Court File #C66065

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

CHARLES KENNEDY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

AND:

ABORIGINAL LEGAL SERVICES

INTERVENERS

FACTUM OF THE INTERVENER, ABORIGINAL LEGAL SERVICES

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PART I – STATEMENT OF THE CASE

1. Aboriginal Legal Services (ALS) intervenes pursuant to an order of the Honourable Chief Justice Strathy dated June 18, 2021.
2. Issues regarding Indigenous people seeking to strike their guilty pleas are not new. In 1969, the Supreme Court of Canada decided the case of a Cree man, Lawrence Brosseau.[1] English was not Mr. Brosseau's first language and he had a Grade 2 education.[2] After initially pleading not guilty to a capital murder charge, he eventually pled guilty to non-capital murder. After the crown spent considerable time outlining the circumstances of the offence, Mr. Brosseau's counsel began his very short submissions on sentence by saying "Only to indicate to the Court that the accused is describable only in terms of an absolute primitive."[3]
3. One week later Mr. Brosseau sought to strike his plea. He said that his lawyer told him that if he did not plead to the charge then he would be sentenced to be hanged. He pled guilty out of fear.[4] Having already been sentenced to life in prison the motion to strike went to the Alberta Court of Appeal which rejected the application. The Supreme Court upheld the decision of the Alberta Court of Appeal. [5]
4. This case will allow this Honourable Court to determine if, other than statutory amendments, anything has changed over the last 42 years with respect to how courts should address motions to strike from Indigenous accused persons.

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[1] *Brosseau v The Queen*, [1969] S.C.R. 181
[2] *Ibid*, Pages 184-5
[3] *Ibid* Page 185
[4] *Ibid* Page 186
[5] *Ibid* Page 190

PART II – SUMMARY OF THE FACTS

5. ALS adopts the position of the Appellant as to the facts of the case.

6. In addition to the facts as set out by the Appellant, the Intervener relies on an exchange between counsel for the Appellant on the motion to strike and the Court on April 26, 2018. Following the calling of evidence on the motion to strike the plea, but prior to submissions being made on the motion, counsel for the Appellant stated:

> … And tomorrow morning, if everything goes as we would expect it to go, because we tend to rely on what the transcript says, I would suggest that we enter into submissions at that time, sir. And I mean, I don't think it would take very long. And if, Your Honour, if Mr. Kennedy is unsuccessful, sir, my friend, I understand is prepared to proceed with sentencing submissions. But Mr. Kennedy, I understand, will ask for an adjournment to allow for the completion of the Gladue report because he is - has status as a native Canadian.[6]

The Court's only response to that suggestion was to say "Well, we are getting ahead of ourselves."[7]

7. The transcript thus makes it clear that prior to hearing submissions and determining whether the Appellant would be permitted to strike his plea, the Court knew that the Appellant was an Indigenous person.

PART III – ISSUES AND THE LAW

8. This case raises the issue of what obligation, if any, does a trial judge have to ensure that Gladue factors are before them in a motion to strike a plea brought by an Indigenous accused person. More specifically, when the finder of fact becomes aware that the accused person is

[6] Proceedings on Application, April 26, 2018, p. 56, line 32, p.57, lines 1-11
[7] *Ibid*, p. 57, lines 12-13

Indigenous, is there an active duty to inquire of counsel as to whether they will be making submissions on the relevance of the person's Indigenous background when considering a motion to strike?

9. In addressing these issues ALS will make four points.

    A) The Gladue principles have changed the role of the judge when hearing a matter involving an Indigenous accused person or offender;
    B) The reason the role of the judge has changed is because courts now recognize that Indigenous people face systemic discrimination in the criminal justice system;
    C) Wrongful conviction guilty pleas are an example of the systemic discrimination faced by Indigenous people; and
    D) These factors mean that there is an obligation on a judge to seek out submissions from counsel on the relevant Gladue factors when considering a motion to strike a guilty plea.

A) The Gladue Principles Have Changed the Role of the Judge

10. In the criminal justice system, the role of the judge is to be the decision-maker. In an adversarial system the judge is not an active participant in the process and instead relies on submissions from counsel. In the course of hearing a criminal case and ruling on submissions on motions, a judge does not inject themselves into the process and proactively ask counsel if they are advancing a particular legal argument.

