



Production and Delivery of Gladue Pre-sentence Reports A Review of Selected Canadian Programs

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EXECUTIVE SUMMARY

Gladue reports are specialized pre-sentence reports meant to assist the courts in determining the Gladue factors in each case. Gladue reports assist judges by contextualizing the circumstances of individual Indigenous people who are charged with crimes and being sentenced. In *R. v. Ipeelee* (2012) the Supreme Court of Canada (SCC) indicated that a Gladue report is an indispensable sentencing tool to be provided at a sentencing hearing for an Aboriginal offender and it is also indispensable to a judge in fulfilling his/her/their duties under s. 718.2(e) of the *Criminal Code*.

In order to understand the current state of Gladue report writing programs in Canada and consider future state of Gladue report service delivery in British Columbia (BC), this report presents and compares information gathered from interviews with stakeholders from various jurisdictions in Canada about Gladue report service delivery models. A total of 159 stakeholders were consulted for the present report, either during individual interviews or group discussions. Comparisons were made between Gladue report delivery programs in Alberta, British Columbia, Nova Scotia, Ontario, Prince Edward Island, Québec, and Yukon. The analysis, however, was limited by the lack of publicly available data on the sentencing of Indigenous persons in the seven jurisdictions considered and the lack of systematic research on the impact of Gladue reports on the sentencing of Indigenous persons. Data to support an analysis of sentencing decisions in cases where a Gladue report is produced for the court are still unavailable.

The SCC has provided direction in *Gladue*, reaffirmed in *Ipeelee*, about the consideration of Gladue factors in every case involving an Indigenous person being sentenced in Canada. At this time, however, the SCC has not provided specific direction about the preferred content, structure, and approach of Gladue reports. Nevertheless, some reasonably clear direction as to the preferred content, structure, and approach of Gladue reports has been provided by the lower courts (where most of the sentencing of Indigenous people takes place) and the appellate courts. The report reviews the guidance offered at that level.

The process of producing and delivering Gladue reports can be complex and differs in each jurisdiction. Gladue report service provision is still unstructured in many parts of the country. There are no national approach, guideline, or policy with respect to the production and delivery of such reports. There are three primary means through which the courts receive Gladue information at the time of sentencing: Gladue reports, Pre-sentence reports (PSRs) with Gladue

components, and oral submissions. Gladue reports are produced in most parts of the country, but there are provinces and territories where Gladue information is mostly, or exclusively, presented by means of a PSR with a Gladue component, or by oral submissions (by legal counsel, Native Courtworkers, or other advocates).

This report briefly describes the Gladue report provincial programs. It also considers the following main questions:

- Who *should* be responsible for, in the sense of funding, the production and delivery of reports?

There is substantial variance across the country in terms of who assumes responsibility for the production of Gladue reports and who is currently funding Gladue report programs. In some provinces and territories, the responsibility is centralized and belongs to one organization, whether government or a non-profit organization, while in others several agencies have accepted responsibility for producing Gladue reports. There are also differences in staffing models; in some jurisdictions Gladue writers are contracted, in others they are staff with organizations, and in some cases, both contracted and staff writers exist. Another difference observed between programs is the fact that in some jurisdictions the responsibility for producing Gladue reports lies exclusively, or almost exclusively, with Indigenous organizations. In many instances, Indigenous organizations also offer a range of justice-related services, including caseworker or court worker services, aftercare support, healing programs, and restorative justice programs.

Each of the provinces and the territory researched use different models to employ and pay Gladue report writers. In most cases, either a government department or a stand-alone organization was responsible to manage these relationships. The different funding models they used reflected the ways in which each agency operated. For example, most choose to employ writers directly either as contractors or as salaried employees. BC is an exception in that writers are paid indirectly.

- Access to Gladue reports and protection of privacy

In most provinces, the issue of whether Gladue reports should be distributed or accessible to others than the parties that originally received them has not yet been fully settled. While some people may argue that the reports contain information that is relevant to the rehabilitation of the offender and would be valuable to others working with the offender (including probation officers and correctional authorities), the sensitive and personal nature of the information contained in Gladue reports should dictate great caution in their further distribution. Courts have recognized the need to and, in some cases, found ways to limit access to Gladue reports and protect confidentiality. There are however significant variances between jurisdictions in terms of who gets access to the reports once they have been produced, including after sentencing and by correctional authorities.

