TRAUMA-INFORMED APPROACHES TO *GLADUE* PROCESSES

A Statement from the Action Committee

Our Committee supports Canada's courts in their modernization efforts. It provides guidance for addressing challenges, and highlights opportunities and innovative practices to modernize court operations and improve access to justice for court users.

1. CONTEXT AND BACKGROUND

Taking a trauma-informed approach when sentencing Indigenous individuals is an important way judges can work to minimize additional harm to those who appear before them. While sentencing judges are responsible for developing an appropriate sentence for every individual offender, s. 718.2(e) of the Criminal Code mandates they pay particular attention to the unique circumstances of Indigenous offenders. These circumstances – which often result from the legacy of colonialism and could include racism, prejudice, poverty, homelessness, low educational attainment, discrimination, abuse and victimization, the direct and intergenerational impacts of residential schools, separation from culture or family, or substance abuse disorder – are generally called *Gladue* factors, after the Supreme Court of Canada case in which they were articulated, *R. v. Gladue*. These factors are generally introduced into court through a report called a *Gladue* report, as part of a pre-sentence report, or via oral submissions. Since these factors are often rooted in difficult personal and community experiences, the process of gathering the information needed to develop an appropriate sentence for an Indigenous person can cause further harm to the very people it is intended to help.

The Criminal Code also requires a consideration of *Gladue* factors for bail determinations, and some courts apply them to other decisions including, for example, parole, or long-term offender designations. While the guidance in this document may be relevant to these additional scenarios, it is primarily focused on sentencing. Because of this emphasis, this guidance primarily considers potential trauma from the perspective of the offender. This focus does not preclude the importance of a trauma-informed approach for everyone involved in the process, and especially for victims of crime. In developing this guidance, the Indigenous Advisory Group of the Action Committee drew upon its members' own experience as well as consultations with judges, counsel, and Indigenous service-delivery organizations from across the country.

2. TRAUMA AND *GLADUE*

The way *Gladue* factors are introduced into court can cause trauma to the person being sentenced, their family, or other members of their community. Trauma may be caused or compounded if a person feels that their past pain is being dismissed or minimized. This can happen, for example, if a non-Indigenous person is relaying sensitive details of an individual or community's past trauma in a way that feels impersonal or decontextualized. Sharing intimate details of previous traumatic experiences when many people are listening in open court, especially in small communities where community or family members are present, can also have negative effects on both the person who has experienced the event and their family and friends.

Recognizing that many practices that support reduced trauma are used by judges in all sentencing hearings, the judge and other justice actors can minimize the traumatic effects of the *Gladue* process by taking a trauma-informed approach that:

→ Treats each person as an individual and provides choice and autonomy whenever possible

→ Takes time to build trust and connection and acknowledge the positive aspects of a person's life before delving into traumatic events

→ Minimizes the number of times a traumatic story must be told

→ Minimizes or eliminates the sharing of personal information, sources of trauma, and the effects of that trauma in open court

→ Identifies the supports that are available to offenders and encourage their use. This may include Elders, family members, Indigenous Courtworkers, or other Indigenous justice programs or service-delivery organizations

→ Warns both the offender and observers that the information may be difficult to hear, and encourages them to seek the necessary support to process the experience

3. THE ROLE OF THE JUDICIARY

While it is primarily the defence's responsibility to provide the relevant information, both the judge and Crown also have a role in meeting s. 718.2(e) of the Criminal Code's requirement that an Indigenous person receives a sentence that is proportionate to both the seriousness of the offence and their moral culpability and appropriate to their specific circumstances. In jurisdictions where *Gladue* reports or letters are available, they provide a valuable source of relevant information, but these sources of information are not accessible in all provinces and territories. Even in jurisdictions with reports and letters, there is not yet capacity to have them prepared for all Indigenous people. This means, if the defence does not raise relevant background information, the judge must find another way to obtain this information such as, for example, from members of the individual's family or community or an Indigenous Courtworker who is familiar with the community.

Sentencing is a highly contextual exercise. The experience of a judge in an urban centre with a diverse Indigenous population will be different from someone serving in a court located in a smaller centre on or near an Indigenous community. Further, the significant time pressure that many sentencing judges face may mean there is insufficient time to follow every practice outlined below in every courtroom. And finally, each case will require a unique balance between the potentially conflicting imperatives to maintain an open court and to reduce trauma. Regardless of the limitations, though, orienting oneself towards the key principles outlined in this guidance can improve the sentencing experience for Indigenous offenders.