11. The assumption behind the adversarial system is that counsel know what they are doing and that submissions that might be expected to be made in a particular context might not be made due to tactical considerations.[8] These tactical decisions rest with counsel and the judge is not expected to make inquiries in this regard.[9]

[8] *R. v. Torbiak and Campbell* (1974), 1974 CanLII 1623 (ON CA), 18 C.C.C. (2d) 229 (Ont. C.A.), at page 230. *R v Lahouri*, 2013 ONSC 2085 (CanLII), 280 CRR (2d) 249, per K.L. Campbell J, at para 8. *R v Switzer*, 2014 ABCA 129 (CanLII), 572 AR 311, per curiam, at para 13

[9] *R v Stucky*, 2009 ONCA 151 (CanLII), 240 CCC (3d) 141 at paras 69 to 72

12. The Supreme Court's decision in *R v Gladue*[10] – and subsequent decisions that have interpreted *Gladue* – has changed the landscape. Certainly as it relates to sentencing, a judge is now under a positive obligation to ensure that, if the offender is Indigenous, the judge receives submissions on the application of Gladue principles to the case. As the Supreme Court stated in *Gladue*, in a section of the reasons entitled Duty of a Sentencing Judge:

> Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.[11]

13. It is an error of law if a judge does not properly advert to Gladue principles in sentencing. In a sentence appeal it is not open to the crown to say that *Gladue* considerations do not apply because they were not raised by defence counsel. If the judge is aware that the offender is Indigenous then the judge must proactively seek out the information they require.

14. There are many cases that speak to the obligations of a sentencing judge where the offender is an Indigenous person; we will focus on two particular decisions that came shortly after *Gladue*.

15. In R v *Wells*,[12] decided a year after *Gladue*, the Supreme Court stated:

> …It is to be expected in our adversarial system of criminal law that counsel for both the prosecution and the accused will adduce this evidence, but even where counsel do not provide the necessary information, s. 718.2(e) places an affirmative obligation upon the sentencing judge to inquire into the relevant circumstances. In most cases, the requirement of special attention to the circumstances of aboriginal offenders can be satisfied by the information contained in pre-sentence reports. Where this information is insufficient, s. 718.2(e) authorizes the sentencing judge on his or her

[10] *R. v. Gladue*, [1999] 1 S.C.R. 688 [*Gladue*]
[11] *Ibid* at para. 85
[12] *R. v. Wells*, [2000] 1 S.C.R. 207 [*Wells*]

own initiative to request that witnesses be called to testify as to reasonable alternatives to a custodial sentence.[13]

16. The extent of this obligation can be seen in the decisions of this Honourable Court in *R v Kakekagamick,*[14] decided six years after *Gladue*. In the first of these two decisions, the Court concluded that they did not have the necessary information regarding the circumstances of an Indigenous offender and therefore took it upon themselves to request a new pre-sentence or Gladue Report.[15] Subsequent to this decision, this Honourable Court has not hesitated to request additional information regarding an Indigenous offender in a sentencing matter when it felt that appropriate information was not before them.[16]

17. It is possible for an Indigenous offender to waive consideration of Gladue, but as this Court found in *Kakekagamick II*, such a waiver "must be express and on the record."[17]

18. In the context of bail, even prior to the recent amendments to the Criminal Code in s. 493.2,[18] this Honourable Court found that the Gladue principles applied to the determination of bail for Indigenous accused persons.[19] Thus, a justice determining whether an Indigenous person receives bail is bound by the Gladue principles. Failure to advert to those principles is just as much an error of law as it is in sentencing.[20] At a bail hearing, therefore, a justice is under a positive obligation to ensure that counsel provide them with the necessary relevant information to allow for a meaningful consideration of *Gladue*.

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[13] *Wells*, *supra* note 12 at para 54
[14] *R. v. Kakekagamick I*, 2006 CanLII 11656 (ONCA) , *R. v. Kakekagamick II*, 2006 CanLII 28549 (ON CA)
[15] *R. v. Kakekagamick I*, 2006 CanLII 11656 (ON CA), at para 3
[16] *R. v. Macintyre-Syrette*, 2018 ONCA 259 (CanLII), at para 2
[17] *R. v. Kakekagamick II*, 2006 CanLII 28549 para. 44
[18] Criminal Code, RSC 1985, c C-46, s 493.2 making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of: (a) Aboriginal accused; and (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part
[19] *R v Robinson*, 2009 ONCA 205 (CanLII). *R. v. Sledz*, 2017 ONCJ 151 (CanLII)
[20] *R v Vickers*, 2021 ONSC 3895 at para 24. *R. v. E.B.*, 2020 ONSC 4383 (CanLII)

19. This positive obligation on the trial judge to proactively manage the full criminal justice process with respect to Indigenous people before the court, was reemphasized by the Supreme Court in *R v Barton*.[21]

> Trials do not take place in a historical, cultural, or social vacuum. Indigenous persons have suffered a long history of colonialism, the effects of which continue to be felt…. this Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system…With this in mind, in my view, our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons…head-on.[22]

B) Systemic Discrimination Towards Indigenous People in the Justice System

20. Why is that judges cannot rely on the operation of the adversarial system to ensure issues relevant to Indigenous people are before the court? The answer to this question will assist in resolving the ISSUES before this Honourable Court in this case.

