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Ipeelee/Ladue and the Conundrum of Indigenous Identity in Sentencing

Jeanette Gevikoglu*

I. INTRODUCTION

The Supreme Court of Canada’s recent decision in *R. v. Ipeelee/Ladue*¹ is an opportunity to revisit the critiques of *R. v. Gladue*² and to consider whether the sentencing of indigenous offenders under section 718.2(e) of the *Criminal Code*³ is the best means to alleviate the historical injustice and systemic discrimination indigenous people associate with the criminal justice system. The law has always distinguished indigenous people from other Canadians on the basis of their identity. For instance, defined benefits flow from the meaning of “Indian” within the meaning of the *Indian Act*⁴ and constitutional rights flow from the meaning of “aboriginal” in the *Canadian Charter of Rights and Freedoms*.⁵ Indigenous identity certainly has come to matter in the criminal justice system, which articulates particular accommodation for “Aboriginal” offenders when determining a fit sentence in accordance

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with section 718.2(e) of the *Criminal Code*. In *Ipeelee/Ladue*, the Supreme Court revisits section 718.2(e) of the *Criminal Code* and considers its application to the sentencing of indigenous offenders breaching long-term supervision orders (“LTOs”). The Court reaffirms its decision in *R. v. Gladue* and ultimately both Ladue and Ipeelee receive consideration for their status as indigenous offenders.

On its face, *Ipeelee/Ladue* may be considered a success for advocates for indigenous offenders. Specifically, the decision means that the principles the Court articulated in *Gladue* are a mitigating factor in sentencing indigenous offenders, even those who breach an LTO. Although the narrow issue is important, more interesting is how the Court construes indigenous identity in the sentencing of indigenous offenders. The criminal law, as *Ipeelee/Ladue* demonstrates, uniquely particularizes indigenous identity as a factor that must have weight in sentencing indigenous offenders — regardless of the offence, the victim, or the link between the offender and his or her indigenous community. The decision demonstrates the dilemma courts face in their efforts to remedy the historic injustice and systemic discrimination indigenous people suffered in the criminal justice system through accommodating indigenous difference. *Ipeelee/Ladue* shows that the Court is mindful of the challenges adjudicating indigenous offenders’ claim to historical disadvantage and systemic discrimination pose. The decision does little, however, to probe how sentencing law plays a part in constructing indigenous identity in the law and what that means to the goal of 718.2(e): the mitigation of the historic injustice and systemic discrimination that makes up part of the indigenous experience of criminal law. Although the response to the decision has renewed interest in the practicalities of sentencing indigenous offenders, it remains one confined to solutions within the framework of criminal law rather than a broader consideration of indigenous communities’ relationship with the state.

To explore the implications of particularizing indigenous identity in *Gladue*, it is important to consider the facts of the case, which I set out in the next part of this paper. Then, I place *Ipeelee/Ladue* within context as the most recent decision in a line of jurisprudence and legislative initiatives aimed at remedying indigenous communities’ negative experience of the criminal justice system. Next, I consider how

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*Note that for the purpose of s. 718.2(e), the meaning of “aboriginal” is broader than the *Indian Act* and includes “at least, all who come within the scope of s. 25 of the Charter and s. 35 of the *Constitution Act, 1982*”: *Gladue*, supra, note 2, at para. 90.*
Ipeelee/Ladue demonstrates that making use of indigenous identity in sentencing poses a conundrum for the criminal justice system. I conclude by considering whether there is a way to confront the conundrum of indigenous identity in sentencing.

II. THE BACKGROUND OF IPEELEE/LADUE

The background of the offenders and the offences at issue in Ipeelee/Ladue are familiar to many criminal lawyers working in indigenous communities. Both Manasie Ipeelee and Frank Ladue were sentenced to penitentiary sentences and designated long-term offenders subject to an LTO upon their release. A long-term offender designation is given to individuals convicted of certain enumerated offences or a “serious personal injury offence” whom the court deems likely to re-offend based on evidence offered during sentencing (such as a psychiatric assessment or criminal history). If a sentencing court finds an individual to be a “long-term offender”, it imposes an LTO of up to 10 years after the individual completes his or her penitentiary sentence, during which that individual is under the jurisdiction of the parole board.

