

COURT OF APPEAL FOR ONTARIO

CITATION: Cooper (Re), 2024 ONCA 484

DATE: 20240614

DOCKET: COA-23-CR-1276

Roberts, Monahan and Dawe JJ.A.

IN THE MATTER OF: Dale Allan Cooper

AN APPEAL UNDER PART XX.1 OF THE *CODE*

Anita Szigeti, for the appellant

Samuel Mazzuca, for the respondent, His Majesty the King

Jessica Szabo and Anne Marshall, for the respondent, Ontario Shores Centre for Mental Health Sciences

Heard: June 11, 2024

On appeal against the disposition of the Ontario Review Board, dated October 24, 2023.

REASONS FOR DECISION

[1] The appellant appeals from the disposition of the Ontario Review Board (“the Board”) with respect to the Board’s refusal to order a *Gladue* Report. At the conclusion of the parties’ submissions, we allowed the appeal for reasons to follow.

These are our reasons.

Background

[2] The appellant is a 35-year-old Indigenous man. On September 26, 2023, the appellant was found not criminally responsible on account of mental disorder (“NCRMD”) on a charge of assault causing bodily harm, arising from an incident on December 21, 2022. The matter was referred to the Board.

[3] The parties jointly recommended a detention disposition and agreed on its terms. Appellant’s counsel asked that the Board also order a *Gladue* Report to inform its disposition at the next year’s review. No party raised any objections or opposed this request. During the Board hearing, the appellant’s attending psychiatrist confirmed that a *Gladue* Report could be beneficial. In response to the Chair of the Board’s question about whether she had any preference regarding the timing of the appellant’s interview for the *Gladue* Report, the appellant’s psychiatrist stated: “Certainly, he would benefit, I think, from at least a couple of months of stability prior to an interview”. The Board did not ask for further submissions on the issue nor did it indicate that it would not order the requested *Gladue* Report.

[4] On October 24, 2023, the Board ordered that the appellant be detained at Ontario Shores Centre for Mental Health Sciences (the “Hospital”). The Board declined to order a *Gladue* Report for the next hearing. It explained, in its November 17, 2023 reasons for disposition, that the appellant’s attending psychiatrist suggested that “[a *Gladue* Report] may be helpful, but that any benefit

might be more apparent after more time in treatment has occurred.” The Board determined that it would be premature to order the *Gladue* Report at this point in the appellant’s treatment and relied on the treatment team to determine the appropriate timing.

Analysis

[5] The appeal focuses on the Board’s refusal to order that a *Gladue* Report be prepared for the next annual hearing.

[6] We agree that the Board’s failure to order the requested *Gladue* Report was unreasonable in the circumstances of this case. We see no basis at all for the Board’s refusal.

[7] The Board has a duty to search out, gather, and review all relevant and available evidence pertaining to the four factors, set out in s. 672.54 of the *Criminal Code*, that are to be considered when making a disposition – namely, public protection, the mental condition of the accused, the reintegration of the accused into society, and other needs of the accused: *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at paras. 54-55. In the case of an Indigenous NCR accused, in the absence of equivalent information, it is difficult to see how the Board can properly carry out its duties without a *Gladue* Report. We also note that while the parties can request it, only the Board can require the preparation of a *Gladue* Report.

[8] It is well-established that *Gladue* principles apply to proceedings before the Board: *R. v. Sim* (2005), 78 O.R. (3d) 183, at para. 16; *Mitchell (Re)*, 2023 ONCA 229, at para. 23. The Board is required to take *Gladue* principles into account when considering the four factors set out in s. 672.54 of the *Criminal Code* in the case of an Indigenous NCR accused.

[9] As this court explained in *Mitchell (Re)*, at para. 22, in cases involving Indigenous accused persons, the Board is to engage in a “different method of analysis”, which “requires adjudicators to pay particular attention to the unique circumstances of Indigenous people detained in psychiatric facilities, and how those circumstances affect the four statutory criteria” under s. 672.54.

[10] There is no dispute that a *Gladue* Report is relevant here. The appellant is an Indigenous man with Indian status. His paternal grandmother was a Residential School survivor, and the September 21, 2023 Hospital Report prepared by his attending psychiatrist suggested that intergenerational trauma may exist in his family. Specifically, the Hospital Report addresses the following: the appellant’s father grew up in poverty and experienced abuse; as a child, the appellant witnessed domestic violence; there is family history of substance use and mental illness; and the appellant’s history of polysubstance use.

[11] There is also no dispute that his attending psychiatrist opined that a *Gladue* Report may be helpful in assisting with his treatment.

[12] Finally, there is no dispute that there was no objection to the ordering of the *Gladue* Report. In the circumstances of the hearing, it was the parties' reasonable expectation that a *Gladue* Report would be ordered by the Board.

[13] In keeping with Board's duty to obtain and consider all relevant information when coming to a disposition, it was up to the Board and not to the treatment team to determine if and when to order the *Gladue* Report. It is no answer that the appellant may not have been immediately available to participate in the preparation of the *Gladue* Report. This indicates a misapprehension of the scope of a *Gladue* Report that goes well beyond an interview with the appellant, and a misunderstanding of how long it typically takes for a *Gladue* Report to be prepared – often several months. Moreover, given the breadth of a *Gladue* Report's contents, these reports provide a wealth of valuable information for the Board regardless of an Indigenous NCR accused person's ability to participate.

[14] It was therefore unnecessary and plainly unreasonable for the Board to delay the commencement of the preparation of the *Gladue* Report. As noted above, the appellant's attending psychiatrist indicated that the appellant would benefit from a couple of months for his condition to stabilize before being interviewed. There was no need to wait for a year to order a *Gladue* Report. Even if the appellant were never in a stable enough position to participate in a meaningful way, the *Gladue* Report would provide important information necessary for the

Board's execution of its duties, including the availability of and access to Indigenous-specific programming not available in the Hospital.

[15] We understand from the inquiries made of the office that would prepare the *Gladue* Report that once the order and file assignment are made, the turn-around time for the preparation of a Report is about eight weeks. The office is hopeful a Report could be prepared in this case by the time of the appellant's next review on October 22, 2024. The appellant consents to the writers of the *Gladue* Report speaking with whomever they need in order to prepare the Report. Counsel for the Hospital indicates that the Hospital is ready, willing, and able to facilitate the preparation of the Report in time for the October 22, 2024 hearing.

[16] For these reasons, we order that a *Gladue* Report be prepared prior to the appellant's next hearing before the Board scheduled for October 22, 2024. The appellant's disposition shall therefore be amended to require that a *Gladue* Report be prepared prior to the appellant's next hearing before the Board scheduled for October 22, 2024. Except upon the appellant's request, the appellant's October 22, 2024 disposition shall not be delayed or adjourned in the event that the *Gladue* Report is not completed by that date.

"L.B. Roberts J.A."
"P.J. Monahan J.A."
"J. Dawe J.A."