July 8, 2019

Gladue Factors: Still Not a "Race-Based Discount"

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Case Commented On: *R v Matchee*, 2019 ABCA 251

In *R v Matchee*, Justices Patricia Rowbotham, Ritu Khullar, and Dawn Pentelechuk of the Alberta Court of Appeal (ABCA) overturned Alberta Court of Queen's Bench Justice Eldon J. Simpson's sentencing decision because it did not give proper effect to *Gladue* factors (named for the case that created them, *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 (SCC)). The ABCA sentenced the offender afresh, substituting a six-year sentence for the original seven-year sentence (though with the deduction of three years 7.5 months credit for pre-sentence custody the remaining sentence was two years 4.5 months). The ABCA also commented on the correct application of *Gladue* factors, which are frequently misapplied and misunderstood as a "race-based discount" rather than "a partial remedy for the systemic discrimination suffered by [A]boriginal people which has led to their overrepresentation in the criminal justice system" (at para 31).

The errors the ABCA identified in Justice Simpson's decision reflect common difficulties interpreting the legal effect of the Supreme Court of Canada's 1999 decision in *Gladue*. However, the persistent judicial confusion and disagreement over the application of *Gladue* at every level of court indicates a deeper uncertainty about the efficacy of addressing Indigenous over-incarceration as late in the game as sentencing. While those who dismiss *Gladue* as a "race-based discount" are oversimplifying a nuanced legal principle, it should be transparently obvious that without broader systemic change for Indigenous peoples, *Gladue* will not solve Indigenous overrepresentation in the justice system and in prisons.

[I will use the word "Indigenous" to refer to groups identified as "Aboriginal" in the *Canadian Charter of Rights and Freedoms*, except when quoting directly from a decision or commentary. The two terms are roughly synonymous in the context of *Gladue* factors.]

The Offender

Mr Matchee, a mixed race man born to an Indigenous mother (of the Flying Dust First Nation near Meadow Lake, SK) and a Black father, was convicted after trial of 10 counts all related to breaking and entering the complainant's home and stealing property (at paras 5, 8).

He spent his early childhood with his mother, who struggled with addiction. Both his mother and grandmother attended residential schools. The first six years of his life were unstable and he was sometimes taken in by relatives. At the age of six, he entered the foster system. Until age 10 he suffered neglect, as well as physical and sexual abuse. From ages 10 to 15, he stayed with a

stable foster family. At the time of the pre-sentence report, he was 34 years old and had 42 prior convictions (both adult and youth) spanning more than two decades.

Both the sentencing judge and the appellate judges noted several heartbreaking details about Mr Matchee. His foster mother and sister described him as "a sweet, little boy who had a hard time trusting anyone" (at para 38). He acknowledged serious internal conflicts due to his mixed race, describing himself as "the only black person in Saskatchewan" (at para 40). At sentencing, Justice Simpson noted that Mr Matchee "barely had a chance in life" and commented, "his introduction to life has been the exact opposite of what we would want any child to have" (at para 42). The complainant gave evidence that Mr Matchee was wearing the complainant's jacket, hoodie and shoes and, prior to attacking him, made the comment that he wished that he had the lifestyle of the complainant (at para 43). The ABCA decision makes it clear that systemic factors exacerbated Mr Matchee's risk of getting caught in the "revolving door" (at para 36) of the criminal justice system.

Application of *Gladue* Factors

In *R v Gladue*, the Supreme Court of Canada (SCC) established the considerations judges must take into account when sentencing Indigenous offenders under s 718.2(e) of the *Criminal Code*. That section requires judges to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders." The SCC's rationale for this approach was twofold: Indigenous offenders are overrepresented in prisons, and Indigenous communities hold "different conceptions of appropriate sentencing procedures and sanctions" such that incarceration has a disproportionately severe negative effect on them (*Gladue* at para 70). According to the SCC, this section requires judges to consider, specifically:

> a) the unique systemic or background factors which may have played a part in bringing the particular Indigenous 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 Indigenous heritage or connection. (*Gladue* at para 66)

