



FAIR PLAY

Indigenous women and the justice system – fair or unfair play?

By Bryan Hansen

Maneuvering the complex web of the justice system can be daunting for anyone, especially when the odds have historically been stacked against you, which has often been the case for Indigenous women. Since 2018, the Ontario Native Women's Association has been able to provide a hand up in Ontario with the first Indigenous-women-specific Gladue Program. The ONWA Gladue Program is funded through the Ministry of the Attorney General and provides Gladue Report writing, Gladue aftercare programming and bail support and services.

The national Gladue Program was established in 1999 as a way for the criminal justice system to reduce the overrepresentation of the Indigenous population in the correctional system, as well as rates of

reoffence. It works to assist Indigenous peoples at the sentencing stage of criminal cases by detailing unique systemic factors, such as intergenerational trauma caused by residential schools, that may have played a role in their involvement in a crime needing a Gladue Report.

This, in turn, helps with reconciliation by providing a response to the Truth and Reconciliation Commission of Canada (TRC): Calls to Action, specifically 30 and 31 involving justice, where the TRC is calling on the government "to commit to eliminating the overrepresentation of Aboriginal people in custody."

Gladue rights stem from the 1999 *R. v. Gladue* Supreme Court decision that recognized the need to address Canada's high rates of incarcerated Indigenous peoples.

Anyone who self-identifies as First Nations, Inuit or Métis has Gladue rights and can request a Gladue Report. Gladue rights apply whether you live on- or off-reserve, as well as in an Indigenous or non-Indigenous community.

The Canadian Criminal Code s718.2(e) states, "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

ROLE OF COLONIALISM

Gladue Reports are prepared and submitted to the courts for consideration in the sentencing process. Judges have a duty to

apply Gladue principles, regardless of which court the accused appears in. “In a nutshell, Gladue is making a judge aware of what the impact of colonialism looks like,” explains Jennifer Bolton, who works with ONWA as a researcher, but has extensive experience working in the criminal justice system.

Specific to ONWA’s Gladue Program for Indigenous women, Bolton says that it’s helping people to understand the ‘why’ for Indigenous women in the system. “It is direction from the Supreme Court to the judiciary to take into account the state’s role in the overrepresentation of Indigenous peoples in the justice system because of colonization, how colonialism plays a part in bringing more Indigenous peoples into custody, into prison, and staying there,” notes Bolton.

Within Canada’s criminal justice system, Bolton says that Indigenous peoples are more likely to serve a full sentence and less likely to make bail, calling it “a huge net.” One of the reasons for this is constant surveillance. “Indigenous people are under a different amount of state surveillance than the general population,” she explains. “If you are under constant surveillance then you’re more likely to be over-charged. There is a long history of over-surveillance by the state going back to displacing Indigenous people from their lands and placing them onto reserves, thereby determining where we belong.” Social control over Indigenous bodies and spaces has been a consistent government goal as part of colonialism and patriarchy.

According to a recent report from Canada’s correctional investigator, Indigenous women account for nearly half of the female inmate population in federally run prisons. Thirty-two per cent of the federal prison population is made up of Indigenous peoples, despite being less than five per cent of the Canadian population. Indigenous women account for 48 per cent of the population in women’s prisons.

ONWA has been writing Gladue Reports at the sentencing of Indigenous women since 2018, recognizing that disproportionate incarceration rates begin well before sentencing, often at the denial of bail.

Indigenous women have been especially affected by gender norms imposed by colonialism. Indigenous women, notes Bolton, were thought to be a threat to Victorian morality, and laws were even passed in the late 1800s that reflect that attitude. Colonial interests sought to prevent intimate relationships between European and Indigenous peoples by presenting Indigenous women as a threat. “All of these different things have a long, long history of the state interfering with the lives of Indigenous women, and this overrepresentation in the system gets created,” explains Bolton.

When it comes to modern times, adds Bolton, “Indigenous women’s voices aren’t being heard in the justice system. It’s a one-sided narrative. There are systemic issues, and Indigenous women don’t have a voice in the process – to say what’s not working, where they’re getting lost and not getting access to justice.”

FILLING A GAP

When it comes to a Gladue Program that is specific to Indigenous women, ONWA wanted to fill a gap. “It was beneficial to be specific to Indigenous women, to meet their needs and take into consideration all aspects

of gender and how circumstances might be different to Indigenous women before the court,” notes Bolton.

Overall, ONWA’s Gladue Program recognizes the incredible strength and resiliency of Indigenous women, providing support and services to ensure their voices are heard in the justice process. Gladue creates a safe space for women to tell their stories by asking how the system can approach Indigenous women who are in conflict with the law in a trauma-informed way, to help them find the best path forward. “ONWA is there to advocate,” notes Bolton. “They hear the voices of the community and they act on it.”

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“ONWA’s Gladue Program supports Indigenous women caught in the justice system, and adds perspective to why they are there in the first place”

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Thanks to two court decisions from 1999 and 2012, Gladue Reports are a right for every Indigenous person who appears in court. However, to date not everyone is aware of this, or has access to Gladue Report writers. “Not having reports for women because they don’t know Gladue Reports exist can be a detriment,” explains Bolton. And further, if Indigenous women do not know that this will be helpful to them, then they will not request to have one.

Another issue is that there are also lawyers who do not know what Gladue Reports are and the important role they play. Their main purpose is to give the judge a full picture of what circumstances brought the person before the court. Key to this process is that it humanizes the individual before the court, so they are seen as more than just an offender. It gives context to their life and how colonialism and systemic racism may have impacted their life course.

ONWA’s Gladue Program serves part of a larger Indigenous Women in Justice Program. And justice, stresses Bolton, is critical. The association helps to focus the narrative on one seen through an Indigenous woman’s lens. “From cradle to grave, justice impacts our lives, and programs such as the Gladue Program can help disrupt injustices. Indigenous women are experts in their own lives and we need Indigenous women’s voices leading change,” says Bolton.

This begs the question: just how much change is occurring when the odds have historically been stacked against Indigenous women? Incarceration statistics, after all, are only one facet of the systemic factors that Indigenous women still battle in the present day, a world Bolton says is not yet post-colonial.

Indigenous women are nonetheless thriving, and change is happening. “Within the last decade we’ve seen the first Indigenous woman with a PhD in criminology,” emphasizes Bolton. “We have continued to see the true wonder of amazing women who are making change across disciplines.”

Advocating and having Indigenous women’s voices at the decision-making tables are key to making continued change in justice. Indigenous women need to be supported through a web of supported services rather than caught in a net that leads to incarceration. Our interaction with the criminal justice system needs to be about more than carceral options. It needs to be about restorative practices that lead to healing and justice. ●