SCC File No. 39227

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

BETWEEN:

CAMERON O'LYNN PARRANTO
ALSO KNOWN AS CAMERON O'LYNN ROCKY PARRANTO

APPELLANT

-and-

HER MAJESTY THE QUEEN

RESPONDENT

AND BETWEEN:

PATRICK DOUGLAS FELIX

APPELLANT

-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 Karakatsanis on March 26, 2021.

PART II – STATEMENT OF POSITION

2. Starting points occupy a very prominent place in the sentencing landscape in Alberta. While sentencing judges have the ability to depart from starting points,[1] if those sentences are appealed, the Alberta Court of Appeal (ABCA) is quick to find that the failure to sufficiently advert to and reflect a starting point is an error of law. Continued reliance by the ABCA on starting points has frustrated the ability of sentencing judges to reflect the direction of this Honourable Court in cases such as *Gladue*,[2] *Ipeelee*,[3] *Lacasse*,[4] and *Friesen*,[5] among others when sentencing Indigenous offenders.

PART III – LEGAL ARGUMENT

3. ALS will make two arguments with respect to the case at bar:

> A) The ABCA's continued reliance on starting points ignores significant legislative amendments and judicial decisions going back to 1996; and
>
> B) Reliance on starting points allows the Court to find errors of law to justify re-sentencing Indigenous offenders in a manner that is inconsistent with the direction from this Honourable Court.

The ABCA and *Gladue*

4. In 2016, the ABCA in *Okimaw*[6] reversed a 30-month sentence imposed on an Indigenous offender. The offender was convicted of aggravated assault and possession of a weapon for a dangerous purpose. The sentence was reduced to 21 months.[7]

5. In overturning the original sentence, the Court engaged in a deep and nuanced consideration of this Honourable Court's decisions in *Gladue* and *Ipeelee*. In its decision, the Court

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[1] *R v DAM*, 2019 ABQB 336, *R v Dennehy*, 2019 ABQB 912, *R v Yatchotay*, 2017 ABQB 679.
[2] *R v Gladue*, [1999] 1 SCR 688.
[3] *R v Ipeelee*, 2012 SCC 13.
[4] *R v Lacasse*, 2015 SCC 64.
[5] *R v Friesen*, 2020 SCC 9.
[6] *R v Okimaw*, 2016 ABCA 246.
[7] *R v Okimaw*, 2016 ABCA 246 at paras 3-4 and 93.

referred to *Gladue* over 50 times and to *Ipeelee* over 25 times – they also quoted extensively from *Ipeelee* on five occasions. At the end of the decision the Court stated: "Our hope…is that these reasons may succeed in providing a useful roadmap to sentencing judges when crafting a sentence for an Aboriginal offender."[8]

6. The ABCA has shown itself very able to engage in a careful application of *Gladue* and *Ipeelee* when not constrained by starting points. That changes when the Court self-imposes its starting point methodology.

7. This factum will examine three recent cases from the ABCA that show how starting points work to frustrate *Gladue* considerations - *Arcand*[9] from 2010; *Corbiere*[10] from 2017 and *Hilbach*[11] from 2020. Before this review however, it is important to examine the early starting point cases.

A. The Starting Point of Starting Points

8. The ABCA first embraced starting points in the case of *Johnas*[12] in 1982. In that case the court set a three-year starting point for unsophisticated armed robberies of stores where there is no actual violence and the offender obtains little or no money from the robbery.[13]

9. Three years later in *Sandercock*[14] the Court reiterated their support for the use of starting points. In that case they set the starting point for a major sexual assault at three years.[15] That starting point contemplates "a mature accused with previous good character and no criminal record."[16]

10. Both *Arcand* and *Hilbach* show that these starting points are alive and well in Alberta, 40 years after *Johnas* and 37 years after *Sandercock*.[17] The ABCA continues to cling to these

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[8] *R v Okimaw*, 2016 ABCA 246 at para 97.
[9] *R v Arcand,* 2010 ABCA 363.
[10] *R v Corbiere,* 2017 ABCA 164.
[11] *R v Hilbach*, 2020 ABCA 332.
[12] *R v Johnas*, 1982 ABCA 331.
[13] *R v Johnas*, 1982 ABCA 331 at para 19.
[14] *R v Sandercock*, 1985 ABCA 218.
[15] *R v Sandercock*, 1985 ABCA 218 at para 17.
[16] *R v Sandercock*, 1985 ABCA 218 at para 17.
[17] *R v Arcand*, 2010 ABCA 363 at para 169; *R v Hilbach*, 2020 ABCA 332 at para 46.

decisions as though they have talismanic power despite the huge changes to the sentencing landscape in Canada, both legislatively and judicially, over the past five decades.

