Reasons for Independent Background Cultural Impact Reports based on the Supreme Court of Canada Decision R. v. Gladue for Pre-Sentencing of an Aboriginal Offender

In order for the courts to follow the two step process outlined in the Supreme Court of Canada decision in R. v. Gladue, the Courts require information about the unique circumstances of Aboriginal offenders and culturally relevant sentencing options that are available and appropriate. An understanding of the roots of Aboriginal crime and what sanctions are more likely to slow or stop the individual from revolving through the justice system, should be based upon accurate and in-depth information from an Aboriginal perspective. These reports can be in addition to a conventional Pre-Sentence report.

Conventional Pre-Sentence reports seldom provide this kind of information to the courts for obvious reasons, including the fact that they originate with and are a product of the justice system.

1) Probation and parole officers typically do not seek out or cannot gain ready access to the background history of Aboriginal offenders or their communities due to mistrust based on their probable non-Native ancestry. The Supreme Court cited historical dislocation, economic deprivation, social turmoil, and systemic discrimination as relevant considerations when determining sentence. This is a specified area of study and knowledge not generally of common knowledge.

2) "Gladue" reports include detailed information that answers (but not limited to) the following questions, as well, addresses the effect these issues may have had on the offender's family, the community/ies where the family members originate and/or live, and the multi-generational effect of these issues on the offender.

Has this offender been affected by:

- substance abuse; personally, in the immediate family, extended family and community?
- poverty; as a child, as an adult, offender's family, or community?
- overt/covert racism; in the community, by family members, strangers, school or workplace?
- family (divorce, born out of wedlock) or community breakdown?
- abuse; sexual, emotional, verbal, physical, and spiritual, who was the perpetrator; stranger, family member, authority figure, friend?
- witnessing violence; spousal, family, community?
- unemployment, low income, lack of employment opportunity?
- lack of educational opportunities?
- dislocation from an Aboriginal community, loneliness and community fragmentation?
- loss of identity, culture, ancestral knowledge?
- foster care or adoption; at what age, for how long, was the foster/adopted family non-Aboriginal?
- family involvement in the criminal environment?
- has the offender or family members attended residential school; if so, where, how many years, how were they treated, how long were they denied family contact?
- what are the main social issues affecting the offender's home/original community?
- how has the offender's family/community addressed those issues?
- how has the offender, offender's family and the community been affected by economic conditions?

- what is the quality of the offender's relationship with family, extended family, community?
- who are the offender's support network; spiritual, cultural, family, community?
- what culturally relevant or mainstream healing resources are available to the offender?
- what culturally relevant alternatives to incarceration can be set in place that are healing for the offender and all others involved, including the community as a whole?

Time and budget constraints do not allow for the in-depth report that a Gladue Cultural Impact Assessment provides. The justice system is already working beyond capacity and is not in the position to assume the additional responsibility of providing the court with the information necessary to remedy the mischief behind the enactment of s.718(2)(e) CCC as interpreted by the Supreme Court of Canada decision in R. v. Gladue. (If Native Courtworkers are available, they also are overburdened and understaffed)

3) The Government Ministries do not, in general, have adequate relationships of trust with Aboriginal people, communities and organizations necessary to facilitate the level of cooperation, shared decision making, and resource sharing for effective systemic community alternatives. Preparation of the "Gladue" reports leads to meaningful individually developed alternatives.

4) Current practice is specific to the offender and the offence, and does not incorporate the holistic, restorative approach emphasized in the Supreme Court of Canada decision in R. v. Gladue. Justice, from a traditional Aboriginal perspective, begins with the person and the factors and circumstances which led up to the moment of the offence and what must be done to restore harmony to the individual, victim, and community. Standard Pre-Sentence reports focus on the offence and the ways and means to prevent the offence from being committed in the future. Most Pre-Sentence reports are written using the offenders criminal history with very little understanding and empathy of the offender's Aboriginal culture, their family, or their community.

5) The standard Pre-Sentence reports are a product of the criminal justice system which has been found by numerous inquiries, commissions, and most recently acknowledged by the Supreme Court of Canada, as being part of the problem facing Aboriginal people. This has two consequences. First, Aboriginal people are, for sound reason, distrustful of authority and alienated from the criminal justice system. It is unlikely that a probation or parole officer would be able to gain the trust of the offender, his/her family and the community to the degree necessary to obtain the very personal, often tragic, and not always flattering background information. Probation and parole officers are not generally in a position where they may be objective. This information is crucial to a realistic understanding of the circumstances which brought the offender before the courts. This is not to say that Aboriginal communities do not want to work cooperatively with the criminal justice system in reducing the crisis of Aboriginal incarceration, merely that they are distrustful of an institutional approach. Second, the Supreme Court of Canada decision in R. v. Gladue also asks the courts to consider the systemic racism within the criminal justice system. As racism is not always intended or obvious but rather the result of racialization, it is unlikely that the system itself can fulfill the responsibility of identifying and reporting its existence as it manifests itself in a case-by-case basis.

Gladue Cultural Background Impact Assessments, on the other hand, specifically seek to assist the court in implementing the requirements of s. 718.(2)(e) CCC as interpreted by the Supreme Court of Canada in R. v. Gladue. Ideally these assessments should be researched and prepared in the private sector by representatives of the Aboriginal community who have a thorough knowledge of the criminal justice system and are sensitive to the issues that stem from the inter-generational trauma

experienced within Aboriginal communities and how that relates to criminal behavior. This allows for more effective communication and trust while conducting interviews.

These extensive and accurate reports, which come from an Aboriginal perspective and seek to provide information regarding traditional Aboriginal concepts of justice and restorative sentencing alternatives, are beyond the scope of standard Pre-Sentence reports. They provide the court with individual, family and community history and assessments. Also recommended are holistic treatment programs accessing the local cultural healing practices, using relevant resources, which incorporates the needs and opinions of all involved. As the purpose of these reports is to provide the court with as much information as possible regarding the circumstances of Aboriginal offenders, they also include, when relevant, researched background information regarding specific factors, such as fetal alcohol syndrome, discovered during the preparation of the report.

The time has come for Aboriginal communities to facilitate change that will allow them to accept responsibility for the healing of their members and their communities as a whole. This can only be achieved through committed partnerships with all levels of the justice system. For these partnerships to succeed, it is crucial that everyone cast aside the notion of blame, replacing it with a common vision of healing.

Respectfully submitted by:

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