

IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)

B E T W E E N:

MANASIE IPEELEE

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

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**FACTUM OF THE INTERVENER  
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(Pursuant to Rule 37)**

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## PART I – OVERVIEW

1. Aboriginal Legal Services of Toronto (ALST) is a non-profit organization that was incorporated to assist Aboriginal people gain access to, and control over, justice related issues that affect them.
2. ALST adopts the position of the Appellant on the facts of the case.

## PART II – STATEMENT OF POSITION

3. ALST submits that the Ontario Court Appeal erred in failing to give proper consideration to the principles set out by this Honourable Court in *R. v. Gladue*, [1999] 1 S.C.R. 688, in the sentencing of the Appellant, Manasie Ipeelee, and that the proper approach to this matter is found in the decision in the British Columbia Court of Appeal in *R. v. Ladue*, [2011] 2 C.N.L.R. 277.

## PART III – STATEMENT OF ARGUMENT

### **(a) The Trilogy of Aboriginal criminal justice cases – *R. v. Williams*, *R. v. Gladue* and *R. v. Wells***

4. This is the first opportunity this Honourable Court has had to review the treatment of Aboriginal people in the criminal justice system since the trilogy of Aboriginal criminal justice cases from 1998 to 2000: *R. v. Williams*, [1998] 1 SCR 1128; *R. v. Gladue*, and *R. v. Wells*, [2000] 1 S.C.R. 207.
5. In *R. v. Williams*, at para. 58 this Court found that:

Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in *Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release* (1988), at p. 5:

Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a

coherent social or moral order. The stereotype prevents us from seeing native people as equals.

There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.<sup>1</sup>

6. In *Gladue* at para. 61 this Honourable Court reiterated the conclusion arrived at in *Williams* and went on to find that the over-representation of Aboriginal people in prison is “a crisis in the Canadian criminal justice system.”<sup>2</sup>
7. By describing Aboriginal over-representation as a “crisis” this Honourable Court recognized that the problem of over-representation was not due solely to the fact that Aboriginal people commit crimes, but also to the way in which Aboriginal people are sentenced. The Court therefore found the responsibility for over-representation rests in large part with the criminal justice system itself.
8. The Court stated in *Gladue* at paragraphs 65 and 68:

The unbalanced ratio of imprisonment for aboriginal offenders flows from a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for aboriginal people. It arises also from bias against aboriginal people and from an unfortunate institutional approach that is more inclined to refuse bail and to impose more and longer prison terms for aboriginal offenders.

Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

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<sup>1</sup> *R. v. Williams*, [1998] 1 SCR 1128 at para. 58. In support of this finding this court cited: *The Royal Commission on Aboriginal Peoples, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, vol. 2 (Ottawa: Supply and Services Canada (1996) at p. 33; Royal Commission on the Donald Marshall, Jr., Prosecution: *Commissioners' Report, Findings and Recommendations vol. 1* (Halifax: Canadian Cataloguing in Publication Data, 1989), at p. 162; Cariboo-Chilcotin Justice Inquiry, *Report on the Cariboo-Chilcotin Justice Inquiry* (Canadian Cataloguing in Publication Data, 1993, at p. 11 [TAB 8].

<sup>2</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 64 [TAB 2].

9. This Honourable Court also found that even where a jail sentence is necessary, the length of that sentence must also be considered and that,

Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.<sup>3</sup>

10. In *Wells*, this Honourable Court clarified the notion of sentence parity between Aboriginal and non-Aboriginal offenders at para. 50 stating:

The generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

#### **(b) The Reality on the Ground and In the Prisons**

11. Aboriginal people make up a small percentage of the Canadian population. Over a span of 10 years the percentage of Aboriginal people in Canada has increased from 2.8% in 1996, to 3.8% in 2006.<sup>4</sup>
12. When this Honourable Court found Aboriginal over-representation to be a crisis in *Gladue*, it relied on statistics found in “Locking Up Natives in Canada”.<sup>5</sup> When this report was written in 1988 Aboriginal people made up 11% of inmates in federal prisons, and 17% of inmates in provincial and territorial prisons.<sup>6</sup>

<sup>3</sup> *Gladue*, *supra* note 2 at para 79 [TAB 2].

