Case Comment

R. v. Gladue

BY JEAN LASH

Cet article se penche sur la décision de la Cour suprême du Canada et sur les réactions suite au cas de Jamie Tanis Gladue qui a tué son mari, accusée de meurtre au second degré. L'auteure conteste le fait que la Cour suprême savait que madame Gladue était autochtone.

Jamie Tanis Gladue[1] killed her common law husband on her nineteenth birthday and was charged with second-degree murder. She pled guilty to manslaughter but appealed her three-year prison sentence on the grounds that the trial judge failed to give appropriate consideration to her circumstances as an Aboriginal offender. The case went all the way to the Supreme Court of Canada, but Ms. Gladue failed in her attempt to reduce her sentence. In spite of this failure, the judgment is being hailed for interpreting and applying the new sentencing provisions set out in s. 718.2(e) of the *Criminal Code* in a way that will "sensitize the judiciary to the unique situation of Aboriginals and ... end the alienation of Aboriginals from the criminal justice system" (Stack 481).

This case comment will argue the contrary. The judgment does not recognize the unique situation of Jamie Tanis Gladue as an Aboriginal woman. The Supreme Court refused to consider her crime in the context of the domestic violence perpetrated against her; failed to include domestic violence in its analysis of Aboriginal heritage; and refused to send the matter back for a new sentencing hearing because it was a "serious crime of violence." There is evidence that Ms. Gladue was the victim of spousal abuse and may have been able to argue the defence of self-defence to her original charge of second-degree murder had she gone to trial. Chances are Ms. Gladue would never have gone to jail, had her Aboriginal heritage and spousal abuse been considered. But the judgment applied a narrow and gender neutral interpretation of s. 718.2(e), and thereby missed an opportunity to break ground in fighting systemic discrimination against Aboriginal women in the Canadian justice system.

The Supreme Court refused to consider her crime in the context of the domestic violence perpetrated against her and failed to include domestic violence in its analysis of Aboriginal heritage.

This case comment will demonstrate that there were good reasons to take into account the fact that Ms. Gladue was a woman when looking at her special circumstances as an Aboriginal offender. The comment will also analyze the legal method used to interpret s. 718.2(e) of the *Criminal Code* in a manner that appears broad and liberal, but which excluded Gladue herself from the benefit of the interpretation because it applied a gender-neutral interpretation to her case. It will also discuss the implications for all Aboriginal women of the Supreme Court's decision not to address the issue of Ms. Gladue's history of abuse at the hands of the partner she killed.

The case

The appellant, Jamie Tanis Gladue, was charged with second-degree murder for killing Reuben Beaver, her common law spouse. Ms. Gladue, pregnant with her second child, had good reason to believe Beaver was having an affair with her sister. A loud argument transpired in which Beaver taunted her with insults and caused a neighbor to believe a physical altercation was taking place. After some time, the neighbor saw Gladue chase him with a large knife, saw Beaver collapse in a pool of blood, and Gladue dance around as if she did not realize she had killed Reuben Beaver with a knife to his heart. Following a preliminary hearing and after a jury had been selected, the appellant entered a plea of guilty to manslaughter.

The following facts are key to an analysis of this case:

- The deceased had been convicted of assaulting Gladue during her first pregnancy and had received a 15-day intermittent sentence with one-year probation.
- Although Ms. Gladue had bruises consistent with her being in a physical altercation the night of the murder, the trial judge did not believe that she was a "battered or fearful wife."
- Ms. Gladue was considered the "aggressor" because she stabbed her husband twice..

•Ms. Gladue was diagnosed after the stabbing with a hyperthyroid condition that produced an exaggerated reaction to any emotional situation.

•While on bail for 17 months pending her trial, Ms. Gladue took drug and alcohol counselling, completed Grade 10 and was about to start Grade 11.

•Ms. Gladue was remorseful and did not intend to kill her husband.

•The trial judge did not give any special consideration to her Aboriginal background because she lived in an urban setting.

•The trial judge did not require and therefore did not have the benefit of a pre-sentence report.

The sentence

Jamie Tanis Gladue was sentenced to three years in prison with a ten-year firearms prohibition—a sentence considered appropriate for manslaughter. Mitigating factors included her young age, supportive family, alcohol abuse counselling, educational upgrading, her partner's provocative behavior and insults, the hyperthyroid condition, her remorse and apology to Beaver's family, and her guilty plea. Aggravating factors were that she stabbed Beaver twice, intended to harm him seriously, was not afraid of him, and had committed a serious crime.

