

Sentencing for Aboriginal Clients

Understanding the Gladue Decision

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What is the Gladue Decision?

The Gladue Decision deals with interpretation of section 718.2(e) of the Canadian Criminal Code, a section that was added to the Canadian Criminal Code in 1996 by way of Bill C-41. In practical terms, this section states that courts must take into account the unique circumstances of Aboriginal people when passing sentence on Aboriginal offenders, and wherever possible opt for alternatives to jail sentences.

What does Section 718.2(e) say?

Section 718.2(e) says that "A court that imposes a sentence shall consider all available sanctions other than jail that are reasonable for the offender, with particular attention to the circumstances of Aboriginal offenders." In other words, it changes the way a sentencing judge examines the circumstances ("method of analysis") of the offender. These circumstances are used when finding an appropriate sentence for Aboriginal offenders. When sentencing Aboriginal offenders, the judge can automatically acknowledge the existence of background and systemic factors, like intergenerational trauma, residential schools or poverty, without the defence or Crown having to prove them. Judges can also acknowledge the priority within Aboriginal cultures of a restorative approach to sentencing without it needing to be proven. Additional evidence can help, however.



The Gap - Theory versus Practice

When sentencing Aboriginal offenders, judges need information such as why the Aboriginal offender in question is before the court and what options other than jail may address their reasons for being before the court. In most cases, judges do not receive this information. The Gladue Decision does not clarify where this information is supposed to come from.

As an NCSA courtworker, how can I use the Gladue Decision?

Section 718.2(e) and the Supreme Court of Canada's interpretation in the Gladue Decision should be raised with all Aboriginal offenders. If an Aboriginal offender is not represented by a courtworker, the principles of section 718.2(e) still apply.



NCSA courtworkers can use Gladue principles in the following ways:

- They can write their own reports and submit them to the court.
- If any of the following life circumstances apply to a client, they are to be mentioned in the report:
 - Residential school background
 - Involvement with child welfare
 - Domestic violence
 - Abuse (sexual, physical, mental, spiritual)
- Always acknowledge the present behaviour the alleged crime) while presenting contributing factors (e.g. residential school). Contributing factors allow the court to better understand your client.

Additionally, the Supreme Court of Canada states that:

- The main reason why the criminal justice system fails Aboriginal people is the differing cultural views in regards to the nature of justice (para. 62).
- Jail is often culturally inappropriate when sentencing Aboriginal offenders (para. 68).
- If jail is necessary, the length of the jail term must be considered by the sentencing judge (para. 79).
- Section 718.2(e) is not an automatic sentencing discount (para. 88).
- Restorative justice can be more challenging than regular sentencing (para. 72).



- Section 718.2(e) applies to all Aboriginals: rural, urban, on or off reserve (para. 90-91).
- A lack of alternative sentencing options in a community does not mean that alternative sentencing cannot be used (para. 92).
- Case law from the Ontario Court of Justice in R. v. Bain confirmed that Gladue standards apply to bail hearings.

Jamie Gladue's Story

Jamie Tanis Gladue was born in 1976 in the small town of McLennan in northwestern Alberta to a Cree mother and a Métis father. Gladue's mother died in a car accident in 1990 and from then on she was raised by her father. In 1993, she began living with her boyfriend Reuben Beaver, with whom she had a daughter, Tanita. In August 1995, she moved to Nanaimo, British Columbia together with Reuben, Tanita, her father and two of her siblings. In September 1995 the couple became engaged. Gladue was five months pregnant with their second child at the time.

On September 16, 1995, Gladue celebrated her 19th birthday with family and friends. Both her and Reuben were drinking alcohol, and tensions escalated when she accused Reuben of cheating on her. They began fighting and Reuben eventually fled their townhouse but was stabbed twice by Gladue. She had a blood alcohol level of 0.160 at the time.



Jamie Gladue in B.C. Provincial Court

Jamie Gladue was charged with second-degree murder and pled guilty to manslaughter on February 11, 1997. She was granted bail until her sentencing. While on bail, Gladue lived with her father. She sought drug and alcohol counselling and finished Grade 10. During this time she was diagnosed with a hyperthyroid condition, a condition that caused her to overreact emotionally in stressful situations.

During her sentencing, Gladue's defence counsel brought up section 718.2(e). When asked if McLennan was an Aboriginal community, her counsel said "it's just a regular community." The sentencing trial judge said, with consideration of section 718.2(e), that the accused and deceased were Aboriginal but were not living within the Aboriginal community because they were living off reserve, and that the offence had taken place in an urban setting. Therefore, according to the judge, there were no special circumstances related to her being Aboriginal. Jamie Gladue was sentenced to three years in jail with a ten-year weapons prohibition.



Jamie Gladue and the B.C. Court of Appeal

In 1997, Gladue appealed her three-year jail sentence to the B.C. Court of Appeal. (She did not appeal the ten-year weapons prohibition.)

The jail sentence was appealed on four grounds, one being that the trial judge had not given appropriate consideration to Gladue's Aboriginal heritage. Her defence provided new evidence, such as the fact that she had applied for Cree status and that she had already gained such status for her daughter, Tanita.

The Court of Appeal said that the trial judge had erred in the judgement that section 718.2(e) did not apply to Gladue's case because she lived off reserve. However, the Court of Appeal still came to the same conclusion, and the appeal was dismissed.

Jamie Gladue and the Supreme Court of Canada

On April 23, 1999, the Supreme Court of Canada agreed with the B.C. Court of Appeal and supported the decision to dismiss the appeal. Although this decision did not change Jamie Gladue's sentence, the Supreme Court of Canada helped interpret section 718.2(e) of the Canadian Criminal Code for the first time.



Information summarized from writings by Jonathan Rudin, Program Director of Aboriginal Legal Services of Toronto, and from R. v. Gladue, 1999 CanLII 679 (S.C.C.).



Got questions? Please contact us.

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