

# Indigenous perspectives

Increasing the chance of meaningful sentences

# The two sets of circumstances

When sentencing an Indigenous person, a judge must consider:

1. The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
2. 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.

# 1. The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts - SUMMARY

- Under this set of circumstances, **Gladue writers identify the “unique systemic or background factors”, often called “Gladue factors”, that apply to the person;**
- These factors speak to why a prison sentence might be less appropriate for Indigenous people, and affect whether imprisonment will meaningfully deter and denounce criminal conduct;
- These factors, if not evaluated correctly, feed into systemic discrimination in the criminal justice system for Indigenous peoples;
- This is why when such circumstances exist in a person’s life, a sanction that takes into account the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment. This is why finding ways to support the subject’s healing can be an important component of a Gladue report;
- **Consequently, the options Gladue writers present to the court need to address the Gladue factors;**
- This set of circumstances bears on the degree of culpability of the offender (also called moral blameworthiness or moral culpability). The information you present in the Gladue report provides the judge with the necessary information to apply the fundamental principle of sentencing: the principle of proportionality.

For more info regarding the 1st set of circumstances and the type of informations writers should bring in their reports regarding this set of circumstances:

- Legal Aid BC, *Best Practices for Writing Gladue Reports and Understanding Gladue Principles*, p 58-69 and 107

## **2. 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 - SUMMARY**

- This set of circumstances derives from the fact that for many if not most Indigenous people going through the criminal justice system, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of Indigenous people or Indigenous communities. For this reason, the court needs to learn about the subject's Nation's and community's world view on the "substantive content of justice and the process of achieving justice";
- This is where the Gladue writer needs to provide information on:
  - The community's perspective, needs and alternatives to incarceration;
  - More broadly, the "Aboriginal perspective", which was interpreted as including the "laws, practices, customs and traditions of the group";
  - Culturally sensitive, appropriate and responsive options addressing the "underlying cause of the criminal conduct".
- Information on Indigenous law helps Gladue writers develop their final options, but it will also give supplementary legal tools to the judge when determining a fit and effective sentence;
- This set of circumstances bears on the effectiveness of the sentence itself;

For more info regarding the 2nd set of circumstances and the type of informations writers should bring in their reports regarding this set of circumstances:

- Legal Aid BC, *Best Practices for Writing Gladue Reports and Understanding Gladue Principles*, p 69-106 and 108

# Assessment of Gladue reports - 20 reports

**\*\*FYI:** Zoom meeting on April 12 in French (2pm) and English (10am) for service providers and Gladue writers of Quebec to present the results of the Gladue report assessment: email Marie-Andrée ([madenisboileau@gmail.com](mailto:madenisboileau@gmail.com)) if you want to be there and you haven't received the invitation.

# Assessment of Gladue reports - 20 reports

- 1<sup>st</sup> set of circumstances:
  - ❑ Gladue factors are identified
  - ❑ Generally, the story of the person's life is explained as well as his current life situation
  - ❑ A few issues identified: attend meeting for more info!



# Assessment of Gladue reports - 20 reports

- 2nd set of circumstances:
  - ❑ Community perspective rarely included (support network): What does the support network think? What can they offer? Do they have a justice program? (see LABC, *Best practices*, pp 72-73)
  - ❑ Options do not include the will and needs of the accused, his introspection (which help ensure the sanctions is appropriate and responsive)
  - ❑ No information on Indigenous legal orders and their implementation
  - ❑ Judges have no way of knowing how the measure fits within the relevant Indigenous legal order and how it can be implemented

# Assessment of Gladue reports - 20 reports

Alternative Options to incarceration must be concrete and practical:

- Lack of explanation on alternative options
- Lack of practical information
- Suggested options are not organized
- Options are not specific enough to the individual

# What are Indigenous legal traditions? Indigenous laws?

- Indigenous people's own legal traditions and laws, NOT state laws about Indigenous peoples
- At one point, comprehensive legal orders with all the requirements to manage messy human life, NOT just restorative justice or even "Aboriginal justice" programs.

