Federal Court  Cour fédérale

Date: 20160513

Docket: T-1341-15

Citation: 2016 FC 537

Ottawa, Ontario, May 13, 2016

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

JOEY-LYNN TWINS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] This is an application by the applicant, Joey-Lynn Twins, for judicial review of the decision of the Appeal Division [the Appeal Division] of the Parole Board of Canada [the Board], affirming the decision of the Board to revoke her day parole. She challenges the reasonableness of these decisions and argues in particular that they failed to take into account principles derived from the decision of the Supreme Court of Canada in *R v Gladue*, [1999] 1 SCR 688 [*Gladue*] and related jurisprudence, arising from the over-representation of Aboriginal peoples in Canadian prisons.

[2] For the reasons that follow, this application is allowed.

I. Background

[3] As expressed in her Memorandum of Fact and Law, the applicant, Ms. Twins, is an indigenous Canadian, Aboriginal, from the Ermineskin Cree Nation. She is serving a life sentence for second degree murder. She was born in 1958 and has been incarcerated since 1979. As a minor, she attended residential schools.

[4] On December 12, 2013, the applicant was granted what the Board described as an "Urban Section 84" day parole. This refers to a parole granted under section 84 of the *Corrections and Conditional Release Act,* SC 1992, c 20 [the Act] in a process which involves the First Nations community in release planning for offenders. The applicant was released to a community residential facility [CRF] in Toronto.

[5] In addition to the standard release conditions, special conditions were attached to the applicant's release. She was required to report relationships, avoid drinking establishments, not consume alcohol or drugs, follow psychological counselling, and not associate with particular persons.

[6] The applicant's parole supervisor was advised on May 15, 2014 that the applicant had been spending time with a woman who resided in the neighbourhood, Ms. Maxie. The applicant claimed that the woman was an approved associate, but her parole supervisor was not aware of the relationship. During a disciplinary meeting on May 16, 2014, the applicant was informed that

this woman was not an approved associate, and the applicant agreed that she would no longer have contact with her.

[7] The Board reviewed the applicant's case for continuing day parole on June 9, 2014. The Board found that the applicant was utilizing the day parole release for its rehabilitative purpose and concluded that, with the conditions and supervision strategy in place, her risk remained manageable in the community. Her day parole was continued for a six-month period. An additional special condition regarding financial disclosure was imposed.

[8] On August 23, 2014, the applicant failed to return to the CRF before her 1:00AM curfew, and a warrant for her suspension was issued. She had contacted the facility one hour prior to her curfew and informed them that she was with a friend who was suicidal. At around 1:50AM, the applicant indicated she was returning to the facility, but she did not return until two hours after that time. The applicant initially denied that she had consumed alcohol but later told her parole supervisor that she had consumed six beers with unknown associates. These actions violated the applicant's conditions relating to her curfew, abstaining from alcohol and reporting relationships. Despite the warrant, her release was maintained with additional requirements, and she was not referred to the Board for a hearing.

[9] However, a warrant for the suspension of the applicant's parole was issued on September 16, 2014, after she was witnessed using a cellular phone and associating with Ms. Maxie. When the applicant's belongings were searched upon her arrest, she possessed two cellular phones and

three debit/visa cards. She was referred to the Board for a hearing. The Board met with the applicant in a culturally-assisted hearing on December 23, 2014.

II. The Decision of the Board

[10] The Board reviewed the relevant facts. In addition to the facts laid out above, it noted that during the six-month review period, the applicant attended numerous Aboriginal resources and/or participated in Aboriginal activities on an almost daily basis. She took steps to gain employment, attended Alcoholics Anonymous and Narcotics Anonymous meetings, and volunteered in the community. However, the Board also noted that the file reports and statements at the hearing indicated that dealing with the applicant became difficult after the August 23, 2014 incident and that she objected to the additional requirements then imposed.

[11] The Board also highlighted inconsistencies in statements made by the applicant. During her post-suspension interview, she initially denied her activities and associations, but she later admitted that she spent time with Ms. Maxie and that on August 23, 2014 she had been with Ms. Maxie and had consumed alcohol. She acknowledged Ms. Maxie's substance abuse and violence issues, but indicated that she wished to fight to remove the condition not to associate with Ms. Maxie and would marry her if necessary. At the hearing before the Board, the applicant indicated that she did not want to marry Ms. Maxie and only associated with Ms. Maxie to help her. She claimed to be willing to abide by any conditions, including avoiding contact with Ms. Maxie.

[12] The Board observed that the applicant's case management team deemed that her risk remained manageable in the community with a jurisdictional change and had recommended that

her suspension be cancelled. However, it noted that the applicant had been encouraged to transfer to a culturally sensitive CRF in Vancouver, but that she requested a release to a CRF in Hamilton.

[13] The Board stated that it considered both the positive and negative aspects of the applicant's case. She maintained a strong connection to her heritage, participated in required counselling, sought to maintain employment and sought to upgrade her education. However, the applicant breached her "report relationships" condition, despite having her release maintained previously after breaching this condition and instructions from her case management team that the relationship was inappropriate. The Board noted that the applicant deliberately deceived those supervising her release after her first suspension.