The SCC quoted Professor Tim Quigley at para 67, who noted, "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail." According to the SCC, to the extent to which systemic marginalization is linked to an offender's specific life experience, the combination of the two can reduce an Indigenous offender's moral blameworthiness for an offence and thus lead to a reduced sentence (as the ABCA has discussed in decisions such as *R v Swampy*, 2017 ABCA 134 at paras 25-26). In subsequent decisions, courts have interpreted and discussed *Gladue* factors extensively as a result of confusion over the effect they should have on calculating appropriate sentences. In *Matchee*, the Alberta Court of Appeal provided a few clarifications on how to apply *Gladue* correctly. While these clarifications should assist judges in

making subsequent sentencing decisions, they also implicitly indicate the inability of *Gladue* factors to address the much deeper and more troubling reasons that Indigenous offenders make up such a disproportionate percentage of inmates.

The ABCA disagreed with the sentencing judge in four main ways: the sentencing judge did not consider Mr Matchee's particular personal circumstances; the sentencing judge concluded that *Gladue* does not apply to violent offences; the sentencing judge failed to appropriately take into account Mr Matchee's mother's and grandmother's attendance at residential schools; and the sentencing judge incorporated his own experience of the views or preferences of Indigenous communities regarding sentencing for serious crimes.

Personal Circumstances

Gladue requires judges, when sentencing Indigenous offenders, to assess their moral blameworthiness by considering how systemic marginalization has impacted their unique circumstances. Courts have sometimes oversimplified the idea of considering unique circumstances by incorrectly equating "unique circumstances" with race. These decisions, such as the sentencing decision at issue in *Matchee*, wrongly assume that *Gladue* factors amount to an automatic "race-based discount" in sentencing. The sentencing judge gestured toward this assumption by stating, "the fact that he's an Aboriginal offender, does not persuade me that he should attract any less sentence than a non-Aboriginal offender" (at para 13). The ABCA considered this oversimplification to be one of the errors in the sentencing judge's ruling. When correctly applied, the logic of *Gladue* is that an Indigenous offender's race plays a role in the systemic marginalization they experience. *Gladue* factors will accordingly mitigate the severity of the sentence to the extent that systemic marginalization related to race reduces moral blameworthiness by impacting a specific offender's life. Given the negative effects of incarceration on Indigenous offenders, a reduction in sentence is an appropriate remedy.

That said, *Gladue* factors do not entitle a judge to impose a less restrictive sentence solely due to an offender's racial background. Instead, *Gladue* requires judges to consider specific disadvantageous factors that affect moral culpability when sentencing Indigenous offenders and possible alternative sentences. An offender's Indigeneity triggers additional duties that courts, prosecutors, and defence lawyers are expected to fulfill: for example, duties to offer the option for a *Gladue* report and, even absent a *Gladue* report, to make inquiries about an offender's background and consider restorative sentencing options. However, once an offender's Indigeneity triggers this duty, any reduction or variation in sentence that may result is only indirectly related to race. Instead, judges may reduce or vary an Indigenous offender's sentence because they find that systemic factors such as residential school attendance are linked to personal circumstances such as substance abuse.

As the SCC explained in *Gladue*, "In cases where [systemic] factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime" (at para 69). However, judges may also find that there is no link between systemic factors and personal circumstances; that there is a link but that other sentencing principles (such as protection of the public) require incarceration; that there is a link but it has no bearing on moral blameworthiness; or that no

restorative options are available. All of these are acceptable outcomes so long as judges adequately fulfill their duties: to be informed about an offender's personal circumstances, to consider the way in which those personal circumstances may be linked to systemic disadvantage, to turn their minds to the way in which the combination of the two has the potential to affect moral blameworthiness, and to evaluate a full range of restorative sentencing possibilities.

As has been extensively documented, Indigenous peoples are severely overrepresented among the ranks of accused people and inmates (see also *Gladue* at paras 59-62). It should not need to be said that this overrepresentation cannot be due to a genetic predisposition toward crime (though an era where this would have been considered common sense is not too far behind us in our societal rear-view mirror). Instead, the overrepresentation stems from years of systemic and direct discrimination, as well as a legacy of dislocation (*Gladue* at para 68). Accordingly, given the Canadian government's participation in creating social, legal, and economic frameworks that marginalize Indigenous people, it has a responsibility as a settler state to acknowledge how its mistakes have created a justice system that disproportionately punishes a particular racial group. Conceptually, the *Gladue* decision was intended to do just that. Practically, it of course falls short when not combined with other systemic changes.

