

Manitoba Appeal Court ruling exhibits progress away from punishment toward rehabilitation

By **John L. Hill**

Law360 Canada (January 5, 2024, 2:39 PM EST) -- The facts of the case were simple. Nancy Angela Whiteway was crossing a busy Winnipeg intersection with a male companion. George Elie Houle was sitting at a bench near the crosswalk.

Words were exchanged between Whiteway (or maybe the male companion; a street videotape was not instructive in that regard.) As Houle approached Whiteway, the woman swung her arm in the direction of Houle, striking him in the chest. She then walked away. Houle, however, had been stabbed; he proceeded to his car, attempting to make a 9-1-1 call before collapsing. Whiteway was eventually charged with second-degree murder but pleaded guilty to manslaughter shortly before trial.



John Hill



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Although the facts surrounding Houle's death were simple, Whiteway's background was highly complex. She was a 35-year-old Indigenous mother of three. Her grandmother raised her because of her parent's addiction to alcohol and drugs. Her parents were products of the residential school system. Her father had committed suicide when she was a toddler.

The grandmother, the sole provider in the house, did her best to provide for Whiteway and eight of her cousins. They lived in extreme poverty. A relative sexually abused Whiteway when she was between the ages of 9 and 14. There was nowhere to turn for help, and she resorted to alcohol and drugs.

She quit school in grade nine and left home to live alone at age 18. She met a man, and together, she had three children in quick succession. All the while, she was exposed to intimate partner abuse.

When she left the relationship, she had no financial means to support her children. They were taken into care.

This resulted in more emotional trauma to Whiteway. She turned to becoming a sex trade worker and struggled with depression and bipolar disorder. From age 24, she experienced homelessness. Her mental instability was made worse by her use of methamphetamines.

Between 2014 and 2022, Whiteway had been convicted 34 times with 15 convictions for violent crimes. The stabbing of Houle was carried out because Whiteway felt unsafe and distrusted a man she saw as an attacker.

Once she pleaded guilty, it was for the Manitoba Court of King's Bench to impose a sentence. Oral reasons were delivered on Dec. 21, 2023 (*R. v. Whiteway*, 2023 MBKB 186).

The seriousness of the offence and Whiteway's lengthy criminal history led the Crown to recommend a sentence of eight years less enhanced credit for 713 days of pretrial custody, translating into a sentence of five years and 11 days. The defence urged that she be sentenced to five years less pretrial credit, leaving just over two years to be served at the Maple Creek Healing Lodge in Saskatchewan.

Both Crown and defence accepted the restraint in imposition of a severe sentence in conformity with s. 718.2 (e) principle as interpreted in *R. v. Gladue* [1999] 1 S.C.R. 688 and *R. v. Ipeelee* 2012 SCC 13.

The Manitoba court should be congratulated for agreeing that *Gladue* principles are paramount. While acceptance of *Gladue* reports is now standard in Ontario, Alberta, British Columbia, Manitoba and Nova Scotia, other provinces need to catch up. In 2014, judicial commentators noted that *Gladue* reports were virtually nonexistent in Saskatchewan. Justice should be standard across Canada, and injustice results when full acceptance of the Supreme Court directive in the case is not made.

In looking at sentences imposed for manslaughter, the sentencing judge accepted the analysis set out in *R. v. Swampy* 2017 ABCA 134, where it was held that if the assessment of moral culpability at the core of the proportionality analysis is flawed by the failure to consider the mitigating effects of *Gladue* factors on moral culpability, this amounts to an error in principle and subject to appellate intervention, as set out in *R. v. Lacasse* 2015 SCC 64.

The judge emphasized that no two cases are the same and that part of a sentencing judge's duty is to reflect on the unique lived experiences of the offender when assessing the crimes committed.

In the end, the sentence imposed was a six-year custodial sentence less an enhanced credit of 1,069 days, with a recommendation to the Correctional Service of Canada that that term be served in whole or in part at the Maple Creek Healing Lodge so Whiteway can benefit from any rehabilitative programming available.

In both *Gladue* and *Whiteway*, the offender was a victim of colonialism, which Canada at various levels of government imposed on Indigenous people that shattered otherwise healthy communities and family structures and led to the deprivation of access to adequate health care, education and economic opportunities available to the non-Indigenous portion of the population.

Although the motivation would seem to be trying to right historical wrongs, the judgment has greater significance: moving the judicial system away from a punishment-based approach to one that looks to rehabilitate offenders.

John L. Hill practised and taught prison law until his retirement. He holds a J.D. from Queen's and LL.M. in constitutional law from Osgoode Hall. He is also the author of Pine Box Parole: Terry Fitzsimmons and the Quest to End Solitary Confinement (Durville & UpRoute Books). Contact him at johnlornehill@hotmail.com.

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