1. Manasie Ipeelee

Manasie Ipeelee, an Inuit offender, was living in the Kingston area bound by an LTO. He was born in Iqaluit, Nunavut. His mother was an alcoholic and died of exposure when Ipeelee was quite young. He began consuming alcohol at the age of 11 and became an alcoholic. He alleged he was sexually abused as a child. Ipeelee was raised by his grandparents, but at the time of his LTO hearing he was estranged from his family in Iqaluit. Many close members of his family had died while he was in custody on previous sentences. Ipeelee was living in the Kingston area because there was no Community Correctional Centre in Nunavut that could accept him.8

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8 A “serious personal injury offence” is defined in s. 752 of the Criminal Code and includes certain enumerated offences, like sexual assault, as well as offences a court finds “use or attempt use of violence” and/or involves “conduct that endangered or is likely to endanger life, safety of another person or inflicts or is likely to inflict severe psychological harm”.

In 1999 Ipeelee committed the predicate offence resulting in the imposition of the LTO in Yellowknife when he violently sexually assaulted a 50-year-old homeless woman. He served the entirety of his six-year sentence for that offence and commenced his LTO in March 2007. Prior to the charges for breaching his LTO that brought his case to the Supreme Court, Ipeelee’s LTO had been suspended four times. In August 2008, the Kingston police found him riding a bicycle, intoxicated, and also possessing two bottles of alcohol. He was charged with breaching a condition of his LTO that required abstention from alcohol. He pleaded guilty to that offence on November 14, 2008 and was sentenced to three years’ imprisonment. At his sentencing, the judge found his Aboriginal status to be of diminished importance in the context of the case, a determination that formed one of the grounds of Ipeelee’s appeal to the Ontario Court of Appeal, who upheld the sentence. The Ontario Court of Appeal agreed that the sentencing judge should have taken Ipeelee’s Inuit status into account, but found that the sentence was nonetheless fit. Ipeelee subsequently appealed to the Supreme Court.

2. Frank Ladue

Frank Ladue is a member of the Ross River Dena Council Band in Yukon Territory, part of the Kaska nation. Ladue’s parents had problems with alcohol abuse and died when he was young; his mother may have been murdered. He was raised by his grandparents, who lived a traditional life on the land. From the age of five until nine, he attended residential school, where he alleged he was the subject of abuse. The experience of residential school for members of the Ross River Dena community was documented in the pre-sentence report tendered at Ladue’s sentencing. Much like Manasie Ipeelee, his criminal record was related to intoxicants, and he began using illicit drugs while in the federal penitentiary. He was characterized as a “serial sex offender”.

Ladue was convicted of break and enter and sexual assault in 2002 when he sexually assaulted a 22-year-old woman passed out in a house. He was sentenced to three years’ imprisonment and a seven-year LTO.

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9 Ipeelee CA, id.
His LTO commenced in December 2006. It was suspended three times, and he had just finished serving a sentence for one of these suspensions in August 2009 when he was arrested on an outstanding DNA warrant. As a result of that arrest, he lost his place in Linkage House, a placement in Kamloops where he received the support of an indigenous elder, and was released instead to Belkin House in downtown Vancouver. Shortly after that placement in Vancouver, he provided a urinalysis that tested positive for cocaine. He pleaded guilty to breaching his LTO in February 2010 and was sentenced to three years’ imprisonment, a sentence longer than the 18 months to two years requested by the Crown. Ladue appealed his sentence on the basis that the sentencing judge failed to consider his Aboriginal status. The majority of the British Columbia Court of Appeal allowed his appeal, reducing the sentence to one year. Justice Chaisson, in dissent in the result, would have imposed a sentence of two years. The Attorney General of British Columbia appealed to the Supreme Court.\(^{11}\)

3. *Ipeelee/Ladue* in the Supreme Court

The Supreme Court heard Ipeelee’s and Ladue’s cases together. Justice LeBel, writing for the majority, allowed Ipeelee’s appeal, reducing his sentence to one year. Similarly, the majority dismissed the appeal of the Attorney General of British Columbia and upheld the decision of the majority of the British Columbia Court of Appeal to reduce Ladue’s sentence to one year. Justice Rothstein dissented on the question of whether protection of the public was the paramount principle in sentencing individuals who breach LTOs, but he agreed with the majority’s approach to sentencing indigenous offenders. Justice Rothstein also dissented in the result, finding both appeals should have been dismissed.

The decision reviews the principles of sentencing in the *Criminal Code* and the provisions of the *Corrections and Conditional Release Act*\(^{12}\) that govern LTOs. In particular, it reviews how judges should approach the determination of a fit sentence for indigenous offenders who breach LTOs.\(^{13}\) The decision was critical of the line of LTO-breach sentencing decisions that emphasized protection of the public over rehabilitation of offenders.\(^{14}\) It was apparent from the decision and the


\(^{12}\) S.C. 1992, c. 20.

\(^{13}\) *Ipeelee/Ladue, supra*, note 1, at para. 34.