[14] The Board found that the applicant's lack of transparency with her case management team outweighed her positive achievements. It was not confident that a geographical change would lead to the necessary behavioural changes, finding that she demonstrated ingrained criminal values and a lack of insight into her risk factors. As a result, the Board found that those supervising the applicant's release cannot be assured of her associations, relationships and activities and they therefore have no way of assessing or managing any escalation in her risk.

[15] Concluding that the applicant's decision to breach her conditions of release and engage in ongoing deceptive behaviour rendered her risk undue, the Board issued a decision dated December 23, 2014, revoking the applicant's day parole [the Board Decision].

III. The Decision of the Appeal Division

[16] The applicant appealed this decision to the Appeal Division. The Appeal Division observed that the applicant submitted that the Board's decision was not reasonable, because it did not properly assess the positive factors in her case and failed to consider the difficulties associated with reintegration after being in custody for 35 years. It also noted that the applicant argued that the Board conducted an insufficient risk assessment because it failed to consider the principles derived from *Gladue* and *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*] and failed in its duty to endeavor to alleviate the over-representation of Aboriginal peoples in prison.

[17] The Appeal Division found that the applicant had not raised any grounds to justify intervention. It noted that, pursuant to section 135(5) of the Act, the role of the Board was to determine, in light of the applicant's behaviour after release, whether she presented an undue risk to reoffend in society. The risk assessment is guided by the Decision-Making Policy Manual for Board Members [the Manual], including section 8.1, which requires consideration of "any systemic or background factors that may have contributed to the offender's involvement in the criminal justice system, such as the effects of substance abuse, systemic discrimination, racism, family or community breakdown, unemployment, poverty, a lack of education and employment opportunities, dislocation from their community, community fragmentation, dysfunctional adoption and foster care, and residential school experience".

[18] The Appeal Division found that the Board's decision was supported by relevant, reliable and persuasive information. The Appeal Division noted that the applicant is serving a sentence

for second degree murder and was assessed as having a "moderate to high" risk of general and violent recidivism. The applicant had received two suspensions for breaching conditions. In the hearing before the Board, she acknowledged that Correctional Service Canada [CSC] had accommodated her struggles in the community in the first six months after her release, but she continued to be deceitful with her case management team. The applicant's case management team expressed a concern that she failed to recognize the link between her behaviour patterns, relationships and offence cycle. Additionally, CSC reassessed the applicant's risk factors as needing intervention. The applicant declined to accept her case management team's recommendation to transfer to an Aboriginal CRF with culturally sensitive programming.

[19] The Appeal Division found that the Board considered the background and systemic factors in the applicant's case. The Board considered the applicant's involvement in Aboriginal ceremonies and programs, involvement in the Aboriginal Wellness Committee, work with the Aboriginal Liaison Officer and volunteer work with the Native Women's Resource Centre. The Board also noted at the hearing that its initial decision to grant section 84 parole resulted from the applicant's background and a recognition of the progress she had made.

[20] The Appeal Division concluded that the Board had reviewed the applicant's case in a manner consistent with the decision-making release criteria set out in law and Board policy. In a decision dated June 16, 2015 [the Appeal Division Decision], the Appeal Division affirmed the decision of the Board to revoke the applicant's day parole.

IV. Issues and Standard of Review

[21] The applicant raises the following issues:

A. Does the Parole Board of Canada have a duty to address the over-representation of Aboriginal peoples in prison where practicable, and did it recognize and satisfy this duty in this case?

B. Is the decision of the Appeal Division reasonable?

[22] The respondent frames the issues differently as:

A. Was the consideration of the applicant's Aboriginal background reasonable?

B. Is the decision to revoke the applicant's day parole reasonable?

[23] The parties agree that the second issue raised, the overall reasonableness of the decision, represents an application of the standard of reasonableness, in accordance with the principles enunciated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*].

[24] The respondent adds that this Court has recognized the expertise of the Board and the Appeal Division and has afforded them "considerable deference" (e.g. *Fernandez v Canada (Attorney General)*, 2011 FC 275 [*Fernandez*] at para 20; *Korn v Canada (Attorney General)*, 2014 FC 590 [*Korn*] at paras 13-19; *Christie v Canada (Attorney General)*, 2013 FC 38 [*Christie*] at paras 29-32). The respondent notes that, because the Appeal Division affirmed the

Board's decision, this Court is effectively reviewing the reasonableness of the Board's decision (*Korn* at para 13; *Christie* at para 31; *Cartier v Canada (Attorney General)*, 2002 FCA 384 [*Cartier*] at para 10). The applicant appears to concur with this approach as, in the event the Court's decision is to allow her application and refer this matter back for redetermination, she advocates that it should be referred to the Board.

