THUNDER BAY LAW ASSOCIATION

2021 Fall Conference – Criminal Law Program

28 October (by Webinar)

(LSO CPD credit: "EDI" Professionalism 2 hours; Substantive 1 hour)

Doing Time Before Your Time: Bail Court and Remand Population

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I know not whether laws be right,
Or whether laws be wrong;
All that we know who lie in jail
Is that the wall is strong;
And that each day is like a year,
A year whose days are long.

-Oscar Wilde

1:30-3:30: The Bail Crisis and the Over-Representation of Indigenous Peoples in Canada's Remand Population: Criminal Justice Trends, Sources and Ways Forward. With Professor Cheryl Webster and Ph.D. candidate Megan Mitchell (University of Ottawa department of criminology)

3:30-4:30 "The Round Up"
Your need-to-know review of the high points in criminal law (the top 10 cases) from the past year, featuring the newest / soon-to-be-newest members of our bar (Rob Atatise, Justin McConnell, Justis Danto-Clancy, Danika Goshulak).

GUEST PRESENTERS

Cheryl Marie Webster received her MA in Sociology from the Instituto Superior de Ciências do Trabalho e da Empresa, Lisbon, Portugal, and her PhD in Criminology from the University of Toronto. She was subsequently awarded a post-doctoral fellowship at the University of Toronto Faculty of Law before accepting an academic position at the University of Ottawa. She is currently a professor in the Department of Criminology. Her research has focused on the effectiveness of general deterrence as applied to sentencing, trends in pretrial detention, and, more recently, the operation of bail courts, the development of Canadian criminal justice policy, and variation in imprisonment rates in Canada and abroad.

Megan Mitchell is a Ph.D. Candidate in Criminology at the University of Ottawa working under the supervision of Professor Cheryl Webster. Megan's criminal justice research focuses on the overincarceration of Indigenous Peoples in Canada as well as issues within the Canadian bail system. Her doctoral research uses data from the Ontario Ministry of the Attorney General to explore the operation of Indigenous Persons Courts (or *Gladue Courts*) at bail. Megan recently co-authored a journal article on Indigenous Peoples' contacts with the police and she and Professor Webster have written a forthcoming book chapter on Indigenous Peoples at Bail.

PANELISTS

Rob Atatise is a 2016 graduate of the Bora Laskin Faculty of Law (Charter Class). He is the founding lawyer of Atatise Law Office located on Fort William First Nation, primarily practicing in criminal defence law. He is per diem lawyer on the Thunder Bay criminal law duty counsel panel and is also on the criminal law panel for Legal Aid Ontario and Nishnawbe-Aski Legal Services Corp. Prior to law school, Rob attended Lakehead University and graduated with his HBA in Political Science, with a minor in Sociology (but really he just loved his philosophy classes). Since the courts have gone virtual, Rob has been assisting all over northwestern Ontario region and even the northeast region in his capacity as a criminal defence duty counsel lawyer, mostly and excitingly, running bail hearings. Rob is originally from Lac La Croix First Nation in Treaty #3 Territory, an Anishinaabe community of about 400 people. Rob enjoys hunting and catching walleye (and gifting fillets to Neil and his family) on his days off. Walleye is his favourite food.

[Editor's note: Rob is an extremely talented filleter, who leaves no shred of bone behind; and his gifts of walleye to the Program Chair are purely coincidental to his inclusion on this panel, and to the fact that his biography is first in order.]

Justin McConnell was called to the bar in 2018, and is presently a federal prosecutor. He was an undergraduate at Algoma University (Political Science with a minor in Philosophy), and went on to Lakehead University's Bora Laskin Faculty of Law. Prior to his current position, he worked in family law, and criminal defence. Originally from Sault Ste. Marie, he now has a fiancée (happily) and a mortgage (perhaps less so) in Thunder Bay, such that his ambition of remaining in Northern Ontario, appears achievable. He will discuss the Toronto Raptors with anyone that will listen, following which they can join him in ultimate frisbee, golf, and hiking with his dog. He used to be employed shoveling manure, some would say he still does in some sense.

[Editor's note: that was Justin's own joke, not the Program Chair's; but Justin merits leeway because, hailing from the Soo, he is not just from "northern ontario" but can validly claim "*Northwestern Ontario,"* which I say starts there.]

Justis Danto-Clancy received his JD from the Bora Laskin Faculty of Law at Lakehead University in 2021 and is currently a Judicial Law Clerk at the Superior Court in Thunder Bay. Prior to law school, Justis worked in film and television production, theatre and the performing arts, as a high school teacher, and as a carpenter. During law school, Justis volunteered for the Lakehead University Community Legal Services Clinic, and the Kinna-Aweya Legal Clinic. He played an active role coordinating the Indigenous Justice Conference in 2019. From the

end of 2L to the end of 3L, he worked for PM Law Offices in Thunder Bay. In 2020, Justis won the Arnup Cup Criminal Law Trial Moot competition, earning the right to represent Ontario at the Sopinka Cup – the National Competition. Justis and his teammate Justin Blanco subsequently won the Sopinka Cup, and Justis received an award for best direct examination. He was chosen by his peers to be the president of the Law Students' Society in 2L, and to speak on behalf of his class as Valedictorian at graduation. Justis played rugby for Lakehead University (before COVID 19 ruined everything) and loves the outdoors, canoes, and team sports.

