## II. Identity

The application of *Gladue* and *Ipeelee* is not a matter of proving or disproving that the person before the court is an Indigenous person. The determination that a person is Indigenous triggers a different process, but it does not necessarily mandate a different

1 See e.g. *R v Kakekagamick* (2006), 81 OR (3d) 664 at para 34, 70 WCB (2d) 470 [*Kakekagamick II*].

2 *R v Ipeelee*, 2012 SCC 13 at paras 84-87, [2012] 1 SCR 433 [*Ipeelee*].

3 *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*]; *Ipeelee*, *supra* note 2 at para 62.

4 *Ipeelee*, *supra* note 2 at para 75.

result. It is not as though the "finding" that a person is Indigenous automatically changes what would otherwise be a fit sentence.

As discussed in Chapter 3, identity is a challenging concept and for many a somewhat malleable one. Inviting courts to determine if someone is or is not an Indigenous person after the individual has made that assertion is not just fraught with moral, ethical, and legal concerns, all of which are heightened by the impacts of colonialism, but most importantly are irrelevant to applying the law. In *R v TAP*, Croll J of the Ontario Superior Court succinctly summed up the law by stating the process of *Gladue* assessment "must go beyond a technical assessment of bloodline."[5]

Perhaps the best discussion of this issue is in the decision of George J of the Ontario Court of Justice (as he then was) in *R v Boyd*.[6] At sentencing, Mr Boyd asserted his Indigenous identity but provided no further information. George J stated:

> I did not have the benefit of a pre-sentence report that explored Gladue factors. I did not have the benefit of a Gladue report. I know only that he self identifies as an Aboriginal person, because apparently, one of his parents has Aboriginal ancestry. I am told that connection is with the "Oneida Band of the Blackfoot Tribe." I have never heard of this. What I do know is the Oneida people are members of the Iroquois Confederacy. They are Haudenosaunee. I know also that the Blackfoot Nation is located traditionally in the upper plains of the United States and in parts of Canada's Prairie Provinces. There was no elaboration. I was told nothing more than that.
>
> I am therefore of the view, notwithstanding the self-identification, that the Gladue analysis should play no important role in formulating a fit sentence for Mr. Boyd. Identifying as an Aboriginal person does not amount to a sentencing discount.
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> The decision to not engage the analysis, in the face of an identification, is tricky, because displacement is a key feature of *Gladue*, and who am I to serve any kind of gate-keeping function in determining who is Aboriginal and who is not. Displacement, and lack of connection to one's Aboriginal community, is one of the sad and lasting legacies of the residential school system, as is the current prevalence of First Nations children being placed in the care of child welfare agencies. That is, loss of identity can play an important role in contributing to criminal behavior, and is encompassed within a Gladue analysis.
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> The problem here is, no part of the "picture" has been painted for me, other than to be told he may have some First Nation blood; which is not even all that apparent, given the confusing description of his tribal affiliation.[7]

5 2013 ONSC 797 at para 40, 105 WCB (2d) 339.

6 2015 ONCJ 120, 119 WCB (2d) 625.

7 *Ibid* at paras 14-17; see also *R v Jones*, 2013 ONSC 6613, 109 WCB (2d) 707; *R v Drinkwater*, 2015 ONSC 3513, 128 WCB (2d) 293; *R v Judge*, 2013 ONSC 6803, 110 WCB (2d) 365 [*Judge*]. Importantly, in *Judge* at paras 435-37, while the court concluded that the offender's lack of information about his Indigenous background made it impossible to conduct a *Gladue* analysis with respect to type or length of sentence, his self-identification and expressed interest in Aboriginal programming was something that should be considered in determining sentencing options.

In arriving at his conclusion, George J was not concerned with whether Mr Boyd's Indigenous identity could be proven or disproven. The reason that he declined to embark upon a *Gladue* analysis was based on the fact that he had no relevant information about the significance of Mr Boyd's Indigenous identity. At the end of the day, the information provided about the circumstances of the individual as an Indigenous person is what matters. Arguments about whether someone is or is not an Indigenous person are beside the point.[8]

8 The provisions of section 718.2(e) apply to all offenders, of course; it is only the last nine words that specifically engage consideration of the person's Aboriginal background. The call on judges to look for alternatives applies to all offenders. Relevant information regarding an offender's circumstances will be important even if the sentencing does not include *Gladue* factors.

9 See *R v Benedict*, 2014 ONSC 6898, 117 WCB (2d) 550; see also *R v Day*, 2010 ONSC 1874, 87 WCB (2d) 639.

10 2013 ONCA 251, 106 WCB (2d) 464.

11 *Ibid* at paras 15-17.