\(^{14}\) *Id.*, at paras. 49-54.
questions directed at counsel during the hearing of the appeal, that the Court was concerned with the possibility that lengthy penitentiary sentences for an LTO would effectively convert that LTO into a dangerous offender designation. The Court did not decide the case merely on that basis, however. The decision goes on to re-examine the principles that should govern the sentencing of indigenous offenders and applies them to the case.

Justice LeBel revisited Gladue and the legislative history of 718.2(e) of the Criminal Code, which requires specific consideration of the circumstances of indigenous offenders. He considers and dismisses critiques of Gladue and ultimately reaffirms the need to consider Aboriginal status in sentencing. He attempts to “make sense of aboriginal sentencing” and evaluate the existing approach to sentencing of indigenous offenders. He then applies the principles discussed to Ipeelee’s and Ladue’s circumstances. The Court finds that in sentencing Ipeelee, the lower courts erred in principle by making protection of the public the paramount principle of sentencing and giving attenuated consideration to Ipeelee’s status as an Inuit offender. It concludes that, given Ipeelee’s history of drinking since age 11, “relapse is to be expected as [Ipeelee] continues to address his addiction”. With respect to Ladue, the Court determined that the judgment of the majority of the British Columbia Court of Appeal was “well founded” and that the court was correct to intervene on the basis that inadequate consideration was given to Ladue’s status as an indigenous offender.

III. WHY THE PARTICULAR CIRCUMSTANCES OF INDIGENOUS OFFENDERS?

The Court’s reasoning in Ipeelee/Ladue reflects an approach to sentencing indigenous offenders that makes use of those offenders’ indigenous identity. The concern with indigenous identity stems from Canada’s troubled history of accommodating indigenous difference, especially in the criminal justice system. That troubled history provides important context for understanding how Ipeelee/Ladue is both an

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15 Id., at para. 37; Hearing of Ipeelee/Ladue, Supreme Court Webcast, online: <http://scc-csc.gc.ca>.
16 Ipeelee/Ladue, id., at paras. 64-79.
17 Id., at para. 92.
18 Id., at para. 97.
affirmation of 718.2(e) and by extension provides a place for Canada’s indigenous people in the criminal justice system. Section 718.2(e) requires judges to consider the “particular circumstances of indigenous offenders”. The amendment came about as a result of advocacy by and on behalf of indigenous people that sought to curb over-incarceration of indigenous offenders and to mitigate the historical disadvantage and systemic discrimination offenders experienced in the criminal justice system.

Indigenous offenders make up a disproportionate number of those incarcerated in Canada’s prisons, a fact most recently confirmed in the report of the Office of the Correctional Investigator. Various reports commissioned by parliamentary, legislative or committee inquiries document this indigenous experience and characterize the Canadian criminal justice system as a failure for indigenous people. These critiques of the criminal justice system tend to revolve around: (1) over-representation of indigenous Canadians in the criminal justice system, particularly in jails; (2) failure of the criminal justice system to deal with the social and economic dislocation that is often related to crime;

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(3) lack of indigenous perspectives in the criminal justice system; and
(4) the sense of illegitimacy and oppression most indigenous Canadians
associate with the criminal justice system. 23

The numerous government inquiries and reports into the failure of
the Canadian criminal justice system for indigenous people also direct
criticism at the lack of political power and legal authority indigenous
communities suffer in their experience of criminal justice. The reports of
the Royal Commission on Aboriginal Peoples and the Manitoba Justice
Inquiry, in particular, called on the federal government to respond to the
charge that the criminal justice system fails indigenous people in Can-
da. 24 The Royal Commission on Aboriginal People’s report on criminal
justice outlined how the criminal justice system accounted for part of the
historic disadvantage and oppression indigenous people in Canada have
suffered. 25 The Commission rejected “indigenization” 26 of the criminal
justice system, which was already taking place with court workers and
diversion, and any reform that targeted cultural awareness without
changing the political framework of the criminal justice system. 27 The
Manitoba Justice Inquiry recommended that the federal government sup-
port the establishment of indigenous systems of justice to empower
indigenous communities and to ensure that the criminal justice system
applies indigenous law. 28 About the criminal justice system, the late
Patricia Monture once commented, “[t]he legal system is at the heart of

23 See, e.g., Bridging the Cultural Divide, supra, note 20, at xi, 7; Sinclair, id.; Patricia
Monture, “Thinking About Aboriginal Justice: Myths and Revolution” [hereinafter “Monture”] in
Continuing Poundmaker and Riel’s Quest, supra, note 20, at 222; Roach & Rudin, id., at 376.

