the judicial branch as well as other branches. This stand-alone principle recognizes that the judicial branch is not the only branch that can have an impact on Aboriginal people's liberty interests and their continued over-representation in Canadian prisons, and that other agencies — including prosecutors — also have an important role to play in applying that principle. Further, its constitutionalization as a principle of fundamental justice would signal its fundamental importance in our system and provide more robust accountability and remedies in cases of non-compliance, as will be seen below in relation to prosecutors.

By considering the *Gladue* principle as a distinct principle from proportionality that applies beyond sentencing, it is possible to make the

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[22] David M. Paciocco, "Why the Constitutionalization of Victim Rights Should Not Occur" (2004), 49 Crim. L.Q. 393-431.

argument that it has all the elements required to be considered as a principle of fundamental justice. Indeed, in order to be recognized as a principle of fundamental justice, the Supreme Court of Canada has reiterated[23] its three prong test developed in *Malmo-Levine*,[24] which requires the presence of three components. Hence, in order to be recognized as a principle of fundamental justice, a principle must (1) be a legal principle; (2) enjoy consensus that the rule or principle is fundamental to the way in which the legal system ought to fairly operate, and (3) be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[25]

The first component is met, since the *Gladue* principle — in other words, the principle that requires public agencies to take into account the status of Aboriginal people and their background when making decisions that can affect their liberty interests — is indeed a rule or legal principle. As highlighted above, the analytical framework has formally been recognized in *Gladue* as part of sentencing, and the failure to respect it by a sentencing judge is ground for an appeal. Further, the Court of Appeal of Ontario in *Leonard* has also found that this principle needs to govern government agencies, including the Minister of Justice outside of the sentencing and criminal justice process. Indeed, as highlighted above, in this case the Court required the Minister of Justice to take into account Aboriginal status and background in the context of extraditing an Aboriginal person. The failure by the Minister to consider this principle gave rise to a situation that shocked the community and was contrary to s. 7.

The second component of the test is also met since the principle developed in *Gladue* is intrinsically based on the need for the state to recognize its historical abuse towards Aboriginal people, as well as the existing and continuous discrimination in the criminal justice system that give rise to the over-representation of Aboriginal people in Canadian prisons. As a remedy to these state harms caused in great part by state agencies, the ethos behind the *Gladue* principle is indeed rooted in fairness and respect, and thus considered fundamental in a society that values these elements as a way of which the legal system ought to fairly operate. Some might disagree however, and state that society may not think there is societal consensus around this question. A similar situation arose several years ago around the requirement for a mental element of crime in criminal law. Judges recognized the requirement of a mental element as a principle of fundamental justice without much evidence that there was such consensus.[26] As highlighted by Hogg, it seems that the criteria of societal

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[23] *R. v. B. (D.)*, 2008 SCC 25, 2008 CarswellOnt 2708, 2008 CarswellOnt 2709, [2008] 2 S.C.R. 3, 231 C.C.C. (3d) 338, 56 C.R. (6th) 203.

[24] *R. v. Malmo-Levine*, 2003 SCC 74, 2003 CarswellBC 3133, 2003 CarswellBC 3134, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417, 16 C.R. (6th) 1 [hereinafter "Malmo-Levine"].

[25] *Ibid.*, at para. 113.

[26] See *e.g.*, *R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289.

consensus is very loosely applied and in his own words "not intended to be taken seriously".[27]

Finally, the third required component to recognize the *Gladue* principle as a principle of fundamental justice would also be met, since it would be possible to identify it with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person. Indeed, the *Gladue* principle entails that special consideration is attributed to Aboriginal status in every decision by a state agency that has the potential effect of undermining an Aboriginal person's life, liberty or security interests. These decisions would therefore be limited — possibly to situations that can result in incarceration[28] — and would specifically require the decision-makers to explain how Aboriginal status and background have contributed to the specific decision at play. In this respect, it is a principle identified with some "precision and applied to situations in a manner which yields an understandable result".[29]

Accordingly, this reasoning and principle would be applicable to all decision-makers who have the ability to affect Aboriginal peoples' freedom interests. Due to time and space constraints, the following analysis will specifically examine the importance and rationales behind the recognition of this principle towards prosecutors and the way it can be implemented.

(b) Rationales and implementation of this principle for prosecutors

The following section specifically examines the rationales and implementation of this principle to prosecutors. It argues that the application of this stand-alone principle to prosecutors is indeed compatible with their constitutional role and can be a robust way forward in ensuring proper accountability and implementation of their duties.

