Court File #C65766

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

AND:

KEVIN MORRIS

RESPONDENT

AND:

THE DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CRIMINAL LAWYERS' ASSOCIATION, ABORIGINAL LEGAL SERVICES, SOUTH ASIAN LEGAL CLINIC OF ONTARIO, CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, BLACK LEGAL ACTION CENTRE AND CANADIAN ASSOCIATION OF BLACK LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS ASSOCIATION AND URBAN ALLIANCE ON RACE RELATIONS

INTERVENERS

FACTUM OF THE INTERVENER, ABORIGINAL LEGAL SERVICES

ABORIGINAL LEGAL SERVICES LEGAL CLINIC
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4

Caitlyn E. Kasper
Douglas Varrette
Telephone: (416) 408-4041 ext. 229
Fax: (416) 408-1568
Email: kasperc@lao.on.ca
Counsel for the Intervener

TABLE OF CONTENTS

PART I – STATEMENT OF THE CASE …………………………………………………………. 1

PART II – SUMMARY OF THE FACTS ……………………………………………………..…. 1

PART III – ISSUES AND THE LAW ………………………………………………………….. 2

1. The Overrepresentation of Indigenous People in the Criminal Justice System.. 2

2. The History of Gladue Reports ………………………………………………………… 3

3. Characteristics of Gladue Reports ……………………………………………….…….. 7

   a. Content of Gladue Reports …………………………………………………….. 7

   b. Differences Between a Pre-Sentence Report and a Gladue Report ……………………………………………………….... 9

   c. A Gladue Report is not an Expert Report ………………………………….. 11

PART IV – ORDER REQUESTED ……………………………………………………………… 12

SCHEDULE "A" – AUTHORITIES TO BE CITED …………………………………………. 13

SCHEDULE "B" – RELEVANT LEGISLATIVE PROVISIONS …………………………… 15

PART I – STATEMENT OF THE CASE

1. This sentence appeal by the Attorney General for the Province of Ontario concerns the treatment of social context evidence in the creation of a fit sentence for racialized and non-Indigenous offenders.

2. The focus of Aboriginal Legal Services' (ALS) intervention is to provide an important perspective on this issue as a result of the Supreme Court of Canada's (Supreme Court) interpretation of s. 718.2(e) of the *Criminal Code*[1] in *R v Gladue*[2] and *R v Ipeelee*,[3] which explained how courts should consider the unique circumstances of Indigenous offenders in the sentencing context.

3. ALS will also provide information on the nature of Gladue Reports and their preparation, which the Court may find helpful in the resolution of the case at bar.

PART II - SUMMARY OF THE FACTS

4. ALS intervenes in this case pursuant to an Order issued by Chief Justice Strathy on June 18th, 2019.

5. ALS accepts the facts as summarized by the Respondent.

[1] *Criminal Code of Canada,* RSC 1985, c C-46, s 742.1(c) and (e)(ii) *[Criminal Code]*
[2] *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 [*Gladue*]
[3] *R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433 at para 60 [*Ipeelee*]

PART III - ISSUES AND LAW

1. The Overrepresentation of Indigenous People in the Criminal Justice System

6. The overrepresentation of Indigenous people in the Canadian criminal justice system began at the end of the Second World War[4] and since the 1970s has been the subject of numerous government and academic studies focused on highlighting the injustices affecting Indigenous communities.[5]

7. According to 2017/2018 Statistics Canada figures, Indigenous people represent approximately 4% of the adult population in Canada but account for approximately 30% of provincial and territorial correctional services admissions.[6] Among women, 42% of those admitted into provincial and territorial custody are Indigenous, in comparison to 28% of men. In the federal system, Indigenous women account for 40% of female admissions, while Indigenous men account for 28%.[7]

8. In comparison with all other accused people, Indigenous people are overrepresented among youth in custody, denied bail and overrepresented in the remand population, classified as high risk offenders and denied parole more frequently, and are overrepresented in the segregation population.[8]

