



International Centre for Criminal Law  
Reform and Criminal Justice Policy

# **Production and Delivery of Gladue Pre-sentence Reports**

## **A Review of Selected Canadian Programs**

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<sup>1</sup> See: <https://icclr.org/about/>

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We wish to offer apologies to anyone we have neglected to include in the above.

## Note

In the course of conducting research for this report the research team heard that the family of Jamie Tanis Gladue, the woman whose case resulted in the landmark Supreme Court of Canada ruling in *R. v. Gladue* in 1999, has expressed concerns about the legal terms associated with the *Gladue* decision being referenced always prefaced by “Gladue” (i.e.: Gladue factors, Gladue reports, Gladue rights, Gladue submissions, etc.). While we were unable to locate any information about this or confirm it, the research team does wish to acknowledge these sentiments and include them here if only to hold space for the possibility of this being the case. We acknowledge that we continue to reference these terms in this way throughout this report.

We do not wish to further inflict harm on Ms. Gladue or her family by referring to the concepts coming out of the Supreme Court of Canada’s decision and the development of the law since then in a manner that may seem to freeze Ms. Gladue in time or only connects her to encounters with the Canadian criminal justice system. Rather, recognizing the power of words and the importance of associating a person’s name with specific experiences or life events, we wish to express that from our perspective, Ms. Gladue’s name as associated with the *Gladue* decision and legal impacts it has for all Indigenous peoples in Canada is for us a harbinger of hope that invokes a call to justice and meaningful access to justice for all Indigenous peoples.

The *Criminal Code of Canada* refers specifically to “Aboriginal offenders” in s.718.2(e), as does the Supreme Court of Canada (SCC) in *R. v. Gladue*, [1999] 1 S.C.R. 688. Throughout this report we use the terms “Aboriginal offenders” or “Indigenous offenders”. In using these terms we refer to Aboriginal/ Indigenous individuals who have been convicted of committing a criminal offence and who have been sentenced in a Canadian court of law, and who are entitled to specialized pre-sentence reports, also called Gladue reports. This is in no way meant to represent these Indigenous peoples as defined by their encounters with the criminal justice system, but rather to describe the position they find themselves in within the criminal justice system when being sentenced. We do not suggest this is the only circumstance when an Indigenous person’s Gladue rights may be engaged or when they may benefit from a Gladue report.

We are inspired by the resilience, strength, and survivance of Indigenous people who have challenged the fairness of the Canadian justice system for Indigenous peoples and who have survived and continue to thrive despite the individual and collective impacts of colonialism.

All Our Relations

# Table of Contents

<b>Acknowledgments</b> .....	ii
<b>Note</b> .....	iii
<b>Terms and Definitions</b> .....	7
<b>Introduction</b> .....	11
<b>Method</b> .....	13
<b>1. General description of the issue(s)</b> .....	16
<b>2. Discussions in British Columbia</b> .....	20
2.1 Tenth and Eleventh BC Justice Summits.....	21
2.2 Gladue Knowledge Sharing Gathering.....	22
2.3 BC First Nations Justice Council and the Métis Nation of British Columbia Consultations.....	23
2.4 Legal Services Society’s Gladue programs.....	24
2.5 Law Foundation of British Columbia.....	26
<b>3. Court decisions and Gladue reports</b> .....	26
<b>4. Focus of this comparative analysis and the issues considered in this report</b> .....	29
4.1 Who is Responsible for the Production and Delivery of Gladue Reports?.....	30
4.2 Who can request a Gladue report?.....	31
4.3 Are Gladue reports produced for bail hearings?.....	34
4.4 Access to Gladue reports and eligibility criteria.....	36
4.5 Are other forms of reports produced (PSR with Gladue component)?.....	38
4.6 Is there a prescribed format for Gladue reports?.....	40
<b>4.7 Who are the writers and what are their connections to Indigenous communities?</b> .....	41
4.8 Selection, recruitment, training, remuneration of writers.....	41
4.9 Support for writers.....	42
4.10 Perceived usefulness of the reports.....	42
4.11 Advantages and disadvantages of different models of service delivery.....	43
4.12 Who is responsible for funding for the production of Gladue reports.....	43
4.13 Access to Gladue reports, protection of privacy.....	43
<b>5. Description of Provincial Programs</b> .....	45
5.1. British Columbia.....	45