Violent Offences

The sentencing judge also commented, "the Supreme Court of Canada said that as cases -- offences -- the more violent offences, it's more likely that Aboriginal and non-Aboriginal offenders will be treated similarly" (at para 13). While a close paraphrase of *Gladue*, this is not quite correct. As the ABCA noted, even in the context of violent offences, Indigenous and non-Indigenous offenders should not be treated the same (at para 24). This makes logical sense: *Gladue* focuses on moral blameworthiness, and there is no particular reason for violent offences to be more morally blameworthy than non-violent ones.

However, based on the small portion of the sentencing transcript included in the decision, the ABCA may have mischaracterized the sentencing judge's decision on this point somewhat. The ABCA held that the sentencing judge relied on an "incorrect statement of law that *Gladue* factors do not apply to serious offences" (at para 25). That is not what the sentencing judge said: he seems to agree that *Gladue* applies, but that the violent nature of the offence means that a substantial prison sentence is nonetheless appropriate. One possible explanation for this discrepancy is that lower courts do often make this mistake (although the sentencing judge did not specifically make it here), and the ABCA felt that *Matchee* presented an appropriate opportunity to correct it.

The source of the confusion regarding *Gladue*'s application to sentencing for violent offences stems from the SCC's comments in *Gladue* as well as the sentencing principles enumerated in s 718 of the *Criminal Code*. Regarding violent offences, the SCC stated, "it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for [A]boriginal offenders as often as for non-[A]boriginal offenders" (at para 33). This appears to be the source the sentencing judge relied on for his comments about treating Indigenous and non-Indigenous offenders similarly. It is true that judges must consider s 718(c) of the *Criminal Code*, which says that one of the objectives of sentencing is to separate offenders

from society where necessary; violent offences make such separation more likely to be necessary. However, the method of analysis used to reach those sentences for serious offences must be different: when sentencing an Indigenous offender, judges must consider the remedial purpose of s 718.2(e) and fulfill their additional duties to investigate systemic factors that may affect Indigenous offenders. Regardless of whether the ultimate sentence is similar for Indigenous and non-Indigenous offenders, the path taken to reach that sentence must not be the same.

Family Residential School Attendance

The sentencing judge dismissed Mr Matchee's family history of residential school attendance in terms of its impact on his sentence, commenting, "There's not a great deal of connection between the fact that his mother and grandmother went to a residential school [and his offence]" (at para 13). The ABCA held that it was an error for the sentencing judge not to "find that there was a significant link between Mr. Matchee's ancestors' attendance at residential schools and his personal circumstances" (at para 17).

The ABCA's explanation of the role that a family history of residential school attendance should play in assessing the specific circumstances of an Indigenous offender is brief but helpful. The ABCA quotes from the SCC's decision in *R v Ipeelee*, 2012 SCC 13, a follow-up to *Gladue*, noting that a history of residential school attendance does not itself justify a different sentence for Indigenous offenders. Rather, it provides the necessary context for understanding and evaluating case-specific information about an offender like Mr Matchee. The information that drives the assessment of moral blameworthiness, according to the ABCA, is that case-specific information and the extent to which a link exists between the offender's specific circumstances and the existence of systemic marginalization.

The ABCA explained this link as follows:

> In this case there is a link between Mr. Matchee's mother's and grandmother's attendance at residential school and his disadvantaged upbringing. Mr. Matchee's mother had significant troubles with drug abuse and the sentencing court is required to take judicial notice of how matters such as residential schools lead to a variety of outcomes, including substance abuse: *Ipeelee* at para 27. That is enough to establish a link between Mr. Matchee's family's attendance at residential schools and his mother's substance abuse. The evidence clearly shows that Mr. Matchee's mother's substance abuse led to his eventual placement in foster care and the abuses he suffered there during the first 10 years of his life. (at para 28)

This paragraph is an excellent example of how the *Gladue* analysis should be performed: the sentencing judge should identify a particular systemic issue, such as residential school attendance; identify particular facets of the offender's specific experience, such as a disadvantaged upbringing due to parental drug abuse; and conclude by taking judicial notice of the established link between the two. By following these steps, sentencing judges can avoid the error of concluding that because an offender did not himself attend residential school, the existence of the residential schools system had no effect on his life.