<sup>4</sup> Statistics Canada, *Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census* (The Daily) (Communications and Library Services Division, 2008) at p. 1–5, online: <<http://www.statcan.gc.ca/daily-quotidien/080115/dq080115a-eng.htm>> [TAB 11].

<sup>5</sup> *Gladue*, *supra* note 2 at para. 58, citing Michael Jackson, “Locking Up Natives in Canada” (1988-89), 23 U.B.C.L. Rev. 215 [TAB 2].

<sup>6</sup> Statistics Canada, *Adult Correctional Services in Canada, 1999-00* (Catalogue no. 85-002-XIE Vol. 21 no. 5) (Juristat Canadian Centre for Justice Statistics) at 8, online: <<http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0050185-002-XIE.pdf>> [TAB 12].

13. In 1995-1996, when Bill C-41— the legislation that enacted s. 718.2(e) of the *Criminal Code* was passed, Aboriginal people made up 12% of inmates in federal prisons, and 16% of inmates in provincial and territorial prisons.<sup>7</sup>
14. In 1999-2000, when this Honourable Court decided *Gladue*, Aboriginal people made up 17% of inmates in federal and provincial and territorial prisons.<sup>8</sup>
15. In 2007-2008, rates of over-representation were at their highest levels ever - 18% of inmates in federal prisons and 25% of inmates in provincial and territorial jails were Aboriginal.<sup>9</sup>
16. In its 2009-2010 Annual Report, the Office of the Correctional Investigator specifically addressed the circumstances of Aboriginal people incarcerated in federal prisons in Canada, it stated:

In November 2009, my Office released an independent report authored by Michelle Mann entitled *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*. The Mann Report documents the fact that outcomes for Aboriginal offenders continue to lag significantly behind those of non-Aboriginal offenders on nearly every indicator of correctional performance. In comparison to the non-Aboriginal inmate population, Aboriginal offenders tend to be:

- Released later in their sentence (lower parole grant rates).
- Over-represented in segregation populations.
- More likely to be released at statutory release or at warrant expiry.
- More likely to be classified as higher risk and in higher need in categories such as employment, community reintegration and family supports.

<sup>7</sup> Statistics Canada, *Adult Correctional Services in Canada, 1995-1996* (Catalogue No. 85-002-XIE, Vol. 17, no. 4.) (Juristat Canadian Centre for Justice Statistics) at 9, online: <<http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0049785-002-XIE.pdf>> [TAB 13].

<sup>8</sup> Statistics Canada, *Adult Correctional Services in Canada, 1999-00* (Catalogue no. 85-002-XIE Vol. 21 no. 5) (Juristat Canadian Centre for Justice Statistics) at 8, online: <<http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-002-XIE/0050185-002-XIE.pdf>>. These statistics were not available to the court at the time of the decisions [TAB 11].

<sup>9</sup> Statistics Canada, *Aboriginal Statistics at a Glance* (Catalogue No. 89-645-XWE) (Juristat Canadian Centre for Justice Statistics) online: <http://www.statcan.gc.ca/pub/89-645-x/2010001/c-g/c-g014-eng.htm> [TAB 14].

If a *Gladue* lens was fully and consistently applied to decision making affecting security classification, penitentiary placement, segregation, transfers and conditional release for Aboriginal offenders, then one could reasonably expect some amelioration of their situation in federal corrections. The fact that they are almost universally classified “high needs” on custody rating scales, the fact that nearly 50% of the maximum security women offender population is Aboriginal, the fact that statutory release now represents the most common form of release for Aboriginal offenders and the fact that there is no Aboriginal-specific classification instrument in use by CSC all suggests that *Gladue* has not yet made the kind of impact one would hope for in the management of Aboriginal sentences.<sup>10</sup>

17. The problems facing Aboriginal offenders in the penitentiary system are illustrated by the experience of Mr. Ipeelee. The Ontario Court of Appeal noted at para. 14 that the Appellant served his full six year sentence in the Kingston Penitentiary<sup>11</sup> and he:

...lost many close relatives while serving his penitentiary term and at this point, he appears to lack links with his own community. He was not released in his home community in Iqaluit because the Inuit-oriented facility there refused to accept him on the ground that he posed an undue risk of re-offending. The community correctional facility in Kingston has relatively little to offer by way of aboriginal services.