11. Continuing to give these decisions great weight and power ignores the major sentencing changes in the *Criminal Code* enacted by Bill C-41 in 1996. This Honourable Court in *Gladue* and *Proulx* said that these changes were remedial in nature and thus required a reexamination of the entire sentencing edifice in Canada for all offenders.[18]

12. With respect to the sentencing of Indigenous offenders, the decisions in *Gladue* and *Ipeelee* make it clear that a different process must be undertaken. While such an approach may not lead to a different result, it may well do so, and these different results are not an exception to the principle of proportionality but a reaffirmation of the primacy of that principle.[19] Understanding proportionality in the context of sentencing of Indigenous offenders is essential given this Court's finding in *Barton* that "when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done."[20]

13. Starting points leave no real room for meaningful consideration of the circumstances of Indigenous offenders. At best, those circumstances may be seen as slightly mitigating.[21] But that is not what *Gladue* and *Ipeelee* require of sentencing judges. Understanding the lived realities of Indigenous people is not a matter of making minor adjustments to the way they are sentenced. It is not a slight recalibration that is required. Rather, as this Honourable Court made very clear in *Ipeelee*, it requires a different approach to sentencing.

> 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 sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.[22]

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[18] *R v Proulx*, 2000 SCC 5 at paras 16 – 20; *R v Gladue*, [1999] 1 SCR 688 at paras 33-34.
[19] *R v Ipeelee*, 2012 SCC 13 at paras 37, 38, 75.
[20] *R v Barton*, 2019 SCC 13 at para 199.
[21] *R v Corbiere*, 2017 ABCA 164 at para 29, 30; *R v Hilbach*, 2020 ABCA 332 at para 42, 48, 49.
[22] *R v Ipeelee*, 2012 SCC 13 at para 86.

14. This point was made again by this Court in *Ewert*[23] at para. 56:

> Parliament has recognized an evolving societal consensus that these problems must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views.

15. The ABCA's understanding of the binding nature of *Gladue* and *Ipeelee* is clear from *Okimaw*. That same understanding however is totally lacking when it engages its starting point methodology, as demonstrated by *Arcand, Corbiere* and *Hilbach*.

B. Errors of law, Re-sentencing and the Impact on Indigenous offenders

16. As this Court has noted in *Lacasse* and *Friesen*, the fact that a sentencing judge departs from a starting point is not, in and of itself, an error of law that allows an appellate court to revisit the sentence. Despite this determination, for the ABCA, it is the departure from the starting point that has become the error in law that justifies the re-examination of the initial sentence. Failure to properly advert to the relevant starting point opens the door for judicial review.

17. In *Arcand* and *Corbiere*, the ABCA itself arrived at a proportionate sentence that was below the starting point that they had previously set for the offence. It is unclear why the Court of Appeal's variance from the starting point is acceptable while that of the sentencing judges was not. What is clear however, is that the departure from the starting point creates the legal fiction to allow the ABCA to do what this Honourable Court has said appellate courts ought not to do - impose their own determination of what a fit sentence might be over that of the sentencing judge. This practice has a particular impact on the sentencing of Indigenous offenders.

18. In the three cases examined in this factum, *Arcand, Corbiere* and *Hilbach*, the ABCA adverts to the decisions in *Gladue* and *Ipeelee* but it is never clear why those cases are relevant. The direction by this Court to look for alternatives to imprisonment for Indigenous offenders is nowhere stated in the decisions although two of the cases involved intermittent sentences.

i. Arcand

[23] *Ewert v Canada*, 2018 SCC 30.

