

# Risk, rights and deservedness: Navigating the tensions of Gladue, Fetal Alcohol Spectrum Disorder and settler colonialism in Canadian courts

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## Abstract

In 2008, the Truth and Reconciliation Commission of Canada engaged in a public project of national reconciliation to address the ongoing impacts of settler colonialism including the disproportionate number of Indigenous adults and youth who are held in remand facilities awaiting trial or sentence as well as those who are convicted and sentenced to periods of incarceration. Efforts to further reconciliation by reducing Indigenous incarceration rates have relied largely on the courts and their application of a sentencing principle rooted in the Supreme Court's ruling in *R. v. Gladue* [1999] 1 SCR 688. In this article, we argue that the Gladue sentencing principle is being fundamentally undermined in the courts through risk models that actively displace the very context that Gladue reports seek to illuminate. Included in the analysis are the compounding impacts facing Indigenous individuals struggling with a complex disability like Fetal Alcohol Spectrum Disorder.

## KEYWORDS

Fetal Alcohol Spectrum Disorder, Gladue, legal anthropology, settler colonialism, systemic racism

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## 1 | INTRODUCTION

In 2008, Truth and Reconciliation Commission of Canada (TRC) engaged in a public project of national reconciliation to address the ongoing impacts of settler colonialism on Indigenous peoples. A central element of this work focused on reckoning with the disproportionate number of Indigenous adults and youth who are held in remand facilities awaiting trial or sentence as well as those who are convicted and sentenced to periods of incarceration. However, over the 13 years since formally entering a phase of reconciliation, incarceration of Indigenous people in provincial and federal correctional centres and institutions has only accelerated. In 2008, Indigenous people comprised roughly 3.8% of the general Canadian population but accounted for 27% of those in provincial or territorial custody and 18% of those serving federal sentences. The most recent numbers indicate that a slightly larger Indigenous population (4.5% of the general Canadian population) accounts for 31% of those in provincial or territorial custody and 29% of those serving federal sentences (Malakieh, 2020). Among the latter, Indigenous women comprise 41% of all federally sentenced women, while Indigenous youth, who make up 8.8% of Canadian youth, represented 43% of youth admitted to custody in 2018/2019 (Malakieh, 2020).

Efforts to further reconciliation by reducing Indigenous incarceration rates have relied largely on the courts and their application of a sentencing principle rooted in the Supreme Court's ruling in *R. v. Gladue* [1999] 1 SCR 688. Since this decision and the Court's more recent determination in *R. v. Ipeelee* [2012] 1 SCR 433, Canadian courts are required to consider the 'unique background and circumstances' of an offender and reasonable alternatives to incarceration whenever an Indigenous person is facing a possible loss of liberty, with a view to remedying the over-incarceration of Indigenous people. In the just over 2 decades that have passed since the *Gladue* decision, the 'Gladue requirements' have been deemed to apply at both youth and adult court levels and throughout the entire criminal justice system, including at bail hearings (*R. v. Robinson*, 2009 ONCA 205), hearings before the mental health review board (*R. v. Sim* [2005] 78 OR (3d) 183), Dangerous and long-term Offender hearings, and parole hearings (*Twins v. Canada* (Attorney General), 2016 FC 537). *Gladue* has also inspired conversations about generalizing the requirement for 'contextualized decision-making' beyond the criminal law into areas such as Indigenous child welfare and family law, and beyond Indigenous offenders to those who are Black or Persons of Colour.

The striking over-representation of Indigenous peoples in jails and prisons in Canada must be situated within the 'structure and logic' of settler colonialism that speaks of reconciliation while perpetuating structures of 'never-ending... inequity and the need to stay the course' (Simpson, 2016), both within and outside the criminal justice system. Within the system, the rhetoric of reconciliation is belied by adherence to sentencing approaches that elide the spirit and intent of *Gladue* and embrace understandings of risk ill-informed by the complex realities of the incarcerated Indigenous population. The latter bear the significant burden of the historical traumas implicit in settler colonialism and the intergenerational impacts of state policies integral to the rise of settler dominance, which include high rates of complex trauma, trauma responses and Fetal Alcohol Spectrum Disorder (FASD) which, while not unique to the Indigenous population, must be understood as symptoms of settler colonialism.

In this article, we will draw upon our extensive experience as researchers in Indigenous criminal justice and FASD and as established *Gladue* writers, to argue that the *Gladue* sentencing principle is being fundamentally undermined in the courts through risk models that actively displace the very context that *Gladue* reports seek to illuminate. We will start with an overview of reconciliation and the justice system, summarize *Gladue* and the risk models used to predict and prevent recidivism, and look at the added complexity of disability when considering the capacity for reconciliation. We will explore the tension between state conceptions of risk and reconciliation that obscure the intergenerational impacts of trauma and the blunt realities of systemic racism. We will then look at the compounding impacts facing Indigenous individuals struggling with a complex disability like FASD. We do so to illustrate how carceral risk models frame FASD as an imminent and sustained risk—risk that is (incorrectly) understood as best managed in custody. In so doing, this article will make the case that the failure of *Gladue* lies not only within the courts, but within legal and medical systems that privilege non-Indigenous narratives of risk, rights and deservedness, to the detriment of Indigenous peoples.

## 1.1 | Reconciliation and the justice system

The TRC released 94 Calls to Action and a six-volume report in 2015 (Truth and Reconciliation Commission of Canada, 2015). The Report and Calls to Action were the outcome of gatherings, testimony, meetings and research that took place between 2008 and 2015. The Calls focussed on addressing the ongoing impacts and legacy of the residential school system that operated in Canada for over 100 years. The schools were central to Canada's policy of 'aggressive assimilation' (Davin, 1879) and premised on the notion that separating entire generations of Indigenous children from their families, communities and cultures and interning them in a system of residential schools, would end the state's 'Indian problem' and eliminate any barriers to realizing non-Indigenous interests nationally. The first school, The Mohawk Institute in Brantford, Ontario, opened its doors in 1831; the last of the schools, Gordon Residential School located in Punnichy, Saskatchewan, was shuttered in 1996. Over the intervening 165 years, it is estimated that over 150,000 Indigenous children between the ages of 4 and 16 attended over 130 schools (Miller, 2012a, 2012b) and endured the schools' well-documented practices of physical, emotional and spiritual violence. While the TRC Final Report dedicated Volume Four to unmarked graves, the violence of the schools has been further reinforced of late, as Indigenous communities have begun to excavate the sites of the schools and unearthed mass graves of children as young as 7 years old (Honderich, 2021).

