SCC File No. 37769

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

B E T W E E N:

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-and-

HER MAJESTY THE QUEEN

RESPONDENT

-and-

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PART I – OVERVIEW

1. Aboriginal Legal Services (ALS) intervenes in this case pursuant to an Order issued by Justice Rowe on August 2, 2018.

2. ALS is a non-profit organization that was incorporated to assist Aboriginal people gain access and control over justice-related issues that affect them.

3. The Intervener accepts the facts as set out by the Alberta Court of Appeal at paragraphs 12 – 44 of their decision.

PART II – STATEMENT OF POSITION

4. ALS' position is that the repeated references by the crown and defence to the victim in this case as a "Native" person and a "Native" prostitute warranted appellate intervention and that this intervention was necessary to ensure the fairness of the trial process.

PART III – LEGAL ARGUMENT

5. ALS will make three arguments with respect to the case at bar:

    1) The repeated references to Cindy Gladue, the victim in this case, as a "Native" person, necessitated a specific response or responses by the trial judge in light of findings from this Honourable Court that jurors may hold stereotypes and prejudices towards Aboriginal people;

    2) The need for a response by the trial judge was heightened by the repeated descriptions of Ms. Gladue as "Native" and a prostitute because of stereotypes regarding Aboriginal women; and

    3) The fact that neither the crown nor defence took objection to the repeated characterization of Ms. Gladue as both "Native" and a prostitute does not prevent appellate review of these errors.

1. The trial judge's obligation to respond to repeated references to Cindy Gladue as a "Native" person.

6. It is submitted that the repeated references to the victim in this case, Cindy Gladue, as a "Native" person raised concerns that should have been addressed by the trial judge outside and independent of concerns relating to the application of s. 276 of the *Criminal Code*.[1] The Court of Appeal noted that Ms. Gladue:

> …was referred to as "Native" approximately 26 times throughout the trial by witnesses, defence counsel and Crown counsel. In one instance, the witness was directly asked to describe Gladue's ethnicity. In other circumstances, witnesses introduced and used the term "Native" or "Native woman" as a descriptor of Gladue and defence counsel, and Crown counsel continued to use that descriptor while questioning the witness.[2]

7. The analysis required to determine the harm caused by these repeated references must include this Court's decisions in *R v Williams*,[3] *R v Ipeelee*,[4] and *Ewert v Canada*.[5] In *Williams* this Court found:

> … In my view, there was ample evidence that this widespread prejudice [against Aboriginal people] included elements that could have affected the impartiality of jurors. Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated in Locking up Natives in Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release (1988), at p. 5:
>
> > Put at its baldest, there is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.
>
> There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system…[6]

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[1] *Criminal Code,* RSC 1985, c C-46, s 276: In this regard we agree with the Appellant at para 77 of his factum that the repeated use of the term "Native" to describe Ms. Gladue does not engage considerations under s. 276 or *Seaboyer*. As will be discussed later in the factum, when the term "Native" is used in conjunction with words like "prostitute" however, this raises s. 276 and *Seaboyer* concerns.

[2] *R v Barton,* 2017 ABCA 216, 354 CCC (3d) 245 at para 124 [*Barton ABCA*].
[3] *R v Williams* [1998] 1 SCR 1128, 159 DLR (4th) 493 [*Williams*].
[4] *R v Ipeelee,* 2012 SCC 13, [2012] 1 SCR 433 [*Ipeelee*].
[5] *Ewert v Canada,* 2018 SCC 30 [*Ewert*].
[6] *Williams, supra* note 3 at para 58.

8. While *Williams* approved of allowing an Aboriginal accused person to challenge potential jurors based on prejudices they might hold towards Aboriginal people, this approach has also been used by crown attorneys to challenge potential jurors where the victim is Aboriginal and the accused is not. In *R v Rogers*,[7] Justice MacKinnon of the Ontario Superior Court permitted the crown to ask questions to determine if potential jurors might be biased when the victim in a murder case was Aboriginal. He stated:

> I hold that widespread racial prejudice, in the context of this case, is sufficient to give an air of reality to the challenge. Racism will be at work on the jury panel as soon as the victim is described as an Aboriginal. ... I do not agree with defence counsel's submission that the question proposed would be counterproductive in that it would inject racial overtones into a case where none previously existed. A question directed at revealing those of the panel whose bias renders them partial does not "inject" racism into the trial but seeks to prevent that bias from destroying the impartiality of the jury's deliberations….
>
> …The interracial nature of the crime increases the possibility of partiality. There may be potential jurors who would consider that they would be able to reach an impartial verdict in the case of a white accused, but not where the victim of the alleged violence is Aboriginal.[8]