[4] Jonathan Rudin, "Aboriginal over-representation and *R v. Gladue:* where we were, where we are and where we might be going." (2008) 40 SCLR (2d) 678
[5] Michael Jackson, "Locking Up Natives in Canada" (1989) 23:2 UBC L Rev 215-300; Canada, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Aboriginal Justice Implementation Commission, 1991); Canada, Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada (Ottawa: Royal Commission on Aboriginal Peoples, 1996)
[6] Statistics Canada, 2019. "Adult and youth correctional statistics in Canada, 2017/2018." Jamil Malakieh, Canadian Centre for Justice Statistics. Juristat 85-002-X 39:1 [Accessed 17 July 2019]
[7] *Ibid*
[8] Green, M. 2012. "The Challenge of Gladue Courts." *Criminal Reports (Articles), 6th Series* 89 CR-ART 362; Government of Canada, 2018. "Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System: Statistical Overview on the Overrepresentation of Indigenous Persons in the Canadian Correctional System and Legislative Reforms to Address the Problem" Department of Justice [Accessed 17 July 2019]

2. The History of Gladue Reports

9. In 1996, the Government of Canada reformed the sentencing provisions of the *Criminal Code* in Bill C-41.[9] Part of this amendment included section 718.2(e), a remedial provision directed at alleviating Indigenous overrepresentation in the criminal justice system through sentencing.

10. Section 718.2(e) mandated judges to look for:

> 718.2…
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[10]

11. In 1998, the Supreme Court released the decision of *R v Williams*[11] which dealt with discriminatory and racial stereotypes held by jurors towards Indigenous people. The court found that: "There is evidence that this widespread racism [toward Aboriginal people] has translated into systemic discrimination in the criminal justice system."[12]

12. In 1999, the Supreme Court interpreted s. 718.2(e) for the first time generally and with regard to Indigenous offenders in *Gladue.*[13] This decision concerned an Indigenous woman named Jamie Tanis Gladue who was sentenced to a federal term of incarceration for three years in the manslaughter of her common-law spouse.

[9] Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof,* 1st Sess, 35 Parl, 1995 (assented to 13 July 1995).
[10] *Ibid*
[11] *R v Williams*, 1998 1 SCR 1128, 124 CCC (3d) 481 [*Williams*]
[12] *Ibid* at para 58
[13] *Gladue, supra* note 2

13. In writing this decision, the Supreme Court called the overrepresentation of Indigenous people in custody a "crisis in the Canadian criminal justice system"[14] and echoed the findings of various reports and commissions that Indigenous people in Canada suffer from unique systemic background factors that question the effectiveness of incarceration as a means of rehabilitation:

> It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as had 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.[15]

14. The decision in *Gladue* constituted an important beacon for change and placed obligations on sentencing judges to:

> … pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:
>
> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender 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 particular aboriginal heritage or connection.[16]

[14] *Ibid* at para 64
[15] *Ibid* at para 68
[16] *Ibid* at para 66

15. While the Supreme Court recognized in *Gladue* that the problem of Indigenous overrepresentation could not be solved through sentencing alone, it determined that judges do have a role to play. The Court determined that in order to properly sentence an Indigenous offender according to s. 718.2(e), judges require more information about the person standing before them.[17]

16. Each province in Canada has approached the evidentiary requirement in *Gladue* slightly differently. In Toronto, Ontario, the first Gladue (Aboriginal Persons) Court began hearing cases in Old City Hall in 2001 as a result of the combined efforts of judges, crowns, duty counsel, and Aboriginal Legal Services.[18] Simultaneously, the need for resources to assist both the court and the Indigenous person appearing before it became crucial.