21. Since 1998, the Supreme Court has repeatedly stated that Indigenous people face systemic and direct discrimination in the criminal justice system. This point was made in *R v Williams*,[23] *Gladue*, *R v Ipeelee*,[24] *Ewert v Canada,*[25] *Barton,* and, most recently, *R v Chouhan*.[26] These cases all found that while the roots of the systemic discrimination faced by Indigenous people are found in Canada's colonial past, this discrimination is present in the day-to-day operations of the criminal justice system today.

22. The first time the Supreme Court addressed the issue of the discrimination faced by Indigenous people in the justice system was in 1998 in *Williams*. While that case focused on

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[21] *R. v. Barton*, 2019 SCC 33 [*Barton*]
[22] *Ibid* at para 198-200
[23] *R v Williams*, [1998] 1 SCR 1128, 124 CCC (3d) 481 [*Williams*]
[24] *R v Ipeelee*, 2012 SCC 13 , [2012] 1 SCR 433 [*Ipeelee*]
[25] *Ewert v Canada*, 2018 SCC 30, [2018] 2 SCR 165 [*Ewert*]
[26] *R. v. Chouhan*, 2021 SCC 26, at para. 22, 57, 116

racist stereotypes held by potential jurors, the Court's findings encompassed the justice system as a whole:

> … 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...[27]

23. One year later, in *Gladue,* the Supreme Court went into more detail regarding the causes of systemic and direct discrimination and included the prison system in their analysis as well:

> However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.[28]

24. In 2018, in *Ewert*, the Supreme Court turned their focus on the prison system and found that in the 20 years since *Williams*, nothing had changed with respect to the discrimination faced by Indigenous people:

> 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

[27] *Williams, supra* note 23 at para 58
[28] *Gladue*, *supra* note 10 at para 68

> result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system.[29]

25. In *Barton,* Canada's highest court emphasized the need to remedy this ongoing discrimination in order to work towards reconciliation:

> Furthermore, this Court has acknowledged on several occasions the detrimental effects of widespread racism against Indigenous people within our criminal justice system… when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done.[30]

26. The Supreme Court has held that the day-to-day experiences of discrimination faced by Indigenous people in the justice system is rooted in Canada's colonial practices. They first made this observation in *Gladue*, and then were even blunter in *Ipeelee* where, at para 60, they stated:

> [C]ourts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.

27. This Honourable Court explicitly adopted the perspective of the Supreme Court in *United States v Leonard*,[31] where Sharpe JA wrote of the need for the justice system to cease perpetrating systemic discrimination. At para 60, he wrote:

> … *Gladue* stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons. Yet it is on the idea of formal equality of treatment the minister rests his Gladue analysis. That approach was soundly rejected by the Supreme Court in both *Gladue* and *Ipeelee*, which emphasize that consideration of the systemic wrongs inflicted on Aboriginals does not amount to discrimination in their favour or guarantee them an automatic reduction in sentence. Instead, Gladue factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so

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[29] *Ewert*, *supra* note 25 at para 57
[30] *Barton, supra* note 21 at para 199
[31] *United States v Leonard*, 2012 ONCA 622, 112 OR (3d) 496 [*Leonard*]

> often flows from the failure of the justice system to address their special circumstances.[32]

28. It is therefore clear that, not only are the impacts of colonialism at the root of Indigenous over-representation, but also that they are manifested in the present-day systemic discrimination that Indigenous people face in the criminal justice system.

C) Indigenous People and Wrongful Conviction Guilty Pleas

29. The Intervenor obviously has no knowledge of what would have occurred if the Appellant's plea was struck and his matter remitted for trial. As Justice Pomerance stated in *R. v. McIlvride-Lister*, when a motion is brought to strike a plea:

> …the question is not whether the person who offered the plea is actually innocent, or can prove innocence. The question is whether the person who offered the plea believed that she was innocent and pleaded guilty despite that belief.[33]

30. In addressing the issue before this court, it is necessary to acknowledge the reality of the wrongful conviction guilty plea. It is a fact that people who are innocent nevertheless plead guilty to offences they have not committed.[34] There are many reasons why this phenomenon occurs and it is beyond the scope of this factum to look at the causes in detail.[35]