24 See 2 and 5 [hereinafter “Andersen”]; Kent Roach & Jonathan Rudin, “Gladue: the Judicial and
412, at 416 [hereinafter “Anand”].

25 Indigenization refers to the practice of maintaining state and post-colonial structures but
with indigenous staff and programs. For example, Tammy Landau describes the indigenization of
corrections practices: “where Aboriginal workers (for example, probation and parole officers) and
programs (for example, sweat lodges and healing circles) are integrated into existing correctional
practices, either at the institutional or community level”. See Tammy C. Landau, “Plus Ca Change?:

26 Bridging the Cultural Divide, supra, note 20, at 40-53.

27 See the recommendations for Aboriginal justice systems in Chapter 17 of the report of the
what we must reject as aboriginal nations and Aboriginal individuals”.

Monture advocated for indigenous people in Canada to be given “both the resources and the control to address the many problems that our communities now face”. She was fierce in advocating that indigenous people be allowed to apply those resources and that control in accordance with indigenous legal traditions. Thus, it is partly as a result of advocacy for political power and authority that section 718.2(e) was born.

Section 718.2(e) came into effect in 1996 when Bill C-41 amended the sentencing provisions of the Criminal Code. The comprehensive amendments included an expression of principles and purposes to direct judges in sentencing, as well as new sentencing options and rules of evidence for sentencing hearings. The principles and purposes of sentencing reflected in sections 718, 718.1 and 718.2 of the Code were intended to codify existing judicial principles of sentencing and emphasize more the remedial aspects of the rationale for sentencing. Bill C-41 signalled “Parliament’s interest in the restorative justice objectives of reparation for harm done to victims and the community and in promoting a sense of responsibility in offenders and the harm done to victims in the community”.

Most important for indigenous communities was that the reforms added section 718.2(e), requiring “particular attention to the circumstances of aboriginal offenders” in the consideration of “all available sanctions other than imprisonment”. The particular attention Parliament directed at indigenous offenders in 718.2(e) reflected the concerns about the over-representation of indigenous offenders in the Canadian criminal justice system. At the first meeting of the Standing Committee hearings on Bill C-41, the Hon. Allan Rock, then Minister of Justice, spoke to the Committee about section 718.2(e):

"The reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada, ... Nationally, aboriginal persons represent about 2 percent of Canada’s"

29 Monture, supra, note 23, at 223.
30 Id., at 224.
population, but they represent 10.6 percent of persons in prison. Obviously, there’s a problem here.

What we’re trying to do, particularly having regard to the initiatives in the aboriginal justice communities to achieve community justice, is to encourage courts to look at alternatives where it’s consistent with protection of the public — alternatives to jail. ... 33

The reports on sentencing leading up to Bill C-41 supported creating alternatives to imprisonment for indigenous offenders. The Law Reform Commission specifically supported diversion measures, victim-offender reconciliation for indigenous offenders, and codifying the recommendation for diversion. The basis for those recommendations was the premise that “rehabilitation and reconciliation are important for aboriginal communities”. 34 As Sanjeev Anand writes, “it is indisputable that s. 718.2(e)’s purpose is to help ameliorate the serious problem of over-representation of aboriginal people in prisons, and to encourage sentencing judges, where appropriate, to have recourse to a restorative approach to sentencing”. 35 Thus, section 718.2(e) symbolized a constitutional and socio-legal compromise: a space within the criminal justice system for indigenous legal approaches.

In practice, however, section 718.2(e) functions primarily in criminal courts applying Canadian criminal law. The Criminal Code does not specify what constitutes “particular circumstances of aboriginal offenders”. That task has been left to the courts, particularly sentencing judges. The Supreme Court has defined the “particular circumstances of aboriginal offenders” in a way that relies on the notion of indigenous difference and considers indigenous identity a factor to be negotiated and accommodated.


35 Anand, supra, note 22, at 416.
in the sentencing process, as Gladue and Ipeelee/Ladue demonstrate. That is why indigenous difference mattered for Manasie Ipeelee and Frank Ladue. Their identity as indigenous offenders is the rationale for taking into account their particular circumstances in sentencing. Ipeelee/Ladue is an example of how criminal courts are called on daily to remedy the historic disadvantage and systemic discrimination that led to the implementation of section 718.2(e) in the first place. The case reveals that, in practice, performing that task creates a new framework for criminal law’s differential treatment of indigenous offenders.

