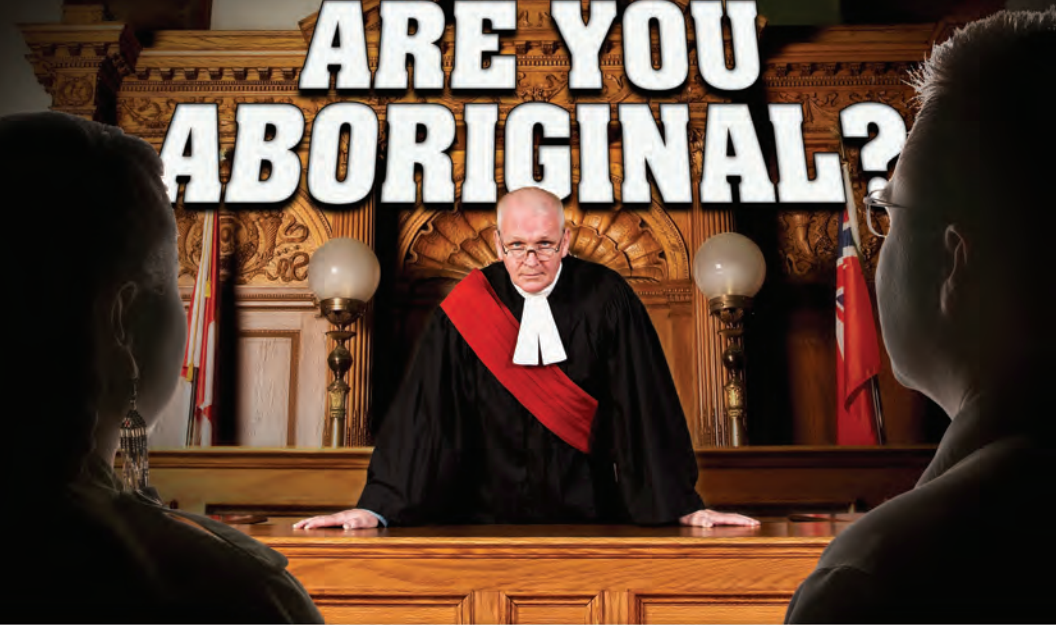


# ARE YOU ABORIGINAL?



**Do you have a  
bail hearing?**

**Or are you going to be  
sentenced for a crime?**





If you are an Aboriginal person, the judge must take your background into account when setting bail or deciding what sentence to give you. The judge must look at all the options besides jail.

Judges have this duty to **all** Aboriginal peoples of Canada, living on or off reserve, including First Nations, status and non-status Indians, Métis with or without a Métis card, and Inuit. It does not matter if you live in a non-Aboriginal community, or if you were adopted and raised by non-Aboriginal parents or in foster homes—if you are Aboriginal, this applies to you.

Another way of saying this is, “If you are Aboriginal, Gladue applies to you.”

Why is the word Gladue used in this way?

The word Gladue is taken from the name of an important case that came before the Supreme Court of Canada in 1999. An Aboriginal woman named Jamie Gladue was the accused person in that case.

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In speaking about the case, the Court said very important things to judges about the way they sentence Aboriginal people. The Court did this because it saw that far too many Aboriginal people are sent to jail. The Court said there is racism against Aboriginal people within Canada and in the jail system.

Now the word Gladue is used to speak about the things judges must consider when they are setting bail or deciding what kind of sentence to give an Aboriginal person.

This pamphlet begins by looking at how Gladue applies to sentencing.

Can I stay out of jail just by telling the judge I am Aboriginal?

No. The judge should be told that you are Aboriginal. But this does not automatically mean that you will not go to jail. The judge also needs to look at a lot of other information before deciding whether you get a jail sentence or a non-jail sentence.

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Non-jail sentences can take place in the community. They can mean less time in jail or no jail. Some examples are alcohol treatment programs, anger management programs, and programs for survivors of abuse.

If jail is the only option, the judge must still apply Gladue when deciding how long you have to spend in jail.

What kind of information does the judge need?

To be able to apply Gladue when deciding your sentence, the judge needs information about:

1. your background, and
2. what kinds of non-jail sentences are available.

What does the judge need to know about my background?

The judge needs to know that you are Aboriginal. The judge also needs information about who you are, how

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you got here, and what happened to your parents and your family. For example:

- Did you or a family member go to residential school?
- Were you adopted or in the child welfare system?
- Did you grow up in a home where there was abuse or addictions?
- Do you have addictions, mental health issues, or FASD (fetal alcohol spectrum disorder)?