The legacies of residential schools documented in the TRC's work have attracted considerable academic study and have been framed as experiences of 'Historical Trauma' (HT) leading to 'Historical Trauma Responses' and inter-generational effects (Bombay et al., 2009, 2019, 2020; Brave Heart, 2003; Evans-Campbell, 2008; Fast & Collin-Vézina, 2019; Whitbeck et al., 2004). Conceptualized in this manner, the schools may be understood as a massive group trauma deliberately perpetrated upon Indigenous people by the state with purposeful and destructive intent, affecting large numbers of people over the generations (Evans-Campbell, 2008). The intergenerational impacts visited upon survivors of the schools are similarly well-documented and include 'substance abuse, as a vehicle for attempting to numb the pain associated with trauma' and 'self-destructive behaviour, suicidal thoughts and gestures, depression, anxiety, low self-esteem, anger and difficulty recognizing and expressing emotions' (Braveheart, 2003, p. 7). Contextualized within a myriad of broader challenges, including poverty and unemployment, racism, substandard lived environments and lateral violence, these stressors deeply undermine human potential in Indigenous communities and perpetuate the traumas of residential schools. In their Calls to Action, the TRC took direct aim at many of these problems and directed 17 Calls at two of the most compelling expressions of the schools' legacy: criminal justice system involvement and one of its common companions, FASD.

In 2020, the Federal Correctional Investigator of Canada, Ivan Zinger, noted that the rates of incarceration for Indigenous peoples have been steadily *increasing* over the past 4 years (Office of the Correctional Investigator, 2020) and within the timelines in which Canada claims to have focused on reconciliation and justice reform. In a scathing media advisory, Zinger called for transformational change because 'tweaks around the edges of the system simply won't cut it' (Office of the Correctional Investigator, 2020, para. 8). His comments tethered the outcomes of the TRC to the recent National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) and further amplified calls for transformation in the justice system, including access to culturally appropriate supports, responsive assessment tools for Indigenous clients and appropriate support for clients with FASD. In the absence of this change, Zinger cautioned:

On this trajectory, the pace is now set for Indigenous people to comprise 33% of the total federal inmate population in the next three years. Over the longer term, and for the better part of three decades now, despite findings of Royal Commissions and National Inquiries, intervention of the courts, promises and commitments of previous and current political leaders, no government of any stripe has managed to reverse the trend of Indigenous over-representation in Canadian jails and prisons. The Indigenousization of Canada's prison population is nothing short of a national travesty (Office of the Correctional Investigator, 2020, para. 5).

It is clear that Canada's national project of reconciliation is not only late in coming but also largely unsuccessful, despite the ongoing efforts of Indigenous peoples, their allies, and researchers which long pre-date formal state adoption of 'reconciliation'. As early as 1966, the federal government's *Survey of the Contemporary Indians of Canada* (also known as the 'Hawthorn report') confirmed what Indigenous people and their allies had known for some time: Indigenous families and communities faced disproportionately higher levels of poverty, substandard lived environments, un- and under-employment, foster care and overall reduced life chances, all of which contributed to higher rates of crime and victimization (Hawthorn, 1966). The survey revealed the connections between Canada's historic policies of deliberate marginalization and underdevelopment of Indigenous communities, the criminogenic conditions fostered by those policies and the high rates of Indigenous involvement in the criminal justice system. These connections were later confirmed by a rising tide of research on Indigenous experiences in the system and no less than 30 task force reports and commissions of inquiry struck to study the problem and propose solutions. Virtually without exception, all these came to the same basic conclusion: The Canadian criminal justice system fails Indigenous people in almost every way and at virtually every turn, over-arresting, over-convicting and over-incarcerating Indigenous men, women and youth.

## 1.2 | *R. v Gladue*—A path towards reconciliation

There is no doubt that the federal government was mindful of the intractable and consistent rises in Indigenous incarceration rates when, in the early 1990s, Parliament turned its attention to revising the sentencing provisions of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*). These concerns dovetailed with a concurrent rise of interest in restorative justice principles to shape a set of revisions that emphasized alternatives to incarceration and a focus on accountability and restorativeness over retribution. Nowhere was this approach more evident than in s.718.2(e), which directs courts that 'all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal<sup>4</sup> offenders' (*Criminal Code*). This and other changes to the code came into effect in 1996; 3 years later the Supreme Court of Canada heard an appeal of sentence in *R. v Gladue*, a case involving an Indigenous woman sentenced for manslaughter without consideration of her circumstances as an Aboriginal offender. In upholding the appeal, the Court interpreted s.718.2(e) to require that courts sentencing an Indigenous person 'consider all available sanctions other than imprisonment and pay particular attention to the circumstances of aboriginal [sic] offenders' (*Criminal Code*, para. 93). The onus was placed on legal counsel to ensure courts received this information and proposed that 'specialized presentence reports (PSR)', possibly augmented by additional case-specific information from counsel or their client's Indigenous community, would be required to do so. In the wake of the *Gladue* decision, these 'specialized PSR' would become known as 'Gladue reports'.