[25] I note that the standard of review was well-summarized by Justice Diner in *Joly v Canada (Attorney General)*, 2014 FC 1253:

> [22] As a general statement, the PBC is owed a high degree of deference in its decisions (*Sychuk v Canada (Attorney General)*, 2009 FC 105 at para 45). For parole cases, the PBC's "decision must not be interfered with by this Court failing clear and unequivocal evidence that the decision is quite unfair and works a serious injustice on the inmate." (*Desjardins v Canada (National Parole Board)*, [1989] FCJ No 910; see also *Aney v Canada (Attorney General)*, 2005 FC 182).
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> [23] This Court has consistently recognized that the Board and the PBAD have expertise in matters related to the administration of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]: *Fournier v Attorney General of Canada*, 2004 FC 1124.
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> [24] When reviewing a PBAD decision, it is incumbent on the reviewing judge to also review the underlying Board decision, as Justice Letourneau stated for the Court of Appeal at paragraph 10 of *Cartier v Attorney General of Canada*, 2002 FCA 384:
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> > The judge in theory has an application for judicial review from the Appeal Division's decision before him, but when the latter has affirmed the Board's decision he is actually required ultimately to ensure that the Board's decision is lawful.

[26] I concur with this analysis, and with the parties' agreed position on the standard of review applicable to the second issue of the overall reasonableness of the decision. However, the parties

are not aligned on the standard of review applicable to the first issue, arising from the applicant's arguments based on *Gladue*, which the applicant submits raise a question of law reviewable on a standard of correctness. The respondent maintains that reasonableness is the standard applicable to this issue as well, taking the position that under a rigorous analysis there is really only one issue for the Court's determination. This issue is the reasonableness of the decision, which includes the reasonableness of the consideration of the applicant's Aboriginal background.

[27] As support for her position on standard of review, the applicant relies on the statement in *Fernandez* at paragraph 10 that questions of law are reviewable on a standard of correctness, as it is the applicant's submission that the question whether *Gladue* imposes a duty upon the Board is a matter of law. The respondent relies on cases cited above (*Fernandez*; *Korn*; *Christie*; *Cartier*) and the argument that the Board and the Appeal Division are specialized tribunals which, when discharging their mandates under the Act, should be afforded deference in interpreting their governing statute and the policies in the Manual made under that statute.

[28] I agree with the respondent's position that the application of the principles derived from *Gladue* to decisions of the Board and its Appeal Division, either by virtue of the jurisprudence derived from *Gladue* or as a result of the express provisions of the Act and the Manual, ultimately engages the interpretation of their home statute and is therefore subject to review on a standard of reasonableness (*Dunsmuir* at para 54; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*] at paras 30, 39; *Saini v Canada (Attorney General)*, 2014 FC 375 at para 27). This case does not involve one of the categories of questions surrounding home statute interpretation to which the correctness

standard continues to apply, i.e. constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, questions regarding the jurisdictional lines between two or more competing specialized tribunals, and true questions of jurisdiction or *vires* (*Alberta Teachers* at para 30).

[29] I also consider this approach to be consistent with the decision of the Ontario Court of Appeal in *United States v Leonard*, 2012 ONCA 622 [*Leonard*], which applied the standard of reasonableness to its review of a decision of the Minister of Justice to surrender two Aboriginal offenders for extradition to the United States, which included reviewing the application of *Gladue* principles to that decision.

[30] Therefore, my conclusion with respect to the standard of review is that I must consider both the Board Decision and the Appeal Division Decision and analyze whether the Appeal Division's affirmation of the Board Decision was reasonable, including taking into account whether it demonstrated any required recognition and application of the jurisprudence in *Gladue*, *Ipeelee* and related authorities.

V. Positions of the Parties

A. *Applicant's Submissions*

[31] The applicant submits that, pursuant to *Gladue* and *Ipeelee*, government entities have a duty to make decisions that will tend to reduce the over-representation of Aboriginal peoples imprisoned in Canada, where practicable. Invoking section 718.2(e) of the *Criminal Code*, RSC

1985, c C-46 [the Code], which the *Gladue* decision was considering, and section 7 of the *Canadian Charter of Rights and Freedoms* [the Charter], she argues that the principles from *Gladue* and *Ipeelee* must apply to other government entities in the criminal justice system as a principle of fundamental justice, not just to the sentencing courts to which those authorities directly relate.

[32] Alternatively, the applicant argues that these principles apply in any circumstances where imprisonment is at stake (see *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 [*Frontenac*]). The applicant submits that *R v Sim* (2005), 78 OR (3d) 183 (ONCA) [*Sim*] holds that the Ontario Review Board, an administrative tribunal like the Board, is accountable for addressing the over-representation of Aboriginal peoples in the criminal justice system. Similarly, she argues that *Rich v Her Majesty the Queen*, 2009 NLTD 69 [*Rich*] stands for this principle in the context of bail decisions. The applicant notes that even extradition decisions, which involve a matter of ministerial discretion entitled to great deference, have recognized the principle that systemic discrimination through over-representation of Aboriginal peoples in prison must be addressed (see *Leonard*).