5.2.	Yukon.....	48
5.3.	Alberta.....	50
5.4.	Ontario .....	51
5.5.	Québec .....	52
5.6.	Nova Scotia.....	55
5.7.	Prince Edward Island .....	57
<b>6.</b>	<b>Comparison Between Programs .....</b>	<b>59</b>
6.1.	Access to the service .....	60
6.2.	Eligibility criteria.....	61
6.3.	Self-care and support for Gladue report writers.....	64
6.4.	Cost-efficiency .....	66
6.5.	Timeliness of production/delivery of the reports (avoidance of unnecessary delays).....	67
6.6.	Access by writers to Gladue report subjects in prisons .....	69
6.7.	Formats and contents of the reports .....	70
6.8.	Quality control - Supervision of writers/review of draft reports .....	73
6.9.	Use made of the report.....	74
6.10.	Quality, usefulness and impact of the reports.....	78
6.11.	Confidentiality and protection of information.....	81
6.12.	Training of Gladue report writers.....	86
6.13.	Writers connection with communities and access to information required for the reports ..	89
6.14.	Role of defence counsel and Crown counsel .....	90
6.15.	Links with diversion programs.....	92
6.16.	Link with aftercare services.....	93
6.17.	Impact on victims and community .....	94
<b>7.</b>	<b>Discussion .....</b>	<b>95</b>
7.1.	Summary of advantages and disadvantages of different models.....	95
7.2.	Gladue reports and <i>Gladue</i> as a national issue .....	95
7.3.	Gladue writers' capacity.....	96
7.4.	Writing teams.....	97
7.5.	The need for evaluation of programs.....	97

7.6.	How to enhance the impact of reports.....	98
7.7.	Partnerships with Indigenous leaders and communities.....	98
<b>8.</b>	<b>Concluding Remarks and Recommendations.....</b>	<b>98</b>

## Terms and Definitions

- “Aboriginal” and “Indigenous”: The Aboriginal peoples of Canada include the Inuit, Métis, and First Nations (status and non-status) peoples. Indigenous peoples include all Aboriginal peoples. These terms are used interchangeably within this report.
- Alternatives to incarceration: All available sanctions, other than imprisonment, that can be considered by a judge at the time of sentencing.
- 2SLGBTQQIA people: Two-Spirit, lesbian, gay, bisexual, transgender, queer, questioning, intersex and asexual people, and all other sexual orientations and genders.
- Community Narrative Template: A tool created by BC corrections to assist probation officers working with Indigenous clients. The tool is meant to be shared with and completed by Indigenous Justice Partners. The object of the tool is to assist its users to tell the stories of their own communities, write PSR’s for Indigenous peoples, and be a source of information for BC Corrections clients about their own communities and the resources there. The template is meant to provide critical information about Indigenous communities in BC, including the rich history, the strength of culture within community, the unique needs and socio-economic challenges the community may be facing, available programs and services, and other resources that BC Corrections may want to draw upon to support their clients.
- Detention Center: An institution where people are held in detention while awaiting trial or sentencing.
- Exhibit: In law, a document or thing produced for the inspection of the court; or a document or thing shown to a witness giving evidence; or a document or thing referred to in a deposition; or a document referred to in, but not annexed to, an affidavit.
- Gladue Factors: The factors the court must consider as “the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts”.<sup>2</sup> These factors “are mitigating in nature in that they may have played a part in the aboriginal offender’s conduct.”<sup>3 4</sup>
- Gladue Letter: A short form of a Gladue report sometimes produced in support of court decision-making in some sentencing proceedings or bail hearings.

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<sup>2</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>3</sup> *R. v. Ipeelee*, para. 73 and *R. v. Wells*, 2000 SCC 10, para. 38.

<sup>4</sup> *Criminal Code of Canada*, RSC 1985, C-46, s. 718.2(e).