4. PRINCIPLES AND PRACTICES

The following orienting principles can help a judge to craft a sentence specific to each Indigenous offender appearing before them while minimizing trauma for the person receiving the sentence, their family, and their community:

1. Every Indigenous offender has a right for their *Gladue* factors to be considered

2. The goal of the *Gladue* process is to find a proportionate – and where appropriate non-custodial – sentence
3. An individualized, respectful, and responsive approach helps to minimize trauma

4.1 Every Indigenous offender has a right for their *Gladue* factors to be considered

The starting point for a sensitive *Gladue* process is to recognize that, absent an informed waiver, every Indigenous person who has been convicted of an offence has a right for these factors to be considered. Centering the process on the individual's right to a proportionate sentence that accounts for their unique lived experience and background will lay the groundwork and increase the possibility for a trauma-informed experience.

4.1.1 Be informed

A trauma-informed approach requires learning about the background of both the individual being sentenced and their community. In addition to the specific circumstances regarding the individual included in a *Gladue* or pre-sentence report or otherwise brought before the court, judges who sit in courts that serve a specific Indigenous community should become familiar with that group's history. Those in urban centres that have a diverse Indigenous population can take steps to learn about the backgrounds of the various Indigenous people who may appear in their court. Knowing a community's experience with residential schools, loss of traditional ways of life, environmental degradation, or other effects of colonization can all minimize the number of times a painful story needs to be recounted. Cultural humility is more important than cultural competence: while it is not possible to become an expert in another culture, it is possible to be open to listening and learning.

4.1.2 Be creative and humble

Minimizing trauma while respecting an individual's *Gladue* rights requires creativity and humility. It is open to a judge to find creative ways to reduce both the number of times a person has to tell or listen to traumatic events from their past, and the number of people who hear their story. For example, consider whether it is possible to use case management or other pre-trial procedures to address traumatic details from a *Gladue* report, rather than having the details introduced in open court.

As another example, while *Gladue* factors may be introduced in a detailed report outlining the individual's personal history, less-detailed information may still provide the court with what it requires to craft an appropriate sentence without sharing more information than necessary about every traumatic event in the offender's past.

4.1.3 Manage the process

While defence counsel make submissions on sentencing with respect to their Indigenous clients, a sentencing judge can use their inherent ability to manage the process to minimize trauma when this information is introduced. This could include:

→ Reminding defence counsel and Crown counsel of their duty to provide the court with the information it needs to craft a proportionate sentence.

→ Controlling the extent to which traumatic information is shared in open court by, for example, reminding counsel the report was read in advance of the sentencing hearing, or encouraging

them to refrain from reading out all the specific details. One alternate approach would be to ask counsel to refer to relevant paragraphs for the judge's consideration.

→ If possible, being aware of who is in the gallery during a sentencing hearing. Extra care may be required if family or community members are present, particularly if anyone present is implicated in past traumas that are relevant to determining an appropriate sentence.

→ Considering whether an in-camera session would be possible and appropriate to discuss any personal details surrounding *Gladue* factors or if a *Gladue* report should be sealed or redacted to remove sensitive information from the public record. The availability of these options will vary by jurisdiction, and all decisions in this regard should consider the rights of the victim, the open court principle, and any relevant requirements to notify media.

→ At an institutional level, reviewing the court's policies associated with access to records to ensure that materials that include information about *Gladue* factors are appropriately protected.

→ Even if the court will remain open, inviting spectators to respect the privacy of the person being sentenced and leave of their own accord while *Gladue* factors are being discussed.

→ Observing the offender to see how the process is affecting them and whether they may require a break.

→ Encouraging a support person, such as an Indigenous Courtworker or justice worker from the local Indigenous justice program, to be present when discussing an individual's *Gladue* factors.

4.2 The goal of the *Gladue* process is to find a proportionate – and where appropriate non-custodial – sentence

Trauma can be reduced by focusing on the fact that the goal of the *Gladue* process, including sharing information about past traumatic experiences, is to find a sentence that is proportionate to the seriousness of the offence and the moral culpability of the offender and that is, whenever possible, served in the community. Explaining this goal can help the offender understand the process.

4.2.1 Scale effort to outcome

The level of detail necessary to craft an appropriate sentence will vary. For example, if the judge and counsel are familiar with an Indigenous community, it won't be necessary to include common historical information in every single *Gladue* submission from that community. Likewise, if someone is going to receive a custodial sentence, the extent to which every detail of their past will assist the court may depend on the possible length of the sentence. For an extremely short sentence, a summary of the person's background may be adequate. And, at the other end, if the nature of the offence means that a custodial sentence is warranted and an offender is likely to spend a significant amount of time in jail regardless of their *Gladue* factors, the potential for harm resulting from a detailed report on all the trauma they have suffered may outweigh the benefits of going through a full *Gladue* report process.