[33] As a result, the applicant argues that the Board has a duty to address the systemic problem of over-representation of Aboriginal peoples in penitentiaries and that the Board and its Appeal Division failed to recognize this duty in this case. The applicant acknowledges that the Appeal Division noted counsel's submissions that the Board failed to consider the *Gladue* principles, but she argues that the Appeal Division failed to comment further on these submissions. The applicant's position is that this constitutes, by implication, a rejection of the

submissions. The applicant also notes that the Board was silent on this issue, despite counsel's submissions.

[34] The applicant submits that, other than its reference to section 8.1 of the Manual, the Appeal Division made no reference to its requirement to address the over-representation of Aboriginal peoples in prison. The applicant argues that this duty is not satisfied by the Appeal Division's general reference to considering systemic factors, because the duty requires that a tribunal pay specific attention to the circumstances of Aboriginal offenders. The duty is not just to consider systemic factors in weighing risk or otherwise assessing the individual prisoner. Rather, it goes to the systemic goal of reducing rates of incarceration for Aboriginal offenders.

[35] Finally, on the issue of the overall reasonableness of the decision, the applicant takes the position that, given her success on a gradual release program, the fact that the professionals in this case recommended her release, the fact that life in prison is at stake, the statutory mandate to reduce imprisonment of Aboriginal peoples, and the applicant's direct experience with residential schools and other unfortunate government policies, the decision is unreasonable. In this respect, the applicant also submits that her substantive misconduct did not consist of any criminal or dangerous activity but only of associating with Ms. Maxie, whom the applicant notes regularly attended the CRF under the observation of correctional authorities and whom the applicant considers to be a pro-social support.

B. *Respondent's Submissions*

[36] The respondent argues a nuanced position on the question whether the *Gladue* principles are applicable to the decisions of the Board and the Appeal Division. The respondent's position is that *Gladue* itself does not apply, because that authority relates to sentencing decisions, not to decisions related to parole, but that the spirit and aims underlying *Gladue* are reflected in principles that are implemented in the Act and the Manual that govern the work of the Board and its Appeal Division. The respondent notes that *Gladue* held that sentencing judges must consider systemic or background factors which may have played a part in bringing a particular Aboriginal offender before the courts and that the Manual has prescribed in similar terms factors that must be taken into account by the Board in reaching decisions under its mandate. The section of the Manual most significant to the case at hand is section 8.1.3, related to assessment for post-release decisions, the relevant portion of which provides as follows:

> *Assessment Process*
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> 3. In reviewing whether the offender's risk has changed since release and, if applicable, incarceration, Board members will assess all relevant aspects of the case in accordance with Policy 1.1 (Information Standards for Conditional Release Decision-Making), including:
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> …
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> h. any systemic or background factors that may have contributed to the offender's involvement in the criminal justice system, such as the effects of substance abuse, systemic discrimination, racism, family or community breakdown, unemployment, poverty, a lack of education and employment opportunities, dislocation from their community, community fragmentation, dysfunctional adoption and foster care, and residential school experience;

[37] I note that this is a reference to the most recent version of the Manual (July 2015) as cited by the respondent, although the relevant provision was in paragraph “g” in the December 2014 version that was before the Board and the Appeal Division.

[38] The respondent also notes that the policies in the Manual are adopted under the authority of section 151(2) of the Act and are required by section 151(3) to respect gender, ethnic, cultural and linguistic differences and to be responsive to the special needs of women and Aboriginal peoples. Section 105(2) of the Act requires members of the Board to exercise their functions in accordance with policies adopted under section 151(2) and section 147(1)(c) provides that an offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making a decision, breached or failed to apply a policy adopted pursuant to section 151(2).

[39] The respondent’s position is that the Board and the Appeal Division considered the applicant’s Aboriginal background as required by the Manual. The respondent notes the Board’s references to the applicant attending numerous Aboriginal resources, participating in Aboriginal activities, and having access to an Elder involved with her case. The Board identified as positive factors the applicant’s participation in numerous native volunteer activities, including drumming, counselling and singing. It also referred to the fact she had been encouraged to transfer to a culturally sensitive CRF in Vancouver and participate in a program for Residential School Survivors, but that the applicant had instead requested release to a CRF in Hamilton.

[40] However, the respondent emphasizes the positon that the applicant's Aboriginal background is only one of the factors to be taken into account by the Board in making its decision. The respondent refers to the guiding principles for conditional release as set out in sections 100 and 100.1 of the Act. Section 100 describes the purpose of conditional release as the contribution to a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their re-integration into the community as law-abiding citizens, while section 100.1 provides that the protection of society is the paramount consideration. The respondent also refers to section 107 of the Act, which grants the Parole Board of Canada exclusive and absolute discretion to terminate or revoke the parole or statutory release of an offender, and section 135(5) of the Act, which provides for the revocation of parole where the Board is satisfied that the offender will present an undue risk to society by reoffending before the expiration of his or her sentence.

