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Criminal

Alberta Court of Appeal reduces sentence for sexual offences on Gladue analysis

By **Jeff Buckstein**

(September 15, 2022, 11:53 AM EDT) -- Failure of the lower court to conduct a *Gladue* analysis resulted in the Court of Appeal of Alberta reducing the sentence of a man convicted of nine sexual offences against two underaged girls. The decision announced on Sept. 2 in *R. v. Dichrow*, 2022 ABCA 282 reduced the global sentence of Tyson Dichrow from eight years to seven years.

Dichrow, who was 24 when the offences were committed between October 2017 and January 2018, was convicted in the provincial court of Alberta [*R v. Dichrow*, 2020 ABPC 58] of invitation to sexual touching, luring, distributing sexually explicit material, sexual interference, sexual assault and possession of child pornography against the victim identified anonymously as AB. He was convicted of invitation to sexual touching, luring and distributing sexually explicit material against the victim identified as CD. Both girls were 13 years old.

The global sentence of eight years imposed by sentencing Judge Bruce Fraser in *R. v. Dichrow* 2020 ABPC 224 included six years for invitation to sexual touching, sexual assault and sexual interference against victim AB to run concurrently, plus an additional two years for the other offences — one year each for the offences against AB and CD, with several of the one- year sentences to run concurrently.

Dichrow appealed his sentence on two grounds. He claimed the eight-year sentence was demonstrably unfit, most significantly due to the principle of parity, exacerbated by the trial judge's failure to consider *Gladue* factors, given his Indigenous heritage as a Métis person. He requested that a reduced five-year sentence be substituted. Second, his counsel argued that the sentencing judge erred in law by double counting aggravating factors, and by also failing to take a "last look" at the sentence to determine whether it was a "crushing sentence."

With respect to the fitness of the sentence, the Court of Appeal found that while six years for sexual assault/sexual interference was at the high end of the sentencing range, it was not unreasonable given that there had been multiple sexual encounters with AB, and she experienced significant harm. The sentencing judge cited depression, anxiety, suicidal ideation, fears for her safety, self-harm and becoming anti-social and reclusive, among other impacts.

The Court of Appeal ruling, signed by Justices Peter Martin, Sheila Greckol and Anne Kirker noted that "the fitness of the sentence received by Mr Dichrow must take into account what effect, if any, his Indigeneity had on his moral culpability for these offences. As noted in *Gladue* at para 75, 'the effect of s. 718.2(e) ... is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders', requiring as it does 'that sentencing determinations take into account the unique circumstances of aboriginal peoples.' "

The ruling stated that "to the extent the sentencing judge suggested a *Gladue* analysis was not required because Mr. Dichrow is not Aboriginal, this was clearly an error. The sentencing judge himself adverted to Mr. Dichrow's Métis lineage, and this alone is sufficient for *Gladue* to apply."

Moreover, the fact that Dichrow had been estranged from his Aboriginal heritage or a particular Aboriginal community, as noted in the sentencing judge's decision, was no reason to ignore *Gladue* considerations. The Court of Appeal said the sentencing judge appeared to have treated Dichrow's "disconnection from his Aboriginal heritage as a reason to avoid the challenge the *Gladue* analysis in his case presents."

It had, therefore, been incumbent on the sentencing judge to consider the unique systemic and background factors in Dichrow's heritage that may have played a part in bringing him before the court to face the sexual offence charges against him, said the Court of Appeal.

The decision noted the trial judge had applied as mitigating factors that Dichrow had suffered sexual abuse as a child and had no prior criminal record.

With respect to the global sentence, the Court of Appeal referenced section 718.2(c) of the *Criminal Code*, which states "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh." The court said, "The failure of a sentencing judge to consider statutory totality when s 718.2(c) is engaged constitutes an error in principle. ... However, in our view, the sentencing judge did consider statutory totality in arriving at the eight-year sentence. Accordingly, no error in principle was committed."

The ruling stated that, "The global sentence had to be a minimum of seven years' imprisonment, at least based on the individual sentences adopted by the sentencing judge."

It listed mandatory minimum sentences for certain offences under the *Criminal Code* that had to be taken into account in sentencing, including a minimum of one-year imprisonment for conviction upon invitation to touch as well as for luring, and of six months for the distribution of sexually explicit material to a child under the age of 16.

"The eight-year global sentence advocated by the Crown and adopted by the sentencing judge was itself premised on statutory totality having already been considered," said the decision. "This was done by running certain sentences concurrently that would otherwise be consecutive (e.g., luring) and asking for only a one-year sentence on each of the luring, distribution and possession offences notwithstanding that higher sentences would have been appropriate."