- Gladue Report: A specialized pre-sentence report prepared for the court by a Gladue report writer that contains “case-specific information... tailored to the specific circumstances of Aboriginal offenders.”<sup>5</sup> A Gladue report provides the court information about an Indigenous person’s unique systemic or background factors. A Gladue report also provides viable information about sentencing options, such as alternatives to incarceration and/or restorative justice including options that may be culturally appropriate.<sup>6</sup>
- Gladue Rights: The rights that flow from the consideration of Gladue factors, these include the rights flowing from the sentencing principle set out in s. 718.2(e) of the *Criminal Code of Canada* and affirmed by the Supreme Court of Canada.
- Gladue Submission: An oral or written submission to the court, or other adjudicating body, made in a form other than a Gladue report, that addresses Gladue factors such as the unique and systemic background of an Indigenous person before the court or alternatives to incarceration.
- Home Community: The Indigenous community an Aboriginal person originates from, including a specific First Nation community, Métis community, Inuit community, or Indian Band or Métis Settlement where an Aboriginal individual has been officially enrolled on a membership list.
- Indigenous Justice Partner: An Aboriginal community, judge, police service, Crown counsel office or other justice stakeholder that participates in events supported by the Aboriginal Justice Strategic Plan to encourage dialogue and relationships between Aboriginal communities and government corrections systems participants.
- Legal Aid Retainer: Also referred to as the “Tariff Contract”, the legal aid retainer is the agreement made between LSS and tariff lawyers. The typical contents of a legal aid retainer, its notices and instructions to counsel may change among different retainers at different times.
- Native Courtworker and Counselling Association of British Columbia: A provincial organization with a 35-year history of providing services to Indigenous Peoples who come into conflict with law. Native courtworkers provide information and guidance to Indigenous persons charged with an offence. These services may be provided at all stages of the criminal justice process, including referral to legal resources and other community resources such as education, employment, and addictions treatment. This organization provides cultural awareness information to justice officials concerning the cultural

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<sup>5</sup> *R. v. Ipeelee*, 2012 SCC 13, para. 60.

<sup>6</sup> Although it is the case that Gladue service delivery is approached differently in different jurisdictions in Canada, generally there is consensus that a Gladue report is a specialized pre-sentence report prepared for the court by a Gladue report writer to provide context specific information about an Indigenous person who is being sentenced.

traditions, values, languages, socio-economic conditions and concerns of Indigenous communities and individuals with whom justice officials may interact.

- Pre-Sentence Report: A type of report submitted to a judge prior to sentencing. The report includes background information about the accused, obtained through interviews with individuals close to the accused. The purpose of a pre-sentence report is to assist the court in coming to a sentencing decision by providing a more thorough look into the accused's background. "Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters: the offenders age, maturity, character, behaviour, attitude and willingness to make amends."<sup>7</sup>
- Pre-Sentence Reports with Gladue Component: A pre-sentence report that contains information about the offender's Indigeneity, relevant Gladue factors, and culturally appropriate sentencing recommendations. Section 721(1) of the *Criminal Code* states that a probation officer may be required by a court to prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.
- Prison: This term is inclusive of penitentiaries, the common jail, public or reformatory prisons, lock-up, guardroom or other place in which persons who are charged with or convicted of offences are kept in custody.
- Sentencing Circle: An event where various members of the community - which may include a judge, prosecutor, defence counsel, police, social service providers, and community elders - along with the offender, the victim and their family and supporters meet in a circle format to discuss: the offence, the factors that might have contributed to it, the sentencing options, and ways of reintegrating the offender into the community. Sentencing circles can be part of the court process but are not separate courts in and of themselves. They can be a valuable way of getting input and advice from the community to help a judge set an appropriate and effective sentence.

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<sup>7</sup> *Criminal Code of Canada*, RSC 1985, C-46, s. 721.3(a).

## Abbreviations

ALS - Aboriginal Legal Services of Toronto  
BC - British Columbia  
BCCA - British Columbia Court of Appeal  
BCSC - British Columbia Supreme Court  
CAJ - Centre Administrative Judiciaire  
CNG - Cree Nation Government  
CNT - Community Narrative Template  
CYFN - Counsel of Yukon First Nations  
DPP - Director of Public Prosecutions  
FASD - Fetal Alcohol Spectrum Disorder  
FNJC - British Columbia First Nations Justice Counsel  
GMC - Gladue Management Committee  
GWSBC - Gladue Writers Society of British Columbia  
ICCLR - International Centre for Criminal Law Reform  
ICLC - Indigenous Community Legal Clinic  
IJC - Indigenous Justice Centre  
IJP - Indigenous Justice Partners  
IJS - Indigenous Justice Strategy  
IPS - Indigenous Perspective Society  
LFBC - Law Foundation of British Columbia  
LSS - Legal Services Society  
MAG - Ministry of the Attorney General  
MCPEI - Mi'kmaq Confederacy of PEI  
MLSN - Mi'kmaw Legal Support Network  
MNBC - Métis Nation British Columbia  
MOU - Memorandum of Understanding  
NCCABC - Native Courtworker and Counselling Association of British Columbia  
PECA - Prince Edward Island Court of Appeal  
PLS - Prisoner Legal Services  
PSR - Pre-sentence Report  
SCC - Supreme Court of Canada  
SPAQ - Services Parajudiciaires Autochtones du Québec, Native Para-Judicial Services of Québec  
TI - Tungasuvvingat Inuit  
TRC - Truth and Reconciliation Commission  
UNDRIP - United Nations Declaration on the Rights of Indigenous People  
YLSS - Yukon Legal Services Society