(i) Compatibility the role and duties of prosecutors

Indeed, as part of their role, prosecutors heavily put at stake the liberty interests of individuals, including those of Aboriginal people. For instance, they have enormous powers in deciding certain outcomes, including, for example, through decisions to prosecute or not, to divert cases, to select the different charges, to oppose bail, to partake in plea bargaining, to decide to pursue charges through indictment or summary process, and to recommend sentences.

Additionally, as ministers of justice, it is part of prosecutors' ministerial duty to make decisions that also consider the public interest, which also includes

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[27] Peter Hogg, "The Brilliant Career of Section 7" (2012), 58 S.C.L.R. (2d) 201.

[28] This would include custody for merely not being able to post bail, as well as proposing any other form of "economic incarceration", in other words sanctions, such as fines, that can become burdensome for certain individuals due to their inability to pay and which can eventually lead to incarceration, see: Bridget McCormack, "Economic Incarceration" (2007), 25 Windsor Y.B. Access Just. 223.

[29] *Rodriguez v. British Columbia (Attorney General)*, 1993 CarswellBC 1267, 1993 CarswellBC 228, [1993] 3 S.C.R. 519, 85 C.C.C. (3d) 15, 24 C.R. (4th) 281 at pp. 590-591.

fairness towards defendants.[30] Prosecutors are also meant to ensure the fairness of the criminal justice process by explicitly being sensitive and taking a leadership role in ensuring that various forms of discrimination are not reflected in the criminal justice system.[31] A notable example is the systemic discrimination that has taken place within the prosecutorial branch and the unequal treatment of Aboriginal people in the criminal justice process. Indeed, empirical work has shown that prosecutors have also contributed to the problem of Aboriginal over-representation in Canadian prisons. For instance, the aforementioned Manitoba Inquiry found that Aboriginal accused are more likely to be charged with multiple offences than are non-Aboriginal accused in a similar context. It further concluded that "the over-representation of Aboriginal people occurs at virtually every step of the judicial process, from the charging of individuals to their sentencing."[32]

Similarly, the Royal Commission on the Donald Marshall, Jr. Prosecution, referring to the work of prosecutors concluded that

> Donald Marshall, Jr's status as a Native contributed to the miscarriage of justice that has plagued him since 1971. We believe that certain persons with the system would have been more rigorous in their duties, more careful, or more conscious of fairness if Marshall had been white.[33]

Some have even argued that the issue of over-representation is not attributable to sentencing judges, but rather the result of prior decisions taken by other criminal justice agencies — including prosecutors and police — and therefore creative remedial solutions should be taken within those agencies instead of within the sentencing process.[34] For these reasons, the need to exercise prosecutorial duties with greater rigour, care and consciousness when it comes to Aboriginal people highlights the importance of ensuring that special consideration of Aboriginal status should not only be imparted upon sentencing judges but also upon prosecutors.

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[30] *R. v. Boucher*, 1954 CarswellQue 14, [1955] S.C.R. 16, 110 C.C.C. 263, 20 C.R. 1; Hon. Marc Rosenberg, "The Attorney General and the Administration of Criminal Justice" (2009), 34 Queen's L.J. 813; Michael Code, "Judicial Review of Prosecutorial Decisions: A Short History of Costs and Benefits, in Response to Justice Rosenberg" (2009), 34 Queen's L.J. 863; Palma Paciocco, "Proportionality, Discretion, and the Roles of Judges and Prosecutors at Sentencing" (2014) 18 Can. Crim. L. Rev. 241; Manikis, *supra* note 4.

[31] See *e.g.*, Crown Policy Manual, "Role of the Crown: Preamble to the Crown Policy Manual" (Ontario: Ministry of the Attorney General, 2005), p. 3.

[32] Manitoba Inquiry, *supra* note 11.

[33] Nova Scotia, The Marshall Inquiry: Royal Commission on the Donald Marshall, Jr., Prosecution, *Digest of Findings and Recommendations 1989* (Halifax: Province of Nova Scotia, 1989).

[34] Philip Stenning and Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137.

