

What is Gladue?

Gladue refers to a right that Aboriginal People have under section 718.2 (e) of the Criminal Code.

Gladue is also a sentencing principle which recognizes that Aboriginal Peoples face racism and systemic discrimination in and out of the criminal law system, and attempts to deal, with the crisis of overrepresentation /inequities of Aboriginal Peoples in custody, to the extent possible, through changing how judges sentence. Gladue instructs judges, when sentencing or setting bail, to consider:

“all available sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to” the circumstances of Aboriginal offenders.”

Gladue and other changes to the criminal code, give judges discretion to use sanctions outside of the mainstream prisons for Aboriginal women and men when appropriate. In most cases, diversion to community supervised justice programs, such as those under the Aboriginal Justice Strategy, or conditional sentences are made use of for less serious offences, and in some cases for those facing first time charges only. Some participants noted that they have seen a decrease in the numbers of Aboriginal women and girls referred to diversion, and expressed concerns about this.

What is a Gladue report?

The Gladue report is a pre-sentencing or bail hearing report, usually prepared by Gladue caseworkers at the request of the judge, defense counsel or Crown Attorney.¹ These reports contain recommendations to the court about what an appropriate sentence might be, and include information about the Aboriginal persons' background such as: history regarding residential schools, child welfare removal, physical or sexual abuse, underlying developmental or health issues, such as FASD, anxiety, or substance use.

Gladue applies to all self-identified Aboriginal People: status and not, regardless of whether they live in or outside of an Aboriginal community. Aboriginal People can waive their Gladue rights. In March 2012, the Supreme Court of Canada ruled that Gladue Principle also applies to breaches of long-term supervision orders. The ruling stated that “failing to take [Aboriginal] circumstances into account would violate the fundamental principle of sentencing”.

Understanding GLADUE

During the Arrest the Legacy circles we heard from a number of legal Gladue specialists, Gladue caseworkers, Aboriginal transformative justice, and restorative justice workers, Native court workers and liaison workers, and others working within various components of the Aboriginal Justice Strategy. In one circle, we also had a presentation from the Regina Drug Treatment Court.

Our circles in the North West Territories were the only ones which did not include a presentation and discussion on Gladue. We were unable to locate any Gladue writers in Yellowknife, or Hay River, and it was unclear whether, or how often Gladue was being applied in cases in these locations. In other provinces, we were able to find a number of Gladue writers, and learned about Gladue courts, and First Nations courts, where Gladue principle is regularly applied in sentencing Aboriginal People. At the same time, participants noted that most courts ignore Gladue. Judges, parole officers and others within the criminal law system poorly understand what systemic discrimination is, and there aren't enough Gladue writers. It was recommended that there be training on the Gladue for all of those in law school, and those working in the criminal law system.

Concerns were also raised about the use of diversion measures and community sentencing for violent offenders. A community sentence might involve mandating someone to participate in drug or alcohol rehabilitation, anger management, or counselling programs. Some community justice advocates and Aboriginal women's organizations noted that the public safety and criminal justice systems have a long history of misogyny, having “ignored and normalized violence against women”. It was noted that some of those charged with crimes of violence, such as rape, child sexual abuse, homicide, and serial violence including homicide, against women, are in fact Aboriginal men who occupy,

or are related to those in positions of power and privilege within communities. Their ability to wield power and manipulate community “justice” processes was raised.

While the Criminal Code clarifies conditions to be met for using alternative measures when dealing with a person who has committed an offence, such as, for example, the direction that they must represent a minimal danger to the community, some participants questioned how Judges, poorly trained in gender justice or the impacts of residential schools and colonization not just on Aboriginal People, but on Aboriginal women in particular, would interpret crimes against women, and render appropriate sentences. Participants noted that the justice system doesn’t support victims well.

The gendered impacts of colonization, human rights violations, ethnocide/genocide, and tragically high levels of violence against First Nations, Inuit and Metis women and girls, have taken a heavy toll. The criminal law system has played a huge role in these violations, and there is ongoing distrust of how laws made to benefit Aboriginal People, will in practice benefit Aboriginal women and girls per se.

The debate is ongoing: some participants in our circles, who work very closely with restorative justice processes, argued that while separating Aboriginal men or women who have harmed others is necessary sometimes, prisons do a very poor job in the area of rehabilitation. They noted that all

people, regardless of gender, tend to come out of jail a lot angrier than when they went in, and when males in particular get out, they will often put that anger on the women or younger children who they live with, and thus for some participants it was critical, to consider on a case by case basis the use of diversion even where accused have been violent, if the places they are being diverted to, have the ability to properly support and monitor both the offenders rehabilitation and the safety of those who are vulnerable in communities. Others were more comfortable working only with those accused of first time offences such as shoplifting, or other non violent property offences.

It was also noted that diversion programs, in themselves, work best when gender –specific diversion and treatment programs, housing for women, life skills and employment training, and follow-up is available. The lack of community supports, housing and food security, for women dealing with trauma, addictions and mental health issues, poverty, and homeless were cited in each circle as particularly critical to both the rehabilitation process, and safety of women and girls.

Better prevention and rehabilitative programs for Aboriginal boys and men are also needed if we are to ensure that Gladue, when applied, does not override the duty to protect women and children from all forms of violence and discrimination, as well as girls and women from violence, and community safety more generally.

1. The Gladue Primer. 2011 Legal Services Society, BC

RECOMMENDATION:
that NWAC work with the Federal Department of Justice, in collaboration with the Status of Women Canada and the Gender Issues Directorate (Aboriginal Affairs and Northern Development Canada) and other community stakeholders, to develop a Federal wide policy to effectively monitor the implementation of a gender specific plan for Gladue reporting.

