Court File #C67830

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT

AND:

DALE KING

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 Associate Chief Justice Fairburn.
2. This case will allow this Honourable Court to consider, for the first time, the need to factor the *Gladue* principles to *Corbett* applications when the accused person is Indigenous.

PART II – SUMMARY OF THE FACTS

3. ALS will not be relying on any of the facts of the case for the purposes of its intervention.

PART III – ISSUES AND THE LAW

4. In addressing how to factor the *Gladue* principles to *Corbett* applications, ALS will:
    a. Discuss the relevant caselaw from the Supreme Court of Canada and this Honourable Court regarding the applicable *Gladue* principles;
    b. Analyze how the inclusionary and exclusionary aspects of *Corbett* need to change where the accused person is Indigenous; and
    c. Propose a framework that trial judges can use when determining whether to include or exclude evidence of the prior criminal record of an Indigenous accused person.

A. The relevant caselaw on the applicable Gladue principles

5. *Gladue* principles capture a developing understanding by the courts that Indigenous people face direct and systemic discrimination within the criminal justice system. The principles encompass decisions from the Supreme Court over the past twenty-three years in *R v.*

Williams,[1] *R v Gladue*[2], *R v Ipeelee*,[3] *Ewert v Canada*,[4] and *R v Barton*.[5] These findings have been expanded upon by appellate courts, including this Honourable Court.

6. The first time the Supreme Court addressed the issue of discrimination faced by Indigenous people in the justice system was in *Williams*. That case focused specifically on racist stereotypes held by potential jurors towards Indigenous people. Significantly, with respect to the issues in this case, the Court found:

> … Racism against aboriginals includes stereotypes that relate to credibility, worthiness and criminal propensity. As the Canadian Bar Association stated…:
>
> > 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]

7. The Supreme Court has held that the 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.* Over a decade later, after the Court found this discrimination remained prevalent, they were even more direct in *Ipeelee* stating:

> [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

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[1] *R v Williams*, [1998] 1 SCR 1128, 1998 CanLII 782[*Williams*].
[2] *R v Gladue*, [1999] 1 SCR 688, 1999 CanLII 679 [*Gladue*].
[3] *R v Ipeelee*, [2012] 1 SCR 433, 2012 CanLII 13[*Ipeelee*].
[4] *Ewert v Canada*, [2018] 2 SCR 165, 2018 CanLII [*Ewert*]
[5] *R v Barton*, [2019] 2 SCR 579 2019 CanLII 33 [*Barton*].
[6] *Williams*, *supra* note 1 at para 58.

> abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.[7]

8. In *Ewert*, the Court found that in the 20 years since *Williams*, little had changed with respect to the discrimination faced by Indigenous people:

> 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...[8]

9. A year after *Ewert* and twenty-one years after *Williams*, the Supreme Court took the opportunity, in *Barton*, to look again at how jurors viewed Indigenous people. It found:

> 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… [T]his 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.[9]

10. The Court concluded its analysis in *Barton* stating bluntly: "when it comes to truth and reconciliation from a criminal justice system perspective, much-needed work remains to be done."[10]

11. This Honourable Court has also recognized the systemic and direct discrimination Indigenous people face in the criminal justice system. Of particular relevance to the case at bar are the decisions in *United States v Leonard*[11] and *R v C.K.*[12]

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[7] *Ipeelee*, *supra* note 3 at para 60.
[8] *Ewert*, *supra* note 4 at para 57. See also *Ipeelee*, *supra* note 3.
[9] *Barton, supra note 5* at paras 198-200.
[10] *Ibid* at para 199.
[11] *United States v. Leonard*, 2012 ONCA 622 [*Leonard*].
[12] *R. v. C.K.*, 2021 ONCA 826 at 53 [*C.K.*].