Finally, in addition to being justifiable in its application to its prosecutors, as it is both compatible with and required by the prosecutor's role, the *Gladue* principle should be recognized as a principle of fundamental justice because it is a greater way of ensuring that this duty is seriously considered and elevated to a standard that can be adequately implemented and accounted for. The following section argues that elevating the *Gladue* principle to a principle of fundamental justice that also applies to prosecutors is a way of ensuring that such duties are met, particularly when considering the impermeability of prosecutorial decisions and the quasi-impossibility of courts recognizing abuses of process in prosecutorial decision-making.

(ii) The need for accountability in the application of Gladue: A challenge to the quasi-absolute prosecutorial discretion in decision-making in Canada

The conclusion in *Anderson* is not surprising considering the larger Canadian trend towards protecting prosecutorial power and decision-making from judicial oversight. It will be shown in this section that courts have been extremely reluctant to recognize abuse of process in most situations, which suggests that it would not be sufficient to find that Crown implementation of the *Gladue* principle would merely be part of the Crown's prosecutorial discretion that can potentially give rise to an abuse of process. Instead, the *Gladue* principle should be recognized as a principle of fundamental justice and its breach adequately addressed.

Although deference to prosecutorial decisions is a laudable goal that protects the constitutional role of prosecutors as separate agencies that need to maintain their independence from politics as well as other bodies including judges,[35] this section argues that the consideration of *Gladue* should be recognized as a stand-alone constitutional duty that applies to prosecutors, since this principle is fundamental to the way the criminal process fairly operates and its recognition would indeed promote transparency, accountability and adequate remedial mechanisms in cases of breaches.

If the Court in *Anderson* had recognized proportionality as a constitutional principle of fundamental justice, it would have opened the door to *Charter* challenges against numerous decisions, including those to trigger mandatory minimums, which would have facilitated judicial oversight of prosecutorial decisions.[36] More specifically, it would have required that prosecutors disclose the reasons behind all their decisions, not only their consideration of the

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[35] Michael Code, *supra* note 30; Marc Rosenberg, *supra* note 30.

[36] The Supreme Court in *Anderson* rooted its decision in the division of responsibility between Crown prosecutors and judges. This suggests that the major concern behind the Court's decision is the resistance towards increasing judicial oversight of prosecutorial decisions. Indeed, the Court concluded that

> "the principle advanced by the accused does not meet the second requirement as it is contrary to a long-standing and deeply-rooted approach to the division of responsibility between the Crown prosecutor and the courts. It would greatly expand the scope of judicial review of discretionary decisions made by prosecutors and put at risk the adversarial nature of our criminal justice

defendant's Aboriginal status prior to triggering a mandatory minimum. This would have arguably been considered a wide reach of judicial scrutiny. Judges would have been able to ensure that this duty was met in conformity with the *Charter* and enabled appropriate remedies in case of breach.

Indeed, the advent of the *Charter* enabled judges to recognize some constitutional duties that applied to prosecutors. This recognition contributed to some additional judicial oversight in areas traditionally characterized by unfettered prosecutorial discretion — most notably in the area of prosecutorial disclosure of evidence to the accused. It was made clear that the decision to disclose relevant information is not discretionary and instead is a part of a constitutionally recognized obligation which must be properly discharged by the Crown. Indeed, the recognition of the prosecutor's duty to disclosure evidence as a constitutional duty enables the use of a relatively lower standard of judicial review, which allows for greater transparency, accountability and remedial options in situations where prosecutors failed to adequately comply with this duty.[37] The recognition of other such prosecutorial duties, however, remains limited.

Indeed, the vast majority of prosecutorial decisions are part of what is recognized as "prosecutorial discretion." These decisions, which are not considered to be governed by the *Charter* and are not considered as "tactics or conduct before the court," remain quasi-unfettered by the judiciary and thus are subject to a much higher standard of review by the judiciary which is known as the abuse of process doctrine.[38] This quasi-immunity rests on a common law

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system by inviting judicial oversight of the numerous decisions that Crown prosecutors make on a daily basis."

[37] See *R. v. Stinchcombe*, 1991 CarswellAlta 559, 1991 CarswellAlta 192, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277. Most recently, in *Henry v. British Columbia (Attorney General)*, 2015 CSC 24, 2015 SCC 24, 2015 CarswellBC 1121, 2015 CarswellBC 1122, [2015] 2 S.C.R. 214, 18 C.R. (7th) 338 [hereinafter "Henry"], the Supreme Court of Canada recognized that section 24(1) of the Charter authorizes courts to award damages against prosecutors for prosecutorial misconduct, including wrongful non-disclosure of evidence to the defence absent proof of malice.