[Editor's note: Bora Laskin was valedictorian of Fort William Collegiate Institute's class of 1930 (where he was *also* a rugby star); the Program Chair was valedictorian of *that same school's* class of 1995 (and was an unremarkable lineman).]

Danika Goshulak is a third year law student at the Bora Laskin Faculty of Law. She is currently on placement with Scullion Law, after having worked at the firm this past summer. She has loved every moment of working at an all-women defence firm. Prior to law school, she completed a BA in International Development and an MA in Politics at York University. She also studied in both Sweden and Brazil before applying to law school on a whim. An interesting fact about Danika is that she spent 8 years working seasonally for Ontario Parks, where she became certified in rattlesnake capture. After completing 3L, Danika will be clerking for Justice Pentney at the Federal Court of Canada in Ottawa, Ontario.

[Editor's note: Rattlesnake capture??! "Awesome" is not nearly a strong enough term. If you were thinking of marching into Scullion's office in a huff, think again.]

Program Chair: Neil McCartney. You all know him. B.A. (Hons) 1999, LL.B. 2003, Queen's University; M.Phil 2001 University of Cambridge (U.K.). 2003-2004 articled with Ottawa Crown Attorney's Office, then associate with Atwood Shaw Labine, now partner with Atwood Labine LLP. Kids 11 & 8. Himself a proud Northwestern Ontario native, he is ambitious to some day be valedictorian of his rattlesnake-filleting class.

APPLICATION OF GLADUE PRINCIPLES TO BAIL PROCEEDINGS

R. v. Robinson, [2009] O.J. No. 1284 (Ont. C.A.) at para. 13:

It is common ground that principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688, have application to the question of bail. However, the application judge cannot apply such principles in a vacuum. Application of the Gladue principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.

GLADUE AND IPELEE REFRESHER (Excerpts everybody should have handy)

***R. v. Gladue*, [1999] 1 S.C.R. 688**. Cory and Iacobucci JJ (Excerpts):

33 In our view, s. 718.2(e) is more than simply a re-affirmation of existing sentencing principles…[It has an] important remedial purpose.

34 …[C]ounsel for the appellant expressed the fear that s. 718.2(e) might come to be interpreted and applied in a manner which would have no real effect upon the day-to-day practice of sentencing aboriginal offenders in Canada. In light of the tragic history of the treatment of aboriginal peoples within the Canadian criminal justice system, we do not consider this fear to be unreasonable. In our view, s. 718.2(e) creates a judicial duty to give its remedial purpose real force…

37 …[S]entencing judges should pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique, and different from those of non-aboriginal offenders… which may specifically make imprisonment a less appropriate or less useful sanction…

58 …By 1997, aboriginal peoples constituted closer to 3 percent of the population of Canada and amounted to 12 percent of all federal inmates…The situation continues to be particularly worrisome in Manitoba, where in 1995-96 they made up 55 percent of admissions to provincial correctional facilities, and in Saskatchewan, where they made up 72 percent of admissions...

64 These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of

aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process…

Framework of Analysis for the Sentencing Judge

66 How are sentencing judges to play their remedial role? …The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic under-development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in Continuing Poundmaker and Riel's Quest (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment…”

69 …[I]t is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member…

79 Yet, even where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing…

83 How then is the consideration of s. 718.2(e) to proceed in the daily functioning of the courts? … In all instances it will be necessary for the judge to take judicial notice of

the systemic or background factors and the approach to sentencing which is relevant to aboriginal offenders….

87 …We would note, though, that the aim of s. 718.2(e) is to reduce the tragic overrepresentation of aboriginal people in prisons…[The] fundamental purpose of s. 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference…

93 …Attention should be paid to the fact that Part XXIII, through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration…If there is no alternative to incarceration the length of the term must be carefully considered…Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

R. v. Ipelee, [2012] 1 S.C.R. 433 (Excerpts)

62 This cautious optimism has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened…[which] can be attributed to some extent to a fundamental misunderstanding and misapplication of both 718.2(e) and this Court's decision in Gladue.

64…Three interrelated criticisms have been advanced: (1) sentencing is not an appropriate means of addressing overrepresentation; (2) the Gladue principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(e) of the Criminal Code…

73 First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in Wells where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)). Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely - if ever - attains a level where one could properly say that their actions were not voluntary and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. As Greckol J. of the Alberta Court of Queen's Bench stated, at para. 60 of R. v. Skani, 2002 ABQB 1097, 331 A.R. 50, [page478] after describing the background factors that lead to Mr. Skani

coming before the court, "[f]ew mortals could withstand such a childhood and youth without becoming seriously troubled." Failing to take these circumstances into account would violate the fundamental principle of sentencing - that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The existence of such circumstances may also indicate that a sanction that takes account of the underlying causes of the criminal conduct may be more appropriate than one only aimed at punishment per se…

75 Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case….

77 This critique [respecting parity] ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, at p. 309). As Professor Carter puts it, "poverty and other incidents of social marginalization may not be unique, but how people get there is. No one's history in this country compares to Aboriginal people's" (M. Carter, "Of Fairness and Faulkner" (2002), 65 Sask. L. Rev. 63, at p. 71)…

81 …some cases erroneously suggest that an offender must establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge.

82 …There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence... .

83 …Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the [page484] unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence…

86 In addition to being contrary to this Court's direction in Gladue, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The Code does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (R. Pelletier, "The

Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons" (2001), 39 Osgoode Hall L.J. 469, at p. 479). Trying to carve out an exception from Gladue for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in Gladue. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the [page486] sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.