- Who can request a Gladue report?

The question of who can require and/or request a Gladue report is also an access to justice issue. The right of an Indigenous person to have a Gladue report produced and considered by the court is treated differently across Canada. A sentencing court may require a pre-sentence report (or

probation report), a pre-sentence report with a Gladue component, or a Gladue report. In most provinces, there has been a steady increase in the number of requests for Gladue reports, as well as the number of such reports produced each year. Across the provinces and territory reviewed, Gladue reports are alternatively requested by: defence counsel on behalf of their client (in some cases Crown counsel may be able to request a report if defence counsel has not), the offender, the court/judge, or all of the aforementioned.

Gladue reports are sometimes also requested in the bail context. It is hard to know how frequently this occurs, but it seems to be quite rare. It is in fact not very clear how, practically, a Gladue report can be produced in time in the context of judicial interim release decisions.

- Access to Gladue reports and eligibility criteria

Access to full Gladue reports is limited and not uniform across the country. Each jurisdiction has adopted a different approach to ensuring optimum access to Gladue reports, with different results. Judges do not always have the information they need to fulfill their statutory obligations in sentencing Indigenous peoples. Eligibility criteria to determine access to a Gladue report vary across the country. In many provinces, particularly in those provinces where the Gladue reports are ordered directly by the court (Alberta, Québec, Nova Scotia, and Prince Edward Island) the only eligibility criteria for receiving a Gladue report is self-identification as Indigenous (Indigenous ancestry). In Québec, however, it appears that reports are not ordered by the court when the prosecution is suggesting a sentence of less than four months of imprisonment.

Offenders can waive their right to have their Aboriginal circumstances considered at the time of sentencing, and therefore can also waive their right to a Gladue report. The SCC has left open the possibility that someone may waive consideration of their Aboriginal circumstances or “Gladue rights” as these are often referred to by justice actors.

- Are other forms of reports produced (PSR with Gladue component)?

Strictly speaking PSRs and Gladue reports are two different types of pre-sentence reports. They are both meant to inform the sentencing judge’s decision. Both types of reports may vary in overall quality and coverage. However, they are distinct in several ways. PSRs and Gladue reports are different from each other in both “purpose and intent”. While PSRs focus on assessing future risks, Gladue reports focus on mining the past to understand the impact of systemic factors and individual circumstances on the problem behaviour.

A pre-sentence report can be produced with a “Gladue component” or from a “Gladue perspective”. In some provinces, for example in New Brunswick, the PSR is the main vehicle through which information on the impact of Gladue factors on the offender is made available to the courts. It is not uncommon in some jurisdictions (e.g. Québec, Nova Scotia, PEI) for the courts to order both a PSR and a Gladue report, in part because these two reports contain different kinds of information. Gladue reports are not “expert reports” in the sense that they report information but do not attempt to determine its accuracy. The latter is left to the judge with submissions from defence and Crown counsel. Data on the frequency with which Gladue reports with an Indigenous component are produced in various provinces or territories could not

be obtained. Respondents tended to agree that PSRs with a Gladue component varied in quality and are generally a poor substitute for a Gladue report.

- Is there a prescribed format for Gladue reports?

There is no national standard framework for Gladue reports. However, in most cases there is an accepted and acceptable format within each jurisdiction.

- Who are the writers and what are their connections to Indigenous communities?

Gladue report writers are generally individuals who have some combination of the following: an expertise on particular Indigenous communities, an educational background working with Indigenous communities or Indigenous peoples in the context of the criminal justice system, and/or lived experience as Indigenous persons. Report writers interviewed for the present were generally either from the same Indigenous communities as the subjects for whom they had written reports or very knowledgeable about and had connections to the Indigenous community a report subject was from.