9. In the circumstances of this case the crown would have been justified in seeking to have the *Williams* question asked of potential jurors when assembling the jury. The crown's decision not to ask such a question cannot be challenged as it is clearly an exercise of crown discretion.[9]

10. The failure of the crown to address racial prejudice in the context of jury selection does not relieve the trial judge of their obligation to ensure a fair trial and particularly to ensure that prejudice against the victim as an Aboriginal person did not taint the jury's decision-making process. This is particularly the case when, as here, both the crown and defence perpetuated

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[7] *R v Rogers* (2000), 38 CR (5th) 331, 2000 CanLII 22829 (Ont Sup Ct) at paras 6, 8.

[8] *Ibid* at paras 6 – 7: The reasoning in *Rogers* has been used in other cases where Aboriginal people have been victims to ask questions regarding racial prejudice of potential jurors; see Susan Clairmont, "Peter Khill found not guilty of second-degree murder in death of Indigenous man" *The Star* (June 27, 2018) online: https://www.thestar.com/news/gta/2018/06/27/peter-khill-found-not-guilty-of-second-degree-murder-in-death-of-indigenous-man.html; see also *R v Munson*, 2001 SKQB 410 at paras 2, 4, aff'd 2003 SKCA 28.

[9] *R v Anderson*, 2014 SCC 41, [2014] 2 SCR 167 at para 32.

the problem by making repeated unwarranted references throughout the trial to Ms. Gladue's race.

11. In this case the identity of Ms. Gladue was not in question. Therefore there was no need to refer to her by anything other than her name. Repeatedly describing her as "Native" would suggest to the jury that there was something about her background that was relevant to the case, but the jury was never told what that was. This leads to the problematic outcome that the jury was left to ascribe whatever meaning they wished to her description without guidance from the court. Given the findings in *Williams* about widespread racism, this was obviously an error made by both the crown and defence that required attention from the trial judge.

12. In *Ewert*, this Court specifically noted that:

> The alienation of Indigenous persons from the Canadian criminal justice system has been well documented. Although this Court has in the past had occasion to discuss this issue most extensively in the context of sentencing and of the interpretation and application of s. 718.2(e) of the *Criminal Code*, R.S.C. 1985, c. C-46, it is clear that the problems that contribute to this reality are not limited to the sentencing process. Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system…[10]

13. Reading *Williams* in light of *Ewert* makes it clear that the fact that systemic discrimination towards Aboriginal people is present throughout the criminal justice system creates specific obligations for judges. In the sentencing context, this Court in *Ipeelee* found that sentencing judges as the front-line workers in the criminal justice system were best able to ensure that prejudice, assumptions and stereotypes about Aboriginal offenders do not contribute "to ongoing systemic racial discrimination."[11] These concerns are equally applicable to the role of the judge in the context of a jury trial. In a jury trial it is the responsibility of the judge, who continues to be the front-line worker in the justice system, to ensure that the stereotypes and prejudices against Aboriginal victims do not impair the ability of the jury to fairly decide the case before them.

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[10] *Ewert, supra* note 5 at para 57.
[11] *Ipeelee, supra* note 4 at para 67.

14. There are at least three ways in which a trial judge can minimize the impact of stereotypes and prejudices towards Aboriginal people in a jury trial. First, the judge can address the issue with counsel in the absence of the jury. This can take place during pre-trial discussions or at the first instance where reference to the person's Aboriginal background is raised by counsel. Second, the judge can specifically caution the jury against relying on any stereotypes or conscious or unconscious biases against Aboriginal people in their charge to the jury. Finally, the judge has the ability to declare a mistrial[12] and order a new jury to be empanelled if they are concerned that the prejudice caused by the references to the person as Aboriginal cannot be addressed through a specific instruction to the jury.

15. The trial judge's failure in this case to prevent "ongoing systemic racial discrimination" in the trial process is an error of law that can be reviewed on appeal and is an appropriate ground for the ordering of a new trial.

2. The trial judge's obligation to address stereotypes arising from repeated references to Ms. Gladue as a "Native" prostitute.

