



# THE GR COURT DOCKET

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## NEED FOR ADMINISTRATIVE TRIBUNAL TO APPLY *GLADUE* PRINCIPLES REJECTED

**By Stephen Thiele**

On June 19, 2015, the Ontario Divisional Court in *Desmoulin v. Criminal Injuries Compensation Board*<sup>1</sup> rejected a bid by an Aboriginal victim of crime to require the Criminal Injuries Compensation Board (the “Board”) to apply what have become known as the *Gladue* principles when assessing whether an Aboriginal victim should or should not be entitled to compensation in circumstances where such a victim has a subsequent criminal record.

In this appeal, the Board had determined that even though an applicant of Aboriginal heritage had been a victim of crime during an 11-month stay at the St. Joseph’s Training School in Alfred, Ontario, he was disentitled to any compensation because he had committed violent acts of crime against others afterward. At the time of the victim’s residency at the training school in 1965-66, the victim was 13-years old.

One of the main grounds of appeal was that the Board in refusing to award the victim compensation had failed to take into account the *Gladue* principles or, in other words, had failed to take into account the fact that the victim was an Aboriginal.

The *Gladue* principles were established in the context of criminal law. In essence they require that where an Aboriginal is found guilty of a crime, the court in considering the appropriate sentence must take into account the unique experiences of the Aboriginal

offender and its difference from that of non-aboriginal offenders. The purpose behind the *Gladue* principles was to address a concern that Canada’s Aboriginal population represents a disproportionate and identifiable group of all those who are incarcerated in Canadian prisons.

As described in the reasons of the Divisional Court, the victim had submitted before the Board that he was a victim of crime as a result of being assaulted throughout his 11-month residency at the training school. The victim told the Board that he had been punched in the jaw and the head, and was often struck in the arms and legs. He further described that he had been smacked in the face, made to kneel all afternoon, handcuffed, and during recess, forced to stand facing the wall. The victim also described that he was “repeatedly” beaten for running away, prevented from going to the washroom, placed in segregation, forced to sleep on the floor, stand to eat and scrub the floor on his knees with a toothbrush. On occasion, he told that the Board that he had been forced to watch sexual assaults on other students at the school as well.

The Board accepted that the victim was a victim of a crime of violence for some of the acts complained about, but, applying s. 43 of the *Criminal Code*, not all of them.

Section 43 of the *Criminal Code* provides:

Every schoolteacher, parent or person standing in the place of a

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1. 2015 ONSC 2696



parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Upon concluding that the applicant was a victim of crime under s. 5 of the *Compensation for Victims of Crime Act*, the Board was then required to determine whether the victim should get compensation, a reduced amount of compensation or no compensation at all, considering all relevant circumstances.

The evidence before the Board was that following his release from the school the victim had been convicted of several crimes. As set out by the Divisional Court, quoting from the decision of the Board, the victim's criminal record included 7 convictions for assault, 5 convictions for assault causing bodily harm, 2 convictions for possession of a weapon, 2 convictions for assault with a weapon, 2 convictions for uttering threats and 1 conviction for forcible entry.

The victim urged the Board to not reject his application for compensation and specifically submitted that the Board should take into his cultural heritage when weighing the pain and suffering he allegedly endured as a result of being a victim of crime against his criminal record.

The Divisional Court concluded that the Board committed no error of law in failing to refer specifically to the *Gladue* principles or the caselaw applying them which suggested that it would be appropriate to traverse the ideas contained therein to a determination of the Board, which was a form of civil remedy.<sup>2</sup>

The court noted, however, that this finding was not to say that the Board should not consider the impact of the cultural

background and travails of Canada's aboriginal population in considering the role that a criminal record should play when conducting its analysis under s. 17(1) of the Act.<sup>3</sup> Indeed in this case, the Board stated in its reasons:

The Appellant's lawyer urged the Panel to consider the Applicant's conduct within the exacerbating context of his having been sent to St. Joseph's for a minor incident (involving property damage) in which he denied any direct involvement, that the Alleged Offenders disparaged the Applicants' (sic) parents and Aboriginal community while he was at the institution, and that while the Applicant should bear some responsibility for his subsequent criminal conduct, the state was also partly responsible for the Applicant's criminal conduct.<sup>4</sup>

The Board then concluded:

As urged by the Applicant's lawyer, in determining whether to refuse to reduce an award the Panel balanced the proportionality of the compensable abuse suffered by the Applicant, and the physical and emotional injuries he suffered and the factors which exacerbated the severity of the abuse and the nature of his injuries, against the Applicant's victimization of others, which is a "relevant circumstance" as per section 17(1) of the Act. In weighing these factors, the Board finds that the extent of the Applicant's extensive convictions for very violent crimes (and his creation of unknown numbers of victims thereof) outweighs the relatively moderate crimes of violence committed against him and injuries which can reasonably

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2. Para. 29

3. Para. 31

4. Para. 31



be attributed thereto. As a result, the Board does not consider the provision of compensation to the Applicant out of public funds for a pain and suffering award, or for any counselling expenses, to be reasonable under the Act and this claim is denied in its entirety.<sup>5</sup>

The Divisional Court concluded that the Board's decision demonstrated that it did not do anything other than consider the evidence and properly apply its discretion under the Act.

On this appeal, the Board was represented by Gardiner Roberts LLP Partner, David Fine, who was assisted by Partner and Director of Legal Research, Stephen Thiele.

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5. Para. 32

