Legal Brief*

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SENTENCING, ABORIGINAL OFFENDERS AND *GLADUE* REPORTS

Criminal law is based on the premise that criminal liability only follows from voluntary conduct. In this regard, the sentence, which is the legal consequence of the crime for which a person is responsible, must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

The analytical framework applicable to sentencing for Aboriginal offenders is not a "race-based discount", but, rather, one that considers the degree of responsibility, as affected by background and systemic factors. Proportionality is an essential condition of a just sanction.[1] When sentencing an Aboriginal offender, the Court must consider certain elements: first, the systemic and background factors that affect an individual's life path and, second, the alternative sentences other than imprisonment that would serve to achieve the same penological goals. While the first bear on the moral blameworthiness of the offender with a view to a proportionate, fair and just sentence, the second acknowledge a different view of justice and the way in which it is administered.[2]

One of the indispensable tools for sentencing is the *Gladue* report, which is designed to paint a portrait of an Aboriginal offender's life path, beginning with his family's history and that of his community. These reports also focus on systemic and background factors that have affected the individual. The *Gladue* report makes it possible to tailor the sentence to the degree of responsibility. From a practical point of view, the preparation of a *Gladue* report, like the presentence report, is requested by asking the court at the sentencing phase.

The Supreme Court of Canada has acknowledged that:

> “there is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system. […] Statements regarding the extent and severity of this problem are disturbingly common. […] The Canadian criminal justice system has failed Aboriginal peoples of Canada — First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural — in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice. [3]

The Supreme Court of Canada has also stated that:

> The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community. (R. v. Ipeelee, 2012 SCC 13 (CanLII), [2012] 1 SCR 433, para 74).

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* The information set out in this document is not a legal interpretation.

The masculine is used to designate persons solely in order to simplify the text.

SENTENCING, ABORIGINAL OFFENDERS AND *GLADUE* REPORTS
(continued)

The court must therefore assess whether a program or measure can be implemented to achieve the same purpose. Such an approach focuses on re-establishing harmony within a community and on the principles of restorative justice. (R. v. Ipeelee, 2012 SCC 13 (CanLII), [2012] 1 SCR 433, para 59).

In conclusion, the sentencing of an Aboriginal offender must consider his degree of moral blameworthiness in order to be proportionate and, therefore, just. From a practical standpoint, the tool that allows the court to take systemic factors into account is the *Gladue* report.

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[1] R. v. Ipeelee, 2012 SCC 13 (CanLII), [2012] 1 SCR 433, para 37.

[2] R. v. Ipeelee, 2012 SCC 13 (CanLII), [2012] 1 SCR 433, paras. 73-74.

[3] R. v. Gladue, 1999 CanLII 679 (SCC), [1999] 1 SCR 688, paras. 61-64.

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