The trial judge acknowledged that specific deterrence was not necessary, but held that the principles of denunciation and general deterrence had to be reflected in the sentence. The sentence also reflected the need to rehabilitate the accused.

Ms. Gladue appealed her sentence because the trial judge: 1) erred by over-emphasizing the principles of denunciation and general deterrence while under-emphasizing her "substantial rehabilitative efforts" during the 17 months she had spent in the community awaiting trial; 2) failed to consider the extent to which Ms. Gladue had been abused by Mr. Beaver; 3) failed to consider her Aboriginal heritage in accord with s. 718.2(e) of the *Criminal Code*; and 4) considered Ms. Gladue's apparent intent to harm Mr. Beaver as an aggravating factor when evidence of provocation was used as a basis for reducing the murder charge to manslaughter. Ms. Gladue applied to introduce a psychologist's report that she might have used to support a "battered woman syndrome" defence, as enunciated by the Supreme Court of Canada in *R.* v. *Lavallée*."

The sentence was reasonable because in cases like manslaughter and spousal abuse, traditional sentencing should be given more weight than issues of Aboriginal heritage.

The British Columbia Court of Appeal dismissed the appeal. It held that there was no basis to admit the psychologist's report on appeal and although the trial judge might have erred in ruling that no special consideration was to be given to Aboriginal persons living off reserve, "there was no basis in this particular case for affording such special consideration." The trial judge gave appropriate weight to the relevant factors and the sentence was well within the usual range.

Rowles J.A. (dissenting) concluded that the sentence was excessive. Following an analysis of s. 718.2(e) of the *Criminal Code,* she agreed that while the principles of general deterrence and denunciation should be reflected in the sentence, "the sentence could have and, in my view, should have been designed to advance the appellant's rehabilitation through a period of supervised probation." Rowles J.A. would have allowed the appeal and reduced the sentence to two years less a day, three years of probation and substance abuse counselling.

The Supreme Court of Canada did not agree with Rowles J.A. Only one of Gladue's four reasons to appeal was considered relevant—whether the trial judge failed to give appropriate consideration to the appellant's circumstances as an Aboriginal offender. The extent of Beaver's prior abuse, the absence of a pre-sentence report, and the evidence of provocation were all acknowledged by the Court. However, the lack of further discussion on these issues suggest that the Court considered them unimportant.

In spite of the broad interpretation of s. 718.2(e) of the *Criminal Code*, and the Supreme Court's conclusion that the British Columbia Court of Appeal may have erred in not requiring that her Aboriginal heritage be considered and in dismissing her attempts to introduce fresh evidence on her attempts to renew her links with her Aboriginal heritage, the Supreme Court did not send the *Gladue* case back for a new sentencing hearing. Ms. Gladue had already been released on parole and had successfully received treatment. But more importantly, the Court determined that Ms. Gladue's sentence was reasonable because in cases like manslaughter and spousal abuse, the traditional sentencing principles should be given more weight than issues of Aboriginal heritage. The appeal was dismissed.

The Supreme Court interpretation—One step forward...

The *Gladue* case was the first time the Supreme Court had been asked to construe and apply the provisions of s. 718.2(e) of the *Criminal Code.* It undertook an extensive analysis of the section and applied it to the issue

of the appeal —whether the British Columbia Court of Appeal erred in affirming the decision of the trial judge. The Supreme Court interpretation of s. 718.2(e) was broad. It confirmed the remedial nature of the section and created a judicial duty to give this remedial purpose real force. The section altered the method of analysis that sentencing judges must use in determining a fit sentence. As the judgment explains:

> The fact that the reference to aboriginal offenders is contained in s. 718.2 (e), in particular, dealing with restraint in the use of imprisonment, suggests that there is something different about aboriginal offenders which may specifically make imprisonment a less appropriate or less useful sanction.

Judges are now directed to sentence Aboriginal offenders individually, but differently; judges must consider the offender's unique systemic or background factors; and it is now "incumbent on sentencing judges to explore reasonable community-based sanctions with every Aboriginal offender as an alternative to imprisonment." The Court justified the broad interpretation by going back to Parliament to look at the intent of the legislature, by quoting the statistics of experts and studies on the problem of over-incarceration and concluded, "[n]ot surprisingly, the excessive imprisonment of aboriginal people is only the tip of the iceberg insofar as the estrangement of the aboriginal peoples from the Canadian criminal justice system is concerned." It stressed the point even more strongly when it said, "These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it."

...And two steps back.