Gladue reports are in many respects unique on the Canadian legal landscape, although they are becoming less so as they have inspired 'Impacts of Race and Culture' reports that are an increasing part of the sentencing of Black and other racialized groups before the courts (Dugas, 2020). Commonly written by 'empathetic peers', Gladue reports emphasize two components consistent with the information prioritized by the Court in *Gladue*. The first and usually most substantial piece of a report relates the Indigenous person's 'unique background and circumstances', ideally over three generations, to reveal any historical traumas and intergenerational effects that have shaped their path and criminal justice system involvement. This information is secured primarily through interviews with the individual before the court and members of their community of care, as well as documentary research that includes aspects of their court file as well as background research on their community, culture and history. This information is then combined in a written narrative that provides a balanced, neutral telling of their story intended to assist a court to assess their moral blameworthiness and impose a fit and proportionate sentence. The latter is also informed by the second piece of a Gladue report, which is the presentation of a set of sentencing options developed by the Gladue writer and shaped by the individual's healing needs as revealed in the report and Crown and defense positions on sentence,

often with evidence-based programming options that align with the healing journey. While the options must include 'alternatives to incarceration', for those writers who understand Gladue reports as providing insight and shaping a healing path for an Indigenous person before the court, reports will provide programming options and healing opportunities for every possible sentence, including incarceration and community-based sentences.

There is little doubt that a well-researched and well-written Gladue report is the best way for a court to learn an Indigenous person's story and inform the sentencing process with that story. However, it appears that Gladue reports are not the most common way courts receive *Gladue* information. In a recent survey of 120 judges across Canada with experience with *Gladue*, it was found that the most common vehicle for *Gladue* information is oral submissions by, in the majority of instances, the Indigenous person's defense counsel, with Gladue reports and Pre-sentence Reports 'with *Gladue* content' running as second and third as sources of Indigenous stories (Dickson & Smith, 2021). It is important to note that these same courts indicated that while oral submissions were the most common way they received *Gladue* information, they were the least satisfactory manner of relating that information, especially as compared with full Gladue reports that were deemed the best way for conveying *Gladue* information (Dickson & Smith, 2021). Access to Gladue reports also appears to vary widely across Canada. Alberta is the only jurisdiction to have interpreted the Supreme Court's decision in *R v Ipeelee* [2012] 1 SCR 433 as requiring 'in all future sentencing hearings involving aboriginals [sic], a Gladue report must be tendered' (*R. v. Mattson*, 2014 ABCA 178, at para. 50), outside of Alberta, British Columbia, the Yukon, parts of Ontario and Quebec and limited locations in the Maritimes, access to Gladue information is largely limited to PSR (or as noted above, where these are not available or not ordered by the court, oral submissions) (Dickson & Smith, 2021). In the same survey informing that judges felt oral submissions were the least effective means for relaying Gladue information, only 14% of respondents indicated that PSRs were the 'most satisfactory' way of receiving that information. It is also interesting to note that in some regions where relative satisfaction with PSR was evident, such as Manitoba, courts also informed that outside predominantly urban centres, it was quite difficult to secure a PSR with *Gladue* content and, as a consequence, they were often left to rely on oral submissions (Dickson & Smith, 2021).

The inconsistent access to Gladue reports and what appears to be a substantial reliance on oral submissions and PSR to convey Gladue information cannot help but have direct consequences on Gladue's remedial goals. While oral submissions are highly variable in quality and quantity and often give the impression that *Gladue* information is merely a 'box to be ticked' in sentencing and related matters, PSR are also problematic as vehicles for Gladue information. These problems are tied in with tensions between the risk-focused, actuarial approach of PSR and the healing and restorative focus of Gladue reports, as well as in growing concerns about the accuracy of actuarial risk models in predicting recidivism of Indigenous people. These tensions are evident throughout the Gladue process.

As noted above, information gained from interviews is integral to meeting the *Gladue* requirements. As empathetic peers, Gladue writers should be able to connect with their Gladue subjects through shared ethnicity and cultural connection as well as by virtue of their common experiences as Indigenous people. There is, in effect, an implicit level of trust that supports the interview process and may facilitate the sharing of Gladue information. While there are certainly Indigenous probation officers, the majority of these officials are non-Indigenous, which cannot help but insert a distance between the officer and their Indigenous client. In this regard, it is notable that in a study of four Indigenous communities in northern New York and southern Ontario, Whitbeck et al. (2004) determined that a common expression of historical trauma was a 'distrust of white people' that hampered interactions with settlers and outsiders. This distrust may not be misplaced, insofar as racism from the settler community against Indigenous people is well-documented (Denis, 2015; Razack, 2015; *R. v. Gladue*; *R. v. Williams* [1998] 1 SCR 1128; Wylie & McConkey, 2019) and justice system professionals are not immune: A 2006 analysis of *Race, Diversity and Criminal Justice in Canada: A View from the UK*, included interviews with a sample of probation/parole officers and documentary analysis of a series of PSRs that included reports for Indigenous, racialized and white offenders. In reviewing the reports, the researchers found 'negative subjective contextualization of race and offending within PSR' that reflected racist stereotypes of Indigenous people with regard to substance abuse, anger management and family life (Denney et al., 2006, p. 10).

The distance created by culture and racism may be exacerbated by the association of the probation officer—whether Indigenous or non-Indigenous—with the court and criminal justice system. The probation officer's association with the court may be expected to hamper the connection between the officer and their client and endanger the trust necessary to encourage the sharing of difficult and potentially triggering *Gladue*-relevant experiences. The irony is not lost that, as 'officers of the court', probation officers may be deemed more credible by the court but potentially much less so by their Indigenous clients. As a result of this association and the potential cultural distance between the probation officer and their client, there may be significant limitations in what information is provided in a 'Gladue PSR' as well as how that information is framed, possibly directly impacting Gladue's remedial impacts where a PSR provides the only *Gladue* information presented to the court.