## Introduction

In Canada, Indigenous persons are disproportionately incarcerated. In federal penitentiaries, and provincial detention centers 22 to 38 percent of inmates are Aboriginal.<sup>8</sup> At the same time, Indigenous peoples make up only four to five percent of the Canadian population.<sup>9</sup>

In 1999, in *R. v. Gladue (Gladue)*, the Supreme Court of Canada (SCC) provided an interpretation of s. 718.2(e) of the *Criminal Code of Canada* and specifically addressed the crisis of Aboriginal overrepresentation in the prison system. The SCC instructed judges to engage in the sentencing of Aboriginal people by considering the systemic factors that impact their lives due to colonialism. These factors have come to be known as Gladue factors. The SCC also directed courts to consider alternatives to incarceration whenever possible when sentencing an Aboriginal person.

In *R. v. Ipeelee* (2012) the Supreme Court of Canada 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*.

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. These circumstances might include; displacement and disconnection from one's Indigenous community, experiences as a result of Indian Residential Schools, involvement in child welfare systems, intergenerational trauma, lack of education opportunities, poverty, substance use, physical and/or mental health issues, and many other barriers and risks faced by Indigenous people within Canadian society as a result of colonialism. Gladue reports describe how issues resulting from colonialism, such as lower education attainment, lower income, higher unemployment, higher likelihood of suffering from substance abuse or attempting suicide, and higher rates of incarceration of Aboriginal peoples, have manifested in the individual offender's case.<sup>10</sup> Gladue reports also outline sentencing alternatives and emphasize healing and culturally appropriate services and programs, including in some cases restorative justice options.

Gladue reports are written by Gladue report writers. The writing of a Gladue report may be achieved in a variety of ways depending on the province or territory where a person is being sentenced. Gladue report writers interview the Indigenous person being sentenced, referred to as

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<sup>8</sup> In federal penitentiaries, 22% of men and 38% of women are aboriginal. In provincial detention centers 24% of men and 31% of women are aboriginal. Julie Reitano, "Adult Correctional Statistics in Canada, 2014/15," *Juristat*, March 22 2016

<sup>9</sup> Statistics Canada, "Aboriginal Peoples: Fact Sheet for British Columbia," March 14, 2016, <http://www.statcan.gc.ca/pub/89-656-x/89-656-x2016011-eng.htm>.

<sup>10</sup> Walker, Mitch (2018) "Gladue Reports, Myths, Realities, Applications and Options" Presented at the 2018 Continuing Legal Education Society of British Columbia's Conference on Gladue Submissions, 15-16 November 2018.

the subject of the report, and interviews are undertaken with other people who have information about the subject and/or their Indigenous community. These people are referred to as collaterals. Collaterals may be family, members of the Indigenous person's community, service providers, support people, counsellors, and others. The writer will also often incorporate research from reliable secondary sources that provide relevant information that assists in contextualizing the life and experiences of the individual or their family and/or community. Some of these reliable secondary sources are; the Royal Commission on Aboriginal Peoples, the reports of the Truth and Reconciliation Commission of Canada, the National Inquiry into Murdered and Missing Indigenous Women and Girls, and/or other historical and government sources.

Despite the fact that *Gladue* reports have been used in Canada for over 20 years, there is little research that investigates the development, delivery, and effects of Gladue reports. To date, there has not been a study of the advantages and disadvantages of different methods of Gladue report production and delivery. Further, there is a lack of data on justice and community stakeholders' perceptions and experience of the process of Gladue report writing.

In order to understand the current state of Gladue report writing programs 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.

The main goals of this study were:

- 1) To map out the service delivery models currently being used to complete Gladue reports in various jurisdictions across Canada, including but not necessarily limited to Alberta, British Columbia, Ontario, Nova Scotia, Québec, Prince Edward Island, and the Yukon. The purpose of the mapping is to attempt to illuminate such features as:
  - a. How accused receive funding for a Gladue report
  - b. The challenges Gladue report program administrators have experienced regarding gaps in the process and how those challenges were addressed
  - c. Who writes the reports, where they are written, and how is the necessary data collected
  - d. Whether report writers have ongoing ties to the offender's home community
  - e. How service delivery models compare across Canada including:
    - The funding models used in various jurisdictions and the advantages or disadvantages of those structures
    - The costs of producing a Gladue report
    - Gaps between eligibility, demand and supply
    - The extent of available aftercare support for the subjects
    - The organizational structure of Gladue report service delivery programs and the level of government involvement
    - Challenges related to staffing models, writer training and professional development
    - The extent of awareness raising activities for the public and for the