Assessing *Gladue* factors in this way indicates that the *Gladue* analysis is more nuanced than a simple race-based discount. Admittedly, the effects of residential schools and other generational trauma are concentrated among a particular racialized group: Indigenous people. However, the *Gladue* analysis marries facts about generational trauma with an assessment of a specific offender's situation, enabling judges to draw reasonable logical connections between sources of disadvantage and the ways in which that disadvantage translates, in the SCC's words, into "systemic discrimination in the criminal justice system" (*Gladue* at para 61). The systemic marginalization of Indigenous peoples is based on race. *Gladue*, however, is about enabling judges to trace the link between race and disadvantage, empowering them to make decisions that recognize the responsibility that the state bears for sanctioning, in both historical and modern ways, social, political, and economic exclusion based on race.

Community Views on Sentencing

The last error the ABCA discusses is the sentencing judge's reliance on his own experience of sentencing preferences within Indigenous communities, and more broadly, attention to any community's views on appropriate sentences. Although the ABCA spent only one brief paragraph on this error (para 30), it merits further discussion because of the ways in which community preferences do currently impact sentencing decisions, for better or for worse. Indeed, enacting reconciliation in the justice system may be impossible without incorporating the views of Indigenous communities.

The sentencing judge referenced ten years that he spent hearing cases on-reserve, commenting, "when it comes to crimes of violence . . . I can assure you that no Aboriginal community . . . ever asked that . . . the Court should treat those type of offenders any less seriously. They want protection for themselves, for their communities" (at para 13). The ABCA criticized this approach, stating broadly, "The view of any community on what is an appropriate sentence is not an animating principle of sentencing law in Canada" (para 30).

Charter s 12 jurisprudence suggests that this statement from the ABCA might require some qualification. Section 12 gives everyone the right not to be subjected to any cruel and unusual treatment or punishment. The SCC considered s 12 in *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045, 1987 CanLII 64 (SCC). In that decision, which dealt with the constitutionality of a seven-year mandatory minimum sentence for trafficking cocaine, the SCC concluded that in order to be found cruel and unusual, a punishment or treatment must be "grossly disproportionate", and "outrage our standards of decency" (at para 57). Standards of decency can come from nowhere except a community, and accordingly the only measure of the decency of a punishment is the view of the community. Therefore, there are at least some situations where the view of a community does animate sentencing law.

The SCC considered s 12 again in *R v Lloyd*, 2016 SCC 13. Like in *Smith*, the accused in *Lloyd* was subject to a mandatory minimum sentence for drug trafficking charges. The SCC found the mandatory minimum was cruel and unusual, commenting that situations existed in which such a sentence would be "grossly disproportionate to what is fit in the circumstances and would shock the conscience of Canadians" (at para 33). How can "the conscience of Canadians" be

meaningfully different from "the view of the community"? Decisions from the SCC on s 12 demonstrate that the views of the community represent a safeguard against truly reprehensible sentencing measures. Again, these situations where a sense of community morality does animate questions of sentencing suggest that community views are relevant.

The extent to which community views should animate sentencing law is an entirely different, and difficult, question. This difficulty is appropriately exemplified by the outcry in Calgary over new freedoms for psychiatric inmate Matthew de Grood. De Grood was found not criminally responsible for stabbing five university students while in the throes of a psychotic episode in 2014. His matter came before the Alberta Review Board in 2018, where the families of the five victims presented impassioned Victim Impact Statements to the effect that de Grood's risk to the community will never be manageable or acceptable, his crime was "evil and heinous", and the prospect of his re-integration is "beyond comprehension." The Board, which includes a forensic psychiatry expert, found that de Grood's schizophrenia was in full remission and approved additional freedoms, contrary to the wishes of the victims' families.

While *Smith* and *Lloyd* establish that the conscience of a community does play some role in sentencing law, Matthew de Grood's situation provides a counterpoint in the sense that the opinion of a community is not guaranteed to be objective or compassionate. Perhaps it would have been more correct for the ABCA to hold that the view of a community on an appropriate sentence is not the determinative principle of sentencing law.