17. Aboriginal Legal Services identified this need as:

> … a person who could provide the court both with details information regarding the Indigenous offender's background, including the impact of systemic factors, as well as suggestions for alternatives to incarceration that could meet those identified needs. Essentially the individual could provide to the court the information that the Supreme Court indicated was necessary in order for judges to meet the requirements of s. 718.2(e).[19]

18. The mechanism to deliver the information was the Gladue Report, a term coined by ALS, who wrote the first of its kind in Canada. In the majority of provinces and territories where Gladue Reports are available,[20] the service provider responsible for assignment and review of

[17] Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54 Crim LQ 453-454
[18] *Ibid* at 459-460. For more information on the distinct operations of the Gladue Court, see: Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*" (2009) 54 Crim LQ 431-446
[19] *Rudin, supra* note 17
[20] In Newfoundland, New Brunswick, Manitoba, Saskatchewan, the Northwest Territories, and Nunavut, there is no formal process that allows for Gladue Reports to be prepared. Gladue Reports are more or less available in the other jurisdictions in Canada. See: Jonathan Rudin, *Indigenous People and the Criminal Justice* (Toronto: Emond Montgomery Publications Ltd., 2019) at 109

written reports will be an Indigenous organization, who is usually part of a funding agreement between the government and Legal Aid.[21]

19. In Ontario, there are currently approximately 25 full-time Gladue Report writers working for several Indigenous agencies, including ALS, producing upwards of 750 reports every year.[22]

20. In 2017 and 2018 the National Inquiry into Missing and Murdered Indigenous Women and Girls conducted a truth gathering process. This process included community hearings in 15 locations across Canada where more than 2,380 people participated. Participants shared their experiences with the Commission and some provided statements and artistic expressions. [23]

21. The Commission made several findings related to Gladue reports. These findings included:

> The application of Gladue principles and the production of Gladue reports are not consistent between jurisdictions. There are no established standards for what must be included and considered in such reports and,
>
> Those in the justice system have not considered Gladue reports as a right, and Gladue reports have not been accessible to women facing sentencing or properly applied by courts and corrections.[24]

22. In the recently released Final Report, Call to Justice 5.15 states:

> We call upon federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right and to resource them appropriately, and to create national standards for Gladue reports, including strength-based reporting.[25]

[21] The exception for this is Alberta and British Columbia, where independent writers produce the reports, but the assignment and review belongs to the Department of Justice in Alberta and Legal Aid-Legal Services in British Columbia. See: Jonathan Rudin, *Indigenous People and the Criminal Justice* (Toronto: Emond Montgomery Publications Ltd., 2019) at 115

[22] The following link from Legal Aid Ontario lists all of the agencies in Ontario that offer Gladue Reports: https://www.legalaid.on.ca/en/info/ASIQ-currentGladuereportprograms.asp

[23] Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,* vol 1a (Ottawa: 2019) (Buller, Audette) at page 49 [*Reclaiming Power and Place (1a)*]

[24] *Ibid* at page 719

[25] Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: 2019) (Buller, Audette) at page 185 [*Reclaiming Power and Place (1b)*]

3. Characteristics of Gladue Reports

23. There are several important differences between a Gladue Report and other types of written reports submitted to a court for sentencing purposes.

a. Content of Gladue Reports

24. *Gladue* and *Ipeelee* require courts to receive the necessary information regarding an Indigenous offender. That information does not have to come from a Gladue Report:

> … a variety of people of diverse experience and background who have access to, or can obtain, information that is reliable and relevant. A formal Gladue report is not necessary to provide the court with Gladue information; Gladue information may also be provided to the Court through a pre-sentence report.[26]

25. In *R v Corbiere*[27], the sentencing judge observed at para 23:

> There is no magic in a label. A "Gladue Report" by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value does hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context.

26. There is no standard format for a Gladue Report written in Ontario, nor elsewhere in Canada. The *Ipeelee* decision, however, offers some instruction as to what evidence will be required for the judge to fashion a fit sentence:

> … the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel.

[26] *R v Lawson*, 2012 BCCA 508 at para 27 [*Lawson*]
[27] *R v Corbiere*, 2012 ONSC 2405 [*Corbiere*]

> … In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2 (*e*) of the *Criminal Code.*[28]

27. A well-written Gladue Report will clearly outline for the court how the above systemic factors may be directly affecting the Indigenous person with respect to sentencing, as well as include additional information about what realistic restorative or rehabilitative services and programs may be available (either in custody or out of custody).[29]

28. This is important because very often, the offender will not fully understand the systemic factors identified within the Gladue Report or how these factors may have brought them before the court. The offender may struggle with a lack of education or awareness of the history of Indigenous people, and there is a tendency for many Indigenous families to refrain from speaking about their experiences with residential school, sexual abuse, or other issues that result in intergenerational trauma.[30]