[41] The respondent explains that the Board plays an inquisitorial role and acts on information that is reliable and persuasive. It does not hear and assess evidence (see *Mooring v Canada (National Parole Board)*, [1996] 1 SCR 75 at para 26). It is an independent tribunal and is not bound by the CSC or the recommendations of an offender's case management team (see *Condo v Canada (Attorney General)*, 2005 FCA 391 at para 13; *Tozzi v Canada (Attorney General)*, 2007 FC 825 at para 42; *Beaupré v Canada (Attorney General)*, 2002 FCT 463 at para 26).

[42] The respondent's position is that the Board's decision was reasonable and based on persuasive and reliable information that the applicant had breached her parole conditions and had not been transparent with her parole supervisors. In particular, the Board noted the applicant's

ongoing association with Ms. Maxie, failure to return for curfew on August 23, 2014 and breach of parole conditions on that date, deceptive behaviour and general lack of transparency (regarding her relationship with Ms. Maxie, her whereabouts on August 23, her two cell phones and her three debit/credit cards), lack of insight into her risk factors, and her resistance to transferring to a CRF in Vancouver. The respondent submits that the Board acknowledged the positive factors, but found that her lack of transparency and the associated risks outweighed these factors.

[43] The respondent submits that the Appeal Division Decision was also reasonable. The Appeal Division specifically referenced section 8.1 of the Manual and the applicant's submissions regarding the *Gladue* principles. It was therefore alive to these issues and was not required to mention or expressly analyze *Gladue* or other cases. The Appeal Division referred to the written reasons of the Board indicating that it recognized that the applicant had maintained an extremely strong connection to her Aboriginal heritage. It also referred to file information that she demonstrated resistance to complying with her Correctional Plan because she declined to accept the recommendation to transfer to an Aboriginal CRF which offered culturally sensitive programming. The Appeal Division found that the Board considered all relevant, reliable and persuasive information including the background and systemic factors in the applicant's case, referring as examples to her involvement in Aboriginal ceremonies and programs, involvement in the Aboriginal Wellness Committee, work with the Aboriginal Liaison Officer, and volunteer work with the Native Women's Resource Centre. Finally, the Appeal Division referred to the Board noting that the awareness of the applicant's background and the recognition of the progress she had made as a result of her desire to follow the Red Road (which the Court

understands to refer to a healing process) had resulted in the Board's initial decision to grant her a section 84 day parole release.

[44] The respondent's position is that the Appeal Division is only entitled to intervene if the Board's decision was unfounded or unsupported by the information available at the time and that it fulfilled its role of ensuring that the Board's decision was based on relevant, reliable and persuasive information.

VI. Analysis

A. *Preliminary Issue – Notice of Constitutional Question*

[45] As a preliminary issue, I note that the applicant served and filed a Notice of Constitutional Question under section 57 of the *Federal Courts Act*, RSC 1985, c F-7, in anticipation of her argument that section 7 of the Charter requires that the *Gladue* principles apply to decisions of the Board and its Appeal Division. The respondent's position is that this notice is unnecessary, as section 57 of the *Federal Courts Act* requires such a notice only when the constitutional validity, applicability or operability of a federal or provincial statute or regulation is in question, which is not the nature of the applicant's argument. At the hearing of this application, the applicant concurred with the respondent's position, and the respondent confirmed that it is raising no objection to the applicant advancing her argument based on the Charter.

[46] I agree that the Notice of Constitutional Question was unnecessary, but nothing further turns on this preliminary issue.

B. *Application of Gladue to the Parole Board of Canada*

[47] *Gladue*, a decision of the Supreme Court of Canada in 1999, addressed the considerations which should be taken into account by a judge sentencing an Aboriginal offender, in the context of Parliament's enactment of section 718.2(e) of the Code, which requires a court imposing a sentence to take into consideration, among others, the following principle:

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[48] The Supreme Court referred at paragraph 50 of *Gladue* to the purpose of section 718.2(e) being to respond to the acute problem of the disproportionate incarceration of Aboriginal peoples in Canada. Following a review of the documentation of this problem, the Court remarked as follows at paragraph 64:

> 64 These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s.718.2(*e*), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.

[49] The Supreme Court then explained at paragraph 66 the manner in which the courts are to discharge this remedial mandate:

> 66 How are sentencing judges to play their remedial role? The words of s.718.2(*e*) instruct the sentencing judge to pay particular attention to the circumstances of aboriginal offenders, with the implication that those circumstances are significantly different from those of non-aboriginal offenders. The background considerations regarding the distinct situation of aboriginal peoples in Canada encompass a wide range of unique circumstances, including, most particularly:
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> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
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> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

[50] In elaborating upon the systemic and background factors which a sentencing judge must take into account, the Supreme Court stated as follows at paragraphs 67 to 69:

> 67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

> 68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.
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> 69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[51] The Supreme Court added at paragraph 83 that judicial notice must be taken of systemic and background factors which are relevant to Aboriginal offenders.

