Indigenous Incarceration in Canada: A Glance at Gladue Policy

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0009-0009-1203-7162

ABSTRACT: Canadian sentencing law reform in 1996 and the R. v. Gladue 1999 Supreme Court landmark decision, Canada introduced an internationally unique requirement for Canadian courts in sentencing Indigenous offenders to give special consideration to systemic factors in order to address the historic and ongoing experiences of Indigenous people in the criminal justice system Canada. While these reforms to the criminal justice system were centred around alleviating the egregious level of incarcerated Indigenous people, this analysis will reveal the implementation of Gladue principles has not been the transformative change many have hoped for. This Canadian policy research paper argues that the Canadian government's Gladue policy has been underfunded and requires a commitment to the complete implementation of Gladue Reports and Gladue Courts to accomplish its objectives of considering the systemic circumstances of Indigenous offenders and providing criminal justice in a culturally appropriate manner.

KEYWORDS: criminal justice system, Indigenous politics, incarceration, Canadian politics, criminal justice reform, Gladue courts

https://doi.org/10.25071/2817-5344/50
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Received 16 June 2023; Received in revised form 30 June 2023; Accepted 01 July 2023
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In the 1990s, Canada initiated a series of reforms to the criminal justice system centred around alleviating the egregious level of incarcerated Indigenous people. This policy research paper is centred around these reforms and the landmark Supreme Court decision, R. v. Gladue 1999, which created the Gladue principles. Gladue marks a transformative shift in Canada's criminal justice policy toward acknowledging Canada's legacy of colonialism and its role in Indigenous incarceration. However, as this analysis will reveal, implementing Gladue principles has not been the transformative change many have hoped for. This essay argues that the Canadian government's Gladue principles have been underfunded and require a complete implementation of Gladue Reports and Gladue Courts to accomplish its objectives of considering the systemic circumstances of Indigenous offenders and providing criminal justice in a culturally appropriate manner.

This paper is subsequently structured into four main sections, followed by a conclusion. These four sections are 1) Colonialism, 2) The History of Gladue, 3) The Current Relevance of Gladue, and 4) Gladue Reform. The first section examines Canada's ongoing legacy of colonialism and how it has contributed to the over-incarceration of Indigenous people. The second section discusses the historical context of the Gladue decision. This section examines the stated goals the Supreme Court outlines in R. v. Gladue and R. v. Ipeelee. The third section explores Indigenous incarceration today and the current government's policy approach. Finally, the fourth section focuses on policy reform options for improving Gladue, looking specifically at Gladue Reports and Gladue Courts.

Colonialism

This first section of the paper describes colonialism in Canada and its implications for Indigenous people in Canada. First, this section begins with conceptualizing colonialism in Canada using Glen Coulthard's 2014 book *Red Skin, White Masks* to link the criminal justice system to systems of colonial oppression. The second part of this section outlines the systemic effects of colonialism and the cycles of violence that colonialism has created. This section

establishes the relationship between Indigenous people and the Canadian state, characterized by a pattern of colonial and paternalistic governance.

Defining Colonialism

In Canada, there has been much attention to the systemic conditions of Indigenous people. The prevailing societal narrative is that the horrific conditions Indigenous people experience today result from Canada's legacy of a colonial past.[1] However, Coulthard explains that this narrative of colonialism as a "legacy of past harms" explicitly ignores the present-day systems of oppression in which colonialism persists.[2] In this way, Indigenous people are described as being held back by the "psychological residue of this legacy" instead of the abusive colonial government itself.[3] With this in mind, this paper uses scholar Glen Coulthard's concept of settler colonialism in which:

> A settler-colonial relationship is one characterized by a particular form of domination; that is, it is a relationship where power—in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power—has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the dispossession of Indigenous peoples of their lands and self-determining authority.[4]

Furthermore, as Jeffery Hewitt explains, settler colonialism has continued beyond the end of official colonial policies and, as long as colonization continues without redress, will never end until it accomplishes the colonial project of "physical elimination, cultural extinction, or assimilation."[5]