- Selection, recruitment, training, remuneration of writers

Training for report writers varies by jurisdiction. No one program is considered the standard training model for educating Gladue report writers. Rather, various training programs exist in each jurisdiction studied for this comparative analysis. In some instances, writers have not received formal Gladue report writing training. Most of the stakeholders who were interviewed for this study agreed that the appropriate skills a Gladue report writer must possess are some combination of the following: detailed knowledge of the history of colonialism in Canada; knowledge of the specific Indigenous community/ communities they are writing about; strong interviewing skills; ability to build rapport/ trust; trauma-informed approach to working with people, and cultural competency skills.

- Perceived usefulness of the reports

Gladue reports are useful to the courts at sentencing. This fact is not controversial. However, the available data on how Gladue reports specifically impact sentences are extremely limited. For this reason, gathering stakeholder perceptions about usefulness was particularly important.

Key Conclusions

Access to the Gladue reports should be available to anyone who self-identifies as Indigenous and access should not be restricted by geographic or regional limitations.

Eligibility criteria: Gladue reports should be available to anyone who self-identifies as Indigenous, unless the accused waives their right to have a report produced, which does not waive the duty to consider Gladue factors. Courts, Crown prosecutors, and defence counsel all carry the responsibility of inquiring whether an accused self-identifies as an Indigenous person

Self-care and support for Gladue report writers: Gladue report writers require more supports, training for writers should include information on self-care, and funding should be provided for culturally appropriate counselling or other support services for writers as requested.

Cost efficiency: There is significant room for improvement in the ways that various agencies track the costs of producing Gladue reports. To make gains in this area accurate data is required including data that tracks administrative staff and writer time allocated to Gladue reports.

Timeliness of production/delivery of the reports: Timely production and delivery of reports is desirable and essential to the role that Gladue reports may play in sentencing decisions.

Access by writers to persons in detention: Access to incarcerated Gladue report subjects is rarely an issue. Maintaining good relationships with Corrections is necessary to facilitating report writers' access to subjects in prisons.

Formats and contents of the reports: Standards exist for the format and contents of Gladue reports, although different standards may be applied by various providers.

Quality Control : In most Gladue reports service delivery models, there is a report quality control process in place as well as supervision of the work of report writers, although practices vary depending on the service providers.

Use made of the report: Gladue reports are a means for the court to take into account the unique and systemic factors of each Indigenous person being sentenced, as well as to consider alternatives to incarceration.

Quality, usefulness and impact of the reports: Gladue reports are generally of good quality, are useful to the courts, and are perceived to have an impact on the sentencing of Indigenous offenders. Reports are also often seen to have a “therapeutic” impact on the subject of the report.

Confidentiality and protection of information: It is important to be clear about who can access Gladue reports and how they can be accessed. This clarity is necessary to protect the privacy rights of the report subject and collateral interviewees. It is also important to convey the right message about confidentiality, informed consent and the protection of Gladue report.

Training of writers: Gladue report writers have access to training programs; however, the level of training required of writers is not consistent across jurisdictions and the training programs are not currently standardized. A certification process for Gladue writers may achieve consistency in knowledge and skills.

Writers connection with communities and access to information required for the reports: Connections to Indigenous communities is beneficial to Gladue writers to complete their work. However, in some cases, it may not be beneficial for a writer to work on reports for people within their own Indigenous communities.

Role of defence counsel and prosecutors: Defence and Crown counsel both have a duty to try to identify Indigenous defendants and bring Gladue information before the court in every case involving an Indigenous person.

Links with diversion programs: Gladue principles should be considered as a part of diversion and/or restorative justice programs for Indigenous people.

Link with aftercare services: Gladue aftercare services are essential to support Indigenous offenders and help ensure their success in meeting sentencing conditions.

Impact on victims and community: The impact of Gladue principles on victims, their families, and Indigenous communities must be considered.

The report concludes with several recommendations concerning the need for future consultations, research and data collection. The report also notes the need for funding to support Indigenous communities and organizations in developing or reviving culturally appropriate resources, including those grounded in Indigenous laws and legal processes that support alternatives to jail while also meeting the principles and purposes of sentencing.

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