**(c) The (in)significance of serious and violent offences and s. 718.2(e)**

18. As noted above, this Court in *Gladue* and *Wells* discussed the significance, or lack of significance, of the fact that an Aboriginal offender has been charged with a serious or violent offence. It is clear that there has been confusion at the appellate court level as to whether or not the circumstances of a particular offence will mean that in practice *Gladue* will have little or no effect.
19. Prof. Kent Roach, in “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal” found that with reference to *Gladue* and *Wells*:

<sup>10</sup> Canada, Office of the Correctional Investigator “Annual Report of the Correctional Investigator 2009-2010” at section 4, online: <<http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20092010-eng.aspx#2.4>> [TAB 9].

<sup>11</sup> *R. v. Ipeelee*, [2009] O.J. No. 5402 at para 14 [TAB 5].

Appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments – paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders. To some extent, this focus is unfortunate. Appellate courts have not spent as much time discussing the bulk of the court’s decision in *Gladue* with respect to the overrepresentation of Aboriginal people in jail, reliance on imprisonment, and the role of restorative sentencing purposes aimed at rehabilitating the offender and recognizing the harm caused by the offence.<sup>12</sup>

20. In its factum, the Respondent makes reference to this Honourable Court’s statements in *Gladue* and *Wells* with regard to serious and violent offences to support the proposition that the sentences in such cases will generally be similar for Aboriginal and non-Aboriginal offenders.<sup>13</sup> However, even in cases of serious and violent offences appellate courts have nevertheless given greater weight to the principles associated with s. 718.2(e) and *Gladue*. Specifically in Ontario the Court of Appeal reduced the sentences of Aboriginal offenders where sentencing judges applied *Gladue* and *Wells* to impose sentencing parity with non-Aboriginal offenders in: *R. v. Batisse* [2009] O.J. No. 452, the abduction of a baby from a hospital; *R. v. Towegishig* [2008] O.J. No. 1662, a series of historic sexual assaults against a step-daughter; and *R. v. Sellen* [2008] O.J. No. 3507, a case of manslaughter. All of these cases involved offences where, as in this case, courts have stressed the need for general deterrence and denunciation.

**(d) The long-reach of the sentencing decision for the predicate offence**

21. The decision of Justice Richard in sentencing the Appellant for the predicate offence in Yellowknife in 2001 has, in at least two ways, had an undue and negative impact on the decisions made by the sentencing judge and the Ontario Court of Appeal in arriving at the sentence that is the subject of this appeal.

22. First, it is submitted that the Court of Appeal erred by finding the statement made by Justice Richard in 2001 that, “...I am convinced that there is a substantial risk

<sup>12</sup> Kent Roach, “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal” (2009) 54 *Crim. L.Q.*, pp. 470-505, at 472-473 [TAB 10].

<sup>13</sup> See the Respondent’s Factum at para. 50 – 51.

that Manasie Ipeelee will reoffend. Indeed, if he has access to alcohol, it is as certain as night follows day,” still applicable eight years later in 2009. Indeed, despite allegations to the contrary, the incident that brought the Appellant before the courts was the first evidence he had consumed alcohol since his sentencing on the predicate offence.<sup>14</sup> The Court of Appeal failed to consider that the principles of *Gladue* must be applied at every stage of sentencing particularly in light of fresh evidence regarding the circumstances of the offender since the initial sentencing. Reliance on this dated conclusion by Justice Richard drove the Court of Appeal to ignore the other relevant circumstances of the Appellant.