IV. A COURTROOM CONUNDRUM: IPEELEE/LADUE AND THE APPLICATION OF SECTION 718.2(e)

Using individual identity as a factor in sentencing is not unique to indigeneity. Sentencing is a process that requires law take up the question of individual identity, always assessing and evaluating the quality of the individual, “the circumstances of the offender”, and weighing them against the crime before the court, “the circumstances of the offence”. If an individual’s circumstances are always before a sentencing judge, why then should the mandated consideration of indigenous identity concern us? It should concern us because the concept of indigenous identity has already been mobilized by the state and the criminal justice system in ways we decry as harmful.

The law was a tool in colonialism. To this day, legal language defines indigeneity: “Indian”, “Eskimo”. The law criminalized indigenous political and cultural activities, and regulated who could take up land, attend school or access government resources. In remote areas of the country, criminal justice was often the first and most dominant aspect of the

36 Criminal Code, supra, note 3, Part XXIII.
Canadian state with which indigenous people had contact. Articulating how indigenous communities experience disempowerment and historical disadvantage in the legal system, John Borrows writes: “[p]ut simply, the continent’s original inhabitants have never been convinced that the rule of law lies at the heart of their experiences with others in this land.” The legacy of that colonial history remains: the Truth and Reconciliation Commission of Canada, ongoing land claims negotiations, the Idle No More movement and the disproportionate number of indigenous people involved with the criminal justice system.

1. Essentializing Indigenous Communities

The way the Court depicts indigenous identity in Ipeelee/Ladue creates a framework for differential treatment of indigenous offenders that is problematic. The problem is revealed in the way that the Court construes and then dismisses the critiques of Gladue. The Court is mindful of the challenges of adjudicating indigenous offenders’ claims to historical disadvantage and systemic discrimination. It engages some critiques of the application of Gladue, namely that: (1) sentencing is not an appropriate means of addressing over-representation; (2) the Gladue principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) the sentences for indigenous offenders are disparate. Ipeelee/Ladue dismisses these critiques almost out of hand. The Court pays little attention, for instance, to what effects differentiating offenders on the basis of indigenous identity has for indigenous communities. The particularized focus on indigenous identity takes on a character that subsumes other considerations, including differences within indigenous communities and the purpose behind the implementation of section 718.2(e). Indeed, it is this particularization with which Rothstein J., in part, takes issue, declaring: “Aboriginal communities are not a separate category entitled to less protection because the offender is Aboriginal.”

His comment reflects the statistical reality of high crime rates in indigenous communities. Statistics are especially stark in remote communities.

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39 John Borrows, Canada’s Indigenous Constitution (Toronto: University of Toronto Press, 2010), at 1.

40 Ipeelee/Ladue, supra, note 1, at para. 131, per Rothstein J.
such as Iqaluit, where “the volume and severity of police-reported crime were found to be highest in the territories, particularly in the Northwest Territories and Nunavut”.

The Court does little to address how particularizing indigenous identity as a determinative factor in sentencing — regardless of the offence, the victim, or the link between the offender and his or her indigenous community — could create a category of community that receives less protection from the law. If anything, it is dismissive of the idea, selectively drawing an inflammatory quote from the legislative history of 718.2(e):

Why should an Aboriginal convicted of murder, rape, assault or of uttering threats not be liable to imprisonment like any other citizen of this country? Can we replace all this with a parallel justice, an ethnic justice, a cultural justice? Where would it stop? Where does this horror come from?

Framing the concern about community protection in this manner suggests that intolerance is the source of this critique of Gladue. It ignores the question of whether indigenous communities themselves have the impression that they are the subject of “race-based” sentencing. It fails to consider the indigenous critics and communities that have taken issue with section 718.2(e) and the approach espoused in Gladue.

The diversity of indigenous communities and their engagement in sentencing is an unexplored factor in Ipeelee/Ladue. Indigenous communities, which are multiple, varied, rich and diverse in cultural and legal traditions, are all meant to be encompassed in the reference to “Aboriginal”. The effect essentializes indigenous identity. “Essentialism” refers to the idea that individuals who share the same characteristics possess a shared, constant biological nature or essence, or “ascribe to group members a common experience of oppression that is culturally and historically invariable”.

Essentialism is especially problematic when institutions of authority, within and outside a group, define rights and benefits on the basis of a set of closed characteristics meant to define that group’s identity. Theorists and advocates of identity politics alike have

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44 Id., at 30-35.
wrestled with the issue of essentialism. In the context of sentencing indigenous offenders, essentializing indigenous identity creates a conundrum. Section 718.2(e) was meant to alleviate discrimination and historic disadvantage. Essentializing indigenous identity, even in the service of remediating the circumstances of particular offenders, puts the criminal courts in a quandary. It calls into question whether the implementation of section 718.2(e) can ever respond to what indigenous advocates and critics of the criminal justice system called for: power and autonomy for indigenous people in the criminal justice system.