But *Gladue* was a missed opportunity for the Supreme Court of Canada to address the problem of the over-incarceration of Aboriginal women and men in a manner that reflected gender as well as racial inequalities. While the judgment was successful in creating a framework for a broad and progressive application of the section, and the Court used studies and statistics to shore up its case for a broad interpretation of the section, it turned to the lower courts' narrower interpretations of the section, to cut short its potential. The judgment stated, "it will generally be the case as a practical matter that particularly violent and serious offences will result in imprisonment for aboriginal offenders as often as for non-aboriginal offenders." By limiting the application of s. 718.2 to non-violent and minor offenders, the Supreme Court excluded Jamie Tanis Gladue herself from the benefit of its interpretation.

Even though the Supreme Court pointed out that over-incarceration of Aboriginal people is worse for women than for men, it did not consider the unique needs of Aboriginal women.

Ignoring spousal abuse

Even though the Supreme Court pointed out that the problem of over-incarceration of Aboriginal people is worse for women than for men, it did not direct judges to consider the unique needs of Aboriginal women. It thereby set the stage for a decision that did not consider the issue of domestic violence against Aboriginal women. This fact had serious implications for the outcome of the case and the interpretation of s. 718.2(e).

Had the Supreme Court considered the extent to which Reuben Beaver had abused Ms. Gladue, it could have judged her aggression in the context of the 'battered woman syndrome." It might have questioned whether domestic violence was part of her circumstances as an Aboriginal offender and reconsidered whether s. 718.2(e) of the *Criminal Code* should be put beyond her reach because her offence was serious and violent.

Excluding the issue of spousal abuse also made it possible for the Supreme Court to look at Gladue's violence in a gender-neutral way. It made it possible to isolate Gladue's offence from the context in which it occurred and accept the trial judge's conclusion that she was not afraid of the deceased, that she was "indeed" the aggressor. It made it possible to describe the offence "properly...as near murder. Having de-contextualized the violence, the Court reverted to the traditional sentencing jurisprudence of promoting separation, specific and general deterrence, denunciation and rehabilitation.

In addition, the Supreme Court did not question why Ms. Gladue's hyperthyroid condition was not given more weight as a mitigating factor. Had the Supreme Court considered that Ms. Gladue was reacting to an abusive partner who had done more than provoke her on this occasion, the impact of her hyperthyroid condition in this emotional and dangerous context might have been explored. As it was, the Supreme Court did not consider this medical condition to be anything more than one of several mitigating factors.

Ignoring its own guidelines

Judging the violence of Ms. Gladue's act in isolation also made it possible for the Supreme Court to

disregard its own guidelines in the case and conclude that her offence did not warrant an analysis of her circumstances as an Aboriginal offender.

In addition, the judgment pointed out that it is the role of sentencing judges to ensure that they have all relevant information on which to base their decision and stipulated that "the presence of an aboriginal offender will require special attention in pre-sentence reports." However, the Supreme Court was not concerned in this case that the trial judge did not request a pre-sentence report or that the British Columbia Court of Appeal dismissed the application to introduce fresh evidence on Ms. Gladue's Aboriginal heritage. The Court admitted that in most cases such errors would be sufficient to justify sending the case back for a new sentencing hearing, but refused in Gladue's case because "the offence in question is a most serious one."

The Supreme Court focused on the nature of the crime rather than on Ms. Gladue, contrary to its own guideline that "sentencing of Aboriginal offenders must proceed on an individual (or a case-by-case) basis." It did not ask any of the questions it recommended to elicit information about the Aboriginal heritage of an accused because her offence was "violent." These questions, including asking whether the offender had been affected by substance abuse, poverty, overt or systemic racism, or family breakdown, might have supported a claim that she was reacting to an abusive partner.

Instead, the Supreme Court appeared to turn to the lower courts to apply the principles of preceding cases without looking at the unique situations of each of the offenders. For instance, it cited the case of *R.* v. *Hunter* where the Alberta Court of Appeal overturned a two-year suspended sentence for a man convicted of assaulting his wife because the more traditional principle of denunciation should be given priority in cases of spousal abuse. The principles established in this man's case are strikingly similar to those applied to Ms. Gladue, yet the case could easily have been distinguished on the grounds that there was absolutely no evidence that Mr. Hunter had ever been assaulted by his wife. We know that Jamie Tanis Gladue had been criminally assaulted by the partner she killed.

A study on intimate femicide indicates that Aboriginal women are at least six times more likely to be victims of intimate femicide than are non-Aboriginal women.

