

***Gladue* Factors and Extent of Impact on the Sentencing of Dangerous Offenders**

Manitoba's Court of Appeal recently affirmed a trial judge's sentencing decision involving consideration of *Gladue* factors in the case of dangerous offenders. In *R. v Dumas*, the accused was given concurrent indeterminate sentences on two cases of sexual assault.¹ *Dumas*, an Indigenous man, appealed his sentence and argued that the trial judge erred in applying relevant *Gladue* factors which would have led the judge to hand down a 20-year determinate sentence and a subsequent 10-year long-term supervision order.² The Court of Appeal dismissed the appeal and found that the trial judge had adequately balanced relevant *Gladue* factors with the situation.³

In relation to sentencing, section 718(2)(e) of Canada's *Criminal Code*⁴ states:

“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 offenders.”⁵

*R. v Gladue*⁶ further clarifies this provision and identifies *Gladue* factors which judges should consider when sentencing an individual of Indigenous descent. Looking at the trial judge's decision, we see multiple *Gladue* factors involved in *Dumas*' case. Among other details, *Dumas* grew up in an abusive household, his grandparents were shot and killed while he was living with them, and he had been subjected to residential schools.⁷ He had been sexually abused multiple

¹ *R. v Dumas*, 2020 MBCA 28 at para 1 [*Dumas 2020*].

² *Ibid* at para 1-2; *R. v Dumas*, 2018 MBQB 49 at para 8 [*Dumas 2018*].

³ *Dumas 2020 supra* note 1 at para 3.

⁴ *Criminal Code*, RSC 1985, c C-46.

⁵ *Ibid*, s 718(2)(e).

⁶ *R. v Gladue*, [1999] 1 S.C.R. 688 [*Gladue*].

⁷ *Dumas 2018, supra* note 2 at para 9.

times as a child and has experienced substance abuse.⁸ These factors clearly demonstrate a distressing childhood and historic disadvantage, which would need to be taken into account by the trial judge when sentencing Dumas. To consider alongside the *Gladue* factors present in this case is Dumas' troubling criminal record, which included 75 prior convictions with nine of those convictions being in relation to sexual offences.⁹ Expert witnesses on both sides reported that Dumas would continue to pose a high risk to the public and was very likely to consistently reoffend over the course of his lifetime.¹⁰ Furthermore, the court-ordered expert was of the opinion that the condition which made him particularly a risk to youth and children and which made him likely to reoffend multiple times throughout his lifetime was a condition that occurred at birth.¹¹ If Dumas was born with a condition that made him a child sex offender, this might make *Gladue* factors less applicable because he would have arguable committed these offences without a historic disadvantage. However, it is also arguable that historic disadvantage and Dumas' life experiences likely exacerbated any pre-existing conditions that he may have had. Further, the historic disadvantage of his parents and previous generations may have increased Dumas' chances of ending up with this condition. As such, while a congenital condition may mean that historical disadvantage was unnecessary for the offences to have occurred, historic disadvantage likely still played a role in the extent to which he committed such offences and thus *Gladue* factors should still be strongly considered to ensure that the most restorative measures are contemplated.

⁸ *Ibid* at para 10.

⁹ *Dumas 2020, supra* note 1 at para 5.

¹⁰ *Ibid* at para 6-7.

¹¹ *Ibid* at para 6.

That said, I sympathize with the decision of the Court of Appeal and the trial judge in the case of Dumas. While *Gladue* factors were prevalent in this case and did need to be seriously deliberated over, in my view the trial judge did spend appropriate time reviewing *Gladue* factors as they applied to Dumas.¹² However, Dumas was found to be a dangerous offender who would very likely reoffend.¹³ *Gladue* factors and s.718(2)(e) of the *Criminal Code* are for the purpose of using restorative measures for Indigenous peoples wherever possible. In Dumas' case, removing Dumas indeterminately from the public was necessary for public safety because evidence strongly suggested that Dumas would continue to be a risk to the public for an indeterminate time. As stated by the trial judge and reiterated by the Court of Appeal, caselaw demonstrates that *Gladue* factors must be considered with protection of the public being of great importance.¹⁴ It would not have been reasonable to give him a sentence that would allow him to interact with the public where he was determined to be likely to commit another sexual offence. This is particularly the case when he was prone to assault children and youth, more vulnerable members of society. Dumas also committed some of these offences to other Indigenous individuals.¹⁵ It does not seem to be in accordance with the purpose of restorative measures for Indigenous individuals to allow a dangerous offender who has a very high risk of reoffending to maintain access to Indigenous communities where he will likely harm the most vulnerable members of these communities. Additionally, section 761 (1) of the *Criminal Code* provides for a review of indeterminate sentences every seven years.¹⁶ Dumas's indeterminate sentence does not necessarily provide Dumas with a life sentence as he might feel is the case and as his counsel

¹² *Dumas 2018*, *supra* note 2 at para 8-13.

¹³ *Dumas 2018*, *supra* note 2 at para 48-49.

¹⁴ *Dumas 2020*, *supra* note 1 at para 5.

¹⁵ *Dumas 2018*, *supra* note 2 at para 19.

¹⁶ *Criminal Code*, *supra* note 4, s. 761(1).

suggested is essentially the case.¹⁷ In fact, it could lead to him being granted parole in the event that he is later found to no longer be a risk to the public. As such, should he take measures to drastically improve his ability to be in community with others and his compliance to the law, he may find himself in a better place than he would have been with the determinate sentence for which he appealed.

Gladue factors must be seriously considered in sentencing, and restorative measures should precede imprisonment, particularly for Indigenous offenders, wherever possible. The Court of Appeal felt that while still taking into account the *Gladue* factors present in Dumas' case and acknowledging the significant impact these factors have on Dumas as an individual, the trial judge made the correct decision in handing down an indeterminate sentence based on the significant risks that Dumas posed to the public. Considering the nature of his offences and his troubling history of past offences, upholding the indeterminate sentence appears proportionate given the circumstances even whilst accounting for Dumas' life history and historic disadvantages.

¹⁷ *Dumas 2018*, *supra* note 2 at para 66.

LEGISLATION

Criminal Code, RSC 1985, c C-46.

JURISPRUDENCE

R. v Dumas, 2020 MBCA 28.

R. v Dumas, 2018 MBQB 49.

R. v Gladue, [1999] 1 S.C.R. 688.