The Court’s characterization of indigenous identity also calls into question the role the criminal justice system plays for indigenous offenders. The needs of the communities or offenders are constructed in a way that characterizes the indigenous person being sentenced as victimized by systemic and direct discrimination, suffering from dislocation, and substantially affected by poor social and economic conditions. *Ipeelee/Ladue* not only makes such comparisons in the case of Frank Ladue and Manasie Ipeelee, but also states:

> Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability.

Although Ipeelee and Ladue suffered deprivation as individuals, the Court treats their context not as “circumstances of the offender” in the same way it might other offenders who lack opportunity or suffer disadvantages. Rather, the Court connects Ipeelee’s and Ladue’s social and economic deprivations to their identity as indigenous offenders and moves from that connection to a broader generalization about indigenous offenders as a category. Section 718.2(e) is of course the foundation for the differentiation of indigenous offenders, but the Court’s decision still draws the difference in a way that enforces traditional power imbalances.

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46 *Ipeelee/Ladue*, supra, note 1, at paras. 2-27.

47 *Id.*, at para. 73.
between indigenous people and the state. The Court’s decision has the effect of inferring diminished moral culpability on an offender by virtue of his or her indigenous identity. It places indigenous offenders in a similar position as others for whom the assignation of responsibility is a problem, such as the mentally ill or youth. It is important to consider the impact that both appropriating indigenous identity and essentializing that identity as victimized, dislocated and poor has on indigenous communities’ and offenders’ agency in the sentencing process. The state becomes a kind of trustee for indigenous people, tasked with remedying the disadvantage Gladue describes. The irony is, of course, that part of the disadvantage indigenous offenders suffered was as a result of past policies and institutions that the state implemented as a self-declared trustee for indigenous people.

2. Essentializing Indigenous Legal Perspectives: Dismissing the Concerns of “Race-Based” Sentencing

Ipeelee/Ladue indicates that the Court is aware of the dangers of essentialism, making reference to criticism that refers to section 718.2(e) as “race-based” sentencing. Nonetheless, the Court dismisses this concern. The dismissal glosses over more profound concerns that critics have expressed regarding the sentencing framework that Gladue laid out for indigenous offenders. The first concern was that there would be disparate sentences for indigenous offenders or that less punitive sentences would endanger the community, as many indigenous communities already suffered from high crime rates. The decision also attracted criticism from feminists who argued that the decision’s emphasis on restorative justice practice overlooked the gender dimensions of crime and victimization in Aboriginal communities. Finally, it faced the critique that decisions

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48 Ipeelee/Ladue, supra, note 1, at para. 71.
49 Roach & Rudin, supra, note 22; Andersen, supra, note 22. See also the Pauktuutit Inuit Women Association’s submission to the Standing Committee on Justice and Legal Affairs: House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs in Official Report of Debates (Hansard), 35th Parl., 1st Sess., Vol. 144, No. 1-85 (February 28, 1995) [hereinafter “Pauktuutit Submission”]
made under the framework essentialize indigenous people and indigenous culture in a way that reinforces historical stereotypes.\textsuperscript{51}

The Court essentializes indigenous identity in a way that can perpetuate problematic stereotypes that were the basis for asserting sovereignty over indigenous people and appropriating indigenous identity in the first place. \textit{Ipeelee/Ladue} reflects how courts set indigenous legal perspectives up in opposition to the criminal justice system:

The \textit{Gladue} principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.\textsuperscript{52}

The Court thus places indigenous offenders in a position that is in contrast to the way sentencing principles normally operate in the \textit{Criminal Code}. Unfortunately, the Court does not suggest that anything about the Inuit or Dena world view was particularly relevant to the Court’s approach to sentencing repeat sex offenders who breach court orders, like Ipeelee or Ladue. The Court openly acknowledges that “sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions”; but the Court maintains, quoting \textit{Gladue}, that sentencing options other than jail can play “a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime”.\textsuperscript{53} \textit{Ipeelee/Ladue} does not, however, include a discussion of these options. In fact, although making the argument that the consideration of sentencing options need not result in more lenient custodial sentences, the Court then goes on to find that what is appropriate for Ipeelee and Ladue is a more lenient custodial sentence.