- justice sector
  - How service providers address issues relating to informed consent and confidentiality of information
- 2) To determine the advantages and disadvantages of different Gladue report writing service delivery models paying particular attention to:
- a. Experiences of stakeholders (stakeholders to include a select number of program administrators, judges, lawyers and Gladue Report writers) including recommendations from stakeholders on opportunities for program improvement
  - b. Timeliness of reports
  - c. Relevance to sentencing process and other uses, if any of the information revealed through the development of reports (ex. child protection reporting, healing plans etc.)
  - d. Utilization of a Gladue report versus a PSRs with or without Gladue components
  - e. Methods of monitoring and evaluating Gladue report programs including if and how case outcomes are tracked, and how this data is used

## **Method**

An Advisory Committee was formed to advise the research team throughout the process. The Committee met twice by conference call to discuss the project as it developed. Committee members were updated as necessary between conference calls. The interview questions, the report outline, and draft were reviewed by the members of the Committee who provided feedback at various stages of the research and reporting process, including detailed feedback on the initial draft of this report.

The authors reviewed the case law concerning Gladue reports and conducted a literature review which included academic articles, policy documents, government reports, and program documentation. However, this report is primarily based on qualitative data collected through interviews, both by telephone and in-person, in six provinces and one territory as well as community consultations in two communities in BC – a in a smaller urban centre and a remote reserve community. The semi-structured interviews followed a set of stakeholder interview questions that was adapted to the various respondents.

The research team relied on a targeted snowball sampling approach to identify potential interview subjects. Interviews and group consultations were conducted with various justice system participants and stakeholders, government officials, Gladue report writers, defence counsel, judges, Crown counsel, First Nations justice workers, former probation officers, former corrections officers, Native Courtworkers, advocacy workers from local social service organizations, as well as community members, including Elders and Chief and Council members from one remote reserve First Nations community in BC.

In Alberta, British Columbia, Nova Scotia, Ontario, Prince Edward Island, Québec, and Yukon the team conducted detailed telephone or in person interviews with judges, Crown attorneys, defence counsel, Gladue report writers, representatives of service delivery agencies responsible for the production of Gladue reports, Native Courtworkers, First Nations Justice Liaison Workers, First Nations community members, and provincial government officials. In BC, group consultations were held with Native Courtworkers, First Nations Justice Liaison Workers, and First Nations community members. In total, 159 stakeholders were consulted.

**Table 1**

Province or Territory	Judges	Defence counsel & Legal Aid Administrator	Prosecutors	Service providers	Writers	Federal & Provincial Government Officials	Academic	Community Members	TOTAL
Alberta	1	3	3	1	3	1			<b>12</b>
BC	15	9	5	10	13	1		34	<b>88</b>
Nova Scotia	2	2	2	1	1		2		<b>10</b>
Ontario	5	2	2	4	6		2		<b>21</b>
PEI		1	1	3	2	1	1		<b>9</b>
Québec	2			2	1	2			<b>7</b>
Yukon		2	1	4	2	2	1		<b>12</b>
Other						3	1		<b>3</b>
<b>TOTAL</b>	<b>25</b>	<b>19</b>	<b>14</b>	<b>25</b>	<b>28</b>	<b>7</b>	<b>7</b>	<b>34<sup>11</sup></b>	<b>159</b>

### *Limitations*

The study was constrained by its timeframe and the difficulty in identifying and contacting potential respondents. Notwithstanding that difficulty, the authors are confident that their approach allowed a fair comparison between the different models of Gladue reports service delivery approaches in the selected provinces.

The initial plan for the study envisaged conducting a survey or some interviews in British Columbia with individuals who have been the subject of a Gladue report. Unfortunately, it soon became evident that the research team would not have direct access to these individuals. However, the information gathered through the interviews, in particular the 25 judges who

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<sup>11</sup> This number accounts for individual interviews and group consultations in Prince George and Bella Bella with First Nations justice workers, Native Courtworkers, and First Nations community members, including Elders and Chief and Council members. Of these 34 participants consulted, 11 engaged in individual interviews and/or group consultations, while the remaining 23 participated through group consultations exclusively.

participated in the study, was sufficient in the authors' view to begin to compare the different service delivery models in terms of the perceived timeliness, quality and usefulness of the Gladue reports currently being produced, as well as their perceived impact on sentencing.