16. Compounding the problematic and repeated reference to Ms. Gladue as "Native" was the linking of her Aboriginal status to the unproven and irrelevant statement that she was a prostitute. The evidence in the case went only as far as establishing that she had exchanged sex for money on two occasions. It is submitted that the Alberta Court of Appeal correctly found that the standard caution given by the trial judge to the jury with respect to the victim's prior sexual activity was inadequate:

> …to counter the stigma and potential bias and prejudice that arose from the repeated references to Gladue as a "prostitute", "Native girl" and "Native woman". Those references implicitly invited the jury to bring to the fact-finding process discriminatory beliefs or biases about the sexual availability of Indigenous women and especially those who engage in sexual activity for payment. What was at play here, given the way in which the evidence unfolded, was the intersection of assumptions based on gender (woman), race (Aboriginal) and class (sex trade worker). We emphasize that we are not suggesting that counsel or the trial judge sought to insinuate improper thinking into the minds of this jury. Nevertheless, without a sufficient direction to the jury, the risk that this jury might simply have assumed that Barton's money bought Gladue's consent to whatever he wanted to do was very real, indeed inescapable. Add to this the likely risk that because Gladue was labelled a "Native" prostitute – who was significantly intoxicated – the jury would believe

[12] *R v Khan*, 2001 SCC 86, [2001] 3 SCR 823 at para 79.

> she was even more likely to have consented to whatever Barton did and was even less worthy of the law's protection. This is the very type of thinking that s 276 was introduced to eradicate.[13]

17. Section 276 (and the parallel analysis arising from the common law) is aimed at ensuring that improper inferences are not drawn about a complainant's consent based on her past sexual history. The section is specifically aimed at addressing sexist stereotypes. In a case involving an Aboriginal complainant, care must be taken to ensure that the consideration of past sexual behaviour does not lead to improper inferences based on sexist and racist stereotypes about Aboriginal women.

18. Aboriginal women are subject to particular negative stereotypes about their sexuality. These stereotypes are a legacy of colonialism. As noted by Professor Lise Gotell:

> Aboriginal women in Canada were rendered promiscuous and constructed as legitimate targets of sexual violence as part of the colonizing project. The portrayal of the Aboriginal woman as immoral and inherently sexualized helped to constitute and maintain the spatial and ideological boundaries between settlers and native peoples. As Sherene Razack has argued, from the nineteenth century, the almost universal conflation of the "squaw" with the prostitute placed Aboriginal women beyond the reach of law's protections.[14]

19. This racist stereotype continues to inform how sexual violence against Aboriginal women is understood in the criminal justice system today. In Part 1, Chapter 13 of the Report of the Aboriginal Justice Inquiry of Manitoba, the Commission cites with approval the work of Professor Emma Larocque which found that "The 'squaw' is the female counterpart to the Indian male 'savage' and as such she has no human face; she is lustful, immoral, unfeeling and dirty."[15]

20. One of ways such stereotypes can lead to an improper inference about consent is the conclusion that Aboriginal women who exchange sex for money are not only more likely to have consented, but also to have brought the violence they experience on themselves. In her essay "Symbolic and Discursive Violence in Media Representations of Aboriginal Missing

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[13] *Barton ABCA*, *supra* note 2 at para 128 (footnotes omitted).
[14] Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records*"* (2006) 43:3 Alta L Rev 743 at 749.
[15] Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1 Chapter 13 "Aboriginal Women", online: <www.ajic.mb.ca/volumel/chapter13.html>.

and Murdered Women," Professor Yasmin Jiwani studied seven years' worth of articles about Aboriginal women in the *Globe and Mail.* She found that:

> The consistent mention of Aboriginal women as 'drug-addicted prostitutes' comes through most clearly in the stories concerning violence perpetrated by white men. In all of these instances, the men are identified and described in detail with their respect to their backgrounds and their actions. Yet, in each one of these cases … the young women involved were constantly referenced as drug-addicted sex workers. Reiterating the identities of Aboriginal women victims of violence as fitting this profile makes them seem responsible for the violence they experience. It is a discursive strategy of blaming the victim.[16]

21. This problem in the Canadian criminal justice system has drawn international attention:

> Amnesty International has denounced discrimination against Aboriginal women victims of sexual assault in the justice system because of their perceived promiscuity, as a racist and sexist violation of the fundamental human rights. Such discrimination allows the victimization of Aboriginal women to become normalized, leaving them vulnerable to further sexual violence.[17]

22. The cases of Helen Betty Osborne[18] and Pamela George,[19] Aboriginal women who were sexually assaulted and killed by non-Aboriginal men, are concrete examples of the attitudes, assumptions and prejudices outlined above. That these issues continue to arise decades later during a trial involving the death of an Aboriginal woman illustrates both the pervasiveness of the problem and the need to obtain clear judicial direction.