To determine what the Court means by these different “world views”, it is perhaps necessary to look to what \textit{Gladue} articulates about Aboriginal justice. The Court’s view of the way indigenous identity should be conceived of in the sentencing process is exemplified in this excerpt from \textit{Gladue}:

When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the \textit{Criminal Code} and in the

\textsuperscript{51} Cameron, \textit{id.}
\textsuperscript{52} \textit{Ipeelee/Ladue}, supra, note 1, at para. 74.
\textsuperscript{53} \textit{Ipeelee/Ladue}, supra, note 1, at para. 69.
jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. By means of s. 718.2(e), sentencing judges have been provided with a degree of flexibility and discretion to consider in appropriate circumstances alternative sentences to incarceration which are appropriate for the aboriginal offender and community and yet comply with the mandated principles and purpose of sentencing. In this way, effect may be given to the aboriginal emphasis upon healing and restoration of both the victim and the offender.54

The Court sees indigenous traditions as healing traditions, taking a firm approach in characterizing indigenous law as primarily restorative.55 The decision describes restorative justice as:

an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender.56

In this way, a restorative justice approach becomes the indigenous world view and accordingly part of the Gladue sentencing model.

In the application of Gladue, therefore, indigenous tradition is formulated and set up in contrast, and even in contradiction, to the unitary values of the Canadian criminal justice system; Canada’s criminal justice system is depicted as “retributive” whereas indigenous models of justice are depicted as “restorative”. Len Sawatsky, for instance, has characterized the Canadian criminal justice system in exactly such an oppositional way.57 Rupert Ross’s work depicting his understanding of indigenous difference also relies on the notion that indigenous people have an understanding of dealing with crime that contradicts principles of the Canadian criminal justice system.58 Michael Jackson lays out a framework for indigenous justice systems that parallels the idea that indigenous legal systems are restorative or reconciliatory; his purpose is to show that the recognition of indigenous legal systems complements the way that the Canadian criminal justice system is moving — toward remedial measures and rehabilitation.

54 Gladue, supra, note 2, at para. 81.
55 Id., at paras. 70-74, 77-80.
56 Id., at para. 71.
58 Rupert Ross, Dancing with a Ghost (Markham, ON: Reed Books Canada, 1992).
He summarizes the series of reports and inquiries that recommended changes to Canada’s sentencing process and argues that the recommended changes complement indigenous legal systems’ approach to crime.\textsuperscript{59} I point this out not because I oppose remedial measures or restorative justice, but because characterizing indigenous traditions as oppositional to the Canadian criminal justice system is problematic for a number of reasons. First, equating indigenous culture and law with restorative justice incorrectly conflates indigenous legal systems with Western notions of restorative justice.\textsuperscript{60} Restorative justice allows for ideas of “diversion” or “sentencing circles” to exist within the criminal justice system rather than mandating the creation of a different criminal justice system for indigenous people. Canadian criminal justice authorities, like police or Crown prosecutors, decide who may be diverted or how the sentencing circle is constituted. By conflating indigenous legal systems with the idea of restorative justice that deals with indigenous offenders through diversion in the \textit{Criminal Code}’s process of sentencing, the criminal justice system remains the site in which to negotiate indigenous cultural difference. Indigenous communities must fit themselves into the spaces the criminal justice system creates in sentencing and acquiesce to the same sentencing process that historically appropriated indigenous identity for the purpose of asserting sovereignty. The logic, procedures and language of sentencing remain that of the state, with limited autonomy in the process for indigenous people.

Second, it is also problematic to assume that a Dena or Inuit, or any indigenous legal approach, currently exists separate and apart from the experience of colonialism and criminal justice. In fact, to assume a conception and identification of any indigenous tradition separate and apart from the experience of colonialism may not be possible. Emma Larocque argues that “typologizing Aboriginal cultures results in gross generalizations, draws on stereotypes, reduces Aboriginal culture to a pitiful handul of ‘traits’, and by oversimplifying, ends up infantilizing the very cultures Aboriginal people are trying to build up in the eyes of colonizers”.\textsuperscript{61} Larocque makes an argument about gender that is a good example of the problematic stereotyping that essentializing indigenous identity creates. She argues that gender is often at the heart of what becomes typologized as indigenous tradition and that typologizing frequently creates

\textsuperscript{59} Jackson, \textit{supra}, note 34.

\textsuperscript{60} See, \textit{e.g.}, Monture, \textit{supra}, note 23; Larocque, \textit{supra}, note 50.