The analysis was also limited by the paucity of the 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. Sufficient data, that would have allowed the authors to fully analyze sentencing decisions in cases where a Gladue report was produced, are currently unavailable. The authors were not able to satisfactorily compare cases where a Gladue report was confirmed filed to other sentencing decisions in cases involving Indigenous offenders where, it was confirmed that, no Gladue report was filed.

Marie-Andrée Denis-Boileau and Marie-Eve Sylvestre recently released an analysis of 635 decisions rendered by trial or appellate courts between 2012 and 2015. This is a small percentage of the total number of relevant sentencing decisions rendered during that period. The analysis concluded that there was judicial resistance to the implementation of Gladue principles, but it did not cover the role or impact of Gladue reports.<sup>12</sup> Since quantitative data were unavailable, the authors of the present report had to rely on the stakeholders' perception of the impact of Gladue reports on the sentencing of Indigenous persons. The authors cannot comment on whether sentences are affected by the model of delivery of Gladue reports. However, the authors happily note that Dr. Dickson of Carleton University (Department of Law and Legal Studies) is currently conducting a four-year study, with support from the Social Science and Humanities Research Council, of the use of social context information in judicial determination of sentences for Indigenous peoples in Canada. The study is expected to be completed 2021.<sup>13</sup>

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<sup>12</sup> Marie-Eve Sylvestre and Marie-Andrée Denis-Boileau, *Ipeelee and the Duty to Resist*, UBC Law Review 51.2 (2018): 548-611.

<sup>13</sup> Given that Dr. Dickson's research was already underway when the authors contacted people for the interviews described below, some of the persons contacted may have been under the impression that they had already responded to a survey about sentencing and Indigenous peoples and did not therefore need to respond to our requests for interviews.

## 1. General description of the issue(s)

Under “Other sentencing principles”, s. 718.2(e) of the *Criminal Code* states:

**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 and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.<sup>14</sup>

The aim of this provision was to address the overincarceration of Indigenous peoples. The provision attempts to accomplish this by requiring judges to consider what may have brought a particular Indigenous offender into contact with the law and before the courts.<sup>15</sup> While the provision applies to all individuals who come before the courts, it is especially significant in sentencing Indigenous persons.

In 1999, in *Gladue*, the SCC interpreted s. 718.2(e) and clarified that this section applies to all Aboriginal offenders regardless of where they reside and whether they have maintained connections to their Indigenous community of origin.<sup>16</sup> More importantly, the SCC focused on the problem of Aboriginal overrepresentation in the prison system and instructed judges “to undertake the process of sentencing aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.”<sup>17</sup> In its decision, the SCC referenced *Bridging the Cultural Divide*, the report of the Royal Commission on Aboriginal Peoples and the *Report of the Aboriginal Justice Inquiry of Manitoba*. The SCC assessed the failure of the Canadian criminal justice system when it comes to Indigenous peoples:

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.<sup>18</sup>

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<sup>14</sup> *Criminal Code of Canada*, RSC 1985, C-46, 718.2(e). Note that the words “that are reasonable in the circumstances and consistent with the harm done to victims or to the community” were added in 2015, by *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 24.

<sup>15</sup> *Ibid.*

<sup>16</sup> This clarification bears significant weight today since 55.8% of Indigenous Canadians live off-reserve according to the most recent Canadian census from 2016. See: Statistics Canada, “Aboriginal Peoples in Canada: Key Results From the 2016 Census” (2017), online: <<https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025a-eng.pdf>>.

<sup>17</sup> *R. v. Gladue*, para. 33.

<sup>18</sup> *R. v. Gladue*, para. 64.

The SCC instructed judges sentencing Aboriginal offenders to consider two sets of factors:

- The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts, and
- 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.<sup>19</sup>

In *R. v. Ipeelee (Ipeelee)*, the SCC reaffirmed that “proportionality is the *sine qua non* of a just sanction” and that sentences must all be “proportionate to both the gravity of the *offence* and the degree of responsibility of the *offender*”.<sup>20</sup> Systemic and background factors address moral blameworthiness which must be considered by judges in the crafting of an appropriate sentence. The SCC explained that “Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.”<sup>21</sup> The SCC emphasized that sentencing judges have a statutory duty to consider the *Gladue* principles in every case involving an Aboriginal person and that the sentence must be proportionate to both the gravity of the offence and the degree of responsibility of the offender. Section 718.2(e) “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”.<sup>22</sup>

In 2015, three years following *Ipeelee*, the Truth and Reconciliation Commission (TRC) of Canada announced 94 Calls to Action.<sup>23</sup> These Calls to Action highlighted the need for accountability from the federal, provincial, and territorial governments with respect to addressing the overrepresentation of Indigenous peoples in prisons. The TRC called for providing funding resources that provide meaningful alternatives to imprisonment.