In addition to the challenges probation officers may face in connecting with their Indigenous clients, there are growing concerns about the limitations of the methodology underlying the presentence process—specifically risk models and logics that underpin PSR, few of which have attracted more negative scrutiny than the 'Risk-Need-Responsivity Model' (RNR). This model, developed by psychologists at Carleton University in the 1980s and later formalized in 1990,

...is based on three principles: 1) the *risk principle* asserts that criminal behaviour can be reliably predicted and that treatment should focus on the higher risk offenders; 2) the *need principle* highlights the importance of criminogenic needs in the design and delivery of treatment; and 3) the *responsivity principle* describes how the treatment should be provided (Public Safety Canada, 2007, p. i).

According to Public Safety Canada, the ultimate goal of RNR-informed policies in correctional contexts is to reduce recidivism and create a more prosocial and rehabilitated individual. The model is put forward as a beacon that blends evidence-based practices to generate an effective risk model for universal application, stressing that the responsivity element employs '[c]ognitive social learning strategies are the most effective regardless of the type of offender (i.e., female offender, Aboriginal offender, psychopath, sex offender)' (Public Safety Canada, 2007, p. 1). In this modality, the risk tool becomes understood as an unbiased object that can be applied equally to all and render results that are equitable. In practice, there are growing concerns that its principles may be less universal and effective than the government assumes.

At present, there is limited research on the accuracy of RNR-based approaches with Indigenous people, but a small constellation of that research expresses concerns these approaches may not accurately predict the risks posed by Indigenous offenders. Questions have been raised about whether a risk assessment approach premised entirely on adult white male offenders is a good fit for Indigenous offenders generally and Indigenous women offenders in particular, and whether RNR's failure to consider culture, coupled with the almost consistently more problematic and trauma-intensive context of Indigenous lives, may result in higher estimates of risk for Indigenous persons (Hannah-Moffatt & Maurutto, 2010; Maurutto & Hannah-Moffatt, 2007; Quigley, 2007). As early as 1997, a landmark analysis conducted by Bonta et al. (1997) found that while RNR's central eight risk factors were predictive for male Aboriginal offenders, the risk factors of 'family/marital' and 'school/employment' did not predict for the Aboriginal offender group. More recently, Hannah-Moffatt and Maurutto (2010) compared PSR and Gladue reports and found that there are serious incompatibilities between the risk-based approach integral to PSR and the considerations of culture and context, dislocation and discrimination that are central to Gladue reports and requirements. These concerns have been exacerbated by research indicating that RNR models are characterized by gender bias and when administered by personnel unaware of these biases and lacking in trauma awareness, may directly negatively impact the accuracy of assessments and resulting service delivery (Fritzon et al., 2021; Taxman & Smith, 2020). Most importantly, this small but important body of research documents that 'actuarial risk-based approaches are more likely to result in PSR options that reinforce high rates of incarceration' (Hannah-Moffatt & Maurutto, 2010, p. 280)—something that conflicts directly with the remedial goals of *Gladue* and may render PSR a questionable vehicle for Gladue information.

The possible limitations of current risk assessment instruments have also been recognized by the courts. In its decision in *Ewert v. Canada* (Correctional Service) [2018] 2 SCR 165, the Supreme Court of Canada was asked whether Correctional Service Canada's ('CSC') reliance on its current risk assessment tools respected its obligations under Section 4 of the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA). The latter legislation requires CSC to 'take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible' and ensure its policies and programs are suitable for Indigenous offenders and account for their specific needs and circumstances. The Court found that CSC, in failing to confirm its assessment instruments are equally valid for Indigenous and non-Indigenous persons, had violated its legal obligations under the CCRA and infringed upon Mr. Ewert's ss.7 right to life, liberty and security of the person and 15 equality rights under the Canadian Charter of Rights and Freedoms. The Court expressed concerns that Indigenous inmates are more likely to be classified at a higher security level and less likely to get early release than their non-Indigenous counterparts. These gaps between Indigenous and non-Indigenous inmates were attributed by the Court to policies that may look neutral on the surface but actually work against Indigenous people in a manner that 'perpetuates discrimination and contributes in disparities in correctional outcomes between Indigenous and non-Indigenous offenders' (*Ewert v. Canada*, para.53). CSC was directed by the Court to revise its risk assessment policies accordingly—something it appears the Service has yet to do in a clear and meaningful manner (Cardoso, 2021).

Although the research field querying the efficacy of RNR and actuarial approaches to risk assessment is modest, there are sufficient grounds at this juncture to be leery about assuming PSR—as documents shaped by RNR and focused on determining risks of recidivism—are good or appropriate vessels for placing Indigenous stories before the courts. There is little basis to assume that PSR are able to provide a respectful context for Gladue information or that this information will be sufficient given the range of impediments that may come between a probation officer and their Indigenous client. There is also concern in some courts that probation officers are 'overworked' and lack training, and that '[e]ven if they had the training, they would not have the time to do this work properly' (*R v Noble* [2017] 3 CNLR 135, para.53; see also *R v HGR* [2015] BCJ no.848; *R v Peepeetch* [2019] S.J. No.209; *R v Florence* [2013 BCJ No.216; *R v Corbiere* [2012] ONSC 2405). Courts have also expressed concerns about PSR as proper contexts for Gladue information:

A PSR with a Gladue component written by a Probation Officer is diametrically opposite [to a Gladue report] in several ways... the structural limitations on their [probation officers'] time, due to workload, does not allow them the ability to pursue the depth necessary to address intergenerational trauma. Two, the purpose of the PSR with a Gladue component is much different than a Gladue report. It is framed within the model of Risk/Need/Receptivity, one based in the measurement of actuarial risk with the goal of providing the Court with insight into the risk an individual presents to re-offend. This structure is antithetical to the principle of Gladue... (*R v HRG* [2015] BCJ no 848, p.10).

Policies that may look neutral on the surface but actually work against Indigenous people are integral to the perpetuation of settler colonialism and the ongoing marginalization of Indigenous people, interests and potential. Such policies and the unselfconscious racism and discrimination that informs and enables them lie precisely within the crosshairs of reconciliation. If we are truly committed to the latter goal, we must be open to questioning expressions of racism and discrimination wherever they appear, including and especially within the criminal justice system. This includes challenging impediments to reconciliation and justice reform implicit in the complex intersections between racism, discrimination, trauma and disability.

