

KOOKUM KNEW . . .

EXPLORING HISTORICAL CONTEXTS: ABORIGINAL PEOPLE, THE JUSTICE SYSTEM, AND CHILD WELFARE

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Abstract: This paper concerns the inclusion of a “Gladue Report” in Aboriginal child welfare cases in Canada. A Gladue Report is named after a criminal trial in Nanaimo, Vancouver Island, British Columbia, involving a Cree/Métis woman, Jamie Gladue. During the trial, the defence referred the court to Section 718.2(e) of the Criminal Code that allows a judge to take into consideration the historical context pertaining to an accused Aboriginal person. This section was added to the Code in 1996 in response to the gross overrepresentation, as a percentage of the Canadian population, of Aboriginal people in the justice system. Using this section as an additional tool of analysis, the judge and the court can consider the unique experiences, context, and circumstances of the Aboriginal person’s life, factors that may have played a role in bringing this person before the court. Providing valuable historical context in the life of a child, family or community, the Gladue Report is quickly evolving into an important assessment tool in criminal sentencing, as well as in child welfare cases. Often, the wisdom keepers – the grandmothers and grandfathers in a community – keep these historical memories and stories. They are proving invaluable in supplying insight, information, and understanding, not only in court cases, but in relating the story of the broader dynamic of human interaction and discourse that has clashed and thundered on this land for the past 300 years.

“I got you, you fucking bastard!” exclaimed Jamie as she jumped up and down as though she had tagged someone (R v. Gladue, [1999] 1 S.C.R. 688, p. 2). It was the last thing Jamie Gladue would say to her fiancé, Rueben Beaver. She had suspected him of cheating on her. Both were fuelled by alcohol that evening of Jamie’s 19th birthday, when Rueben was fatally stabbed in the heart and died while trying to flee their home in Nanaimo, British Columbia.

Jamie Gladue’s story neither ends nor begins with the tragic death of her fiancé and the father of her children. Her name and story became the premise upon which a very important concept of jurisprudence in Canada was founded and evolved, in particular with respect to its application and relevance, not only to criminal cases of Canada involving an Aboriginal person, but also to Aboriginal child welfare cases.

Around the same time that Jamie Gladue killed Rueben Beaver, the Government of Canada amended the Criminal Code of Canada. The government was responding to the consistently high rates of incarceration among Aboriginal people ensnared in the justice system. “For example, Aboriginal people constituted close to 3 percent of the population of Canada, yet amounted to 12 percent of all federal inmates” (Gardner & James, 2007).

In reaction to this alarming statistical anomaly of Aboriginal people seemingly entrenched in the system, a new Subsection (e) that would consider the singular and unique circumstances of Aboriginal people was added to Section 718.2 of the Criminal Code. This amendment would be remedial in nature and was cast to ameliorate the grave problem of the overrepresentation of Aboriginal people in the justice system.

In both the ten provinces and in Canada nationally, Aboriginal people represent a small fraction of the population. For example, in the Province of British Columbia in 2009, the general population is recorded at almost 4 million people, of which close to 200,000 are Aboriginal people, or about 5% (Government of Canada, 2009, p. 5). The bloated percentage of Aboriginal people evident in the justice system is repeated in the child welfare system. In 2002, in British Columbia, Aboriginal children were at risk of being in government care at a rate seven times greater than their non-Aboriginal peers (MacDonald, 2005, p. 6). This high rate of Aboriginal children in care came under scrutiny by the Provincial Health Officer who declared in 2002 that there was a direct correlation between the numbers and the legacy of colonization (MacDonald, 2005, p. 6). There was now a clear hard recognition that was indisputable. Statistics and data supported the finding that there were other factors and forces, apparently out of the control of Aboriginal people, that shaped and formed their life experience, often almost inevitably leading them into direct contact with the “authorities” be it the criminal justice system or the child welfare bureaucracy.

In 1996, Section 718.2(e) was added in the Criminal Code of Canada. It reads:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal [sic] offenders.

This was a provision specific to Aboriginal people in the sentencing portion of the offence. This section would allow judges to alter their method of analysis to include an Aboriginal person’s unique background, or systemic factors that may have played a role in bringing this Aboriginal person before the courts. In other words, there was finally acknowledgement that the role of colonization and all its consequences, both current and residual, would be considered. Hereafter, the historical context of the accused’s life could be reported to the judge who in turn could take into consideration such colonizing systems and forces as residential schools, child welfare issues, substance addiction, abuse, poverty, loss of autonomy, and loss of cultural identity.

The second consideration for the judge was to look at alternatives types of sentencing procedures and restorative approaches if available. This new method of analysis was not designed to reduce the incarceration period or the seriousness of a crime. In the instance of killing another, this type of offence would often warrant the same sentencing time as that of a non-Aboriginal offender.