Although the TRC does not specifically name Gladue principles as such in the Calls to Action, Calls 30-32 essentially support the intention of Gladue principles and the implementation of these to assist in the reducing the numbers of the Indigenous people sentenced to prison:

30. We call upon federal, provincial, and territorial governments to commit to eliminating the overrepresentation of Aboriginal people in custody over the next decade, and to issue detailed annual reports that monitor and evaluate progress in doing so.

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<sup>19</sup> *Ibid.*, para. 66.

<sup>20</sup> *R. v. Ipeelee*, paras. 36-39.

<sup>21</sup> *Ibid.*, para. 83.

<sup>22</sup> *Ibid.*, para. 75.

<sup>23</sup> Truth and Reconciliation Commission of Canada: Calls to Action, 2015.

31. We call upon the federal, provincial, and territorial governments to provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.

32. We call upon the federal government to amend the Criminal Code to allow trial judges, upon giving reasons, to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.<sup>24</sup>

The 2017 Evaluation of the federal government’s Aboriginal Justice Strategy (now Indigenous Justice Strategy)<sup>25</sup> noted the “lack of meaningful enforcement of Gladue principles” across Canada and the limited funding and support for “Gladue-related services”. A key finding of the evaluation was that the overrepresentation of Indigenous people in the mainstream justice system, and the inability of that system to address the problem effectively, had not been affected by the Aboriginal Justice Strategy. It recommended that the mainstream justice system’s failures should be addressed through federal government leadership in supporting community-based justice programs.

Very recently, the Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls included Calls for Justice that highlighted sentencing considerations for Indigenous people, including the need for Gladue reports<sup>26</sup>:

5.15 We call upon federal, provincial, and territorial governments and all actors in the justice system to consider Gladue reports as a right and to resource them appropriately, and to create national standards for Gladue reports, including strength-based reporting.

5.16 We call upon federal, provincial, and territorial governments to provide community-based and Indigenous-specific options for sentencing.

5.17 We call upon federal, provincial, and territorial governments to thoroughly evaluate the impacts of Gladue principles and section 718.2(e) of the Criminal Code on sentencing equity as it relates to violence against Indigenous women, girls, and 2SLGBTQQIA people.

5.18 We call upon the federal government to consider violence against Indigenous women, girls, and 2SLGBTQQIA people as an aggravating factor at sentencing, and to amend the Criminal Code accordingly, with the passage and enactment of Bill S-215.

5.19 We call upon the federal government to include cases where there is a pattern of intimate partner violence and abuse as murder in the first degree under section 222 of the Criminal Code.

14.5 We call upon Correctional Service Canada to apply Gladue factors in all decision making concerning Indigenous women and 2SLGBTQQIA people and in a manner that meets their needs and rehabilitation.

16.28 Given that the failure to invest in resources required for treatment and rehabilitation has resulted in the failure of section 718(e) of the Criminal Code and the Gladue principles to meet their

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<sup>24</sup> Ibid., p. 3.

<sup>25</sup> Department of Justice Canada, Evaluation Division. Evaluation of the Aboriginal Justice Strategy December 2016, Ottawa, 2017.

<sup>26</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, Vol. 1b, 2019.

intended objectives, we call upon all governments to invest in Inuit-specific treatment and rehabilitation services to address the root causes of violent behaviour. This must include but is not limited to culturally appropriate and accessible mental health services, trauma and addictions services, and access to culture and language for Inuit. Justice system responses to violence must ensure and promote the safety and security of all Inuit, and especially that of Inuit women, girls, and 2SLGBTQIA people.

## 2. Discussions in British Columbia

In BC, the main methods for providing Gladue information to sentencing judges have been through oral and written Gladue submissions, pre-sentence reports (PSRs, prepared by probation officers trained by the Justice Institute of BC to include Gladue information when writing PSRs for Indigenous persons), and stand-alone Gladue reports available for an increasing number of legal aid clients through the Legal Services Society (LSS). There are a number of Gladue report writers who prepare privately funded Gladue Reports for bail, sentencing, and Parole Board of Canada hearings, as well as some pro bono reports prepared through other service providers.<sup>27</sup>

Concerns regarding a lack of availability of Gladue reports to Indigenous peoples in BC who do not qualify for legal aid have led to some litigation by defendants who have made various arguments about the necessity for government funded Gladue reports. For example, in *R. v. H.G.R.* (*H.G.R.*), the accused was a 74-year-old Indigenous person, who had experienced sexual and physical abuse at various residential schools over nine years. He did not qualify for legal aid, but applied for a full Gladue report funded at “public expense”.<sup>28</sup> The case contains a review of case law in Canada as it applies to the discussion of the necessity of Gladue reports.