[38] See *R. v. Boucher*, 1954 CarswellQue 14, [1955] S.C.R. 16, 110 C.C.C. 263, 20 C.R. 1 at p. 23 [hereinafter "Boucher"]; More recently, in *Anderson*, *supra* note 1, the Supreme Court of Canada recognized two forms of prosecutorial powers, namely exercises of "prosecutorial discretion" and "tactics/conduct before the court". Prosecutorial discretion, is defined as an expansive term that covers "all decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it" (*Krieger v. Law Society (Alberta)*, 2002 SCC 65, 2002 CarswellAlta 1133, 2002 CarswellAlta 1134, [2002] 3 S.C.R. 372, 168 C.C.C. (3d) 97, 4 C.R. (6th) 255 [hereinafter "Krieger"] at para. 47). Although not exhaustive, this includes a number of influential decisions, including the decisions to prosecute a charge laid by the police, to enter a stay of proceedings in private and public prosecutions, to accept a guilty plea to a lesser charge, to withdraw from criminal proceedings altogether, and to take control of a private prosecution. This also includes the decision to enter into and repudiate plea agreements as seen in *R. v. Nixon*, 2011 SCC 34, 2011 CarswellAlta 988, 2011 CarswellAlta 989, [2011] 2 S.C.R. 566, 271 C.C.C. (3d) 36, 85 C.R. (6th) 1 [hereinafter

tradition of immunity, as a vestige of the principle of Crown immunity and concepts such as "the King can do no wrong", as well as the prosecutors' constitutional role, which is meant to be independent from other bodies. At present, while some common law jurisdictions have recognized greater room for oversight,[39] Canada has largely managed to insulate prosecutorial decisions from oversight with few and limited opportunities.

For instance, recently in *Anderson*, the Supreme Court strengthened its protection of prosecutorial discretion, confirming that it is a largely insulated function and limiting the *Charter's* application to it in the name of prosecutorial independence. Recent cases discussed later in this section have also reaffirmed the tendency towards the immunization of prosecutorial decisions by making it clear that prosecutorial discretion is only reviewable in exceptional cases of abuse of process. Indeed, the doctrine of abuse of process by prosecutors has only been found in very exceptional circumstances and even then, remedies, such as stay of proceedings or damages are not always applied.[40] Cases where abuse of process were found generally included situations where there has been a "flagrant impropriety";[41] where the prosecutor acted "dishonestly", in "bad faith", in a

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"Nixon"] and which can only be reviewed in exceptional circumstances where there is an abuse of process. The category of "tactics or conduct before the court" includes "such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum" (para. 47). Hence, it relates to ensuring that the machinery of the court functions in an orderly and effective manner.

[39] See *e.g.*, United States in Stephen Wilks and Charles E. MacLean, "A Tale of Two Countries: Examining the Regulation of Prosecutorial Discretion and Misconduct in Canada and the United States" (2014), 64 S.C.L.R. (2d) 107 and the experience in England and Wales, which has recognized additional review mechanisms; see *e.g.*, *R. v. Christopher Killick*, [2011] E.W.C.A. Crim. 1608 (Eng. Ct. of Crim. App.), which recognized the right of a victim to seek a review of a Crown Prosecution Service (CPS) decision not to prosecute. In light of this judgement, the CPS launched guidelines for the Victims' Rights to Review Scheme which makes it easier for victims to seek a review of a CPS decision not to bring charges or to terminate all proceedings: The Crown Prosecution Service, United Kingdom Government, Victims' Right to Review Scheme (2014), online: Crown Prosecution Service < http://www.cps.gov.uk/victims_witnesses/victims_right_to_review/ > . See discussion in Marie Manikis, "Expanding participation: A comparative approach to victims as agents of accountability in the criminal justice process" (2017) Public Law (forthcoming).

[40] See *e.g.*, *Nixon*, *supra* note 38. Further, even when an abuse of process by the Crown is found, the remedies attached to this finding are limited. For instance, in *R. c. Piccirilli*, 2014 CSC 16, 2014 SCC 16, 2014 CarswellQue 575, 2014 CarswellQue 576, (*sub nom.* R. v. Babos) [2014] 1 S.C.R. 309, 308 C.C.C. (3d) 445, 8 C.R. (7th) 1, the Court decided that a Crown prosecutor who makes threats intended to bully an accused into foregoing his or her right to trial was a betrayal of her role as a Crown, reprehensible and unworthy of the dignity of her offices. Despite finding an abuse of process, the majority found that the remedy of a stay of proceedings was not appropriate since the seriousness of the misconduct needs to be weighed against the societal interest in having a trial.