Colonialism and Criminal Justice

The links between settler colonialism and the criminal justice system demonstrate these ongoing forms of colonialism. The Truth and Reconciliation Commission explains that the Canadian state has

exploited and victimized Indigenous peoples through legal authority for hundreds of years.[6] This process is demonstrated most obviously in the deadly residential schooling system.[7] Eventually, as Canada gradually rescinded formalized colonial practices, the Indigenous children in this system were transitioned out of residential schools and into state institutions, such as prisons and foster homes.[8] As Juan Marcellus Tauri explains, "The fact that specific colonizing projects and strategies went out of style or were refashioned is unsurprising, as every colonial epoch produces projects that support the continuation of colonialist hegemony."[9] In this way, the Canadian state reshapes the historical practices Indigenous people were subject to, such as assimilation, segregation, exploitation, and violence, and has transformed these practices through language and institutions into the present.[10] Therefore, colonialism itself turns large numbers of Indigenous people into criminals as Canada continues to exercise supreme authority over Indigenous Peoples.[11]

The enduring structures of settler colonialism continue today and have caused Indigenous people in these settler countries to be disadvantaged at every stage of society in Canada's capitalist system.[12] Many Indigenous people live in First Nation communities where conditions caused by government neglect have resulted in large numbers of children placed into foster care, high rates of suicide, and high rates of incarceration.[13]

Annalise Acorn explains that the enduring impacts of colonialism are most apparent in how Indigenous people who experienced physical and sexual abuse in the residential school system are at a high risk of becoming abusers themselves.[14] In these schools, Indigenous children learned that adults often exert power and authority through violence and abuse. These lessons were taught in childhood and often managed to stick with survivors into adulthood as they inflict abuse on their own children in an effort to normalize their traumatic experiences.[15] Ally Sandulescu refers to this effect as "intergenerational trauma," in which the cycles of violence that originated in residential schools persist and manifest themselves in many Indigenous communities.[16]

The History of Gladue

This second section of the paper describes the history of Gladue. First, this section begins by delving into the historical context of its creation in the 1990s. Next, this section examines Bill C-41 and Section 718.2(e) of the criminal code. Finally, the section concludes with an analysis of the stated purposes of Gladue outlined in both the 1999 R. v. Gladue and the 2012 R. v. Ipeelee decision.

Defining Gladue

In the 1999 landmark Supreme Court decision, the court affirmed the need to consider the Indigenous community's "unique, systemic, or background factors which may have played a part in bringing the particular Aboriginal offender before the courts."[17] These unique needs, experiences, and perspectives that Indigenous people live through have come to be commonly referred to as "Gladue Principles."[18]

1990s Criminal Justice Reform

In the 1990s, the Canadian government made substantial efforts to consider the issues that Canada's Indigenous population was facing. Most notably, the Royal Commission on Aboriginal Peoples that began in 1991.[19] The Commission's final report was issued in November 1996, recommending sweeping changes to the Indigenous-settler relationship in Canada. Along with this growing Indigenous movement, in 1984, the Pierre Trudeau Liberals created the Canadian Sentencing Commission, which released the 1987 *Report of The Canadian Sentencing Commission*—a report recommending comprehensive reforms to sentencing laws and practices in Canada.[20] In response to this report, the subsequent Mulroney Conservatives and Chrétien Liberals began a decade of reform to the criminal justice system.[21]

Bill C-41

In 1996, Bill C-41 introduced a comprehensive revision of the Canadian criminal justice sentencing policy. Section 718.2(e) of the criminal code was established through Bill C-41, which recognized that Indigenous offenders should be dealt with in more culturally appropriate ways.[22] Section 718.2(e) directed judges to

look for alternatives to incarceration for all offenders "with particular attention to the circumstances of Aboriginal offenders."[23] Section 718.2(e) of the criminal code became known as the Gladue principles after the 1999 landmark Supreme Court decision.

