

# The Criminal Law Quarterly

Volume 54, Number 4

May 2009

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## Editorial

### *Gladue* at Ten

The tenth anniversary of the Supreme Court's decision in *R. v. Gladue*, [1999] 1 S.C.R. 688, is not a cause for celebration. Despite the decision, which articulated a mandatory new methodology for the sentencing of Aboriginal people, overrepresentation of Aboriginal people in our prisons has increased since 1999.

The sad fact that *Gladue* has not reduced overrepresentation does not, however, mean that efforts to reduce overrepresentation should be abandoned. The Supreme Court in *Gladue* recognized that the causes of overrepresentation were complex and multi-faceted, but it affirmed the statutory duty of sentencing judges under s. 718.2(e) to consider all reasonable alternatives to imprisonment with special attention to the circumstances of Aboriginal offenders.

The first paper in this special issue by Justice Brent Knazan of the Ontario Court of Justice provides an important perspective on how *Gladue* changed the way at least some judges think and work in sentencing cases involving Aboriginal offenders. He stresses the importance of considering *Gladue* at bail so that *de facto* decisions about the use of imprisonment are not made without consideration of the broad range of individual and systemic factors that are relevant under *Gladue*. He also discusses practical issues such as the court's reliance on self-identification of an offender as an Aboriginal person.

Justice Knazan's article affirms the important role that judges play, but it also illustrates that judges cannot fully implement *Gladue* on their own. They need assistance from relevant communities and through pre-sentence reports ideally prepared by specialized caseworkers who have the time and ability to explore the full range of *Gladue* factors. Justice Knazan's article provides much insight from his extensive experience as one of the pioneering judges in Toronto's Gladue Court.

Jonathan Rudin of Aboriginal Legal Services of Toronto and York University draws on his long experience with Aboriginal justice issues to

argue that it is a mistake to expect *Gladue* to be self-executing. He situates the decision in the context of a larger societal and institutional dialogue and notes that governments have failed to respond to *Gladue* in the same robust and proactive way that they responded to *R. v. Askov*, [1990] 2 S.C.R. 1199. Rudin views *Gladue* as an important support and stimulus for a difficult and grass-root approach to social change that will and should vary from community to community.

By drawing on his experience as Program Director of Aboriginal Legal Services of Toronto, which among other services provides vital supports for Toronto's Gladue Courts, Rudin provides a glimpse of all the hard work that is necessary to implement *Gladue* in a substantive as opposed to a superficial manner. He describes how Toronto's Gladue Courts are assisted by caseworkers who have the ability to write Gladue Reports to assist in sentencing, as well as by an Aboriginal Bail Supervisor and Aftercare Worker. He also describes efforts outside of Toronto to establish Gladue Courts.

Along with Justice Knazan's article, which also points to the importance of diversion programs such as the Aboriginal Legal Service of Toronto's Community Council program, these two articles provide an indication of what is needed to implement *Gladue*. Readers who are interested in these critical implementation issues would be advised to consult ALST's website — <<http://www.aboriginallegal.ca/>> — which contains much helpful information about *Gladue*.

The last two articles take a more doctrinal approach and will be of greater interest to those who are faced with *Gladue* issues in court. After providing a brief analysis of the Supreme Court's decision in both *Gladue* and *R. v. Wells*, [2000] 1 S.C.R. 207, my article examines the growing jurisprudence about *Gladue* in the courts of appeal. I find significant variations between different courts of appeal. The Ontario Court of Appeal has been unwilling to allow Crown appeals from *Gladue*-inspired sentences, while several such appeals have been allowed by the British Columbia and Saskatchewan Courts of Appeal. Successful Crown appeals from sentence remain rare, but they can inhibit sentencing experimentation.

The rest of my paper discusses the experience with sentencing appeals by the accused that allege that the trial judge erred in failing to take account of *Gladue*. These appeals have had varying degrees of success, with some courts of appeal willing to accept new evidence about *Gladue* factors, but not necessarily changing the accused's sentence. Much of the appellate jurisprudence about *Gladue* has revolved around the ambiguous meaning of the Supreme Court's various statements about sentencing in serious cases. The Ontario Court of Appeal has affirmed that *Gladue* still applies in serious cases, but other courts of appeal stress the idea that there should be no divergence in sentencing in serious cases.

The final paper by Professor Alana Klein of the McGill Faculty of Law provides a comprehensive and insightful account of the treatment of *Gladue* in Quebec. Although the statistics on Aboriginal overrepresentation are not as dramatic in Quebec as in other provinces, Professor Klein argues that the duty to apply s. 718.2(e) remains the same. She details how a number of cases from Quebec either essentially conclude that *Gladue* does not apply in serious cases or seem to ignore *Gladue* altogether, practices that she concludes are contrary to the law.

Professor Klein's article affirms that in Quebec, courts have been hampered by a lack of information about *Gladue* factors in sentencing. She also outlines how several trial judges in Quebec have expressed frustration with a lack of access to community views that may often be necessary for a truly restorative approach to sentencing. Community engagement can be difficult at the best of times but becomes even more difficult when an offender from Northern Quebec is sentenced in an urban centre. She also points out dilemmas caused by the serious impact of certain crimes on Aboriginal communities when the crimes themselves are related to systemic factors. There is a danger here of a vicious circle in which the same underlying conditions of poverty and disempowerment contribute both to crime and to punitive responses to the crime. Professor Klein concludes that more judicial education about *Gladue* is needed. Nevertheless, consistent with the first two articles in this special issue, she warns that judges "cannot go it alone".

The articles in this special issue provide a snapshot of where we stand ten years after the Supreme Court declared in *Gladue* that Aboriginal overrepresentation was a crisis that should be remedied in part by the use of distinctive sentencing methods and sentences for Aboriginal offenders. In the last ten years, many *Gladue* cases have been litigated and there have been important grass-roots responses such as Toronto's Gladue Courts. Increasing Aboriginal overrepresentation, however, underlines that much more work remains to be done.

K.R.