[52] As noted by the applicant, the Supreme Court revisited this issue in 2012 in *Ipeelee*, observing at paragraph 62 that statistics indicate that over-representation and alienation of Aboriginal peoples in the criminal justice system has only worsened, and summarizing as follows at paragraph 59 the principles to be derived from *Gladue*:

> [59] The Court held, therefore, that s. 718.2(*e*) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing (*Gladue*, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(*e*) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (*Gladue*, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*Gladue*, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (*Gladue*, at paras. 83-84).

[53] While both *Gladue* and *Ipeelee* addressed the criminal sentencing of Aboriginal offenders, to which section 718.2(e) of the Code applies, other authorities have applied the resulting principles in other contexts involving interaction of Aboriginal people with the criminal justice system.

[54] In its 2005 decision in *Sim*, the Ontario Court of Appeal applied the principles underlying *Gladue* to the disposition by the Ontario Review Board of an accused who was found not criminally responsible on account of mental disorder [NCR]. The Court held as follows at paragraphs 15 to 16:

> [15] Describing the situation of disproportionate incarceration of aboriginal offenders at para. 64 as “a crisis on the Canadian criminal justice system”, the court in Gladue focused on the interpretation of s. 718.2(e) and the sentencing of aboriginal

> offenders, but suggested that the principles motivating its decision could have wider ramifications. The court observed at para. 65:
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> > It is clear that sentencing innovation by itself cannot remove the causes of aboriginal offending and the greater problem of aboriginal alienation from the criminal justice system ... There are many aspects of this sad situation which cannot be addressed in these reasons.
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> [16] I do not think that the principles underlying Gladue should be limited to the sentencing process and I can see no reason to disregard the Gladue principles when assessing the criminal justice system's treatment of NCR accused.

[55] Similarly, at paragraph 18 of *Rich*, the Supreme Court of Newfoundland and Labrador concluded that the *Gladue* principles were relevant to bail hearings:

> [18] **Gladue** focused on sentencing principles, but it talked about other issues that are relevant to bail: the estrangement of aboriginal peoples from the Canadian justice system, the impact of years of dislocation, whether imprisonment would be meaningful to the community of which the offender is a member, over-representation of members of the aboriginal community in prisons, overuse of incarceration and other concerns unique to aboriginal communities. These type factors are all relevant to bail hearings.

[56] Similar conclusions were reached by the Ontario Court of Appeal in *Frontenac* and *Leonard*, applying the principles derived from *Gladue* to, respectively, sentencing for civil contempt for breach of an injunction and a ministerial decision whether to surrender Aboriginal accuseds for extradition to the United States.

[57] The common thread underlying all these decisions is a recognition of the systemic and background factors that have contributed to the over-incarceration of Aboriginal peoples in Canada and to what has been described as the estrangement of Aboriginal peoples from the

Canadian justice system. These factors apply more broadly than just to the process of criminal sentencing addressed by section 718.2(e) of the Code, and consideration of these factors, as well as consideration of alternatives to incarceration, apply to a range of circumstances in which Aboriginal peoples interact with the justice system.

[58] While the parties could point to no authority that has considered the application of the *Gladue* principles to the work of the Parole Board of Canada, it appears to me that these principles must apply to the decision challenged in this case, as the Board's jurisdiction and resulting decision whether to revoke the parole of an offender represent an important component of Canada's criminal justice system and must therefore be subject to the remedial mandate described in *Gladue*.

[59] I do not accept the applicant's argument that section 718.2(e) of the Code applies to the decision of the Board, as that section is clearly confined to criminal sentencing decisions. However, the authorities canvassed above that have applied *Gladue* outside the context of criminal sentencing have found that *Gladue* is relevant in the application of section 7 of the Charter (see *Leonard* at paras 49-65) or is relevant in light of the particular decision or legislative mandate being considered. For instance, in *Sim*, the Ontario Court of Appeal considered the *Gladue* principles to complement the analysis pursuant to section 672.54 of the Code, which requires the Ontario Review Board, when making a disposition of an NCR accused, to consider criteria including the reintegration of the accused into society and the other needs of the accused.

[60] Similarly, as pointed out by the respondent, the Board's statutory mandate requires it to make decisions consistent with policies adopted pursuant to section 151(2) of the Act, and section 151(3) requires that those policies be responsive to the special needs of Aboriginal peoples. In my view, the Board's mandate to adopt such policies and make decisions guided thereby must be informed by the *Gladue* jurisprudence.

[61] I acknowledge the respondent's submission that the spirit and aims underlying *Gladue* are reflected in principles that are implemented in the Act and the Manual that govern the work of the Board. I agree that the requirement in section 8.1.3.h of the Manual, that the Board consider any systemic or background factors that may have contributed to the offender's involvement in the criminal justice system, including in particular its reference to residential school experience, is consistent with the objectives underlying *Gladue*. I am not prepared to accept what I understand to be the respondent's position that the Board's obligations related to the issues identified by *Gladue* are limited to compliance with the requirements of the policies it has implemented in its Manual. Whether compliance with those policies will satisfy such obligations derived from *Gladue* must be assessed on the circumstances of each individual case and the particular decision involved. However, as will be explained later in these Reasons, the result of the present case turns not on any shortcoming in the Board's policies but on the extent to which its decisions comply with its obligations, as expressed in either the *Gladue* jurisprudence or its own policies.