R. v. Gladue 1999

The Supreme Court's 1999 pivotal ruling emphasized the crucial need to consider the Indigenous community's "unique, systemic, or background factors which may have played a part in bringing the particular Aboriginal offender before the courts."[24] Furthermore, the court additionally mandated Indigenous understandings and practices of restorative justice to be incorporated into the criminal justice system. The Supreme Court wrote, "traditional aboriginal conceptions of sentencing place a primary emphasis upon the ideals of restorative justice. This tradition is extremely important to the analysis under s.718.2(e)."[25] This interpretation by the Supreme Court necessitates the consideration of not only the Gladue factors of Indigenous offenders but also requires the use of restorative justice and culturally appropriate responses when imposing sentences.[26]

R. v. Ipeelee 2012

After the initial ruling, the Supreme Court revisited its 1999 decision in R. v. Ipeelee, 2012. The 2012 Ipeelee decision affirmed much of what was initially stated in Gladue and emphasized the crucial requirement to consider Indigenous people's Gladue factors to address systemic racism.[27] Additionally, the Ipeelee ruling clarified that Judges were to consider Gladue factors in all cases—even the most severe and violent cases.[28] Before this decision, it was clear that the Gladue factors were not consistently applied and were frequently overlooked in more severe cases.[29] Nevertheless, the Supreme Court maintained that the Gladue principles are neither an "excuse" nor an "automatic discount" for Indigenous offenders.[30]

In their decision, the Supreme Court also acknowledged that the overrepresentation of Indigenous people had actually worsened following the Gladue ruling.[31] As a result, the Supreme Court urged the adoption of Gladue Reports as a tool to assist the analysis of

Gladue factors.[32] Alexandra Hebert argues that the language throughout both the Gladue and Ipeelee decisions seems to call for Gladue Reports to be a mandatory part of the Gladue analysis. However, the Supreme Court never explicitly states this requirement, which, as a result, has caused the Gladue principles to remain unevenly implemented across Canadian jurisdictions.[33]

The Current Relevance of Gladue

This next section describes the current relevance of Gladue. First, this section begins by examining the disproportionate level of incarcerated Indigenous people in Canada. This section discusses the 2015 election of the Justin Trudeau Liberals in a majority government and the Truth and Reconciliation Commission as a turning point in the Canadian government's approach to dealing with Indigenous issues.

Indigenous Incarceration

Elizabeth Comack explains that the racialized and violent criminal justice system is the most potent manifestation of the colonial project.[34] In Canada, despite only making up approximately 5% of Canada's population, Indigenous people account for 32% of all individuals in custody, resulting in their incarceration rate being ten times higher than that of non-Indigenous individuals.[35] This situation worsens when examining the number of incarcerated Indigenous women reaching 50% in 2022. In some areas of Canada, like the western provinces, Indigenous representation in prison has reached up to 72 %.[36] There is a widespread consensus that the Gladue reforms to the criminal justice system have been ineffective in reducing Indigenous incarceration.[37] Researcher Ally Sandulescu even found that Indigenous incarceration has increased by an additional 16% since the Gladue decision. This trend has persisted against an overall decline in the incarcerated population since 2012.[38] While Gladue was never supposed to be a single comprehensive solution to the disproportionate incarceration rates of Indigenous people, the aim of Gladue was still to reduce these incarceration levels.[39]

Historically, many governmental bodies have published reports on this issue of Indigenous over-incarceration.[40] Most academics point to the systemic effects of colonialism as the reason for this over-representation in prisons. However, the over-incarceration of Indigenous people goes beyond simply being related to social disadvantage; instead, it is the direct result of the complex and ongoing legacy of colonialism.[41] As Bronwyn Dobchuk-Land describes, "it wasn't 'damaged' families that created most of the problems faced by Indigenous youth, it was the damage inflicted in the course of living everyday life in Winnipeg as an Indigenous person."[42]

2015 Liberal Majority

In 2015, Justin Trudeau was elected to a majority government, beginning a change in Canada's Indigenous-Settler relationship. Along with the new government, 2015 also marked the year that the final report of the Truth and Reconciliation Commission was published. In Call to Action 30, the Truth and Reconciliation Commission called for the "federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody."[43] Furthermore, Call to Action 42 calls for the "implementation of Indigenous justice systems."[44] The Trudeau government is supposedly committed to the calls to action listed by the commission. In response to the final report's release, the Prime Minister issued a statement, declaring, "our goal is to help lift this burden from your shoulders, from those of your families, and from your communities."[45]