[41] *Krieger*, *supra* note 38, para. 49.

way that "undermines the integrity of the judicial process, for an "improper purpose" or with a lack of "objectivity".

This shielded prosecutorial power enables prosecutors to reach a number of decisions about the course of proceedings without having to provide any explanation and without being routinely second-guessed — effectively isolating prosecutors from review by any other body, unless the doctrine of abuse of process can be successfully invoked, which remains a very difficult standard to meet.[42] This high standard was recently illustrated in an appellate court decision, where a court accepted the repudiation of a plea agreement by the Crown without adequate justification and despite the prejudice it would cause to the accused. In *Bérubé*,[43] a plea agreement was reached between the Crown and defence counsel in a case where a war veteran suffering from post-traumatic stress disorder was accused of uttering threats and possessing an unregistered firearm in his room. The Crown entered into a plea with Bérubé, allowing him to plead guilty to uttering threats and possession of a restricted weapon, instead of pressing charges including possession of a firearm, and thus avoiding the mandatory minimum sentence of three years. Accordingly, the prosecutor's decision was driven by public interest, which justifies not prosecuting criminal offences based on several factors, including the personal circumstances of the accused. As part of the agreement, the defendant pled guilty, cooperated in the preparation of a psychiatric and pre-sentence report and remained in detention until his sentencing hearing. Subsequent to this agreement, however, the Crown discovered that the restricted weapon charges excluded firearms from the definition of weapons and therefore conviction on this count would not be supported by the facts. It proceeded by repudiating the agreement, staying the weapon charge and proceeding with a new indictment with the firearm charges and thus triggering the mandatory minimum sentence.

Although the trial judge found there was an abuse of process by the Crown under s. 7 and stayed these proceedings, the British Columbia Court of Appeal accepted the repudiation and ordered a new trial for the firearm charges. Indeed, the Court ignored the Supreme Court's decision in *Nixon*,[44] which highlighted that repudiation by prosecutors can only be done in exceptional circumstances when there are logical reasons. Further, the BCCA accepted this repudiation

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[42] See *Boucher*, *supra* note 38; More recently, in *Anderson*, *supra* note 1. The abuse of process doctrine is available where there is evidence that the prosecutor's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision. Hence, where a claimant establishes a proper evidentiary foundation for an abuse of process claim, the evidentiary burden may shift to the Crown, who will be obliged to provide explanations for its decision.

[43] *R. v. Berube*, 2012 BCCA 345, 2012 CarswellBC 2467, 292 C.C.C. (3d) 100, 95 C.R. (6th) 253.

[44] *Nixon*, *supra* note 38.

without much explanation as to why. This case suggests that the finding of abuse of process by courts is extremely rare, even in situations that posit grave prejudice to the defendant and which might be contrary to the public interest.

The standard of proof required to show abuse of process in such cases has historically been very high and has only been met in a minority of cases.[45] Indeed, abuse of process has generally been found in cases where conduct is egregious and seriously compromises trial fairness and/or the integrity of the system. Further, more restrictions were announced in *Anderson* in terms of evidentiary burdens. Thus, in addition to the long-established onus on the accused to prove on a balance of probabilities that the abuse occurred, even less transparency is required, since "the defence now also has an evidentiary burden to meet before the Crown has to give reasons for the exercise of its discretion"[46] when it alleges an abuse of power.

Interestingly, in the recent case of *Nur*,[47] the dissent opinion by Moldaver, J., with which the majority of the Supreme Court of Canada did not explicitly disagree, highlighted that the abuse of process doctrine is not exceptional and not only reserved for cases of intentional misconduct or bad faith. Indeed, Moldaver, J. made clear that "abuse of process is typically characterized by intentional misconduct or bad faith",[48] but cites *Babos* to suggest that situations may arise where the integrity of the justice system can be affected in the absence of misconduct. Despite this reiteration, it remains unclear whether courts will generally continue to recognize abuse of process only in situations where there is intentional misconduct or bad faith.