[62] But first I must comment on the manner in which the applicant has framed the obligation she argues is borne by the Board as a result of the *Gladue* jurisprudence. While not always

articulated in identical terms in her Memorandum of Fact and Law, she does at times express the obligation as a duty to address the over-representation of Aboriginal people in prison. I agree that the Supreme Court in *Gladue* described section 718.2(e) of the Code as Parliament's direction to members of the judiciary to inquire into the causes of the problem of over-representation of Aboriginal peoples within both the Canadian prison population and the criminal justice system and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. However, in my view, this direction must be understood not only in terms of the problem identified by the Supreme Court and the responsibility of the courts (and, by extrapolation through subsequent jurisprudence, the responsibility of administrative decision-makers) to endeavor to address it, but also in terms of the manner in which this remedial role is to be performed.

[63] In this respect, I am guided by the Supreme Court in paragraph 75 of *Ipeelee*:

> [75] Section 718.2(*e*) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2(*e*) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process. (Emphasis added)

[64] As such, I regard the obligation derived from the *Gladue* jurisprudence, in furtherance of the objective of addressing the problem identified by the Supreme Court, to be a duty to approach decision-making in a manner which is attentive to the systemic disadvantages and discrimination which may have contributed to an Aboriginal offender's engagement with the criminal justice system and to make decisions that are responsive to the unique circumstances of Aboriginal offenders.

[65] This understanding of the duty imposed by the *Gladue* principles also assists in considering the respondent's argument that the Board's obligations must be interpreted in light of section 100.1 of the Act, providing that the protection of society is the paramount consideration for the Board in the determination of all cases, and section 135(5), which requires the Board to terminate or revoke parole if the Board is satisfied that the offender will present an undue risk to society by reoffending before the expiration of his or her sentence. In my view, the respondent's argument does not lead to a conclusion that *Gladue* does not apply to the Board's decisions but goes only to the extent to which *Gladue* considerations will impact a decision. A similar point was considered by the Supreme Court of Newfoundland and Labrador in *Rich.* Justice Goodridge observed at paragraph 17 that, when public safety is the focus of concern, as a practical matter it is unlikely that the accused's background, as either Aboriginal or non-Aboriginal, will carry much weight. However, this did not prevent him from concluding that the principles set out in *Gladue* have relevance to a bail hearing.

[66] Similarly, the Board must make decisions, and its Appeal Division must review those decisions, in accordance with the statutory provisions that confer their mandate, which is to

facilitate the rehabilitation of offenders and their reintegration into the community in a manner consistent with the protection of society. Decisions to terminate or revoke parole are to be governed by the statutory test surrounding risk to reoffend. However, the factors identified by *Gladue* must be considered in the discharge of the Board's mandate and its application of this test.

[67] I note that the respondent argues that an offender's Aboriginal background, while an important consideration, is one of several considerations that must be taken into account by the Board in reaching a decision. I consider this submission to be largely consistent with the above interpretation of the Board's obligations, except in the important respect that the respondent refers to what is to be considered as the offender's "Aboriginal background". In my view, the obligation is not to consider just the offender's background as a member of a First Nations community, but rather to consider the systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts or more generally into interaction with the criminal justice system. It is these factors that the Board must take into account as one of the considerations underlying its assessment under section 135(5) of the Act of whether an offender will, by reoffending before sentence expiration, present an undue risk to society. As explained below, it is in this respect that I have concluded that the Board and its Appeal Division failed in this particular case to discharge their obligation. I reach this conclusion regardless of whether this obligation is measured in relation to the principles as articulated in *Gladue* or the principles as captured in section 8.1.3.h of the Board's Manual.

C. *Whether the Decisions of the Board and Appeal Division are Reasonable*

[68] The respondent defends the Board's decision based on the Board's references to the applicant attending numerous Aboriginal resources, participating in Aboriginal activities, and having access to an Elder involved with her case. The respondent also notes that the Board identified as positive factors the applicant's participation in numerous native volunteer activities, including drumming, counselling and singing. It also referred to the fact she had been encouraged to transfer to a culturally sensitive CRF in Vancouver and participate in a program for Residential School Survivors, but that the applicant had instead requested release to a CRF in Hamilton.

[69] However, while these components of the Board's decision do represent attention to the applicant's Aboriginal background, they do not demonstrate any consideration of systemic and background factors which may have played a part in bringing the applicant into interaction with the criminal justice system, either the interaction which began with her life sentence in 1979 at the age of 21 or the more recent interaction with the Parole Board of Canada. Ms. Twins is a residential schools survivor, but that factor is mentioned in the Board Decision only in the context of a recommended program. The decision does not demonstrate any consideration of the impact of that element of her experience. Rather, I note from a review of the audio recording of the hearing before the Board that the Board remarked during the hearing that the hearing was just going to focus on the applicant's time in the community and that it was that period of time that the hearing was about.