23. Second, the Appellant was sentenced on the predicate offence after the decision of this Honourable Court in *Gladue*. In imposing a six year sentence followed by a ten year supervision order, Justice Richard paid scant attention to the Appellant’s Aboriginal background and he diminished its significance in light of s. 718.2(e). Justice Richard at para. 70 stated, “Mr. Ipeelee is an aboriginal offender however he had only limited exposure to the lifestyle of the Inuit in his formative years living with his grandparents.”<sup>15</sup>

24. What Justice Richard failed to appreciate is that the circumstances of the Aboriginal offender must include those circumstances that not only bind him to his Aboriginal community, but those factors that have driven him away from his community as well.<sup>16</sup> This error likely contributed to the sentence that Mr. Ipeelee received for the predicate offence.

25. The Ontario Court of Appeal in the instant matter summarized Mr. Ipeelee’s life circumstances at para 14, although as noted above, failed to grant those circumstances proper weight:

I feel compelled to add, however, that the appellant’s aboriginal background and the disadvantage he has suffered clearly provide insight

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<sup>14</sup> *Ipeelee*, *supra* note 11 at para. 9 [TAB 5].

<sup>15</sup> *R. v. Ipeelee*, [2001] N.W.T.J. No. 30 at para. 70 [TAB 4].

<sup>16</sup> *Gladue*, *supra* note 2 at para. 67 [TAB 2]. See also: *R v. Brizard*, [2006] O.J. No. 729 at para. 3 [TAB 1].

into his sorry involvement with the criminal justice system. He grew up in Nunavut. His alcoholic mother froze to death when he was a child. He was raised by his grandparents, one of whom has died. His involvement with alcohol and crime started at an early age. He complains that an older person sexually abused him when he was nine.

**(e) Application of *Gladue* in cases of long term offenders – *H.P.W.* and *Ladue***

26. It is respectfully submitted that the Ontario Court of Appeal erred in relying on the Alberta Court of Appeal's decision in *R. v. H.P.W.*<sup>17</sup> A review of the decision reveals its failure to give proper consideration to the role of *Gladue* in sentencing offenders. The decision improperly attempts to remove the consideration of the circumstances of the Aboriginal offender once a person has been declared a long-term offender. The Court stated at paragraph 50:

The respondent is of aboriginal heritage. However, once an offender is declared to be a long-term offender, consideration of restorative justice and other features of Aboriginal offender sentencing will play little or no role.

27. At paragraph 51 the Court in *H.P.W.*, went even further and stated "With respect to this offender, consideration of his aboriginal heritage can play no role."

28. The Alberta Court of Appeal's interpretation of *Gladue* with respect to long-term offenders is simply incorrect. In *R. v. Jensen*<sup>18</sup>, the Ontario Court of Appeal considered the application of *Gladue* to the issue of parole ineligibility for a person convicted of second degree murder. The Court stated:

We do not read *Gladue* as saying that there are cases in which the *Gladue* principles will not apply. While we agree that there will be cases in which the principles and objectives expressed in *Gladue* will not weigh as heavily as other sentencing objectives...the *Gladue* principles remain applicable in all cases where an aboriginal person is the offender.

29. It is submitted that the correct approach to this issue is found in the decision of the British Columbia Court of Appeal (B.C.C.A) in *R. v. Ladue*. As in the instant case, Mr. Ladue, an Aboriginal offender, was sentenced to three years

<sup>17</sup> *R. v. H.P.W.*, [2003] A.J. No. 479 [TAB 3].