29. As much as possible, the Gladue Report will allow the individuals interviewed to speak for themselves, with verbatim quotes being the norm. In this way, the information contained in the Gladue Report is gathered from the offender, their family, and community, and presented in a storytelling fashion. The Gladue Report becomes a combined effort of the offender as well as their family and community.[31]

[28] *Ipeelee, supra* note 3 at para 60
[29] *Lawson, supra* note 26 at para 26
[30] *Reclaiming Power and Place (1a), supra* note 23 at 89
[31] Jonathan Rudin, *Indigenous People and the Criminal Justice* (Toronto: Emond Montgomery Publications Ltd., 2019) at 112

30. The Gladue Report may also contain publically available information such as the community's treaty relationship with the crown, any forced geographic relocation, and history with the church and/or residential schools that operated in the area.

31. The Gladue Report will contain information about the systemic factors, described above, that have affected the offender's life, such as the involvement of the child welfare system, addictions, and/or criminal justice system. They will also contain information with respect to Indigenous cultural practices, and the offender's knowledge and/or relationship with traditional spirituality, and the significance of this knowledge or lack thereof on the offender's life.[32]

b. Differences Between a Pre-Sentence Report and a Gladue Report

32. It is important to differentiate between a Gladue Report and a pre-sentence report (PSR). A Gladue Report cannot be ordered in the same way as a pre-sentence report, as there is no provision in the *Criminal Code* that demands their production.[33] Rather, Gladue Reports can be requested by those responsible for their production.

33. In some jurisdictions across Canada where access to Gladue Reports are not available, the court may request that a PSR be completed with a Gladue-type component to it.[34] The issue with this however, is that just because the PSR indicates that there is a Gladue component to it does not mean that the person who wrote the report has had any real training in the preparation of Gladue pre-sentence reports.[35]

[32] *Ibid*
[33] *Ibid* at 114
[34] *Ibid*
[35] *R v Noble*, 2017 CanLII 32931 (NL PC) [*Noble*]

34. Regardless of the quality of the PSR, Gladue Reports are distinct from PSRs in a number of important ways. Pre-sentence reports are written from a risk-assessment perspective and will not contain direct quotes from individuals in the offender's life that were interviewed.[36]

35. The risk assessment piece contained within a PSR:

> [G]enerally address the dynamic and static factors at play in the life of the offender. Dynamic factors refer to things that a person can change. Static factors look at those things that the offender has little control over, for example, the community into which they are born, family circumstances, etc.[37]

36. The nature of the PSR as a risk-assessment document will naturally affect the Indigenous offender who is the subject of the report because generally, Indigenous offenders do poorly on risk-assessment measurements that arise from static factors related to colonialism that judges are to take into account when sentencing.[38]

37. Academics Kelly Hannah-Moffat and Paula Maurutto discuss this in their article "Recontextualizing pre-sentence reports: Risk and race":

> … Gladue Reports contextualize risk factors and explain them in a way that allows the court to understand them as considerations other than risks. By understanding where the risk factors come from and what the offender either has done or can do to address certain issues these factors raise, the court can find a way to sentence Aboriginal offenders differently, which is, after all, the core idea in Gladue and Ipeelee.[39]

38. As recently noted by the Supreme Court in *Ewert v Canada*:

> [t]he clear danger posed by the CSC's continued use of assessment tools that may overestimate the risk posed by Indigenous inmates is that it could unjustifiably contribute to disparities in correctional outcomes in areas in which Indigenous offenders are already disadvantaged.[40]

[36] *Ibid*
[37] *Rudin, supra* note 31 at 113
[38] *Ibid*
[39] Kelly Hannah-Moffat & Paula Maurutto, "Recontextualizing pre-sentence reports: Risk and race" (2010) 12 PC at 276-78
[40] *Ewert v Canada,* 2018 SCC 30 at para 65 [*Ewert*]

39. Gladue Reports are an important way for courts to receive information about an Indigenous offender's circumstances using considerations other than risk.