23. Given the harmful stereotypes about Aboriginal women who are – or are perceived to be - involved in sex work, there is a risk that judges considering an Aboriginal complainant's past sexual activity pursuant s. 276 (or its common law corollary) will treat as relevant her past sexual activity when it is not relevant. This would mean they permit evidence to be presented

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[16] Yasmin Jiwani, "Symbolic and Discursive Violence in Media Representations of Aboriginal Missing and Murdered Women" (2009) at 8-9, online: <https://www.researchgate.net/profile/Yasmin_Jiwani/publication/239856449_Symbolic_and_Discursive_Violence_in_Media_Representations_of_Aboriginal_Missing_and_Murdered_Women/links/0046353302321c36f5000000.pdf>.

[17] Elizabeth Adjin-Tettey, "Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery" (2006) 39:1 UBC L Rev 3 at 41.

[18] Report of the Aboriginal Justice Inquiry of Manitoba, Volume 2 Chapter 1, "The Death of Helen Betty Osborne" online: <http://www.ajic.mb.ca/volumell/chapter1.html>.

[19] Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15 CJLS 91.

about a complaint's activity as a sex worker without considering whether this evidence is being used to draw an inference that she was more likely to have consented or to suggest she was responsible for the violence she encountered.

24. In order to prevent this discriminatory outcome, judges must specifically consider whether such stereotypes are at play before deciding whether to admit evidence about past sexual history. This did not occur in this case and was correctly found by the Alberta Court of Appeal a ground upon which to allow the appeal of the Appellant's acquittal.

3. Appellate courts must be able to correct errors that compromise trial fairness even if objections were not taken during the trial itself.

25. In the case at bar defence counsel and the crown improperly and repeatedly made reference to Ms. Gladue as "Native" and as a prostitute.[20] Because both parties repeatedly committed this error, neither of them objected to the use of that language nor did the trial judge intervene on this point. It is submitted that the fact that there was no objection raised does not prevent an appellate court from addressing the issue and, as in this case, ordering a new trial.

26. Appellate courts have not treated the failure to address systemic discrimination against Aboriginal people at trial as a bar to raising the issue on appeal. Obviously it is better if all matters central to a criminal case are raised at first instance; however creating a strict prohibition in this regard will only hurt Aboriginal victims - an already vulnerable population. Aboriginal people accounted for 24% of homicide victims in 2016, while representing an estimated 5% of the Canadian population.[21] In 2016 the homicide rate for Aboriginal people was about six times higher than that of non-Aboriginal people.[22] The rate of sexual assault victimization is roughly three times higher for Aboriginal people than non-Aboriginal.[23] Of the sexual assaults against Aboriginal people, 94% were committed against women.[24]

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[20] *Barton ABCA, supra* note 2 at paras 123-124.
[21] Jean-Denis David, "Homicide in Canada, 2016" Statistics Canada, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/54879-eng.htm>.
[22] *Ibid.*
[23] Shana Conroy & Adam Cotter, "Self-reported sexual assault in Canada, 2014" Statistics Canada, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>.
[24] *Ibid.*

27. In the context of sentencing, appellate courts have allowed Aboriginal offenders to raise *Gladue*[25]-related concerns on appeal. An example of this is *R v Kakekagamick,*[26] where the Ontario Court of Appeal, of its own motion, ordered a report that could address the circumstances of the offender in the absence of substantive submissions by counsel at trial and on appeal.[27] Because failure to consider *Gladue* in the sentencing of an Aboriginal offender is an error of law, the court must be able to raise the issue on appeal even if it was not adequately argued at first instance.[28]

28. There must be a remedy when the parties who are responsible for ensuring a bias-free trial process not only abdicate their responsibilities but also perpetuate stereotypes and prejudices. It is irrelevant whether this failure arose from advertence or inadvertence to the issue; all that matters is that it occurred when it should never have occurred.

29. Failure of counsel, defence or crown, to properly address the spectre of bias against Aboriginal offenders or victims at trial cannot be a bar to an appellate court raising the issue on appeal. It cannot be contended that failure to address these issues at trial is, in any way, some sort of trial tactic that deserves deference. The role of judges as front line workers preventing systemic discrimination from influencing the court process cannot be frustrated by the failure of all parties at trial to recognize the problem at first instance.

