

R. v. Wedzin, 2024 NWTTC 01

Date: 2024 04 19
File: T-1-CR-2022-002209

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

- and -

MITCHELL WEDZIN

REASONS FOR DECISION
of the
HONOURABLE DEPUTY JUDGE VAUGHN MYERS

Heard at: Yellowknife, Northwest Territories
Date of Decision: July 7, 2023
Date of Written Judgment: April 19, 2024
Counsel for the Crown: Juniette Zuniga-Davila
Counsel for the Accused: Valerie Chiatoh

[Application for a Court ordered *Gladue* report]

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[1] The two issues before this Court are:

- 1) Does the Court have jurisdiction to order a separate stand-alone report entitled “a *Gladue* report”; and
- 2) If the Court does have that power, should it exercise it and order one in these circumstances.

[2] *Doyle v R*, [1977] 1 S.C.R. 597, is a Supreme Court of Canada decision often cited for the proposition that statutory courts like this one have only the authority expressly conferred on them. This Court does not have the express authority to order, for lack of a better term, a “*Gladue* report,” unlike the express authority it has in the *Criminal Code* to order pre-sentence reports.

[3] Other lower courts, however, have found that statutory courts like this one, the Territorial Court of the Northwest Territories, have authority to order such reports as being a “necessarily incidental power” when sentencing under section 718.2(e).

[4] Frankly, this court is not convinced that a statutory court does have the power to order such a report. The court notes that in the Yukon Territorial Court system the courts do not order *Gladue* reports, and they only request them. This court further understands *Gladue* reports are not typically ordered in the Northwest Territories.

[5] However, if this court did have the power to order a *Gladue* report, which this court is not convinced it does, it at a bare minimum must be “necessary” to be “necessarily incidental”. It is important to return to the Supreme Court of Canada (SCC) decision in both *Gladue* and *Ipeelee* to see exactly what the Supreme Court of Canada directs.

[6] In *Gladue v R*, [1999] 1 SCR 688, the Supreme Court of Canada stated that 718(2)(e) is *more* than simply a re-affirmation of existing sentencing principles. Its purpose is to ameliorate the serious problem of overrepresentation of Aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing.

[7] *Gladue directs* sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. The judge *must* therefore 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.

[8] In all instances it will be necessary for the judge to take judicial notice of the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders. The court should be provided with case-specific information by counsel or in the pre-sentence report. It will be extremely helpful to the sentencing judge for counsel on *both sides* to adduce relevant evidence. Indeed, it is to be expected that counsel will fulfil their role and assist the sentencing judge in this way.

[9] Whether the offender resides on a reserve, in a rural area or an urban area, the judge must be made aware of alternatives to incarceration that exist, whether inside or outside the aboriginal community. This requirement should not, however, be taken as a means of automatically reducing the prison sentence of aboriginal offenders. The sentence imposed will depend upon all the factors that must be taken into account in each individual case. It is also unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation. Generally, the more violent and serious the crime, the more likely it will be as a practical matter that the terms of imprisonment will be close to each other or the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

[10] That was *Gladue*. 13 years later, the Supreme Court of Canada decided *Ipeelee v R* [2012] 1 RCS 483. It reaffirmed the special sentencing approach. It stated this provision requires the court to use a different method of analysis in determining a fit sentence for aboriginal offenders. A judge *must* consider (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.

[11] It further stated:

Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report.

[emphasis added]

[12] *Ipeelee* puts a *duty*, unless expressly waived by the offender, upon defence counsel to bring that case-specific information before the court. It further goes by mandating courts by saying:

... courts must [emphasis added] take judicial notice of such matters as 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.

[13] These *requirements*, 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.

[14] Failing to take these circumstances into account would violate the fundamental principle of sentencing that requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] It is important to note a discrepancy between the headnote of *Ipeelee* and what the Supreme Court actually said. The headnote reads as follows:

A *Gladue* report is an indispensable sentencing tool to be provided at a sentencing hearing for an aboriginal offender and it is also indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

[16] If this is what the Supreme Court of Canada said, it would mandate “*Gladue* reports” in all cases. However, that is not what the Supreme Court of Canada said. What the Court said is contained in paragraph 60 of *Ipeelee*:

Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. 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*.

[emphasis added]

[17] With great respect, the Supreme Court of Canada could clearly have mandated “*Gladue* reports” had they so wished. They did not. It is the *Gladue* information that is *indispensable*, not the *Gladue* report.