Excluding Aboriginal women

An analysis of the *Gladue* case demonstrates a surprising disregard for the unique situation faced by Aboriginal women in the Canadian justice system, the prevalence of domestic violence in Aboriginal communities and the particular difficulties faced by Aboriginal women in mounting a case of self-defence as it relates to battered women. There are several reasons why the Supreme Court could have chosen to analyze Gladue's case from her perspective as an Aboriginal woman and to integrate this perspective into its interpretation of s. 718.2(e):

•Aboriginal women represent less than four percent of Canadian women and 15 percent of federally sentenced women (Canadian Panel on Violence Against Women);

•In a 1991 review of all women receiving federal sentences between 1971 and 1990 for murder or manslaughter, 61 per cent were Caucasian, 34 per cent Aboriginal and five per cent other races. Aboriginal women tended to be younger and more likely to be serving their first federal term (Dubois);

•A study on intimate femicide indicates that Aboriginal women are at least six times more likely to be victims of intimate femicide than are non-Aboriginal women (Crawford).

•A study by the Ontario Native Women's Association reveals that "one in every ten Canadian women has experienced a form of abuse while eight out of ten Aboriginal women have been abused or assaulted...";

•Although there is no significant difference between violent and non-violent female offenders based on race, Aboriginal women were more likely to serve sentences for violent offences. (68 per cent of Aboriginal offenders were classified as violent and 56 per cent of non-Native counterparts) (Blanchette);

•The Canadian government has expressed concern that women who have been involved in abusive relationships and convicted of homicide "may not have received the benefit of the defence of self-defence when it may have been available to them." (Ratushny 1997a:5)

However, Jamie Tanis Gladue was written off as the "aggressor" without examining her background as an Aboriginal woman and the impact of the extreme violence to which she and others like her are subjected. In fact, the Supreme Court turned the "battered woman syndrome" (BWS) on its head by saying "the offence involved domestic violence and a breach of the trust inherent in a spousal relationship. That aggravating factor must be taken into account..."

This is a serious set back for abused women in light of the legitimacy of BWS and the defence of self-defence for a woman who has killed her violent partner established in *R.* v. *Lavallée.*

BWS and Aboriginal women

The *Gladue* case reveals stereotypes of Aboriginal women perpetrated by the criminal justice system that make it particularly difficult for them to use BWS as a defence. *Gladue* might well be included in Elizabeth Sheehy's discussion of Aboriginal women who killed their partners and for whom the defence of BWS was not used or was unavailable (Sheehy 174). Stereotypes about Aboriginal women may "undermine the presentation of a passive "victim", or lead to a judicial preoccupation with the fact that the Aboriginal women were drinking "and were thus not perfect "victims."(Sheehy 174). Sheehy also points out that "...women who respond to violence with aggression may not receive the same recognition as "battered women,"[25] and the precipitating violence may be completely submerged where the man was not "violent" in the usual sense of the word (Sheehy 184-5). In Gladue's case, Beaver's behavior was not viewed as the kind of violence typically used by a batterer to exert control over his partner. "Judges fail to recognize that psychological abuse itself may be perceived as one or perhaps even the most destructive, form of violence" (Sheehy 185). In addition, Sheehy argues that statistics on "the extraordinarily high rates of incarceration of Aboriginal women in Canada ... suggest that those who participate in constructing offenders for sentencing ... may not readily view Aboriginal women as fitting within BWS" (Sheehy 185).

The fact that Ms. Gladue pled guilty to manslaughter reveals another systemic problem militating against a defence of self-defence for women in her situation. A person accused of second-degree murder is under "irresistible forces" to plead guilty. As explained by Judge Lynn Ratushny in the Final Report of the *Self Defence Review*,

> A woman facing a murder charge risks imposition of a mandatory sentence of life imprisonment with parole eligibility after between 10 and 25 years. By contrast, a woman who pleads guilty to manslaughter will generally receive a sentence of between three and eight years with eligibility for full parole after serving one-third of her sentence ...

Gladue was written off as the "aggressor" without examining her background as an Aboriginal woman and the impact of the extreme violence to which she was subjected.

> there may be additional factors that exert even more pressure on a woman to plead guilty, including the fact that she may have a young family to care for; she may have been the victim of abuse and is reluctant to testify publicly about that abuse; she may be genuinely remorseful and even though she feels she had to act to defend herself she has difficulty justifying taking another person's life even to herself... This situation causes me serious concern. It means that these guilty pleas are influenced in whole or in part by forces extraneous to the merits of the cases. It also means that women (and men) may be pleading guilty to manslaughter when they are legally innocent because they acted in self-defence. (Ratushny 1997b: 23)

Added to these problems is the argument that "Aboriginal people are ... more apt to plead guilty on a charge because of their unfamiliarity with legal procedure and the desire to be out of court as soon as possible." Given that Jamie Tanis Gladue was only 19 and pregnant with her second child when she killed Reuben Beaver, it is not surprising that she took what she thought was the quickest way out.