<sup>18</sup> *R. v. Jensen*, [2005] O.J. No. 1052 at para. 27 [TAB 6].

imprisonment for violating the condition of his long-term supervision order that he not consume alcohol or drugs.<sup>19</sup> Also similar to the instant case, the predicate offence was a sexual assault, the offender had been convicted of a number of sexual assaults and alcohol or drugs were involved in all offences.<sup>20</sup> Unlike this case, Mr. Ladue had breached his long-term supervision order on three previous occasions, all involving consumption of intoxicants.<sup>21</sup>

30. Justice Bennett writing for the majority of the B.C.C.A., correctly identified the application of *Gladue* during sentencing when she stated,

If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed.<sup>22</sup>

31. It is our submission that as the B.C.C.A., found in *Ladue*, the protection of society is important, but rehabilitation is also important and must play a role with all offenders including those designated as long-term offenders.<sup>23</sup>

32. In *Ladue* the Court decided that "Mr. Ladue's background played an instrumental part in his offending over his lifetime and his rehabilitation is critical to the protection of the public."<sup>24</sup> This approach is more consistent with the principles laid out by this Honourable Court in the trilogy of Aboriginal criminal justice cases and should have informed the Ontario Court of Appeal's examination of Mr. Ipeelee's background.

33. Where a court seriously and with due consideration examines the life circumstances and background of an Aboriginal offender, the appropriate and fit sentence may well differ from that of a non-Aboriginal offender. This principle is

<sup>19</sup> *R. v. Ladue*, [2011] 2 C.N.L.R. 277 at para. 1 [TAB 7].

<sup>20</sup> *Ibid.* at para. 3 [TAB 7].

<sup>21</sup> *Ibid.* at para. 12 [TAB 7].

<sup>22</sup> *Ibid.* at para. 64 [TAB 7].

<sup>23</sup> *Ibid.* at Para 71 [TAB 7].

<sup>24</sup> *Ibid.* at para. 82 [TAB 7].

illustrated by the decision in *Ladue*, a decision that resulted in a reduction of his sentence from three years to one year.<sup>25</sup>

34. It is respectfully submitted that the approach taken by the B.C.C.A. in *Ladue* is faithful to the direction of this Honourable Court in *Gladue* and provides a better basis on which to determine an appropriate sentence for the Appellant.

#### PART IV – POSITION ON COSTS

35. ALST seeks no costs and respectfully submits that no costs be ordered against it.

#### PART V – INTERVENER'S POSITION

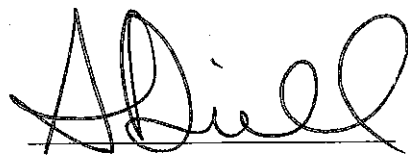
36. ALST respectfully submits that the appeal of Mr. Ipeelee should be allowed. ALST respectfully requests that it be granted 15 minutes to make oral argument at the hearing of the appeal.

37. Such further and other submissions this Honourable Court shall allow.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18<sup>th</sup> day of July, 2011.**



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<sup>25</sup> *Ibid.* at para. 83 [TAB 7].

## PART VI - TABLE OF AUTHORITIES

Jurisprudence	Paragraph Reference in Factum
<i>R. v. Brizard</i> , [2006] O.J. No. 729	24
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<i>R. v. H.P.W.</i> , [2003] A.J. No. 479	26 – 27
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Secondary Sources	Paragraph Reference in Factum
Canada, Office of the Correctional Investigator “Annual Report of the Correctional Investigator 2009-2010” at section 4,	16
Kent Roach, “One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal” (2009) 54 Crim. L.Q., pp. 470-505.	19
Statistics Canada, <i>Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census</i> (The Daily) (Communications and Library Services Division, 2008).	11
Statistics Canada, <i>Adult Correctional Services in Canada, 1999-00</i> (Catalogue no. 85-002-XIE Vol. 21 no. 5) (Juristat Canadian Centre for Justice Statistics).	12, 14
Statistics Canada, <i>Adult Correctional Services in Canada, 1995-1996</i> (Catalogue No. 85-002-XIE, Vol. 17, no. 4.) (Juristat Canadian Centre for Justice Statistics).	13
Statistics Canada, <i>Aboriginal Statistics at a Glance</i> (Catalogue No. 89-645-XWE) (Juristat Canadian Centre for Justice Statistics).	15

**Manasie Ipeelee**

and

**Her Majesty the Queen**

**Court File No. 33650**

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Respondent

**Supreme Court of Canada  
On Appeal from the  
Court of Appeal of Ontario**

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