19. *Arcand* was an appeal of a 90-day intermittent sentence imposed on a youthful Indigenous first offender in a sexual assault. The five-judge panel that heard the case was expressly convened to provide direction to lower courts on the issue of starting points. The ABCA felt the need to provide direction to lower courts because they were concerned that sentencing had become such an individualized process that public confidence in the judicial system was diminishing.[24]

20. Anticipating this Court's decision in *Ipeelee* the ABCA found that proportionality was now "the *only* governing sentencing principle under the *Code*."[25] Proportionality ensured that "just sanctions" were imposed.[26] It made "…the blunt tool of punishment a valid and itself morally acceptable element of social order."[27] While the sentencing provisions of the *Code* include other measures found in sections 718.1 and 718.2 they are all part and parcel of proportionality.[28]

21. After 250 paragraphs discussing sentencing theory and legislative policy, the majority of the ABCA addressed the substantive issues in the case. Mr. Arcand was an 18-year-old first offender with a disrupted childhood, health problems and substance abuse issues. He had sought out counselling subsequent to the offence. An FACS report noted that he likely had impairments in a number of areas of mental functioning.[29]

22. Mr. Arcand was a member of the Fort Alexander First Nation. His case was referred to the local Justice Committee which expressed "strong support for the offender his sobriety and educational and cultural activities since the crime and recommended a community disposition." Other letters of support were provided to the court from a number of sources.[30]

23. The ABCA identified a number of errors of law in the original sentence.[31] Specifically the Court pointed out that the judge had failed to begin his analysis with the relevant three-year

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[24] *R v Arcand*, 2010 ABCA 363 at para 8.
[25] *R v Arcand*, 2010 ABCA 363 at para 47; Emphasis in original.
[26] *R v Arcand*, 2010 ABCA 363 at para 52.
[27] *R v Arcand*, 2010 ABCA 363 at para 54.
[28] *R v Arcand*, 2010 ABCA 363 at para 56-65.
[29] *R v Arcand*, 2010 ABCA 363 at para 257-258.
[30] *R v Arcand*, 2010 ABCA 363 at para 259.
[31] *R v Arcand*, 2010 ABCA 363 at para 265.

starting point.[32] As a result, denunciation was not properly considered. The Court found that denunciation not only affirms community values but also "serves the objective of maintaining the morale of the law-abiding."[33] The Court concluded that a fit sentence was two years less a day imprisonment and two years' probation.[34]

24. While the Court mentioned in a number of places that Mr. Arcand was an Indigenous person, the significance of this fact was never addressed.[35] Ignoring the direction in *Gladue* meant that the Court gave no weight at all to the recommendations of the justice committee for a community disposition. This approach is in stark contrast to the manner in which the Ontario Court of Appeal (ONCA) addressed the same issue in *Jacko*.[36]

25. *Jacko*, decided the same year as *Arcand*, reversed the decision of the sentencing judge to impose a penitentiary sentence where there was a strong recommendation by a community sentencing circle that a non-custodial sentence be imposed. The Court instead imposed a two-years less a day conditional sentence.[37] In arriving at this determination, the ONCA found the trial judge failed to give the necessary weight to recommendations of the sentencing circle and how those recommendations reflected the community's needs and sense of justice.[38]

26. In almost all respects the approach taken in *Jacko* contrasts with that in *Arcand*. Both cases involved youthful offenders, convicted after trial of crimes of violence where starting point sentences or ranges would otherwise have dictated a significant jail sentence. In both cases there were strong recommendations from the local Indigenous community for non-custodial sentences and in both cases the youth did exceptionally well in engaging meaningfully with the community recommendations. What distinguishes the two decisions is that the ONCA actively considered the application of *Gladue* to the case while the ABCA ignored the decision altogether. Indeed, the ONCA specifically referenced *Gladue* over 25 times. At para. 64 they found:

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[32] *R v Arcand*, 2010 ABCA 363 at para 287.
[33] *R v Arcand*, 2010 ABCA 363 at para 275.
[34] *R v Arcand*, 2010 ABCA 363 at para 296.
[35] *R v Arcand*, 2010 ABCA 363 at paras 12, 256.
[36] *R v Jacko*, 2010 ONCA 452.
[37] *R v Jacko*, 2010 ONCA 452 at para 100.
[38] *R v Jacko*, 2010 ONCA 452 at para 81.