4.2.2 Focus on identifying appropriate resources

Ultimately, the reason for considering the unique circumstances of an Indigenous offender is to provide them with a proportionate sentence that is, whenever possible, non-custodial. Understanding a person's background provides an opportunity to tailor the sentence to their needs, while knowledge about the community, including its laws and traditions, can help to develop a culturally-appropriate response to repair the harm they have caused.

Some *Gladue* reports include a healing plan, developed in partnership with the individual, that will outline actions that can be adopted as part of a custodial or non-custodial sentence to support growth and reduce the likelihood of re-offending behavior. A local Indigenous justice program can support clients in meeting the appropriate marks on the healing plan and can help advocate for additional social, emotional and cultural supports.

Further, one way to honour the individual's willingness to share past traumas is by paying appropriate attention to information provided in their *Gladue* report about programs that could be included in a sentence. Many Indigenous communities or Indigenous justice programs have program offerings that could be integrated into a non-custodial sentence, and following the recommendations of an individual who knows the local community can increase the chance the sentence will be effective at both promoting community safety and assisting the individual in addressing the underlying factors that have brought them before the court.

4.3 An individualized, respectful, and responsive approach helps to minimize trauma

Being treated like a person, rather than a number, can go a long way to reducing the strain associated with the criminal justice system. This is particularly important when the court process will involve intimate details from a painful stage of the person's life, as is often the case in sentencing hearings involving *Gladue* factors.

4.3.1 Set the stage

The trauma associated with being sentenced for a crime can be reduced if a person is comfortable in their surroundings. As a starting point, asking the person how they would like to be addressed and how to pronounce their name or the name of their nation or community correctly can help them feel comfortable. Likewise, different Indigenous people self-identify in different ways – for example, by their tribal or National affiliation, as Indigenous, Aboriginal, First Nations, Inuit, or Métis. Asking for, and then using, their preferred designation can set the person being sentenced at ease.

The toll of having to revisit traumatic life experiences as part of the *Gladue* process can be compounded by the discomfort an Indigenous person may feel with the colonial justice system. Making space for participants to smudge; removing colonial symbols from the courtroom, where possible; and engaging a local language interpreter can all reduce the stress associated with the sentencing experience. Elders from the local community or others who know about relevant Indigenous practices can also help identify ways to organize the physical space to minimize the trauma associated with appearing before a colonial justice system. For examples from courts across Canada, consult the Action Committee's publication on Indigenous Practices in the Courts and accompanying Repository of Canadian Examples.

4.3.2 Make a human connection

The judicial practice of empathy, putting oneself in the other person's shoes, and centring the offender's humanity throughout the process is particularly important in a trauma-informed approach. This can be done by:

→ Remembering that an offender still retains their right to privacy.

→ Giving the offender as much agency as possible. Offenders should have the opportunity to give informed consent to either participate in or waive the *Gladue* process. Waiving the opportunity to have an in-depth *Gladue* report prepared does not mean an individual has consented to forego the consideration of relevant factors by other means. Offenders should be aware that they have a right to have their *Gladue* factors considered, but also understand if the information, once compiled, may be placed on the public record, shared with correctional services or a restorative justice program, or otherwise used for purposes beyond sentencing. Consent can be confirmed again before personal details that are not directly related to the offence are shared in open court.

→ Acknowledge the presence of any victim and outline the process for their benefit as well. If there is information that is found in a *Gladue* or other report that may be relevant but is not going to be discussed in detail, explain why this practice is being followed.

4.3.3 Highlight the positive

By its very nature, the *Gladue* process highlights the behaviour that resulted in a criminal charge, as well as the negative experiences in the offender's life that are relevant to the sentencing exercise. An important way to reduce trauma in the sentencing process is to acknowledge the whole person by also highlighting their achievements and positive contributions. For example, an offender could be a devoted parent or grandparent or a reliable and valuable employee, or have made significant strides in addressing a substance abuse disorder or childhood trauma.

4.3.4 Use language carefully

The words that are used can affect how traumatizing the sentencing process is for Indigenous offenders. For example, saying that someone "attended" residential school minimizes the non-consensual experience of many survivors. While a judge may have limited control over the language counsel uses, they can suggest alternatives if a lawyer's choice of words may exacerbate trauma. Counsel can also be encouraged to craft questions in a way that minimizes the need for the offender to speak about unnecessary details by, for example, using "yes/no" questions that will confirm whether the individual experienced physical or sexual abuse, rather than requiring them to provide the full story. This approach can be particularly appropriate when the specific details are of minimal relevance to the sentencing determination.