\textsuperscript{61} Larocque, \textit{id.}
new problems around gender and what is “authentically” indigenous. She asserts that that notion of justice and the role of women in indigenous societies in relation to criminal justice “is actually syncretized fragments of Native and Western tradition which have become highly politicized because they have been created from the context of colonization”. Larocque’s concern was in fact one brought to the attention of the Standing Committee on Justice and Legal Affairs in its consideration of Bill C-41 by the Pauktuutit Inuit Women’s Association of Canada. The way gender engages questions of culture serves as an example of the problematic way that the dichotomized notions of “traditional” and “Western” justice manifest themselves in public discourse about criminal law as it affects indigenous people. Most troubling perhaps is that all indigenous traditions become conflated in some vague way, not only with restorative justice models, but also with each other. In the very effort to create a more profound understanding with indigenous people and to make up for colonialism’s legacy and law’s essentialization of indigenous identity, a new essentialism emerges. The new essentialism comes with a different legal language, but it remains part of the state’s effort to ameliorate the circumstances of indigenous people.

V. CONCLUSION: WHAT TO MAKE OF THE “PERILS” OF MAKING USE OF INDIGENOUS IDENTITY IN SENTENCING

Indigenous identity is a conundrum for criminal justice. That conundrum lies partly in the context in which indigenous identity has become a part of our sentencing regime and partly in our expectations of what the criminal justice system can achieve through sentencing. In Ipeelee/Ladue, the Court is aware that sentencing is not a panacea for the ills that indigenous communities suffer as a result of historical disadvantage and systemic discrimination. Nonetheless, the Court must act, and its action directly affects indigenous people. As a result, it has tried to develop an approach to action that could alleviate over-incarceration and systemic discrimination against indigenous offenders, but that approach also operates to construct indigenous identity. The law’s troubled legacy of regulating indigenous difference is not eliminated; it merely takes a different form. Criminal law continues to be a site of tension between

62 Id., at 76.
63 Pauktuutit Submission, supra, note 49, at 6 and 19 (Martha Flaherty and Jeanne Sala).
indigenous people and the state. The claims of indigenous people for authority over the criminal justice system can only be articulated through the logic and procedures of the Criminal Code. It is a logic for which sentencing is particularly well suited, given its propensity to use an individual offender’s character and identity to determine the extent of criminal responsibility, as well as its role in upholding the state’s authority. But sentencing is not well suited to the task of remedying the historic disadvantage and systemic discrimination that indigenous people have experienced.

What other options are available to criminal courts? Indeed, what other avenues are available for indigenous people? What would lessen the conundrum of the “perils of identity”64 that face criminal courts and indigenous offenders in the sentencing process? One way to address the conundrum courts face would be for the criminal justice system to acknowledge the way that sentencing has the power to essentialize indigenous identity and exacerbate rather than alleviate the harm caused by systemic discrimination and historical disadvantage. That acknowledgment would require practitioners engaged in the criminal justice system to look closely at how they characterize indigenous offenders, communities and indigenous legal perspectives. Reconciling ourselves to the conundrum takes nothing away from the difficult and important work of indigenous advocates in the criminal justice system. Instead, the acknowledgment would mean that advocacy must focus on better community engagement, better systems for diversion and better resources for indigenous communities. Since Ipeelee/Ladue, there is a renewed interest in the sentencing of indigenous offenders. For instance, the University of Manitoba’s Faculty of Law has developed a “Gladue Handbook” to assist judges and lawyers involved in sentencing indigenous offenders.65 Debra Parkes has questioned how the Supreme Court’s emphasis on proportionality for indigenous offenders will conflict with Parliament’s recent legislative amendments instituting mandatory minimum sentencing.66 Ipeelee/Ladue also supports arguments for giving

64 I use “perils of identity” in the same way Caroline Dick does in her book of the same name, supra, note 43, in which she analyzes identity politics and intragroup claims in the context of the Sawridge Indian Band dispute, but I do not adopt her argument in its entirety in that regard.
65 Faculty of Law, University of Manitoba, Gladue Handbook, September 2012 online: <http://chrr.info/resources/gladue-projec>.

A more profound response to the conundrum would be to return to the constitutional and socio-legal compromise that section 718.2(e) represents, and to find a space within the criminal justice system for indigenous legal approaches other than the sentencing process. Indigenous communities seek greater autonomy and control over the justice system that governs them. That is the reason why indigenous identity matters in sentencing. As such, it makes sense to consider whether a better approach to the conundrum lies in revisiting how our state deals with indigenous claims to autonomy and self-governance. Addressing indigenous claims to self-governance means looking to the multiplicity, diversity and richness of indigenous communities to find out what autonomy and self-governance means to them. It requires an ongoing engagement within communities and within our constitutional and legal institutions. It is a difficult task; however, it could be that within a constitutional response to the conundrum there is in fact a remedy for the historic disadvantage and systemic discrimination indigenous people suffered and in which the criminal justice system is implicated.