> …in some instances of serious and violent crime, the length of a sentence of an aboriginal offender may be less than that imposed on a non-aboriginal offender…Serious crime and the objectives of restorative justice are not incompatibles in the sentencing process -- restorative justice objectives may predominate in the sentencing decision for aboriginal offenders convicted of serious crimes.

ii. Corbiere

27. Mr. Corbiere, an Indigenous offender, was sentenced at trial for drug trafficking and received a 90-day intermittent sentence. The ABCA, in 2017, overturned that sentence and imposed a one-year custodial sentence.[39]

28. In their decision, the Court specially adverted to *Lacasse* noting that appellate invention is only warranted when the sentence is demonstrably unfit or where the judge made an error of principle.[40]

29. As evidence of the disproportionate nature of the sentence, the court stated that "the offence was serious enough to attract the three-year starting point for commercial trafficking on more than a minimal scale."[41] The initial sentence improperly overemphasized rehabilitation and thus departed from the principle of proportionality.[42] The sentence also did not give adequate weight to the principle of general deterrence.[43]

30. *Corbiere* refers to the relevance of *Gladue* factors on a number of occasions.[44] Why these factors are relevant is never explained. One can understand why courts might not want to set out the principles in *Gladue* and *Ipeelee* in every decision they render involving the sentencing of an Indigenous offender, but one would expect that when an appellate court overturns a lower court decision that opts for a non-custodial, intermittent or conditional sentence for an Indigenous offender, that the ABCA would spend some time explaining why it was necessary to disregard the direction set by this Court in *Gladue* and *Ipeelee*.

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[39] *R v Corbiere,* 2017 ABCA 164 at paras 30-31.
[40] *R v Corbiere,* 2017 ABCA 164 at para 9.
[41] *R v Corbiere,* 2017 ABCA 164 at para 25.
[42] *R v Corbiere,* 2017 ABCA 164 at para 24.
[43] *R v Corbiere,* 2017 ABCA 164 at para 27.
[44] *R v Corbiere,* 2017 ABCA 164 at paras 10, 11, 26 and 29.

31. The Respondent points to para. 22 of *Corbiere* where the ABCA says that they do not foreclose the possibility of an intermittent sentence for this offence even with the three-year starting point.[45] But neither the Respondent nor the ABCA can point to a case where such a sentence has survived appellate scrutiny. Actions here speak much louder than words.

iii. Hilbach

32. Mr. Hilbach, an Indigenous offender, was sentenced for robbery with use of a firearm in 2020. The case is currently under appeal to this Honourable Court on the issue of whether the mandatory minimum for the offence violates s. 12 of the *Charter* as found by both the sentencing judge and the ABCA. For the purposes of this case however, what is relevant is the overturning by the ABCA of the sentence imposed by the trial judge following the striking down of the mandatory minimum.

33. At sentencing, the trial judge considered the Gladue issues relevant to Mr. Hilbach. The judge felt that a penitentiary sentence would have a profound impact on him and would likely lead to a reconnection with gang life and further involvement in the criminal justice system.[46] The judge determined that a fit and proportionate sentence was two years less a day.[47]

34. The ABCA overturned the decision and imposed a three-year sentence.[48] In determining the sentence was unfit the Court noted this Honourable Court's finding in *Friesen* that it is not an error in principle to depart from a range or starting point.[49] In the same paragraph however, the Court noted that the starting point established in *Johnas* was three years imprisonment.[50]

35. The error of law relied upon the by the ABCA was that the two year less a day sentence did not accord enough weight to the principles of deterrence and denunciation[51] and overemphasized *Gladue* factors.[52]

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[45] Factum of the Respondent, Her Majesty the Queen at para 71.
[46] *R v Hilbach*, 2020 ABCA 332 at para 12 – 13.
[47] *R v Hilbach*, 2020 ABCA 332 at para 4, 14.
[48] *R v Hilbach*, 2020 ABCA 332 at para 50.
[49] *R v Hilbach*, 2020 ABCA 332 at para 46.
[50] *R v Hilbach*, 2020 ABCA 332 at para 46; *Johnas* was cited by the ABCA 10 times in total in the decision.
[51] *R v Hilbach*, 2020 ABCA 332 at para 46.
[52] *R v Hilbach*, 2020 ABCA 332 at para 49.