The judge may also need information that gives a general idea about your community. For example, if you lived on a reserve, are there things about life on the reserve, or the history of the reserve, that the judge should know about?

These are just a few examples, not a complete list. The judge needs to have as much information as possible about you.

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Where does the information about my background come from?

It is up to you, a family member, or a friend to supply your background information. This can be done in writing or by speaking to your lawyer.

The more the information can be supported, the better. Are there other people or documents that can support the information?

It is not always possible to get other people to support certain types of information, especially things like abuse. Even if some of the information can come only from you, you should still give it to your lawyer or the judge. Just because it cannot be supported by other people does not mean it should not be used. The judge needs a full picture of your life.

Will private details about my life be talked about in the courtroom?

Some of the information may be sensitive and you may not want it discussed out loud in court. In that case, ask your lawyer to give the information in

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writing to the judge and the government lawyer. “Crown”, “crown attorney” and “prosecutor” are other names for the government lawyer.

It is probably best to give the information in writing if you are being sentenced in a small community where everyone knows each other, or if the information about your life includes very private details.

What information does the judge need about non-jail options?

The judge needs to be told about sentencing options instead of jail. All non-jail options can be considered under Gladue, even if they are not Aboriginal programs. Sometimes Aboriginal programs are not available in a community, or you may not wish to be part of an Aboriginal program.

Are there programs that could help you with some of the issues that led you to court? For example, are there substance abuse programs or other types of healing programs?

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If there are, the judge will need to know where those programs are and if you can get in. Even if you have been to programs like these before, it does not mean that you cannot go again. The judge may need to know what worked and what did not work the last time.

The judge may also want to know about any suitable programs or activities in your community, on or off reserve. Again, the judge will need to know if you can get in.

Your lawyer might not know this sort of information, so other people, such as Aboriginal courtworkers, may have to help. They may be able to give your lawyer information about you and some of the community issues and programs.

### Who gives the judge all this information?

Your lawyer should collect all the information and give it to the judge. It is best if the information is written up in a report. But that may not always be possible. The most important thing is that the judge should be given all the information needed to apply Gladue.

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In some parts of Ontario, but not all, there are special Gladue caseworkers who write reports about Aboriginal offenders for the courts. If you are in one of these places, a Gladue caseworker can write a report for your lawyer to give the judge. If there are no Gladue caseworkers, an Aboriginal courtworker can help with giving the information to the judge.

Sometimes the judge asks for a pre-sentence report. Most of the time, probation officers write pre-sentence reports. But they are usually not able to get the type of information that a judge needs to apply Gladue.

### What should I expect from my lawyer?

Your lawyer's job is to defend you. That is why your lawyer is also called the "defence lawyer".

Your lawyer might be a lawyer you hired or the "duty counsel" at court. Duty counsel are lawyers who give free legal help to people who are about to appear in court and do not have their own lawyer.

Before you hire a lawyer or agree to work with duty counsel, you should make sure that he or she

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understands Gladue and is up-to-date on the law in this area. This is because Gladue puts more responsibility on your lawyer to give the court information about your background and non-jail options.

If your lawyer has never heard of Gladue or tells you that it does not apply to you, then you should think about getting another lawyer. The same goes for duty counsel. You can insist on getting a properly trained duty counsel.

### What if I do not have a lawyer?

Tell the judge you are Aboriginal and that Gladue applies to you. The judge and the government lawyer have to consider Gladue even if you do not have a lawyer. They may have to ask you directly about your background.

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## What if I committed a very serious crime?

There are no crimes so serious that Gladue does not apply. Gladue applies to all crimes in the Criminal Code of Canada.

Each case has to be decided on its own, no matter what the crime is. The sentence could be one that fits your situation and has meaning in your culture.

Remember, even if you are sent to jail, the judge still needs to decide how long you spend there.

## Is there any stage at court when Gladue does not apply?

Gladue does not apply to the trial process.

Gladue applies at your bail hearing, which happens before the trial. Gladue applies again if you are tried and found guilty or you plead guilty. The judge then has to apply Gladue when deciding your sentence. If you are sent to jail, Gladue applies to your parole hearing in jail.

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Does the judge always have to consider Gladue for Aboriginal people?

Yes, unless you tell the judge not to. This is sometimes called “waiving” Gladue. If you waive Gladue, the judge will not have to consider your Aboriginal background when deciding your sentence. This is hardly ever a good idea. So, be very careful about agreeing to waive Gladue.

In some situations it might make sense not to ask for a report. This could happen if, for example, you are in jail waiting for your trial and the crown attorney is asking for a sentence that is shorter than the time it would take to prepare the report. But, this does not mean that you should waive all of Gladue. Your lawyer could still provide the information the judge needs to follow Gladue.

