



KAWASKIMHON MOOT 2020

FACT PATTERN

Twenty years have passed since *R v. Gladue* (*Gladue*), in which the Supreme Court of Canada (SCC) stated that the over-incarceration of Indigenous peoples could be “fairly termed a crisis in the Canadian criminal justice system.”¹ The over-representation of Indigenous people in custody has been a concern going back to the end of the Second World War.²

It’s fair to say that the crisis has only worsened since this time. A number of studies and committees have examined the issue over the years, the *Aboriginal Justice Inquiry* report³ being the most comprehensive as it relates to Aboriginal people in Manitoba. There are several factors that have prevented real change from occurring.

Gladue was a landmark decision by the SCC involving section 718.2(e) of the *Criminal Code*, in the case of an Aboriginal woman from British Columbia. On September 16, 1995, Jamie Tanis Gladue was celebrating her nineteenth birthday when she got into a violent

¹ *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

² Jonathan Rudin, “Aboriginal Over-Representation and R v. Gladue: Where We Were, Where We Are and Where We May Going (2008) 40 SCLR: Osgoode’s Annual Constitutional Cases Conference 687 at 687.

³ Angus C Hamilton & C.M. Sinclair, Report of the Aboriginal justice Inquiry of Manitoba, Vol 1, The Justice System and Aboriginal People (Winnipeg, Queen’s Printer, 1991).

disagreement with her boyfriend and stabbed him. She was eventually convicted of manslaughter. At her sentencing hearing, the judge took into account her youth, her status as a mother, and the absence of any serious criminal history. She was sentenced to three years imprisonment. When the Supreme Court dismissed her appeal of the sentence in 1999, the Court approvingly quoted a study to the effect that “the prison has become for many young native people the contemporary equivalent of what the Indian residential school represented for their parents.”⁴

The SCC outlined two considerations that sentencing judges must apply when determining a fit and appropriate sentence:

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

Arguably, the failure to ameliorate the over-incarceration of Indigenous people has been due to weak and inconsistent application of the *Gladue* principles. Commitment across jurisdictions has been uneven, particularly those provinces with the highest population of Indigenous people.

Proper consideration of *Gladue* factors is a powerful tool for addressing the crisis of Indigenous over-incarceration. One way to provide context and important information is

⁴ Truth and Reconciliation Commission, *Canada’s Residential Schools: The Legacy*, v. 5, page 235.

by way of a Gladue assessment. The case *R v. Ipeelee (Ipeelee)* involved two men — one from Yukon, the other from Nunavut, both with serious alcohol problems going back to their youth, both with long criminal records, both from broken families, and both with links to residential schools. The argument that reached the SCC concerned the breach of their long-term supervision order. In its 2012 ruling, the Court reduced the sentence of one man and affirmed that of the other. Importantly, in *Ipeelee*, the SCC revisited and reaffirmed *Gladue*. The justices noted that the problem of Aboriginal overrepresentation had gotten worse in the thirteen years since *Gladue* was decided. The Court pointed out that while Aboriginal people comprised 12% of federal inmates in 1999 when *Gladue* was decided, they constituted 17% of federal admissions in 2005.⁵

The SCC pointed out that some lower court judges had erred in their application of *Gladue* by concluding that it did not apply to serious offences or that it required an offender to demonstrate a causal connection between the commission of the crime and the legacy of residential schools or other background or contextual factors. *Gladue* mandates trial judges to consider all the background factors for Aboriginal offenders. This was clear direction from the SCC's ruling that offenders need not demonstrate a direct causal relationship between the legacy of residential schools and the commission of offences.⁶

Gladue Information

One issue of concern is the nature and status of comprehensive Gladue assessments or Gladue reports presented to the Courts.

⁵ *Ibid* at page 237.

⁶ *Ibid*.

In some jurisdictions there has been the introduction of more extensive pre-sentence or Gladue reports that provide the sentencing judge with contextual information on the background of Aboriginal offenders. Producing these reports has not been without difficulty and controversy. In 2012, the Globe and Mail reported:

Saskatchewan, Alberta and Manitoba have barely begun to produce [Gladue] reports. While the number in Alberta has shot up from 14 in 2011 to 100 that are now in production, most of them are being prepared by probation officers — who are trained to assess risk factors but have no particular understanding of aboriginal culture and history. In Quebec, Gladue reports are almost unheard of.⁷

Although the term Gladue report has now entered the legal lexicon in Canada there is no precise form for these reports or a specific manner in which the reports can be requested.⁸

Unlike pre-sentence reports, there is no provision in the *Criminal Code* that would specifically empower a judge to order such a report. Although there has been widespread recognition that Gladue reports perform an important function at sentencing, the availability of these reports depends on the particular funding mechanism that does or does not exist in each province and territory. The ability to obtain a Gladue report for an Aboriginal offender is not a question of need, rather it is a question of whether the resources are available for the production of these reports.⁹

⁷ *Ibid* at page 236.

⁸ Jonathan Rudin, *Indigenous People and the Criminal Justice System* (Toronto: Emond Montgomery Publications Limited 2019) at page 109 [Rudin].

⁹ *Ibid*.

Rudin notes “to describe the availability of Gladue reports across the country as a patchwork quilt would do a disservice to quilt makers. Even patchwork quilts do not have huge holes in them.”¹⁰

Issue for Kawaskimhon Moot

Prosecutors play a crucial role in the criminal justice system. In order to implement *Gladue* (and for the purposes of this moot) Manitoba has decided to create a policy to guide Crown prosecutors in the implementation of *Gladue*. Manitoba would like a policy that guides not only sentencing but to guide Crown prosecutors in all aspects of its engagement with accused Indigenous people from bail forward. Manitoba wishes to engage with stakeholders to develop a policy to implement *Gladue* in spirit and in intent.

At the moot, you are asked to develop a Crown policy (or the foundational principles for such policy) that will guide Crown prosecutors all with a view to address the issue of over-representation of Indigenous people in prison.

You are asked to develop the principles from the perspective of the interests of your assigned client. The list of clients shall be distributed separately.

¹⁰ *Ibid* at page 110.