12. In *Leonard* this Court stated:

> …*Gladue* factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances.[13]

13. Following a review of its earlier decisions in cases such as *R v Sim*,[14] *R v Robinson*[15], and *Frontenac Ventures* and *Ardoch Algonquin*[16] the Court in *Leonard* concluded:

> …the *Gladue* factors are not limited to criminal sentencing but… they should be considered by all "decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system" whenever an Aboriginal person's liberty is at stake in criminal and related proceedings.[17]

14. In 2021, in *C.K.* this Honourable Court took judicial notice of the fact that Indigenous accused persons are more likely than non-Indigenous accused to plead guilty to offences that they did not commit. The Court found:

> The proposition that Indigenous accused persons plead guilty at higher rates than non-Indigenous accused persons is an important observation, since it adds credence to the suggestion that the experiences of Indigenous persons may influence the decision to plead guilty. Moreover, if a disproportionately high number of Indigenous accused persons plead guilty, this can only exacerbate the relative overincarceration of Indigenous persons in Canadian custodial settings.
>
> […]
>
> Given the central purpose for which judicial notice is to be used in this case, a high level of reliability or trustworthiness is needed before judicial notice can be taken. I would conclude that this high level is met…

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[13] *Leonard*, *supra* note 11 at para 60.
[14] *R. v. Sim*, (2005 ONCA 37586.
[15] *R. v. Robinson*, (2009) ONCA 205.
[16] *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, (2008) ONCA 534.
[17] *Leonard*, *supra* note 11 at para 85.

> […]
>
> In my view, reasonable people who have taken the trouble to inform themselves would accept that the proposition that Indigenous persons tend to plead guilty at materially higher rates than non-Indigenous persons is reliable and trustworthy enough to be judicially noted...[18]

15. 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.[19]

16. The cumulative weight of caselaw from the Supreme Court and this Honourable Court shows there is now a positive duty on trial judges to understand and apply the *Gladue* principles in order to address the chronic injustices and systemic barriers continuously faced by Indigenous people in all aspects of the criminal justice system. What that duty entails will depend on where in the justice continuum the issue arises.

B. The Conceptual Framework for Corbett Applications for Indigenous Accused Persons

17. The Supreme Court's decision in *R v Corbett*[20] addressed two distinct but related issues. First, it provided an inclusionary rationale for allowing prior convictions to be put to an accused person when they are a witness.[21] Second, it also provided an exclusionary rationale for prohibiting certain prior convictions from being put to an accused person.[22]

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[18] *C.K.*, *supra* note 12 at paras 57 58, 63.
[19] *Ipeelee*, *supra* note 3 at para 67.
[20] *R. v. Corbett*, [1988] 1 SCR 670 [*Corbett*].
[21] *Ibid* at paras 22-25.
[22] *Ibid* at paras 28-31, 99-101, 117-119, 166-168.

18. The inclusionary rationale in *Corbett* is that prior convictions are relevant because they can assist jurors in assessing the credibility of the accused person as a witness.[23] While offences of dishonesty or disobeying court orders may most directly be relevant to assessments of credibility, it is certainly possible that other convictions can also assist the jury in this regard.

19. The exclusionary rationale in *Corbett* is an acknowledgement that the evidence of certain prior convictions could lead jurors to use those convictions not as a basis to assess credibility, but rather to determine the propensity of the accused person to commit the offence for which they are being tried. If a prior offence could lead the jury to propensity reasoning, then a judge should exclude that evidence, even though it could also help jurors assess credibility.[24]

20. The determination of whether to include or exclude prior convictions is a matter for the trial judge to determine based on their assessment of the issues at play in the trial.[25] Different judges may weigh the factors differently. Considerable deference is to be granted to the decisions of trial judges on these questions.[26]

21. When *Gladue* principles are factored into *Corbett* decisions - as they must be and as recognized by the crown in their factum[27] - they raise concerns both to the inclusionary question – whether the prior convictions help at all with credibility assessments – and the exclusionary question – what sort of convictions might lead to propensity reasoning.

i. Credibility through a Gladue lens

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[23] *Ibid* at para 22.
[24] *Ibid* at paras 51-52, 57, 99-101, 117-119, 166-168.
[25] *Ibid* at paras 52, 57, 65, 115, 136, 145, 173.
[26] Peter Sankoff, "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007) 42 Queen's LJ 487 at paras 18-20, (pdf) (QL).
[27] Factum of the Appellant at para 74 [FOA].

22. The *Gladue* principles require an examination of the inclusionary principle as it relates to prior convictions for Indigenous accused persons. Much of the discussion below regarding propensity also applies to credibility concerns, because the pernicious perception of Indigenous people as prone to criminality encompasses a belief that Indigenous people would be more prone to dishonesty.