As illustrated by some of the cases above, there has been a trend towards isolating prosecutorial decisions and ensuring that they remain one of the least transparent and unfettered powers in the country. Since courts have been extremely reluctant to recognize abuse of process in most situations, this analysis makes it clear that it would not be sufficient to find that Crown implementation of the *Gladue* principle would merely be part of the Crown's prosecutorial discretion that can potentially give rise to an abuse of process. As seen above, qualifying a situation as an abuse of power has historically been treated with much resistance by judges and generally only recognized in situations of intentional misconduct or bad faith. In this respect, prosecutorial failure to observe the *Gladue* principle could easily be undermined as a prosecutorial error or a forgotten consideration, similar to cases that justified the reneging on plea agreements, and thus would not give rise to an abuse of process.

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[45] See *e.g.*, *Krieger*, *supra* note 38; *Nixon*, *supra* note 38; *R. v. Power*, 1994 CarswellNfld 9, 1994 CarswellNfld 278, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 29 C.R. (4th) 1.

[46] Don Stuart, "Anderson: Continuing a Questionable March to Legal Immunity for Crown Attorneys" (2014), 11 C.R. (7th) 26.

[47] *R. v. Nur*, 2015 CSC 15, 2015 SCC 15, 2015 CarswellOnt 5038, 2015 CarswellOnt 5039, [2015] 1 S.C.R. 773, 322 C.C.C. (3d) 149, 18 C.R. (7th) 227.

[48] *Ibid.*, para 164.

Further, even in the event where an abuse of process is found, remedies would not be obvious. Indeed, remedies are less forthcoming in situations of abuse of process[49] than remedies for a breach of a constitutional duty.[50] Finally, the new evidentiary threshold post-Anderson remains an important barrier. According to this new evidentiary standard, the defence would need to meet an additional evidentiary burden before the Crown has to give reasons for the exercise of its discretion. To prevent these hurdles and ensure greater transparency, implementation and accountability, it is important that the *Gladue* principle, that creates a duty to take into account Aboriginal background and context, is elevated into a constitutional principle.

(c) The implementation of the *Gladue* principle as a constitutional duty imparted to prosecutors

The prosecutorial constitutional duty to take into account Aboriginal status would be considered as an element of procedural fairness that would require more transparency by having prosecutors certify that a person's Aboriginal status was taken into account during decision-making. More specifically, this would indeed require prosecutors to certify that they have taken into account

(a) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(b) The types of procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection

Prosecutorial decisions that fail to take into account this duty by failing to include background and contextual reasons in their decision, would be considered unconstitutional under s. 7 of the *Charter*.

(i) Transparency

The following section argues that as part of the implementation of *Gladue*, prosecutors would need to be transparent in the way they have considered a person's Aboriginal status and background.

As an element of procedural fairness, the implementation of this duty would require that for every decision that can have an impact on a person's freedom interests, prosecutors would need to explicitly certify in each file that the person's Aboriginal status was taken into account. This specific inquiry would be readily verifiable[51] since it would need to be written down in every file. Its articulation would therefore be descriptive.

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[49] For instance, as seen in *Babos*, even when an abuse of process is clearly recognized, a stay of proceedings is heavily resisted and this abuse of process remained without a remedy.

[50] As illustrated by the remedy recognized in *Henry*, the recognition of a prosecutorial decision as a constitutional duty would increase the chances of remedies being awarded in the event of *Gladue* violation.

[51] Contrary to the generally uncompensated costs and delays incurred by the defence in

This act of transparency would also increase public confidence without interfering with prosecutorial independence. Indeed, as recommended by Justice Rosenberg a few years ago, in order to increase legitimacy and understanding of the criminal justice process, prosecutorial decisions should be backed up as much as possible with the explicit articulation of the rationales behind their decisions.[52]

To avoid disturbing prosecutorial safeguards and allow for some discretion and flexibility in its implementation, this constitutional duty would be limited to a procedural requirement that (1) prosecutors certify in writing that Aboriginal status/background was indeed considered in each file and (2) a justification of the ways that this status/background information has specifically informed or affected the specific prosecutorial decision. More specifically, the way that this information would be evaluated and weighed should be made clear by clear prosecutorial guidelines and would be considered as part of exercising prosecutorial discretion. For the second component of the analysis, the courts would need to be deferential with the reasons behind the decision, since it would require them to substitute their decision for the one made by prosecutors that had considered the Aboriginal status and background already. It is worth mentioning that like all other protected *Charter* rights, this requirement for transparency would be a bare minimum obligation that would need to be followed to respect this *Charter* obligation. Any laws or ethical guidelines cannot fall below this requirement, but can offer protections beyond those guaranteed by the *Charter*.[53]