**Val Napoleon and Hadley Friedland, ppt prepared for the Public Inquiry Commission on relations between Indigenous people and certain public services in Quebec, dec 4 2017, p 4**

# Indigenous laws

“Laws can arise whenever interpersonal interactions create expectations about proper conduct. Indigenous legal traditions develop in the same way”

- John Borrows, *Indigenous Legal Traditions*, p 7

Questions that can make Indigenous legal principles appear: *Legal Aid BC, Best Practices*, pp 84-85

## Indigenous laws are *laws*.

- Tools for social ordering, problem-solving and dispute resolution
- Diverse and adaptable
- Complex, imperfect and collaborative
- Meaningful, messy and in practice.

## Indigenous laws:

- Are not fully intact, visible or evenly functioning today.
- Are capable of being recovered and revitalized even after immense loss and damages.
- Require hard work and serious, sustained engagement to recover, learn, practise.

**Val Napoleon and Hadley Friedland, ppt prepared for the Public Inquiry Commission on relations between Indigenous people and certain public services in Quebec, dec 4 2017, p 22**

# Indigenous laws: keep in mind

1. **Reasoning and Reasonable:** Indigenous peoples were and are reasoning people with reasonable social and legal orders.
  2. **Present Tense:** Use present tense to talk about and consider Indigenous law today so it is not relegated to the past.
  3. **Particular:** Think about Indigenous laws as a particular response to universal human issues.
- Val Napoleon and Hadley Friedland, Indigenous Legal Traditions Core Workshop material, 2015

# Where can you find information on Indigenous laws?

- Around you: Elders, knowledge keepers, relations, stories, song, practices, language, historical descriptive accounts by outsiders, oral histories, kinship roles, dances, ceremonies, land, nature, written work by community members
- Written resources and videos (see provided bibliography - will be included in upcoming French version of LABC, *Best Practices*)

***The Indigenous organisation responsible of Gladue reports for its area or Nation should provide this information to their Gladue writers, and as much as possible, share with judicial actors***

## Indigenous perspectives in Gladue report

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# Indigenous laws in a Gladue report and in a court decision

Separate the underlying purpose/objective from the way it is upheld

Beware of false equivalencies. It is not because there are communalities between the Indigenous ways and State law that there is equivalency.

Ex: Neutralise by separation = jail (this is false equivalency)

# Indigenous Perspectives

In Gladue reports any options which reflect Indigenous ways should be well explained

- Why is this option relevant and meaningful?
- What is the purpose ?
- Why is it known to be effective?
- Its connection with Cree/Inuit/Atikamekw/Mohawk,... ways.

How do you know? Who said so or Where did you find the information

# Informing on the meaningfulness of:

- Experiential learning
- Story telling
- Sharing and peacemaking circles
- Healing
- Connection to land-bush
- Hunting-fishing-berry picking practices
- Ceremonies
- Traditional medicines and cleansing
- Traditional journeys-expeditions
- Mentoring and Elders' guidance
- Carving, sewing, beeding, making own regalia, etc
- ...

# The process of getting the information for alternative options to incarceration

- Introspection of the client on needs, motivation and wants
  - Benefits for the individual
  - Benefits for the court
- Input from close circle and others
  - Benefits for the individual
  - Benefits for the court

# Writing practical and detailed options and validation with resources

- Who, when , how, where, how often, how long, material needed, who did you verify with, cost associated and payables, accepted into the program, on wait list, if refused to an option-why,etc
  - ❖ Letters, pamphlet, content, web references, etc
- Who will support the person during this time (natural network, Gladue after-care worker, Justice committee coordinator, etc)
- What is the continuum of interventions or options, if need to be explained

# Impact of offering detailed and practical information to the Court

- Better assurance and trust that the options will be implemented
- Information accessible to the court to truly assess the effectiveness of the options presented
- Increase chances of Indigenous perspectives being recognised
- Increasing knowledge about Indigenous and community resources and perspectives. (can be useful in other cases)



# Additional information and supporting references of the options

- Research papers and empirical studies
- Recording and testimonies of Indigenous people

*Make sure to insert and reference it*



# Discussion: Accessing information

- What do you know and have already, and how do you bring it into the report or to the court?
- What helps?
- What are the obstacles?
- What other ways can we bring more information so the court can consider the 2nd Set of circumstances?