When the trial judge asked about Jamie Gladue’s background, her defense counsel replied that she was Cree. The trial judge then inquired as to whether or not McLennan, Alberta, the town Jamie grew up in, was an Aboriginal community. Her defense counsel responded that McLennan was just a regular community. This was the full extent of the

report submitted by her defence to the court. In his deliberation, the trial judge noted that both Jamie and Rueben were Aboriginal, but indicated that because they were living in an urban, off-reserve area, no special circumstances arising from their Aboriginal status should be given consideration by the courts (*R v. Gladue*, [1999] 1 S.C.R. 688).

When Section 718.2(e) came into effect, there was confusion around the practical matter of exactly who would gather the information pertaining to the unique circumstances and background of the Aboriginal person before the courts and provide it to the defence counsel. This still remains a fundamental problem.

In most Aboriginal families, the Elders are highly revered and respected for the knowledge and memories they hold with respect to individuals and families. My “*Kookum*” or grandmother was the wisdom keeper of our Cree family. My “*Mushoom*” or grandfather died before he reached the age of 70 years. My older aunts and my mother could often speak to the memories and experiences of the family and held those important historical contexts for our family.

In Jamie’s case, her Cree mother left the home in 1987. Marie Gladue left all nine of her children to the care of their Métis father when Jamie was only 11. At the age of 14, her mother was killed in a car accident. At the age of 17, Jamie began living with Rueben Beaver and they had a daughter. In 1995, along with her father, two of her sisters, and Rueben, the family moved to Nanaimo, British Columbia.

After the death of her fiancé, and with the help of Rueben’s mother, Jamie reconnected with her Cree culture. She was able to gain her “status card” and status for her children with Rueben. Jamie took both educational upgrading and counselling for alcohol and drug abuse. She was subsequently diagnosed with a hyperthyroid condition, known to produce an exaggerated reaction to any emotional situation (*R v. Gladue*, p. 2.). She was treated for this condition, but still struggled with alcohol and pleaded guilty to one incident of alcohol consumption while out on bail.

The details of Jamie’s life story now begin to unfold. The historical context of her story found its way into the court transcript of the appeal process and ultimately of the Supreme Court of Canada. Looking back on her life, it clearly must have been very difficult for Jamie, not yet a teenager, to have her mother leave home. Although Jamie’s Métis father takes over parenting of Jamie and her eight siblings in the small town of McLennan, when Jamie is asked about her heritage, she identifies only as Cree and does not mention her Métis ancestry.

McLennan, Alberta is a small town nestled close to Lake Kimiwan, about 415 kilometres northwest of Edmonton. There are some obvious Métis settlements in the larger area, like Peavine and Gift Lake Métis settlement, as well as First Nations communities like Beaver Ranch, John D’Or Prairie, Fox Lake, and Peace Point. This is a land rich in cultural holdings, which nonetheless bears the scars of communities deeply affected and impacted by the forces of colonization.

From the beginning of contact in the Americas, the tentacles of colonization have insidiously spread out to reach, squeeze, and grasp anything that comes into their path. Aboriginal people have been, to put it bluntly, terrorized and subjugated by the atrocities of colonialism for centuries. Our families, collectives, and communities have been broken, our children abducted, our languages, culture, and spirituality outlawed. The colonization of the Americas has been a pervasive and destructive force overwhelming Aboriginal people causing multi-generational trauma. Its effects linger on in successive generations of the people, families, and communities and with these effects come the stories.

So, too, in Canada: Every person has a story, or as we sometimes say in academia a “historical context”. Through years of contact and colonization, Indigenous people in Canada have suffered tragedy after tragedy in a struggle for the autonomy to live as free people in a free world. At the highest levels of the Canadian government, the history and reality of colonialism is still challenged, contested, and glossed over, as it has been for decade upon decade. It has been unacknowledged and openly denied. It is important, therefore, when looking at historical context, to also consider the speaker of the story: Who holds these stories, the historical context of Aboriginal peoples, if not the people themselves?

Jamie Gladue’s story never completely revealed itself at the original trial. The Supreme Court of Canada ruled that the trial judge did err in not considering historical context based on reasoning that Jamie and Rueben were not living on reserve or in an Aboriginal community (R v. Gladue at para. 18).

The Supreme Court also made an important determination in interpreting the new subsection (e) of Section 718.2 of the Criminal Code. Within the deliberation it was noted – replete with an underline – that “judges should pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique, ...” (R v. Gladue at para, 37). Such circumstances refer to unique systems or background factors, which may have played a part in bringing the Aboriginal person before the courts. It is acknowledged that many Aboriginal people experience both systemic and direct discrimination. Experiences include: memories from residential schools; abuse; child apprehension and adoption; dislocation; disconnection from land, culture, spirituality, language, and community; loss of identity and connection; poverty, and a lack of opportunities and options.

The second area of interpretation the Supreme Court addressed in looking at subsection (e) was in the matter of sentencing. The court recognized again that community-based values and the principles of restorative justice are more meaningful and relevant to Aboriginal peoples, families and communities. As Gardner and Owen (2007) explain:

Most traditional Aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. Restorative justice is an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony, which existed prior to a crime’s occurrence.