(ii) Breaches and remedies

A failure to implement this constitutional duty as an explicit certification that is part of the record would give rise to the wide list of enforceable *Charter* remedies under s. 24(1). Novel and creative remedies would also be available to meet the challenges and circumstances of specific cases at hand. These remedies would depend on the moment this failure was discovered. For instance, remedies would range from a declaration to consider this duty or an adjournment if the breach is discovered early on, to granting new proceedings, including a new trial, to granting a stay of proceedings if the breach is discovered later on in the process and there is no other way to provide an adequate remedy. Further, damages from the part of prosecutors would also be an option to remedy the

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applying to remedy inadequate or failed disclosure per Stinchcombe (see: John Kingman Phillips, "The rest of the story: *R. v. Stinchcombe*: A case study in disclosure issues" (2003), 40 Alta. L.R. 539-565, at 556), the verification for compliance in this context will be simplified.

[52] The Honourable Marc Rosenberg, "The Attorney General and the Prosecution Function on the Twenty-First Century" (2009), 43(2) Queen L.J. p. 813.

[53] *R. v. Oickle*, 2000 SCC 38, 2000 CarswellNS 257, 2000 CarswellNS 258, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129 [*Oickle*]; Justice Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter" (2008) 40 SCLR (2d) Supreme Court Law Review 293-306.

prosecutor's failure to consider Aboriginal status. This would indeed attempt to compensate the defendant for the breach, but would also send a message to vindicate this right, and possibly deter future infringements. As highlighted by several commentators,[54] for this remedy to make sense, all courts of criminal jurisdiction should be given the power to award *Charter* damages in order to facilitate access to remedies. Indeed, this would be particularly important in the context of breaches of the *Gladue* principle, where defendants could be financially unable to make a separate Charter challenge outside of the court's criminal jurisdiction.

4. CONCLUSION

In conclusion, taking into account Aboriginal status in criminal justice is fundamental in a system that values fairness and respect among individuals. Indeed, being subjected to a history of discrimination with ever-lasting consequences, including the over-representation of Aboriginal people in prisons are rationales that justifie a duty to give special attention and consideration to Aboriginal people in the criminal justice process. This duty should not only be imparted to sentencing judges, but also to all actors of the criminal justice system that have the power to interfere with an Aboriginal person's fundamental liberty interests and freedoms.

This piece specifically focused on the role of prosecutors and offered an argument for recognizing the *Gladue* principle as a principle of fundamental justice that applies to different actors, including prosecutors. Indeed, prosecutors have important powers and a major role to play in affecting the liberty interests of individuals. In addition, empirical work has suggested that they are partly responsible of the issue of over-representation of Aboriginal people in prisons. For these reasons, these agencies should play a determinate role by applying the *Gladue* principle in the powerful decisions that they make on a daily basis. The proposed constitutional entrenchment would require prosecutors to certify, in every file involving an Aboriginal person, that Aboriginal status and background were taken into account during the decision-making process. Failure to comply with this duty would allow for *Charter* remedies. This would indeed increase the chances that the information collected and included into the file was considered carefully when making decisions that would affect the Aboriginal person's liberty interests. The way that this information would be evaluated and weighed should be guided by clear prosecutorial guidelines, and this component of the decision would be considered as part of exercising prosecutorial discretion and only opened to review in cases of abuse of process. Indeed, this approach combines both elements of accountability and remedies, but also considers the importance of prosecutorial independence and flexibility in their decision-making process. It is worth mentioning that this constitutional requirement should not be

[54] Penney, Rondinelli, Stribopoulos, Criminal Procedure in Canada, 2011, 541; Kent Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora : Canada Law Book, 2008) at paras. 11.210-11.285.

considered a panacea, but rather a starting point towards the elaboration a different analysis for prosecutors that would take into account a more contextual framework.

With these rationales in mind, this piece welcomes future work and discussion in the area of prosecutorial duties and discretion towards decisions that affect Aboriginal people, but also urges for more analysis on the work and obligations of other criminal justice actors, including the different members of law enforcement and prison authorities, and their role in implementing the *Gladue* principle of fundamental justice.