## 2 | FASD AND THE JUSTICE SYSTEM

FASD is a complex disability. Much like autism, it is experienced on a 'spectrum' which means each individual who has FASD will experience the disability in different ways (Clarren, 2018). FASD is often described as a disability that is 100% preventable and a result of prenatal exposure to alcohol. What is left unresolved in this description is that FASD is a deeply stigmatized disability that places blame on mothers (Drabble et al., 2011) which drives a narrative of FASD as infliction. For some, this means that the diagnosis identifies the individual and the mother for interventions and supports—often dubbed a 'diagnosis for two' (Andrew, 2011; Badry et al., 2014). In an ideal world this would mean that both would be provided effective supports and services that are culturally responsive and trauma-informed (Rutman, 2016; Salmon & Clarren, 2011). However, what is more often the case is that the diagnostic and support experiences of the parent and individual are deeply challenging and traumatic (Stewart et al., 2018). FASD is understood to be a disability that follows a 'racialized script' that frequently targets Indigenous individuals and families (Oldani, 2009) and one that carries with it built in systems of shame and guilt for mothers, families and those with FASD.

While all disabilities carry different forms of stigma grounded in latent and pervasive ableism, FASD carries a particular type of stigma in that the disability is racialized in Canada as an 'Indigenous problem'. A 'disproportionate focus on FASD research in Indigenous groups in Canada—and a corresponding lack of research in the general population' has contributed to 'exaggerated beliefs and assumptions about which groups are most affected by FASD' (Aspler et al., 2019, p. 30). These 'beliefs and assumptions' can perhaps best be summarized in what has been referred to by the Royal Commission on Aboriginal Peoples (Erasmus & Dussault, 1996) and the Aboriginal Healing Foundation as 'the "Drunken Indian" Stereotype'—a racist caricature that flies directly in the face of ample scientific literature that not only demonstrates the absence of a link between biological race and alcoholism (Tait, 2003), but also confirms that Indigenous people consume less alcohol than their settler counterparts (Groves & Cowan, 2002; Khan, 2008). Thus while anyone exposed to alcohol while in utero could have FASD, there has been a connection between Indigeneity and the disability that is a clear expression of structural racism and that is entangled with the

totality of ways in which societies foster racial discrimination through mutually reinforcing systems of housing, education, employment, earnings, benefits, credit, media, health care, and criminal justice. These patterns and practices in turn reinforce discriminatory beliefs, values, and distribution of resources (Bailey et al., 2017).

We link the lived experience of being Indigenous and having FASD to structural racism and settler colonialism because the 'mutually reinforcing' systems effectively collude as exclusion or challenges in one area produces compounding impacts in another. Discrimination and stigma surrounding the disability are further exacerbated by the challenges one faces in securing access to the very intensive and specialized diagnostic process (Winsor, 2020). Research indicates that diagnosis can impact education and effective interventions (May et al., 2009) which means, by extension, that a lack of diagnosis can have adverse outcomes in these same areas. Barriers to diagnosis can also be understood within the broader experiences of discrimination in the health care industry historically and in the current moment, which include Residential School histories marked by biomedical experimentation on Indigenous children (MacDonald et al., 2014; Mosby, 2013) and recent histories of experiences of medical maltreatment in Canadian hospitals (Berg et al., 2019), respectively. Concurrently, diagnosis for some Indigenous mothers comes with the real-world fear that if they admit to drinking whilst pregnant they might face sanction by social services. Here too a longer history of having children taken and removed into Residential Schools and more recently, loss of children to the Sixties Scoop and Millennial Scoop,<sup>2</sup> adds considerable perception of risk for Indigenous mothers. Seen this way, the diagnosis of FASD is complex and demands attention to the ongoing and intergenerational impacts of settler colonialisms when the individual or family is Indigenous. The role of race is not secondary it must be seen as central.

Consider for example the oft-cited but dated literature indicating that individuals with FASD are 50%–60% more likely to have justice involvement and detention and present increased risk for inappropriate sexual activities as well as drug/alcohol abuse (Streissguth et al., 2004). This research, and other similar pieces (see e.g., Streissguth & O'Malley, 2000; Streissguth et al., 1996), laid the foundation for additional research on FASD that focused on justice outcomes (Fast & Conry, 2009; Fast et al., 1999; Longstaffe et al., 2018; Wyper & Pei, 2016) in which FASD was taken up in current risk regimes (McLachlan et al., 2018; Pei & Burke, 2018) including burden/cost considerations (Popova et al., 2015; Thanh & Jonsson, 2015). Research in the field of FASD and justice does raise important questions about a range of issues including diminished responsibility (Mela & Luther, 2013), risk for victimization (Thiel et al., 2011) or manipulation (Greenspan & Driscoll, 2016). However, the research on FASD and justice focuses primarily on risk and deficit. When considering the role of justice involvement, ableism and race become intersecting variables. If we return to the RNR model, the lived experience of being Indigenous with FASD is that much more challenging. For example, individuals with FASD are often understood to be impulsive, or to live in the moment. This is a characteristic of the disability. In the RNR model, this characteristic is reduced to a static variable that is understood to be something that can be *taught* out of the individual through anger management and self-control.<sup>3</sup> Seen this way, a characteristic of the disability is transformed into something to be corrected; this is an unacceptable framework and yet it persists. As such, the normative understanding of a rational actor who can be trained to not be risky and who will not face systemic racism obfuscates the lived experience of many Indigenous peoples in the justice system who have a disability. Where there should be accommodation, there is instead further sanction.