The Crown advanced the argument in Jamie Gladue's case (and others) that this could be "reverse discrimination", but that was overruled, the Supreme Court stating that the fundamental purpose of this section is to treat Aboriginal people fairly by taking into account their difference (R v. Gladue at para. 87).

The "Gladue Report", now part of the criminal justice system in the determination of the Supreme Court, is the result of recognition that too many Aboriginal people were being charged, convicted, and incarcerated in a justice system that mirrored a dominant society's perspective of both justice and punishment. As we have seen, through the passage of legislation and Section 718.2(e), judges have the discretion to include as part of their analysis and deliberation the historical context of an Aboriginal person. A judge may now thoughtfully deliberate in the sentencing phase to provide restorative and even healing measures that are more relevant and meaningful to Aboriginal communities.

As in the criminal justice system, the child welfare system is a vast wasteland populated with Aboriginal children who have found themselves adrift and, as noted previously, a highly overrepresented group. Often families find themselves entrenched in the system of child welfare, more often than not due to the same principal cause, systemic and direct discrimination.

This concept, the taking into account of historical context, should also be applied in child welfare cases in which children and families find themselves in court. Judges should be given an opportunity to assess the historical context of a child or children, families, and communities. This could be accomplished in the same procedural way that a Gladue Report is brought before the courts in a criminal case. Practitioners, child welfare workers, and family lawyers working with families and communities could gather the information and bring it forward by way of normalized practice in the family court setting. Both the language and method of analysis of such an approach are familiar to judges. This type of report also appropriately cues the court that there may be a lot more going on with this Aboriginal child and family than surface appearances might suggest. The wording could be:

The unique interrelationship of background factors and historical context which may have played a part in bringing the particular Aboriginal child(ren) and family before the child welfare system and/or courts should be considered.

The vast number of Aboriginal children being removed is based upon neglect. We now know that neglect is married to poverty and poverty is still making itself very much at home in the lives of Aboriginal people in both urban and rural communities. To continue with the model used in a "Gladue Report", the second part of the analysis in a child welfare case could determine:

...the types of services, care and support procedures, resources and measures for Aboriginal child(ren) and families that should be considered in light of their particular Aboriginal heritage, history, and culture which may be appropriate and relevant, in consultation with the family, community, and/or advocates.

This approach would offer a complete reframing of the analysis now used in child welfare cases before the courts. It would also introduce a completely new paradigm based on both assessing and providing resources, supports, and measures, where appropriate, in consultation with the family, wisdom keepers, the community, and advocates. For example, in cases of “poverty” linked to neglect and then channelled down the child welfare pipeline, these cases could completely bypass the usual and predictable child apprehension route. Supports, education, and healing could be real outcomes for children, families, and communities and could reflect back those principles and values esteemed by Aboriginal people.

The issues can be broad and they can be narrowly focused. It will take a concerted effort and push from many peoples to find solutions to the community, national, and global problems occurring within Indigenous Nations. The first step is in acknowledging that there are real problems as a result of colonization. Colonization has touched the Earth all over for centuries. The struggles are concurrent and speak of a strong spiritual resistance occurring at all levels globally.

OTTAWA – Amnesty International is accusing Canada of stalling a United Nations negotiation on the rights of indigenous peoples. The human rights group says Canada has been obstructionist and exploitive in its efforts to block discussion on the issue. It notes that Canada and Russia were the only two members of the 47-country Human Rights Council to vote against the UN Declaration on the Rights of Indigenous Peoples in June 2006. (Associated Press, June 6, 2007, *Canada blocking UN aboriginal [sic] rights: Amnesty*).

Amnesty International Canada spokesman Alex Neve says while Canada does not have the dismal human rights record of such countries as China or Sudan, we have more work to do. “There are real issues of real concern in Canada when it comes to human rights protection. While we have much to be proud of, we are far from perfect. We owe it to the people whose rights are at stake to do better.” (CTV News, May 28, 2009, *Amnesty Raps Canada for treatment of Natives*).

At the trial sentencing hearing, the Judge acknowledged that the offence was a serious one and gavelled out a sentence of three years imprisonment. In both the British Columbia Court of Appeal and the Supreme Court of Canada, the sentence stood its original dictum and seemed peripheral to the discourse. Through it all, Jamie Gladue’s sentence remained the same.

Again at the trial hearing, when asked if she had anything to say, Jamie Gladue, expressed remorse. She stated she was sorry for what had happened and that she had not intended to do it. She said she was sorry to Reuben’s family, the Beavers. The baby that she was carrying on the night of the stabbing was a little boy. He was named Rueben Beaver after his father (R v. Gladue at para. 11).

We are still two worlds apart, with differing values and principles, ways of knowing, doing and being. It has been our star-crossed dynamic through the years – these two worlds co-existing, turning and twisting, often clashing and thundering on the land –

in the halls of law and justice, and now over the most precious and sacred cultural holding of all, Aboriginal children.

My Kookum knew. She held the stories long enough to pass them down, so they could make their way to me. She knew that I would have a place to store them, and pass them on. My Kookum knew.

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