23. The decision of this Honourable Court in *C.K.* is particularly relevant to this discussion. As noted above, in *C.K.,* the Court found that wrongful conviction guilty pleas were a particular circumstance of Indigenous people that judges could take judicial notice of.[28]

24. The reason that *Corbett* permits trial judges to allow the introduction of prior convictions is because they can assist the jurors in assessing credibility. In order for the prior convictions to be of assistance, however, those prior convictions must provide evidence of actual guilt. There can be no relevance to the admission of a wrongful conviction guilty plea because it does not assist in the determination of the credibility of the accused. To the contrary, its admission could lead jurors to exactly the wrong conclusions on credibility. Wrongful conviction guilty pleas do not speak to the person's credibility, rather they speak to the systemic biases in the criminal justice system.[29]

25. Wrongful conviction guilty pleas for Indigenous people raise a distinct concern in the *Corbett* analysis. It's not that these convictions should be excluded because they lead to propensity reasoning. Rather, they should be excluded because they do not speak to credibility at all. Someone who pleads guilty to an offence that they are not guilty of tells a juror nothing about the person's credibility.

[28] *C.K., supra* note 12 at para 63.
[29] *Ibid* at paras 86-87.

26. A concern by the trial judge that a prior conviction may actually be a wrongful conviction guilty plea, which could then lead to inappropriate credibility reasoning on the part of jurors, should be a distinct ground under *Corbett* for excluding evidence of such convictions.

27. At paragraph 84 of their factum, the Crown raises concerns regarding the possible differential treatment of prior convictions for dishonesty by an Indigenous accused person using a *Gladue* analysis as opposed to the treatment of similar offences by a *Vetrovec* witness.

28. It is ALS's position that the same reasoning that applies to Indigenous accused persons in the *Corbett* analysis should also be applied to Indigenous Crown witnesses where defence counsel seeks to have the court provide a *Vetrovec* warning with respect to their testimony.

ii. Propensity through a Gladue lens

29. Is there a reason why a judge might exclude prior convictions for an Indigenous person where they would not exclude those same prior convictions for a non-Indigenous person? The answer to that question can be found in two of the Supreme Court decisions discussed above - *Williams* and *Barton*.[30]

30. It is beyond dispute that the general public holds biases against Indigenous people – seeing them as having a propensity towards violence, criminality and addictions. The Supreme Court first made this point in *Williams* and has never resiled from that position. Accordingly, it is both permitted and proper for trial judges to take judicial notice of this fact.

[30] *Williams*, *supra* note 1; *Barton*, *supra* note 5.

31. In *Barton* the Supreme Court addressed biases specifically against Indigenous women which saw them as having a propensity for immoral behaviour and addictions. While the issue in *Barton* were the assumptions jurors held towards Indigenous women as victims of crime, that propensity reasoning would apply equally, if not more so, to an Indigenous woman as an accused person.[31]

32. *Barton* and *Williams* show that when an Indigenous accused person is on trial, jurors will often come to the case believing that Indigenous people have a general propensity for crime. Under those circumstances it may become necessary for the trial judge to exclude more prior convictions to prevent reliance on propensity reasoning. It is important to note that these are case by case, fact-driven decisions. Whether or not a judge would come to the same conclusion if the accused person was non-Indigenous is not the issue. The Supreme Court's finding in *Ipeelee* is as relevant in the *Corbett* context as it is in 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.[32]

33. If an Indigenous accused person were charged with an offence that did not involve any of the *Williams/Barton* stereotypical assumptions, then considerations regarding propensity reasoning might be different. Being Indigenous in itself does not invoke the exclusionary principle. It is a case-by-case analysis and involves the trier of fact paying particular

[31] *Barton, supra* note 5 at paras 195-201.
[32] *Ipeelee, supra* note 3 at para 86.

attention to the nature of the offences on the Indigenous accused person's criminal record.