31. The fact that wrongful conviction guilty pleas occur in Canada is beyond dispute. The 2018 Federal Provincial Territorial Report on Wrongful Convictions included a chapter on "false guilty pleas." The report noted that "we simply do not know the scope of the phenomenon."[36]

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[32] *Leonard, supra* note 31 at para 60
[33] *R v McIlvride-Lister*, 2019 ONSC 1869 at para. 71
[34] *R v Hanemaayer*, 2008 ONCA 580 (CanLII) at para. 17 - 20
[35] Amanda Carling, "A Way to Reduce Indigenous Overrepresentation: Prevent False Guilty Plea Wrongful Convictions" (2017) 64 C.L.Q. 415
[36] Federal Provincial and Territorial Heads of Prosecution, *Innocence at Stake* Chp. 8 (Ottawa: Ministry of Justice, 2018) < https://www.ppsc-sppc.gc.ca/eng/pub/is-ip/ch8.html >

32. Professor Kent Roach along with Amanda Carling and students at the University of Toronto's Faculty of Law, have identified at least 18 recognized wrongful convictions in Canada that involved guilty pleas from a total of 70 recognized wrongful convictions.[37] At least three of these 18 cases involve Indigenous people.[38] False guilty pleas by Indigenous men represented almost 17% of Canada's recognized wrongful conviction guilty pleas, though this is likely under-reported.

33. The phenomenon of Indigenous people pleading guilty to offences they may not have committed has been the subject of comment from a number of inquiries that have looked at Indigenous people and the justice system.

34. The Manitoba Aboriginal Justice Inquiry in 1991 related "inappropriate guilty pleas" and "passivity" and "indifference" to the alienation of Indigenous people from the justice system.[39]

35. Also in 1991, The Report of the Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta – Justice on Trial – found that Indigenous people often pled guilty to their charges in order to avoid further remand time after they had been denied bail.[40]

36. Twenty years later, in 2011, Justice Iacobucci's Report on First Nations Representation on Ontario Juries concluded that many accused Indigenous people plead guilty because they

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[37] Kent Roach, "You Say You Want a Revolution?: Understanding Guilty Plea Wrongful Convictions"(2021) at page 8 online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=3869888>
[38] *Ibid* at pg. 11
[39] Hon Alvin Hamilton and Hon Murray Sinclair *Aboriginal Justice Inquiry* (Toronto: Queens Park, 1991) <http://www.ajic.mb.ca/volumel/chapter6.html#14>
[40] *Justice on Trial: report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta (Cawsey Report)* at 4-28 – 4-29 (Edmonton: Justice and Solicitor General, 1991) <https://open.alberta.ca/publications/1369434#summary>

"believe they will not receive a fair trial owing to racist attitudes prevalent in the justice system, including those of jury members."[41]

37. A 2017 Department of Justice study based on 25 interviews with Indigenous Courtworkers and lawyers also found support for the proposition that many Indigenous people, especially those with criminal records, plead guilty to "get it over with."[42] One participant said:

> Wrongful convictions happen every day in court when people are pleading guilty to things they didn't do because they're denied bail or their sense of responsibility is different from criminal responsibility and people are pleading guilty because they feel responsible for something even though they might not in fact be criminally responsible.[43]

38. While there is much we still do not know about wrongful conviction guilty pleas, we do know enough to be able to state with certainty that while this phenomenon is not restricted to Indigenous people, it does disproportionately impact them. This disproportionate impact occurs because of their unique circumstances and because of the systemic discrimination they experience in the criminal justice system. Wrongful conviction guilty pleas are another example of what *Gladue* called "the estrangement of the aboriginal peoples from the Canadian criminal justice system."[44]

D) The Role of the Judge on a Motion to Strike a Guilty Plea Brought by an Indigenous Accused Person

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[41] Hon Frank Iacobucci, *First Representation on Ontario Juries* at para 372 (Toronto: Ministry of the Attorney General, 2013) <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/iacobucci/First_Nations_Representation_Ontario_Juries.html>

[42] Angela Bressan and Kyle Coady *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017) at 10 < https://www.justice.gc.ca/eng/rp-pr/jr/gp-pc/gp-pc.pdf>

[43] *Ibid* at 9.

[44] *Gladue*, *supra* note 10 at para. 61

39. The repeated findings of discrimination faced by Indigenous people made by the Supreme Court and this Honourable Court place a particular responsibility on sentencing judges. In *Ipeelee* the Court stated:

> Sentencing judges, as front-line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination.[45]

40. As this Court noted in *Leonard*, systemic discrimination occurs not necessarily due to any overt malice or animus towards Indigenous people. In many cases the discrimination arises from the assumptions ground into the criminal justice system, either in the way substantive decisions are reached or in terms of how it functions on a daily basis.