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## What if the judge does not follow Gladue when sentencing me?

**This is what a judge has to do to follow Gladue:**

- 1. The judge must get the necessary information about your background and about the non-jail options available.**
- 2. The judge has to consider whether the options mean that a non-jail sentence should be used instead of jail.**
- 3. Even if the judge decides that jail is necessary, the judge must still consider your background information when deciding how long your jail sentence should be.**

**If any of these three things do not happen, then the judge may have made a mistake and you may be able to appeal the sentence. For help with appealing a sentence, contact the Legal Aid Ontario office in your area.**

**If you have been refused legal aid, you can still appeal your sentence from jail. Make sure you say in your appeal form that you think that Gladue was not followed in your case.**

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What information does the judge need to apply Gladue to bail hearings?

The judge does not need the same amount of information about your personal life.

At a bail hearing, the judge applies Gladue to decide what options can be used instead of putting you in jail while you wait for your next court date. The judge needs a plan for what will happen while you are out on bail.

What if I am sent to jail?

Gladue applies if you have a parole hearing in jail. The people who decide about parole must consider options for allowing you to be let out into the community. They will need to see a plan for what will happen if you are let out.

If you like, you can ask for an Elder to help at your parole hearing.

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## How to get legal help

### **Aboriginal Courtworker Programs** help

Aboriginal people who are in conflict with the law, whether they are living on or off reserve, including First Nations, status and non-status Indians, Métis with or without a Métis card, and Inuit. These programs help Aboriginal people who are accused of committing crimes to better understand their rights, options, and responsibilities at criminal courts.

Many of these programs take place at Friendship Centres. For more information contact your local Friendship Centre. Friendship Centres across Ontario are listed on the web site of the **Ontario Federation of Indian Friendship Centres (OFIFC)** at [www.ofifc.org/ofifchome/page/OfficeList.htm](http://www.ofifc.org/ofifchome/page/OfficeList.htm)



If you or your lawyer want more information about Gladue, go to the web site of Aboriginal Legal Services of Toronto (ALST) and look at the Gladue page. ALST has Aboriginal courtworkers at all the Toronto area criminal courts. ALST also has Gladue

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caseworkers who write reports in several places in Ontario.

**Aboriginal Legal Services of Toronto (ALST)**

**[www.aboriginallegal.ca](http://www.aboriginallegal.ca)**

803-415 Yonge Street, Toronto ON M5B 2E7

Telephone: **416-408-3967** or **416-408-4041**

E-mail: **[alst@web.ca](mailto:alst@web.ca)**



Members of the Nishnawbe Aski Nation (NAN) can get help from:

**Nishnawbe-Aski Legal Services Corporation (NALSC)**

**[www.nanlegal.on.ca](http://www.nanlegal.on.ca)**

86 S. Cumberland Street, Thunder Bay ON P7B 2V3

Toll-free: **1-800-465-5581**

Telephone: **807-622-1413**

E-mail: **[info@nanlegal.on.ca](mailto:info@nanlegal.on.ca)**







Legal Aid is available to low income individuals and disadvantaged communities for a variety of legal problems. To contact **Legal Aid Ontario**, visit their web site at **[www.legalaid.on.ca](http://www.legalaid.on.ca)** or call them:

Toll-free: **1-800-668-8258**

Toll-free TTY: **1-866-641-8867**

In Toronto: **416-979-1446**

TTY in Toronto: **416-598-8867**

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In 1996, the government changed the laws about how a person should be sentenced. One of the changes was to add section 718.2(e) to the *Criminal Code* of Canada:

**718.2** A court that imposes a sentence shall also take into consideration the following principles:  
(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.

This means that a judge should look for options other than jail when sentencing any person, and the judge should look especially hard for options when the person being sentenced is an Aboriginal person. The meaning of this section was explained in 1999 when the Supreme Court of Canada gave its decision in *R. v. Gladue*.

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**This pamphlet contains general information. It is not a substitute for getting legal advice about your particular situation.**



The Ontario Federation of Indian Friendship Centres (OFIFC), Aboriginal Legal Services of Toronto (ALST), and CLEO (Community Legal Education Ontario / Éducation juridique communautaire Ontario) worked in partnership to develop and produce this pamphlet and an accompanying poster.

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Free copies of this pamphlet and the poster are available from CLEO, where you can find free publications on other legal topics as well. For a copy of CLEO's current Order Form, please visit: **[www.cleo.on.ca](http://www.cleo.on.ca)** or call **416-408-4420, extension 33**

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