C. Applying the Modified Corbett Framework

34. As with the discussion regarding the contextual framework of *Corbett*, applying that framework also requires the court to look at the mischief the introduction of a prior criminal record may have in a particular case involving an Indigenous accused person. That analysis will be differ depending on whether the concern is with prior convictions that relate to credibility or propensity. If the concern is that the prior record may lead to incorrect reasoning regarding credibility, then one type of analysis is required. If the concern regarding the prior criminal record is that it may lead to propensity reasoning, then another type of analysis is necessary.

i. The modified credibility analysis

35. In *C.K.*, this Court found that wrongful conviction guilty pleas were a particular circumstance of Indigenous people that judges can take judicial notice of. In the credibility context then, the concern for an Indigenous accused person would focus solely on those offences for which they pled guilty. A finding of guilt after a contested hearing should be allowed to be put to the Indigenous accused person because those convictions do not give rise the concerns expressed in *C.K.*

36. The reason *Corbett* permits prior convictions to be put to the accused person as a witness is because they can speak to credibility. A wrongful conviction guilty plea, by its very definition, is not indicative of guilt. Allowing jurors to assess credibility based on what may be wrongful conviction guilty pleas would not only be counter-productive, it would embed the pernicious aspects of systemic racism deeper into the criminal justice system.

37. The Court in *C.K.* accepted the fact that Indigenous people plead guilty out of the despair they face when navigating the criminal justice system.[33] Requiring an Indigenous accused person to explain before the jury that a prior conviction was a wrongful conviction guilty plea, would entail asking why the person mislead the court on an earlier occasion. This line of questioning puts the Indigenous accused person in a Catch-22 predicament. If they testify that they pled guilty to an offence they did not commit, they will then be asked why they lied to the court at that time by admitting the facts of an offence that did not occur. Their credibility will thus be before the jury in any event.

38. In addition, it is now well known that the general public does not understand how someone could plead guilty to an offence they did not commit. The only way to ensure that jurors do not improperly rely on what may be a wrongful conviction guilty plea is for the judge to exclude evidence of the prior convictions.

39. It is incumbent upon defence counsel in cases such as this, to indicate to the court prior to the Indigenous person taking the stand that they wish to have prior convictions that could go to credibility excluded from cross examination. It would then be necessary for counsel to introduce evidence, either through transcripts or from the Indigenous accused person themselves at a *voir dire*, that those prior convictions were in fact guilty pleas and not findings that were made after a determination on the merits of the case.

ii. **The modified propensity analysis**

40. Under the *Corbett* analysis trial judges are given significant leeway in determining whether the admission of a prior criminal record for an offence might lead jurors to propensity reasoning. The process that a trial judge needs to go through to make that

[33] *C.K., supra* note 12 at para 64.

determination does not require the production of significant evidence. The determination of whether a prior conviction may lead to propensity reasoning is something that is left to the trial judge to determine based on their experience.[34]

41. The process of determining whether to exclude particular prior convictions in order to avoid propensity reasoning should not differ significantly when the accused person is Indigenous. What is different when the accused person is Indigenous is that the judge must explicitly advert to the fact that jurors can and do see Indigenous people as having a propensity for crime, particularly crimes of violence and for addictions. Counsel for the Indigenous accused person need not provide any additional information as to why a jury would be inclined to engage in this sort of propensity reasoning.

42. As is the case generally, the issue of what offences might lead to propensity reasoning will depend on the offences that the person is charged with.[35] For example, if the Indigenous accused person is charged with a crime of violence in a setting where alcohol or drugs were involved, then the concerns expressed by the Supreme Court in *Williams* and subsequent cases would clearly be engaged. It would not be expected that counsel would need to do more than to tell the trial judge that they wish this evidence excluded because their client is Indigenous and that particular prior convictions will likely lead to propensity reasoning.

[34] *Corbett*, supra note 20 at paras 52, 57, 65, 115, 136, 145, 168, 173.
[35] *Ibid* at paras 153-162,

iii. The Need for a Modified Corbett Analysis is not Rebutted by Reliance on Jury Impartiality

43. In their factum, the Crown recognizes that trial judges must take note of the widespread racism and systemic discrimination that Indigenous people face in the justice system.[36] They nevertheless dismiss the need for any modifications to the *Corbett* analysis relying heavily on the "strong presumption" of impartiality of jurors and trusting them to carry out their duty without any bias or "lapse into racist reasoning."[37]

44. Central to the Crown's argument is the decision of the Supreme Court in *Kokopenace*. In that regard particular attention is placed on the Court's finding at para. 53 that:

> …the jury selection process contains numerous safeguards that are designed to weed out potentially biased individuals and ensure that the jurors who are selected for the petit jury will judge the case impartially[38].