Returning to the Streissguth et al. (2004) findings, research indicates that persons living with FASD are less likely to be raised by their biological parents than those without FASD. Research also tells us that racialized minorities are overrepresented in the child welfare system (Fluke et al., 2010; Ma et al., 2018). In Canada, the rates of involvement of Indigenous children in the child welfare system are the highest in the country: According to the most recent figures, Indigenous children, who comprise 7.7% of Canadian children, make up 52% of children in care (Indigenous Services Canada, n.d.). Concurrently, research also tells us that being taken into care is a point of trauma (Trivedi, 2019). Taken together, racialized experiences of trauma are potential key variables that contribute to challenging life outcomes. However, these issues around race and trauma are not frequently accounted for as variables. In other words, the role of structural inequality and settler colonialism is often 'bracketed out' of the discussion or research on FASD; the very complexity that should be centred is strategically avoided because it demands a much fuller analysis—and reckoning (Stewart, 2020). From a Gladue perspective, these would be potentially central concerns (being taken into care and experiences of trauma). The question is whether these variables are taken up in a PSR that is quite commonly conducted by a non-Indigenous worker who, like the researchers we just discussed, might not recognize these significant life events but instead focus on FASD which is understood to be a risky, lifelong disability.

Individuals with FASD are understood to present a particular challenge to the courts given in that these individuals are understood to be prone to risky or impulsive behaviour, have challenges in keeping appointments, struggle with employment and trouble making prosocial friends, and people with FASD are also at greater risk for homelessness (Gagnier et al., 2011). Each of these factors can impact bail conditions on primary (showing up for court dates) and secondary (risk to reoffend) grounds (Criminal Code, s. 515, s. 525). Similarly, if the courts understand that the disability presents a static or ongoing risk, this can impact how FASD is understood in sentencing. Indeed, FASD has been seen by the courts as an exacerbating rather than mitigating factor in both youth and adult sentencing because the individual 'who has FASD has untreatable deficits and lacks ordinary restraint, and that consequently he/she represents an ongoing risk to the public' (Verbrugge, 2003, p. 22).

More recently, Johansen-Hill (2019) reviewed a series of recent cases in Saskatchewan courts and observed that FASD was not being raised by defense attorneys and noted 'this phenomena would make sense given that it is well established that FASD often becomes a "double-edged sword" in the sentencing process and is treated as an aggravating factor as well as a mitigating factor' (Johansen-Hill, 2019, p. 14). This and related research raise serious concerns about what it means to discuss FASD in the context of a Gladue Report, given the courts' ongoing struggles with the complexities of the disabilities and the risk that elaborating on this condition could have a tangible and

negative impact on the individual before the court. With this in mind, it is not surprising that researchers have called for increased literacy around the disability for forensic specialists and how it presents in the justice system (Brown et al., 2019).

### 3 | FASD IN GLADUE REPORTS

FASD presents unique challenges to Gladue writers and the justice system as the courts must manage the tension between the *Gladue* requirements, *Gladue*'s remedial goals and the practical implications of FASD, all of which must be considered in addition to the standard range of considerations in sentencing, including deterrence, denunciation, separation of offenders as necessary and provision for rehabilitation and reparations for harm done to victims (*Criminal Code*, s.718). Above all else, the court must consider the fundamental purpose of sentencing, which is protection of society and community safety (*Criminal Code*, s.718).

In balancing the principles and purposes of sentencing, courts tend to emphasize three focal concerns above all else: the offender's level of moral blameworthiness and harm caused by the offence; community protection; and practical constraints and considerations such as the ability of the offender to complete and benefit from a period of incarceration (Steffensmeier et al., 1998). While the Indigenous histories integral to *Gladue* intersect directly with the moral blameworthiness of the Indigenous person before the courts, these histories will also inform court understandings of risk and how those risks may best be managed in the interests of community safety. Practical considerations around possible sentencing options will also be significant in this regard, especially where those considerations reflect 'static' risks that cannot be changed and must simply be managed. It is here that FASD becomes a complicating factor in sentencing, notwithstanding *Gladue* and its remedial goals.

It is beyond the parameters of this paper to engage in a detailed, multi-case analysis of the courts' handling of *Gladue* information involving possible or confirmed diagnoses of FASD, but we are undertaking this analysis as a future publication. We expect that this analysis will assist in understanding the tension between *Gladue* principles and FASD and the ways in which settler constructions of risk can both consciously and unconsciously undermine *Gladue*'s remedial goals and by implication, reconciliation. For the purposes of the present paper, however, we would like to engage in a case study of *R. v. Charlie* [2012] YKTC 5 which was acknowledged in the Final Report of the TRC for its exemplary consideration of *Gladue* and FASD, and which elucidates court responses to managing the tension between *Gladue*, FASD and the risk management that is central to the sentencing process. This case provides an interesting example of how even the best-informed and best-intentioned courts can be stumble over the limitations of state law and the interests of settler colonialism in determining a fit sentence for an Indigenous person struggling with intergenerational effects and the complexity disability of FASD.

The case of *R v Charlie* involved a home invasion, violent assault and theft from a frail and elderly victim. At the time of his offence Franklin Charlie was 26 years old, a second-generation residential school survivor whose parents both endured significant trauma and abuse at the schools and spent much of their adult lives dulling the impact of those traumas with alcohol abuse and misuse. Franklin's mother shared that she had consumed alcohol whilst pregnant with her son, an admission that was integral to Franklin's confirmed diagnosis of FASD. In sentencing Franklin, who had a substantial criminal record, the court benefitted from a detailed *Gladue* report, a comprehensive FASD evaluation and a PSR (para. 5). These resources enabled the court to engage extensively with Franklin's struggles with FASD as well as his *Gladue* factors and to situate these within a remarkably political appreciation of the historical context of both those struggles and his offending. Regrettably while acknowledging the intergenerational impacts of residential school policies in Franklin's life, the court also contextualized his FASD within a context of victimhood that implicitly blamed and shamed his mother for addictions that are also best understood as among the same intergenerational impacts experienced by her son:

Franklin Charlie's FASD is the direct result of these policies of the Federal Government, as implemented by the local Federal Indian Agent. Ironically, it is the Federal Government who, today, is prosecuting Mr. Franklin Charlie for the offences he has committed as a victim of maternal alcohol consumption (at para. 9).