However, in view of the significance of *Lavallée* for the law of self defence in terms of BWS and the broad view of the evidence that is relevant to the legal elements of the law of self defence, Gladue might have been able to build a case against her original charge of second-degree murder.

The principles in the *Self Defence Review* would have bolstered Jamie Tanis Gladue's case:

> Where there was evidence of abuse in an applicant's case, I always considered what affect that abuse may have had on her perceptions, beliefs and actions. For example, abuse in a women's past may affect the circumstances in which she perceives danger. It may augment or it may diminish her fear and, accordingly, affect the way she responds to it. These possibilities must be considered in analyzing a claim of self defence because the legal elements of that defence require an assessment of the person's actual belief that she was at risk of harm and her belief that she needed to respond to that risk with physical force.

There are many reasons why Ms. Gladue may have reacted to Beaver with such violence. We would do well to learn from the 1993 case of Robyn Bella Kina, an Australian Aboriginal woman who was convicted for murder in the stabbing death of her abusive partner (*R.* v. *Kina*). Ms. Kina's case raised the problem of the obstacles to full and frank disclosure by Aboriginal ap-

pellants due to cultural, psychological and personal obstacles. In a reference by the Attorney-General on the harshness of her sentence, it was concluded by the Supreme Court of Queensland that:

> ... there were, insufficiently recognized, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of: (i) her aboriginality; (ii) the battered woman syndrome; and (iii) the shameful (to her) nature of the events which characterized her relationship with the deceased. These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.[2]

Unfortunately, the Supreme Court of Canada did not recognize that Ms. Gladue may have experienced these kinds of problems at trial and that she had tried to rectify the situation on appeal. Ms. Gladue sought to introduce a report of a psychologist, which contained a number of factual assertions about the events that took place on the evening of the stabbing and relationship with her partner, Beaver. She submitted that the trial judge had failed to appreciate the extent of the physical abuse to which Beaver had subjected her. The evidence was not admitted because she had not put forward a "battered wife syndrome" defence at trial. Jamie Tanis Gladue was not given another chance to present her arguments.

Given the Australian Reference, the shocking statistics on violence against Aboriginal women in Canada and the Supreme Court of Canada's framework for applying s. 718.2(e), it is my view that BWS can and should be analyzed in all cases where Aboriginal women kill an abusive partner and the test for determining a defence of self -defence should be applied to these cases. Section 718.2(e) could help to break down racial and gender inequalities faced by Aboriginal women in the criminal justice system. It need not be gender neutral.

Conclusion—will *Gladue* make a difference?

It is difficult to drum up much hope that *Gladue* will make a real difference to the problem of the over-incarceration of Aboriginal people in Canada. David Stack said "[p]ost-*Gladue*, it can now be unequivocally stated that it is the law of Canada that... [i]n all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective." However, given the above analysis, one might add "as long as you are not a woman reacting to an abusive partner and as long as your crime is not serious."

In order to remedy the *Gladue* exclusion from s. 718.2(e), the "serious lack of research on Aboriginal women ... who are victims of violence and abuse" needs to be addressed. Professor Tim Quigley said the incidence of spousal assault in Aboriginal communities "is likely related to the history of oppression and colonialism that Aboriginal people have experienced"[3] but there appears to be little jurisprudence or materials on the point. Aboriginal domestic violence in Canada will not be integrated in judicial decision-making until we develop and apply a better understanding of the issue to the criminal justice system.

Gladue has been followed 16 times[4] with mixed results in the few months following the judgment. The sample is not large enough to draw conclusions, but we can assume that until the unique situation of Aboriginal women and the fundamental problem of Aboriginal domestic violence is considered part of the Aboriginal experience, s. 718.2(e) of the *Criminal Code* will only tinker with the problem of over-incarceration of Aboriginal women and men.

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[1] *R.* v. *Gladue*, [1997] B.C.J. No 2333 (C.A.), online: QL (C.J.) [hereinafter Gladue].

[2] In Re: *Robyn Bella Kina,* Reference by Attorney-General under s. 672A of the *Criminal Code,* Supreme Court of Queensland

[3] Letter from Tim Quigley to Jean Lash (10 November 1999).

[4] Quicklink for information on cases that follow, mention, distinguish, explain and cite *Gladue.)*

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