Gladue Reform

The Gladue principles have been claimed to be a transformative criminal justice reform; however, the Canadian government has not taken the responsibility to implement the Gladue principles genuinely.[46] This third section of the paper delves into the Gladue principles and provides a proposal for policy reform. First, this section provides a detailed look at Gladue Reports and Gladue Courts. Beginning with Gladue Reports, this section examines

everything they get right and wrong before proposing a reform that will allow for the complete implementation of the Gladue principles. This section ends with an analysis of Gladue Courts and proposes reforms for a more culturally appropriate criminal justice system to ensure the fulfillment of the Gladue principles.

Gladue Reports

Gladue Reports have been used as the primary tool to assist the analysis of Gladue factors. The Gladue Report is a special pretrial sentencing report tailored to assess the "unique, systemic, or background" factors of Indigenous offenders in order to better comply with the Gladue principles.[47] There is a consensus among researchers that—when done effectively—Gladue Reports can provide a comprehensive analysis of an Indigenous offender's Gladue factors and produce lower recidivism rates for offenders.[48] Unfortunately, as the following analysis will show, the Gladue Report process is plagued with problems of lack of access, lack of Gladue professionals, lack of funding, and cultural inappropriateness.[49]

The most apparent problem with Gladue Reports is Indigenous people's lack of access to them. Even after over 20 years of Gladue Reports, most Indigenous people can only access traditional pre-sentencing reports that include Gladue components.[50] In essence, the extent to which Indigenous offenders can benefit from the Gladue analysis they are entitled entirely depends on whether Gladue report funding is available in their location.[51] Indigenous people living in major metropolitan areas may often fully benefit from funded and effective Gladue Reports. At the same time, those outside of large cities often only have access to pre-sentencing reports with Gladue Principles or, at most, unconvincing Gladue Reports.[52] The lack of these legal resources for Indigenous people contributes to a larger pattern of colonial oppression in which the communities that Indigenous people live in have consistently been underfunded, deprived, and neglected. In this way, the unequal implementation of Gladue fits into this broader pattern of colonial oppression that perpetuates the displacement of Indigenous people through limiting and restricting access to essential resources.

Despite their comparatively large Indigenous populations, no Federal, Provincial, or Territorial Gladue Report programs exist in Manitoba, Saskatchewan, New Brunswick, Newfoundland and Labrador, Nunavut, and the Northwest Territories.[53] This lack of access is a crucial problem in the western provinces. Saskatchewan, in particular, ranks close to the bottom of the country regarding the use of Gladue reports.

As previously mentioned, the language in the Gladue decision seems to call for Gladue Reports to be a mandatory part of the Gladue analysis. However, the Supreme Court has hesitated to obligate the Federal or Provincial governments to fund Gladue Reports directly.[54] As a result, this burden has been placed on the defendant. A single Gladue Report costs approximately $ 2,300 and takes about a month to complete.[55] The need for more funding for these programs causes these institutions to prioritize women and young people, leaving gaps in the implementation.[56]

On the rare occasions that Indigenous people have access to Gladue Reports, they are often forced to play up their traumatic experiences to solicit more sympathy from non-Indigenous judges.[57] As a result, many Indigenous people have been subject to unnecessary humiliation as the public is given access to the most personal and traumatic experiences.[58] In Patrick Gilbert's findings, Individuals who completed Gladue Reports disclosed feelings of "embarrassment, degradation, and humiliation."[59] Furthermore, The lack of value given to Gladue analysis has made Gladue Reports develop into a "painful charade" for Indigenous people.[60]

These problems of lack of access, lack of funding, and cultural inappropriateness indicate the need for a comprehensive review of the Gladue Report process. While Gladue is on the right track, funding must be expanded to ensure the complete implementation of the Gladue principles. Extending Gladue Report programs into jurisdictions with none is a crucial step in this process. There is no logical reason to explain why places like Nunavut—with an Indigenous majority population—have no Gladue Report programs.[61] In order to combat this, each province and territory must create a Gladue Report program that the government fully funds. Gladue Reports must be considered and funded as an essential portion

of the criminal justice system to remove the expensive burden placed on Indigenous offenders. In order to ensure this, there should be a statutory requirement for Gladue Reports to be made available to all Indigenous offenders. This idea has been floated by many academics.[62] Indigenous people in Canada should have this "right" to Gladue Reports to ensure consistency and uniformity in applying Gladue principles across the country.