While appreciating the historical context that brought him before the court, the judge also observed that Franklin had 'exhibited severe behavioural and learning issues since he was a child' and 'significant addiction issues' (para. 13), but stressed that 'FASD is not an excuse for antisocial behaviour. Franklin should be held accountable for his actions, utilizing relevant and meaningful consequences' (para. 13). While FASD may not be an excuse for wrongdoing, it is certainly an explanation for much of Franklin's behaviour and as such, should be meaningfully incorporated into the assessment of his level of blameworthiness for his actions. The challenge for the court here, of course, was to determine an appropriate expression of accountability in the face of compelling Gladue factors that mitigate that responsibility and an FASD assessment confirming a severe degree of disability and thus a difficult and significant static risk. Following a detailed and painstaking analysis, the Court determined that the sentence imposed on Franklin

should be meaningful, proportionate to the seriousness of the offence and his moral blameworthiness, and reflect his experience as an Aboriginal person. Except in those few instances where concerns relating to protection of the public overwhelm these considerations, the punitive aspect of the sentence imposed will be reduced for offenders like Mr. Charlie.

39 I have already discussed the impact of Mr. Charlie's FASD diagnosis has on the relevant sentencing objectives. Denunciation and general deterrence are not apt, as, given Mr. Charlie's limitations, they can have little application to other members of the community. Similarly, because of his limited understanding of the big picture or the impact of his behaviours, specific deterrence will not be met by punitive sanctions.

40 Mr. Charlie is not affected by prison as others might be. As pointed out in the FAS Assessment, he finds it a safe place with clear rules and expectations. He functions well in that setting. But it is not a rehabilitative environment for him, because the programs do not recognize and build on his strengths. As a result, after spending two years in a penitentiary, he reoffends again, almost immediately. As stated in the MediGene assessment, prison and cognitive-based programming do not contribute to specific deterrence or rehabilitation of most FASD offenders like Mr. Charlie. When he is released from prison again, he will reoffend again, unless he is provided with the supervision, structure and programming identified in his FAS Evaluation (*R. v. Charlie*, paras. 38-40).

Franklin was sentenced to a total of seven months incarceration on top of the 27 months he had spent on remand awaiting trial and sentence and to a further 3 years of probation, structured by a series of conditions the Court carefully crafted to ensure were comprehensible to Franklin and appropriate given the challenges of his history and disability. While this is notable and reflects the Court's careful, if sometimes stereotypical, consideration of Franklin's disability, its connection with colonialism and the historical traumas experienced by his parents, the sentence still fell short of Gladue's remedial goals. In so doing, it demonstrates the challenges of reconciling those goals, complex trauma and FASD and the reality that, for most Indigenous persons before the courts, their victims are also Indigenous and struggling with very similar histories and circumstances (Dickson & Smith, 2021).

In its decision in Gladue, the Supreme Court stressed the importance of Gladue's remedial goals, but was careful to inform those goals with, first, the qualification that the Gladue requirements do not 'trump' the other principles and purposes of sentencing, and second, that where sentencing is following from a finding of guilt for a very serious offence, there is likely to be little or no difference between the sentence imposed on an Indigenous individual and

that passed on a non-Indigenous person guilty of a similar crime in similar circumstances. As noted, the offence in Franklin Charlie's case was a serious one and, as is often the case, the Court had to balance out the Gladue requirements with other equally relevant and important sentencing requirements. Acknowledging that Franklin's disability was such that he was unlikely to be impacted by a sentence emphasizing deterrence or denunciation, the Court was mindful of the risks presented by Franklin's FASD and their implications for community safety as well as the Gladue factors and their remedial purpose. In the end, however, despite the assumed irrelevance of 'specific deterrence' or the fact that prison is, for most observers, the ultimate expression of denunciation, Franklin would serve over 2.5 years incarcerated and a further three years on probation. In many respects, Gladue's remedial goals were thwarted before the Court was seized with the case, when Franklin found himself held on remand awaiting trial and sentence, as do a significant majority of Indigenous offenders (Justice Canada, 2017). Franklin was 'credited' with the 'dead time' served on remand, but the point here is that despite the Court's best intentions, Franklin's time on remand contributed to over-incarceration and probably did nothing to address the challenges that got him into trouble in the first place. Was it reasonable that Franklin spend this time incarcerated? Based on the representation of his FASD disability and his offending history, both of which represented static risk factors difficult to overlook given dominant understandings of risk and the purposes of remand, the answer is likely 'yes'. As noted by the Court when sentencing Franklin, the difficulty here is that jail was unlikely to be a 'rehabilitative environment' or to be avoided given first, the absence of alternatives to incarceration that could address Franklin's needs and second, the absence of programming in most provincial and territorial institutions. Here is where Gladue and Indigenous offenders get caught in those crosshairs mentioned earlier: A court may seriously and genuinely engage with Gladue and entertain reasonably informed understandings of FASD, but given the lack of government will to support Indigenous community programming that can provide alternatives for people like Franklin Charlie or ensure similar programming is available within correctional institutions, Gladue is likely to come to naught. When the understanding of FASD as an unchangeable and, in some cases, probably unmanageable risk factor is added to the mix, the reality of sentencing as an exercise in risk management further distances Gladue's remedial goals.

And it is here that we see settler colonialism at work: Parliament and the Supreme Court 'gave' courts the Gladue requirements with one hand, while with the other hand promptly and with the apparent support of provincial governments, withheld the resources and programming that would further Gladue's remedial goals. Hamstrung by a lack of options and faced with an offender who undoubtedly fit perfectly within established paradigms of risks and needs and very limited responsivity, the default was further imprisonment followed by a protracted period of probation. That the latter will likely transpire under the supervision of a probation officer with limited understanding of FASD and who faces similarly limited resources and programming and has little time to expend 'supporting' Franklin, encourages the likelihood that he will reoffend and return to jail—another perfect expression of the cycle of 'never-ending... inequity and the need to stay the course' (Simpson, 2016) replicated daily by the criminal justice system: arrest, detain, diagnose, punish and detain again.