36. Significantly, while the ABCA specifically cited paragraphs 26–29 and 37 of *Friesen*[53] they make no mention of those portions of the decision that specifically refer to *Gladue* and the sentencing of Indigenous offenders.[54]

37. As the ABCA noted, at the original sentencing at the Court of Queen's Bench,[55] the sentencing judge specifically alluded to the impact of a penitentiary sentence on a youthful Indigenous offender.[56] The sentencing judge's discussion of *Gladue* went much further however, and was based on a pre-sentence report and a Gladue Report.[57] He spent 11 paragraphs of the decision reviewing the information in those reports[58] and then concluded: "None of this background absolves Mr. Hilbach from responsibility for his actions, but it informs a fair assessment of the degree of his responsibility for those actions."[59]

38. In determining that the two year less a day sentence was in error, the ABCA did not address the *Gladue* issues raised in the case. There is no determination of why the particular weighing of those factors by the trial judge was in error.

39. In *Hilbach*, as in *Arcand*, the ABCA was concerned that the initial sentence did not sufficiently prioritize the principle of denunciation. In *Arcand* the Court noted that denunciation reflects community values[60] and in *Hilbach* the Court stated that denunciation needed to be accorded "significant importance."[61]

40. Unlike deterrence, denunciation does not serve utilitarian purposes. The relationship between denunciation and incarceration is not easy to determine nor is it linear. In *Proulx*,[62] this

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[53] *R v Hilbach*, 2020 ABCA 332 at paras 29 and 46.
[54] *R v Friesen*, 2020 SCC 9 at paras 92, 104, 124; see also *R v Truax*, 2020 ABCA 241. In *Truax*, the Court cites paragraphs 26-28, 30, 31, and 33 of *Friesen* but not the paragraphs that specifically refer to the sentencing of Indigenous offenders.
[55] *R v Hilbach*, 2018 ABQB 526.
[56] *R v Hilbach*, 2018 ABQB 526 at para 14.
[57] *R v Hilbach*, 2018 ABQB 526 at para 24.
[58] *R v Hilbach*, 2018 ABQB 526 at para 25-35.
[59] *R v Hilbach*, 2018 ABQB 526 at para 35.
[60] *R v Hilbach*, 2018 ABQB 526 at para 275.
[61] *R v Hilbach*, 2018 ABQB 526 at para 46.
[62] *R v Proulx*, 2000 SCC 5.

Honourable Court found that denunciation could be accomplished by way of a non-custodial measure, such as a conditional sentence.[63] In *Gladue*, this Honourable Court importantly noted that:

> [a] significant problem experienced by aboriginal people who come into contact with the criminal justice system is that the traditional sentencing ideals of deterrence, separation, and denunciation are often far removed from the understanding of sentencing held by these offenders and their community."[64]

41. Not surprisingly, the ABCA makes no mention of the findings in *Gladue* and *Proulx* in determining that the intermittent sentences imposed in *Arcand* and *Hilbach* were in error.

42. *Okimaw* shows that the ABCA is able to meaningfully engage with the sentencing of Indigenous offenders. It is difficult then to escape the conclusion that the only way the ABCA can overturn sentencing decisions such as *Arcand, Corbiere* and *Hilbach* is not just by prioritizing starting points over *Gladue* and *Ipeelee*, but by acting as though those decisions simply do not exist. It is also clear however, that reliance on starting points continues to blind the ABCA when they arise in the context of the sentencing of Indigenous offenders. If the Court of Appeal is not capable of removing those blinders themselves, we urge that this Honourable Court to do it for them.

PART IV – POSITION ON COSTS

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

PART V – ORDER

44. ALS takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th day of April 2021.

for

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[63] *R v Proulx*, 2000 SCC 5 at para 22.
[64] *R v Proulx*, 2000 SCC 5 at para 70; See also *Ewert v Canada*, 2018 SCC 30 at para 57.

PART VII – TABLE OF AUTHORITIES

AUTHORITIES	AT PARA
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R v Hilbach, 2020 ABCA 332	7, 10, 13, 15, 18, 33-37, 42, 43
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R v Lacasse, 2015 SCC 64	2, 16, 29
R v Okimaw, 2016 ABCA 246	4, 5, 43
R v Proulx, 2000 SCC 5	11, 41
R v Sandercock, 1985 ABCA 218	9, 10
R v Truax, 2020 ABCA 241	37
R v Yatchotay, 2017 ABQB 679	2