Gladue Courts

In addition to Gladue Reports, the Gladue decision also developed into the creation of dedicated Gladue Courts devoted to processing Indigenous people.[63] Gladue courts can be defined as:

> Gladue courts are regular criminal courts that apply Canadian law in cases involving Aboriginal offenders, but they are distinctive in their approach to sentencing. These courts adjudicate bail, conduct trials, and sentence offenders, but they do so by integrating specialized Aboriginal knowledge to produce alternative understandings of an Aboriginal accused so that bail orders and sentences conform to the intent of the R. v. Gladue decision.[64]

Gladue Courts integrate traditional Indigenous knowledge in conducting trials, bail hearings, and sentencing offenders to ensure conformity to the Gladue principles.[65] Gladue Courts use a team of legal professionals educated in Indigenous understandings to facilitate the Gladue process. These professionals incorporate Indigenous languages and cultures and take additional time to "seek alternatives to prison that are informed by Aboriginal understandings of justice."[66] In short, when utilized, Gladue Courts have the potential to achieve a complete actualization of the Gladue principles in the criminal justice system.[67]

While Gladue Courts are far more effective than other methods, Gladue Courts suffer from many of the same problems as Gladue Reports. The lack of access and funding have caused long dockets and limited time per case, with some courts sitting only one day a month.[68] Furthermore, Gladue Courts do not deal with serious or violent crimes. Most Gladue initiatives rarely have any effect on reducing the severity of sentences imposed on Indigenous people for

more serious or violent crimes.[69] These gaps in implementation denote the need for policy reforms to the Gladue Court process.

In order to ensure the Gladue principles are followed, this Gladue Court system must be expanded. Currently, there is minimal access to Gladue Courts. However, the few successes that have come from these courts illustrate the need to give Indigenous people greater autonomy in building more culturally appropriate programs that have the ability to achieve Indigenous-led solutions to the over-incarceration of Indigenous people. As part of its obligation to reconciliation, the Canadian state must ensure funding to include Indigenous communities, elders, offenders, and victims in this process of building a culturally appropriate legal system. While increasing funding may be expensive at first, all of the financial costs of Gladue Courts and other Gladue programs could be offset by the money saved due to the decreased Indigenous population in expensive penitentiaries.[70]

Conclusion

While the Gladue principles are on the right track, many Indigenous and legal scholars were skeptical about its success from the initial implementation.[71] Scholars have argued that the central problem with the Gladue principles is that it is a state-controlled criminal justice intervention.[72] Rudin claims that turning to the Canadian state and expecting the very same institution that has oppressed Indigenous people for years to dramatically change course is the wrong idea.[73] Even a well-funded Gladue program, if administered through the Canadian state, will be a less effective alternative than the full recognition of Indigenous sovereignty over criminal justice matters. While Gladue's reform may appear to be a transformative or liberating change, in practice, the Gladue principles support the maintenance of a system in which Indigenous people are "filtered through a White judicial lens that perpetuates historical power relations."[74] Adding in Gladue Reports or Gladue Courts allows for a further actualization of the Gladue principles; however, the problem for Indigenous people remains that they must depend on

the goodwill of an often non-Indigenous judge in a non-Indigenous criminal justice system.

The implementation of the Gladue principles has yet to be the transformative change many have hoped for it to be. This essay argued that for the Canadian government to fulfill the Gladue principles, a complete implementation of Gladue Reports and Gladue courts must be undertaken. Only then can the Canadian government accomplish its objectives of providing criminal justice in a culturally appropriate manner and adequately considering the systemic circumstances of Indigenous offenders.

Notes

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