Let us be clear here: The fault in Franklin's story lies not with the Court, the Gladue writer, the FASD assessment or, quite possibly, the PSR provided by the probation officer who likely later took charge of Franklin Charlie. There is little doubt that everyone did their best and the Court certainly went well above and beyond in meeting its obligations to Gladue, Franklin, his victim and the community they share. But without a clear willingness by the state to rethink risk, disability and the role of prison, and work meaningfully with Indigenous communities and knowledgeable allies to create and sustain meaningful alternatives to incarceration and culturally informed understandings of risks, needs and responsivity, Gladue will continue to struggle as a meaningful response to intergenerational traumas, Indigenous offending and over-incarceration.

## 4 | CONCLUSION

This article started with an argument: the *Gladue* sentencing principle is undermined by risk models which impact Indigenous individuals and those with FASD differently and deleteriously from non-Indigenous, non-disabled people. To make this argument, we first looked at reconciliation and the justice system, including an overview of the Residential School program and its legacies, intergenerational trauma and over-representation of Indigenous children in care and youth and adults in custody. We then looked more closely at *R v. Gladue*, how the requirements are commonly addressed in courts and the need for more robust engagement with Gladue beyond PSRs and oral submissions. This section also reviewed the challenges with the RNR model which places Indigenous peoples at a disadvantage as the tool was designed with one demographic in mind (able-bodied, white men) and is a blunt tool when used to mitigate perceived risk of 'others', including and especially Indigenous people and those living with FASD. Filtered through a lens of 'risk', the reality of FASD as a disability and a Gladue factor directly linked with colonialism and residential schools, FASD cannot escape its riskiness or how that risk is understood to threaten community safety or implicates the same settler colonialism that has constrained and starved the potential of Gladue. As demonstrated in our brief analysis of *R v Charlie*, even where a Court accepts FASD as both a disability and colonial legacy, the law's emphasis on risk and the state's refusal to meaningfully engage with Gladue's remedial goals leave courts with few options other than incarceration.

Returning to our broader concern, risk tools are at odds with the *Gladue* sentencing principles and reconciliation more broadly. We state this as scholars but also as Gladue Report writers. If we are going to bring about transformational change in the justice system and address the over-representation of Indigenous youth and adults we will need to continue to write effective Gladue Reports but do so realizing that an exploration of *Gladue* factors including FASD carries with it the possibility that stereotyped views of Indigenous people and disability will blunt Gladue's impact and deny its remedial goals. Yet Gladue reports also provide an opportunity to challenge those stereotypes, insofar as each report is an opportunity to teach the courts about FASD and its links to colonialism, to help bring out more fit and thus just sentences. Part of this relates to the broader failure across justice, medical and related 'helping' systems (justice and medical etc.) that continue to elide the role of structural racism and barriers to Gladue's remedial goals in fuelling the 'never-ending nature of inequity' at the heart of settler colonialism.

### CONFLICT OF INTEREST

No declared conflicts.

### ENDNOTES

- <sup>1</sup> In Canada, legislation, the courts and their judgements have for some time enlisted the term 'Aboriginal' as opposed to the term 'Indigenous', which is generally considered to be more inclusive and thus appropriate term. In fact, it was in *R v Ipeelee* [2012] 1 SCR 433 that Canada's highest court used the term 'Indigenous'—an effort to initiate a trend that appears not to have been taken up by most lower courts, at least to date. Throughout this paper we will use the term 'Indigenous' but when discussing cases, judgements and state policies, will use the term 'Aboriginal' to ensure coherence with those sources.
- <sup>2</sup> The 60's Scoop and Millennial Scoop refer to periods of time during which state removal of Indigenous children into care skyrocketed. While removal of Indigenous children has been constant and ongoing since the initiation of the residential schools' policy, to date there have been three waves of child apprehensions that saw extremely high rates of removals: The first was over the course of the Indian Residential Schools policy, which saw thousands of Indigenous children forcibly removed from their families and communities and interned in the schools between 1831 and 1994. The second wave overlaps with the first and takes its name 'the Sixties Scoop' from the high rates of child apprehensions initiated following a 1951 legislative change that permitted provincial governments to provide child welfare services to Indigenous communities. This change resulted in exponential growth in Indigenous children taken into care. In British Columbia, for example, Indigenous children comprised only 1% of those in care in 1951; by 1964 Indigenous children made up over 34% of those in care. The Millennial Scoop is a term used to describe the third wave of apprehensions which is understood as originating in the 1980's and which has resulted in Indigenous children, who constitute 8% of children in Canada, currently comprise over half of children in the child welfare system nationally. It is generally recognized that the second and third waves of

child apprehensions are a direct result of the intergenerational traumas caused but the first wave and which robbed many survivors of parenting skills and competencies, as well as trauma responses that further challenge parenting. For more information about Indigenous child apprehensions, see "The Sixties Scoop and Aboriginal Child Welfare", University of British Columbia Indigenous Foundations, online at: [http://indigenousfoundations.arts.ubc.ca/sixties\\_scoop/](http://indigenousfoundations.arts.ubc.ca/sixties_scoop/).

- <sup>3</sup> See for example the RNR model from Public Safety Canada (<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-nd-rspns-vty/index-en.aspx#a4>) as an example in which Table 1 outlines the Risk/Need Factors alongside the Intervention Goals. The goals are animated by an assumption that each need to or risk can be addressed through an intervention that brings about resolution. The concerns here is that when characteristics of a disability align directly with a risk there is an assumption that the disability can effectively be 'trained' out of the person versus recognizing that the disability is, itself, a part of that person.

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