[18] So when we read what the Supreme Court of Canada has directed this court to do, we can distill a number of points:

- 1) Judges must undertake sentencing of aboriginal offenders individually but also differently because their circumstances are unique.
- 2) The judge must consider unique systemic or background factors that played a part in bringing the accused to court and the types of sentence and procedures and sanctions that may be appropriate because of the accused’s heritage or connection.
- 3)
 - a. While judges may take judicial notice of the broad systemic and background factors and the priority given to restorative justice;
 - b. the Court should be provided with case-specific information by counsel or in the PSR.
- 4) The judge must be made aware of alternates to incarceration that exist inside or outside the aboriginal community.
- 5) They should not be taken as a means of automatically decreasing the sentence of aboriginal offenders.
- 6) The sentence imposed will depend on all the factors in each individual case.
- 7) It is unreasonable to assume the aboriginal community do not believe in the objectives of denunciation, deterrence and separation.

8) Generally, the more violent and serious the offence, the more likely the terms of imprisonment will be close or the same.

[19] 13 years later, in the decision of *Ipeelee*, the Supreme Court again reiterates those principles. Firstly, judges may take judicial notice of the broad systemic and background factors affecting aboriginal people generally. However, it also indicates that defence has a duty to inform of additional information respecting the case-specific factors of the accused.

[20] Secondly, the Courts must take judicial notice of such matters as the history, colonialization, 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 higher rates of suicide and higher levels of incarceration for aboriginal people.

[21] The SCC has instructed lower courts to consider the foregoing so-called *Gladue* factors. It is mandatory that lower courts do so. Lower courts are not instructed to obtain or order a document called “a *Gladue* report.” The Supreme Court has specifically instructed this court that it may take judicial notice of broad systemic and background factors and the priority given to restorative justice, and this court does so.

[22] *Ipeelee* instructs this court, saying that it must take judicial notice of such matters as the history of colonialization, displacement and residential schools and how the history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and higher rates of suicide and higher levels of incarceration for aboriginal people. Once again, this court does.

[23] Again, *Ipeelee* also instructs that additional information will come from counsel, as well as the pre-sentence report (PSR) because there is a duty for counsel to present it. This court has taken judicial notice of all of the factors laid out in *Gladue* and *Ipeelee*.

[24] I wish to state that this judge’s review is tempered by over 45 years of dealing with aboriginal people in an almost exclusive criminal practice. This judge has read scores of *Gladue* reports along with attending numerous courses and conferences dedicated to aboriginal offenders, aboriginal sentences and aboriginal issues.

[25] I would further add that in comparing the scores of *Gladue* reports this judge has reviewed in Alberta to the Northwest Territories pre-sentence reports considering *Gladue* factors, the Northwest Territories pre-sentence reports compare very favourably. The Northwest Territories reports are well written, well considered and cover the ground covered in those *Gladue* reports.

[26] Defence has asked “how will the court fulfill its duty in a situation where the PSR is inadequate, as is the case in most PSRs in the Northwest Territories drafted by probation officers, as discussed above?” The point appears to relate to the different training provided to *Gladue* report writers compared to pre-sentence report authors.

[27] The court wishes to make two points on this last comment. Firstly, *the defence presumed the PSR would be inadequate even before reading it*. The PSR was filed July 6. The defence’s submissions alleging the PSR was deficient were filed June 22. As that was the timeline set, this court blames no one for that. But the fact remains the defence’s allegation was made before the document was even produced.

[28] Secondly, and just as important, *this court is not prepared to accept the proposition that most pre-sentence reports in the Northwest Territories are inadequate*. There is not a shred of evidence adduced to support that proposition, and this court rejects that. As stated earlier, these Northwest Territories pre-sentence reports compare very favourably to the *Gladue* reports produced in Alberta.

[29] Finally, with respect to this PSR in both the body of the document, including family circumstances, as well as case-specific factors related to the accused as an aboriginal offender, dedicates almost one third of the substantive portion of the document to family circumstances relating in large part to a history of violence and Social Service intervention, and multiple *Gladue* factors as well as one and a quarter pages to Aboriginal offender factors.

[30] With respect, it is unfair to label and presume this document is inadequate prior to the reading of it. This court awaits the mandatory information component of case-specific information about the offender from defence counsel, which is mandated as a result of *Ipeelee*. The court is satisfied with its discretionary and mandatory judicial notice of all of the factors laid out in *Gladue* and *Ipeelee*.

[31] The Court is satisfied with the review of the case-specific factors as related in the pre-sentence report. Again, the Court awaits the presentation of the requisite information from defence counsel.

Vaughn Myers
Deputy Judge of the Territorial
Court

Dated at Yellowknife, Northwest Territories
this _____ day of _____, 2024.

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