30. At its core, appellate intervention to remedy the failure by the trial judge to ensure that discrimination does not infect the decisions made by jurors is essential to ensure that there is a fair trial.

31. This Court in *R v Harrer* stated:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: R. v. Lyons, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 362, per La Forest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which

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[25] *R v Gladue* [1999] 1 SCR 688, 171 DLR (4th) 385.
[26] *R v Kakekagamick* (2006), 81 OR (3d) 664, 211 CCC (3d) 289 (Ont CA).
[27] *Ibid* at paras 25-31, 56.
[28] *R v Chickekoo,* 2008 ONCA 488 at paras 8, 11-12; *R v Whiskeyjack,* 2008 ONCA 800, 93 OR (3d) 743 at para 29; *R v JN,* 2013 ONCA 251, 305 OAC 175 at paras 34, 41.

> satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused.[29]

32. In *R v Bjelland* this Court restated its finding in *Harrer* as: "While the accused must receive a fair trial, the trial must be fair from both the perspective of the accused and of society more broadly."[30]

33. The Appellant suggests that the Court of Appeal's addressing of this issue was improper because it did not arise through the adversarial process and was, he contends, improperly raised as a ground of appeal by an intervener.[31] This objection misses the point. Whether the issue was raised by an intervener or whether the Court addressed the issue of their own motion, appellate courts cannot shirk their duty to ensure that stereotypes and prejudices regarding Aboriginal people do not taint the jury's deliberations and thus render a trial unfair. Society cannot have faith that a trial was fair when it was fatally tainted by repeated reliance on discriminatory and prejudicial stereotypes.

PART IV – POSITION ON COSTS

34. ALS seeks no costs and respectfully submits that no costs be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th day of September, 2018.

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Jonathan Rudin Counsel for the Intervener, ALS	Emily Hill Counsel for the Intervener, ALS

[29] *R v Harrer* [1995] 3 SCR 562, 128 DLR (4th) 98 at para. 45; see also *R v Cook* [1998] 2 SCR 597, 164 DLR (4th) 1 at para 101; see also *R v Orbanski; R v Elias* 2005 SCC 37, 2 SCR 3 at para 97.
[30] *R v Bjelland* 2009 SCC 38, [2009] 2 SCR 651 at para 22.
[31] Factum of the Appellant at paras 44, 47 – 49.

PART VI – TABLE OF AUTHORITIES

	AUTHORITIES	Cited at Para. No.
	Legislation	
1.	*Criminal Code*, RSC 1985, c C-46 276 …… *Code criminel*, LRC 1985, ch C-46 276 ……	6
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2.	*R v Barton*, 2017 ABCA 216, 354 CCC (3d) 245	6, 16, 25
3.	*R v Williams* [1998] 1 SCR 1128, 159 DLR (4th) 493	7
4.	*R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433	7, 13
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17.	*R v Orbanski; R v Elias* 2005 SCC 37, 2 SCR 3	31
18.	*R v Bjelland* 2009 SCC 38, [2009] 2 SCR 651	32
Secondary Sources		
19.	Lise Gotell, "When Privacy is Not Enough: Sexual Assault Complainants, Sexual History Evidence and the Disclosure of Personal Records*"* (2006) 43:3 Alta L Rev 743	18
20.	Report of the Aboriginal Justice Inquiry of Manitoba, Volume 1 Chapter 13 "Aboriginal Women"	19
21.	Yasmin Jiwani, "Symbolic and Discursive Violence in Media Representations of Aboriginal Missing and Murdered Women" (2009)	20

	AUTHORITIES	Cited at Para. No.
22.	Susan Clairmont, "Peter Khill found not guilty of second-degree murder in death of Indigenous man" *The Star* (June 27, 2018)	8
23.	Elizabeth Adjin-Tettey, "Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery" (2006) 39:1 UBC L Rev 3	21
24.	Report of the Aboriginal Justice Inquiry of Manitoba, Volume 2 Chapter 1, "The Death of Helen Betty Osborne"	22
25.	Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15 CJLS 91	22
26.	Jean-Denis David, "Homicide in Canada, 2016" Statistics Canada	26
27.	Shana Conroy & Adam Cotter, "Self-reported sexual assault in Canada, 2014" Statistics Canada	26