c. A Gladue Report Is Not an Expert Report

40. A Gladue Report is not an expert report, which would fall under the federal legislation applying to criminal matters, the *Canada Evidence Act*.[41] Rather, it is a form of pre-sentence report. In Lawson, the court describe the requirements of Gladue Reports as follows:

> … Gladue reports should be subject to the same general requirements of balance and objectivity as conventional pre-sentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions. While Gladue reports may offer suggestions or proposals about potential restorative or rehabilitative programs or sentences, and particularly those tailored to Aboriginal offenders, they should not strong recommend specific sentences. The sentencing function belongs to the judge.
>
> …
>
> … Gladue reports are not expert reports and the law does not require them to meet the threshold of expert reports.[42]

41. While Gladue Report writers do as much as possible to determine the accuracy of the information provided to them, they cannot resolve inconsistencies or differences in various individual recollections about events from years ago.

42. People interviewed for the purpose of the Gladue Report may remember events differently and in many cases involving family history, there are no corroborative sources available. For example, it could be the case where some individuals interviewed remember events of the offender's childhood that the parents deny.

[41] *Canada Evidence Act*, RSC 1985, c C-5
[42] *Lawson, supra* note 26 at paras 28, 30

43. If this type of situation occurs, it is up to the judge to listen to submissions from defense counsel and the crown attorney to determine the reliability of the information contained within the Gladue Report.[43]

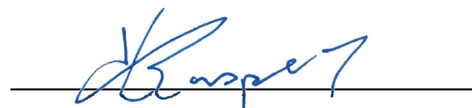
44. Finally, Gladue Reports are not meant to act as conclusive reports with respect to the Indigenous offender's status in terms of risk to reoffend. Without doubt, the most effective Gladue Reports "do not hide the challenges and difficulties faced by the offender but put them in a context in which they can be better understood."[44]

45. As such, the information contained with the Gladue Report and provided to the court at sentencing is most accurately viewed in the context of "a friend of the court" or *amicus curiae*, where the emphasis is on ensuring that the court has all of the relevant evidence with which to assist in its decision making.

PART IV - ORDER REQUESTED

46. ALS takes no position on the disposition of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th day of July, 2019.



Caitlyn E. Kasper
Counsel for the Intervener, ALS

Douglas Varrette
Counsel for the Intervener, ALS

[43] *Rudin, supra* note 31 at 111-114
[44] *Ibid* at 114

SCHEDULE "A" – AUTHORITIES TO BE CITED

Case Law

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R v Ipeelee, 2012 SCC 13, [2012] 1 SCR 433

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Ewert v Canada, 2018 SCC 30

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Kelly Hannah-Moffat & Paula Maurutto, "Recontextualizing pre-sentence reports: Risk and race" (2010) 12 PC

SCHEDULE "B" – RELEVANT LEGISLATIVE PROVISIONS

***Criminal Code of Canada*, RSC 1985, c C-46, s 742.1(c) and (e)(ii)**

> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if …
>
> > (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life; …
> >
> > (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that …
> >
> > > (ii) involved the import, export, trafficking or production of drugs, or

Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, 1st Sess, 35 Parl, 1995 (assented to 13 July 1995).

***Canada Evidence Act*, RSC 1985, c C-5**

FORM 4C

Courts of Justice Act

BACKSHEET

Her Majesty the Queen v Kevin Morris

C65766

Court of Appeal for Ontario

PROCEEDING COMMENCED AT *Toronto, Ontario*

FACTUM OF THE INTERVENER, ABORIGINAL LEGAL SERVICES

ABORIGINAL LEGAL SERVICES LEGAL CLINIC
211 Yonge Street, Suite 500
Toronto, Ontario M5B 1M4

Caitlyn E. Kasper (LSUC # 62385M)
Tel: (416) 408-4041 ext. 229
Fax: (416) 408-1568
Email: kasperc@lao.on.ca

Douglas Varrette (LSUC # 75302U)
Tel: (416) 408-4041 ext. 228
Fax: (416) 408-1568
E-mail: varretd@lao.on.ca

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