41. In the sentencing context we know that judges prevent systemic discrimination from infecting the process by ensuring that they have the necessary information regarding the circumstances of the Indigenous offender. Counsel has a duty to provide the necessary information to the court. If counsel fails in that duty, the obligation rests with the sentencing judge to acquire such Indigenous-specific information as is necessary to properly apply Gladue principles. Absent an explicit waiver from the offender, the judge is required to obtain that information even if defence counsel make no submissions on that point. In Ontario, this is often done through requesting the preparation of a Gladue Report from a third party Indigenous service provider.

42. In the context of a motion to strike a guilty plea by an Indigenous accused person, the Gladue principles require the judge determining the motion to ensure that systemic discrimination does not have an impact on their decision.

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[45] *Ipeelee, supra* note 24 at para 67

43. The dictates of the Supreme Court in *Barton* referred to earlier in para. 19 of this factum, are equally applicable to the determination of a motion to strike. "..our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons…head-on."

44. In paragraph 83 of *Gladue* the Supreme Court set out the specific obligations of a sentencing judge:

> 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. However, for each particular offence and offender it may be that some evidence will be required in order to assist the sentencing judge in arriving at a fit sentence.

45. Applying this direction to a motion to strike would mean that the judge must ensure that contextual evidence regarding the circumstances of Indigenous people generally and with regard to wrongful conviction guilty pleas in particular are before the Court when considering the motion. General contextual information with respect to Indigenous people and the justice system can be the subject of judicial notice.

46. Of course, just as *Gladue* does not always mandate a different result in the final determination of a sentence, consideration of contextual evidence on wrongful conviction guilty pleas does not automatically mean that the motion to strike will be granted. It will always be necessary for counsel to submit evidence that explains why, in this particular case, this particular Indigenous accused person should have their plea struck.

47. The case at bar raises the question of what is required of a judge during a motion to strike application where counsel for the Indigenous accused person does not provide any evidence regarding systemic issues involving Indigenous people generally or the particular circumstances this Indigenous accused person.

48. It is the submission of the Intervenor that, at minimum, once the judge knows the person seeking to strike their plea is an Indigenous person, the Court has an obligation to inquire of counsel whether they will be making Gladue submissions in relation to the motion to strike. The determination of whether such submissions should be made cannot rest exclusively with defence counsel. This is not a tactical decision. Just as this Court found in *Kakekgamick*, the waiver of Gladue considerations must be explicit. If counsel indicates that they do not plan to make such submissions then the accused person themself, who may not be aware that Gladue applies to this particular type of motion, must make an informed decision on the record.

49. If counsel requires more time than initially anticipated to make Gladue submissions on a motion to strike, then a motion to adjourn the hearing to prepare such submissions should be granted. It must be recognized that considerations around the efficiency of the court, particularly as it relates to addressing matters in a timely manner, is yet another systemic barrier that Indigenous people face in the justice system.

50. A motion to strike hearing for an Indigenous person may well take longer than it would absent Gladue submissions, but that is a good thing. Taking more time is a recognition that business as usual means the perpetuation of systemic discrimination towards Indigenous people. Business as usual must be resisted if Indigenous people hope to receive something closer to justice than they currently receive.

51. *Brosseau* was a reflection of how the courts viewed and treated the concerns of Indigenous people navigating the criminal justice system in 1969. The justice system has learned a great deal since then, and this case provides an opportunity to put those learnings into practice.

PART IV – ORDER REQUESTED

52. ALS takes no position on the ultimate disposition of the matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th day of July, 2021.

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SCHEDULE "A" – AUTHORITIES TO BE CITED

Case Law

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Hon Frank Iacobucci, *First Representation on Ontario Juries* (Toronto: Ministry of the Attorney General, 2013)

Angela Bressan and Kyle Coady *Guilty Pleas among Indigenous People* (Ottawa: Department of Justice, 2017)

SCHEDULE "B" – RELEVANT LEGISLATIVE PROVISIONS

***Criminal Code of Canada*, RSC 1985, c C-46, s 742.1(c) and (e)(ii)**

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

(a) Aboriginal accused; and

(b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

FORM 4C

Courts of Justice Act

BACKSHEET

Charles Kennedy v Her Majesty the Queen

C66065

Court of Appeal for Ontario

PROCEEDING COMMENCED AT *Toronto, Ontario*

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RCP-E 4C (May 1, 2016)