45. *Kokopenace* is concerned with the issue of the representativeness of the jury pool as opposed to the impartiality of particular jurors. [39]

46. *Kokopenace* does not provide a "strong presumption" of impartiality. The case is focused solely on the procedures in place in the selection process for those who will be part of the jury pool. The selection of the jury pool is only the first step in a process that concludes with attempting to ensure the impartiality of the individual jurors selected for the particular trial.

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[36] FOA, *supra* note 27 at para 74.
[37] *Ibid* at para 75.
[38] *R. v. Kokopenace*, [2015] 2 SCR 398 at para 53.
[39] *Ibid* at para 51.

47. The Court in *Kokopenace* was well aware that an impartially selected jury pool provided no guarantees of impartial jurors. This is clear in paragraph 53 of the decision which specifically references para 47 in *Williams* which stated:

> …the right to challenge for cause, in cases where it is shown that a realistic potential exists for partiality, remains an essential filament in the web of protections the law has woven to protect the constitutional right to have one's guilt or innocence determined by an impartial jury.

48. The finding in *Williams* that is reflected in *Kokopenace* is, of course, subject to the ultimate finding in *Williams* at para. 58 that, "There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system."[40]

49. *Corbett* recognizes that even with challenges for cause, there is a need to ensure that some prior convictions of the accused should not be put before the jury. La Forest found in *Corbett* that there is no academic or empirical evidence that jurors have not used prior conviction evidence as evidence of guilt, however there is evidence that they have.[41]

iii. The Modified Corbett Analysis Addresses a Legal Problem, Not a Social Problem

50. The Crown in their factum misapprehends the relevance of the *Gladue* principles. They state:

> *Gladue* factors will impact the admissibility analysis under *Corbett* only if they affect the probative value or prejudicial impact of admitting a past conviction. They should not be imported into the *Corbett* analysis as redress for past disadvantages experienced by an Indigenous accused, or as a free-standing remedy for the broader social problems of over-policing and overincarceration.[42] Disadvantages experienced by Indigenous accused persons are irrelevant to measuring the probative value of their past

[40] *Williams, supra* note 1 at para 58.
[41] *Corbett, supra* note 20 at para 128.
[42] FOA, *supra* note 27 at para 72

> convictions unless they rebut the "specific inferences sought to be drawn" from those convictions.[43]

51. The reason why the *Gladue* principles must be applied to the *Corbett* analysis is not to remedy social problems or disadvantages faced by Indigenous accused persons, but rather to acknowledge the continuing impacts of systemic discrimination faced by Indigenous people in the justice system. The prejudices and biases the Supreme Court recognized in *Williams* in 1998 and *Barton* in 2019 have not disappeared. Courts that fail to acknowledge the reality that jurors may still harbour a belief that Indigenous people have a greater propensity to commit crimes are perpetuating the problem that the Supreme Court has repeatedly decried.

PART IV – ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st day of January, 2022.

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[43] *Ibid* at para 80

SCHEDULE "A" – AUTHORITIES TO BE CITED

Case Law

Ewert v Canada, [2018] 2 SCR 165, 2018 CanLII

Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, (2008) ONCA 534

R v Barton, [2019] 2 SCR 579 2019 CanLII 33

R. v. C.K., 2021 ONCA 826 at 53 [*C.K.*]

R. v. Corbett, [1988] 1 SCR 670

R v Gladue, [1999] 1 SCR 688, 1999 CanLII 679

R v Ipeelee, [2012] 1 SCR 433, 2012 CanLII 13

R. v. Kokopenace, [2015] 2 SCR 398, 2015 CanLII 28

R. v. Robinson, (2009) ONCA 205

R. v. Sim, (2005 ONCA 37586

United States v. Leonard, 2012 ONCA 622

R v Williams, [1998] 1 SCR 1128, 1998 CanLII 782

Secondary Sources

Peter Sankoff, "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007) 42 Queen's LJ

SCHEDULE "B" – LEGISLATIVE PROVISIONS

Canada Evidence Act, R.S.C., 1985, c. C-5, s 12.

12 (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.

FORM 4C

Courts of Justice Act

BACKSHEET

R v. King

Court file no. C67830

Court of Appeal for Ontario

PROCEEDING COMMENCED AT *Toronto, Ontario*

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