The sentencing judge's reliance on his own particular experience in Indigenous communities was also incorrect. It is true that experience dealing with the "substantially different cultural values and experiences" of Indigenous communities can provide useful context. It is also true, as the SCC has acknowledged, "It is unreasonable to assume that [A]boriginal peoples themselves do not believe in the importance of [deterrence, denunciation, and separation], and even if they do not, that such goals must not predominate in appropriate cases" (at para 78). Further, the SCC allowed for the possibility in *Gladue* that a sentencing judge might wish to consider a particular Indigenous community's understanding of criminal sanctions (at para 80). However, the sentencing judge appeared to generalize his experience delivering justice to specific Indigenous communities in northern Alberta by assuming that the same experience is useful and accurate when applied to Mr Matchee's community. Indigenous peoples are not a monolith: experience with a specific person or even a specific group will not necessarily provide useful insight into a different specific person or group. As the SCC recognized in *Gladue*, "Aboriginal communities stretch from coast to coast and from the border with the United States to the far north. Their customs and traditions and their concept of sentencing vary widely" (at para 73).

However, the ABCA's blanket statement that community views on sentencing do not animate sentencing law does not seem to take into account situations where community justice does animate sentencing processes. Many Indigenous communities maintained robust pre-contact justice systems based heavily on community input over appropriate sanctions and acts of contrition for offenders. As the SCC said in *Gladue*, "the different conceptions of sentencing held by many [A]boriginal people share a common underlying principle: that is, the importance of community-based sanctions" (at para 74). A legal system that is sensitive and responsive to traditional Indigenous means of delivering justice may be impossible to achieve without robust

incorporation of community views on humane and appropriate sentences. As the SCC also said in *Gladue* when discussing an Indigenous approach to restorative justice, "The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender" (at para 71, emphasis added). The ABCA chose not to consider any of these angles in its decision, but they merit further analysis and discussion.

Conclusion

The ABCA rightly corrected the sentencing judge's misapprehension of *Gladue* and its significance. However, those judges who struggle to see *Gladue* factors as anything but a "race-based discount" are right to feel some discomfort at the idea that systemic marginalization can be remedied by a prison sentence of, as in *Matchee*, six years instead of seven years. While the SCC's decision in *Gladue* helpfully recognizes the disadvantage that many Indigenous offenders face, the practice of slightly reducing prison sentences to reflect a lack of moral blameworthiness has no clear social benefit in the long term. By the time offenders like Mr Matchee reach the courts, so many levels of social safety net have failed them that a small reduction in sentence can accurately be described as "too little, too late". Indeed, the SCC acknowledged in *Gladue*, "sentencing innovation by itself cannot remove the causes of [A]boriginal offending and the greater problem of [A]boriginal alienation from the criminal justice system" (at para 65).

To the extent that sentencing judges may feel that other groups should also receive special consideration on sentencing, not just Indigenous peoples, they are correct. (This was, however, not a consideration for either the sentencing judge or the ABCA.) Offenders who experience substance abuse, have a history of sexual abuse, or suffer generally from the effects of low socioeconomic status should be entitled to have these factors considered on sentencing. However, *Gladue* represents a partial remedy for an extremely disadvantaged group, upon whom the effects of incarceration are especially severe due to cultural context (see *Gladue* at paras 68 and 86-88). Whatever ameliorative effect it has for that group (which, as discussed, may not be very great at all) does not create a new disadvantage for any other group. Indeed, s 718.2(a) of the *Criminal Code* already enables judges to consider "any relevant aggravating or mitigating circumstances" when sentencing.

Unfortunately, Canadian courts appear very reluctant to make rulings requiring government officials to enact broad ameliorative programs that would actually solve the problems Indigenous peoples face as diagnosed in *Gladue*: low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation (*Gladue* at para 67). Courts seldom wade into solving even the most basic problems that keep Indigenous communities in a cycle of systemic poverty, such as lack of access to healthy food, clean water, and basic infrastructure. Instead, it seems the best that even our highest court is willing to do is provide that once all these factors have conspired to land vulnerable Indigenous offenders in prison, their sentences might be slightly shorter than otherwise. This state of affairs is actually what should shock the conscience of all Canadians.

I am grateful to Drew Yewchuk for comments and suggestions on an earlier version of this post.

This post may be cited as: Amy Matychuk, "[Title]" (July 8, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/07/Blog_AM_Matchee.pdf