The Court of Appeal noted that the sentencing judge "did inappropriately double count the fact that Mr Dichrow had provided CD with explicit sexual photos of himself." That was found to be an aggravating factor both in the context of the sexual assault/sexual interference offences against AB, and it also formed the basis of the distribution conviction in relation to CD. However, the court said that this "did not affect the sentence, or render it unfit, since it was entirely absent from the reasons given for increasing the sentence."

Therefore, no appellate intervention was required on that ground of appeal.

The Court of Appeal also found that the principle established in the Supreme Court decision *R. v. Kienapple* [1975] 1 S.C.R. 729, commonly known as the rule against multiple convictions, was not applied as it should have been, to stay the conviction for sexual assault, given there was also a conviction for sexual interference.

C. John Hooker, Craig Hooker Shiskin Criminal Defence

However, it noted that as those two six-year sentences ran concurrently, the misapplication of *Kienapple* did not impact the global sentence.

"The appeal raised technical issues about statutory totality, the double counting of aggravating factors, and application of the *Kienapple* principle. The court provides valuable guidance on these points that may assist lawyers and judges in future cases," said C. John Hooker, a principal with Craig Hooker Shiskin Criminal Defence in Calgary, and counsel for Dichrow.

The most instructive point for lawyers and judges in Alberta relates to the court's consideration and application of *Gladue* factors. While the sentencing judge relied on Dichrow's disconnection from his Aboriginal heritage to decline to apply the principles in *Gladue*, in allowing the appeal, the Court of Appeal provided an exceptional analysis of *Gladue*, instructing sentencing judges to take judicial notice of the "big picture," said Hooker.

"They cautioned that sentencing courts continue to 'wrongly suggest' that there must be a direct causal link between *Gladue* factors and a specific offence," he explained.

Hooker said he believed the court correctly took into account the systemic *Gladue* factors unique to Dichrow. These included family members having struggled with mental illness and substance abuse, coming from a broken family, enduring sexual abuse as a child, including within his family, and dislocation from the Aboriginal community, among other factors.

The Alberta Court of Appeal found this reduced Dichrow's moral culpability and that the sentencing judge erred in failing to account for these factors. However, this decision also confirmed the need for sentences to account for a growing understanding of the harm caused by sexual offences, which illustrated the need for sentencing judges to weigh these various factors carefully in order to strike this delicate balance, Hooker elaborated.

Tyson Dahlem, Dahlem Criminal Defence Professional Corporation

"The allegations seem very severe where you've got sexual contact between an adult male and children under the age of 16 that went on for a lengthy period of time," said Tyson Dahlem, a principal with Dahlem Criminal Defence Professional Corporation in Calgary.

"So given what the case law in Alberta has said with regards to sentencing, both sentences seem appropriate. Eight years for an offence of that nature is appropriate. The reduction of one year by the Court of Appeal for Aboriginal heritage factors is also appropriate for what he was found guilty of," he added.

Evan McIntyre, a criminal defence lawyer with Pringle Chivers Sparks Teskey in Edmonton, said he believed the sentence was ultimately only reduced by one year because these were very serious sexual offences committed against children, and because the Supreme Court in *R. v. Friesen*, 2020 SCC 9 stated that sentences for such offences needed to be increased from what they had been in the past.

Evan McIntyre, Pringle Chivers Sparks Teskey

For another case that didn't involve a sexual offence against two children the sentence reduction might have been larger, he noted.

Dahlem said he agreed with what the Court of Appeal did in terms of the restatement of sentencing law as well as their determination with regard to *Gladue* factors. The Supreme Court of Canada has very clearly stated that wherever there are any Aboriginal elements to an accused person, that must be taken into consideration as one of the sentencing factors, he noted.

"I agree with the court again recognizing the importance of *Gladue* factors and the importance of sentences and judges taking seriously the dictates of *Gladue* in subsection 718.2(e)," said McIntyre.

The main issues in this case were *Gladue* and causation, said McIntyre. "That can be a real struggle sometimes if you have a client who is Indigenous, but alienated from [their] Indigenous heritage. You can find yourself struggling to explain to a judge why it still ought to be considered," said McIntyre.

This case is instructive for both lawyers and judges to remind them not to be too hasty about waiving aside people who do not seem to be connected to their Indigenous heritage, said McIntyre.

"Our office believes that the ABCA's decision in *Dichrow* is essential because it provides guidance and directs sentencing judges to apply *Gladue* in a robust manner, and attempts to correct certain misconceptions that have prevented some sentencing courts from doing so," said Hooker.

"We hope that sentencing judges, and all participants in the criminal justice system, will heed the ABCA's direction in *Dichrow* to consider the 'bigger picture' and carefully consider these factors in sentencing Indigenous offenders," he added.

"The Alberta Crown Prosecution Service appreciates the consideration by the court of this matter. No further comment will be provided," said Sarah Langley, chief prosecutor in the Appeals & Specialized Prosecutions Office of the Alberta Crown Prosecution Service in Edmonton.