[70] In support of the Appeal Division Decision, the respondent notes that the Appeal Division specifically referenced section 8.1 of the Manual and the applicant's submissions regarding the *Gladue* principles, arguing that it was therefore alive to these issues. The Appeal Division's references to the applicant's submission on *Gladue* and section 8.1 of the Manual do demonstrate recognition of the obligation to consider the impact of systemic or background factors. However, the Appeal Division Decision does not demonstrate either a consideration of those factors or support a reasonable conclusion by the Appeal Division that the Board had done so. While the Appeal Division expressly finds that the Board considered the background and systemic factors in the applicant's case, it supports this conclusion by giving examples of her involvement in Aboriginal ceremonies and programs, involvement in the Aboriginal Wellness Committee, work with the Aboriginal Liaison Officer, and volunteer work with the Native Women's Resource Centre. These activities are related to her Aboriginal background but do not represent consideration of background and systemic factors in the way required by either the *Gladue* principles or the Board's Manual.

[71] Finally, the respondent observes that the Appeal Division referred to the Board noting during the hearing before the Board that awareness of the applicant's background and the recognition of the progress she had made as a result of her desire to follow the Red Road had resulted in the Board's initial decision to grant her a section 84 day parole release. In response, the applicant argues that, to the extent this represents a reference to the Board considering the impact of background and systemic factors when it made the initial decision to grant the applicant parole, this does not discharge the Board's obligation, which is to consider such factors in the context of the revocation decision. However, a review of the audio recording of the

hearing before the Board indicates that the Board's comment during the hearing was to the effect that the decision to grant the day parole reflected a recognition of the fact that the applicant had been following the Red Road since 2006, in contrast to problematic behaviours she had demonstrated during earlier periods of her incarceration. It does not appear to the Court that the Board was referring to consideration of systemic factors such as the applicant's residential schools experience, that may have contributed to her incarceration, when it made these remarks during the hearing.

[72] It is accordingly the finding of the Court that there is no support in the record for the Appeal Division's finding that the Board considered the background and systemic factors in the applicant's case, as required by either the *Gladue* jurisprudence or the Manual, or the Appeal Division's resulting conclusion that the Board reviewed the applicant's case in a manner consistent with the decision-making post-release criteria set out in law and in Board policy. Having considered both the Board Decision and the Appeal Decision, the Court concludes that the latter did not reasonably reach its conclusion as to the reasonableness of the former. The Appeal Division Decision must therefore be set aside.

[73] Returning to the Board Decision, I am not expressing an opinion on whether consideration by the Board of the background and systemic factors in the applicant's case should have resulted in a different decision whether to revoke her parole, and I am conscious of the deference due to the Board in discharging its mandate. However, given the importance of these factors, and as it is clear from the record that there were both positive and negative aspects to the applicant's case, I cannot conclude that the required consideration of the these factors could not

have produced a different result. As a result of the failure to give this consideration, the Board Decision is unreasonable and must also be set aside.

[74] Having reached these conclusions, it is unnecessary for me to consider the parties' other arguments as to the reasonableness of the decisions, and I consider it preferable not to comment on these arguments. The various factors to be considered in connection with the decision whether to revoke the applicant's parole, as informed by these Reasons, should benefit from the application of the Board's expertise as a specialized tribunal.

D. *Remedy*

[75] The applicant requests, by way of remedy in this application, an order quashing the revocation decision and ordering the applicant released on day parole. In the alternative, she seeks an order quashing the revocation decision and requiring a new hearing before a differently constituted panel of the Board.

[76] At the hearing of this application, the Court sought the parties' submissions on whether, in the event of success by the applicant, the matter should be referred back to the Board or to the Appeal Division. The parties agreed that, in the event the Court found the Board's decision to be unreasonable, any referral for redetermination should be to the Board, not to the Appeal Division.

[77] My Judgment will accordingly quash the decisions of the Board and the Appeal Division and refer the matter back to the Board for redetermination. As explained above, I have rejected

the applicant's request for an order releasing her on parole, as the decision whether to revoke her parole is a decision that should be made by the Board, following reconsideration of her case in accordance with these Reasons.

VII. Costs

[78] The parties provided post-hearing submissions on costs and have jointly proposed that costs should be in the nominal amount of $250, to follow the cause. My Judgment will so order.

JUDGMENT

THIS COURT'S JUDGMENT is that:

A. This application is allowed;

B. The decision of the Parole Board of Canada dated December 23, 2014 and the decision of its Appeal Division dated June 16, 2015 are quashed, and the matter is referred back to a differently constituted panel of the Parole Board of Canada for reconsideration in accordance with these Reasons; and

C. Costs are awarded to the applicant in the fixed amount of $250.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	KINGSTON, ONTARIO
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APPEARANCES:

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