The Honourable Mr. Justice Punnett found, based on the case law, that the relevant test was whether the sentencing judge had the information required to determine the relevance of the Gladue factors for the individual before the court and, if appropriate, alternatives to incarceration. In *H.G.R.* Mr. Justice Punnett had before him: a PSR with a Gladue Component; information about various programs that might be suitable for the person being sentenced inside and outside of prison; and a psychiatric report. Through these documents, he found that he had all the information required to meet his statutory duty in considering Gladue principles. The Court in *R. v. H.G.R.* did not address the issue of who should fund the Gladue report. During interviews for the completion of this study, the authors were advised by several defence counsel, that similar, unreported cases have been decided in the same way.

In recent years, the BC government has indicated that reconciliation is a priority in its relations with Indigenous peoples. Several commitments to reconciliation made by the Province include implementing the TRC Calls to Action and legislation to codify the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Ministerial mandate letters for the Minister of Attorney General and Minister of Public Safety and Solicitor General, and political platform commitments, stated the need to increase Indigenous peoples’ access to relevant justice services supports, and to take action to reduce the numbers of Indigenous people involved in the justice

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<sup>27</sup> The University of British Columbia Indigenous Legal Clinic, Peter A. Allard School of Law has also provided some pro bono Gladue reports for clients when they have the capacity to do so and there are Gladue report writers throughout the province who provide privately contracted reports. Through our interviews, we were also able to determine that some Native Courtworkers and First Nations Justice workers provide oral and written Gladue submissions for Indigenous peoples before the courts. Access Pro Bono has also developed a Gladue Report Clinic program with intention of running volunteer Gladue report writing clinics on a regular basis as coordinated through Access Pro Bono, though we were unable to find out whether any clinics had been run to date. See: Access Pro Bono Society of British Columbia, “Gladue Report Writing Program Guide,” Jeffrey Ma, Doreen Hess, and Rojin Lamae, 2018.

<sup>28</sup> *R. v. H.G.R.*, 2015 BCSC 681, para. 1.

system.<sup>29</sup> With these and other goals in mind, in 2017, the Province, represented by the Ministry of Attorney General and Ministry of Public Safety and Solicitor General (PSSG) signed a memorandum of understanding with the BC Aboriginal Justice Council (as it was then) to collaboratively develop a provincial Indigenous Justice Strategy (IJS). This was intended to change the way justice is delivered for Indigenous peoples in BC. Several of the focus areas identified in the memorandum of understanding include decreasing Indigenous overrepresentation in the justice system and improving the experience of Indigenous peoples within the justice system.

The BC Justice Council's Strategic Plan for the Justice and Public Sector 2019-2022 contains a statement about the creation of Indigenous Justice Centres and funding has been identified in 2019-2020 to develop up to three Indigenous Justice Centres (IJC) over the fiscal year. IJCs represent a high priority action area within the strategy, offering the means for Indigenous communities to build capacity for priority programming and services.<sup>30</sup> The strategic plan also acknowledges ongoing work on Gladue policy reforms in the province.

## 2.1 Tenth and Eleventh BC Justice Summits

The British Columbia Justice Summit process was created in 2013 via the *Justice Reform and Transparency Act*.<sup>31</sup> The justice summits provide a forum for discussion between justice and public safety sector leaders in BC, to facilitate innovation in and collaboration across the justice and public safety sector, and to consider how sector performance can be improved. The Summit reports are provided to Ministers, the judiciary, Justice Summit participants, and are made publicly available online.

The Tenth Justice Summit<sup>32</sup> started the conversations on Gladue that continued at both the Gladue Knowledge Sharing Gathering in October, 2018, as well as the Eleventh Justice Summit in November of that year.<sup>33</sup> The Eleventh Summit emphasized the need to address the exercise of the Gladue rights of Indigenous persons appearing before the courts, including issues of awareness of rights, reporting capacity, and the establishment of appropriate structure to support the process.<sup>34</sup> The discussion at that Summit made clear that Gladue reports could be more consistently utilized and that sufficient resources are required to ensure this.<sup>35</sup> This Summit recommended that:

...the British Columbia justice and public safety sector (as defined in the *Justice Reform and Transparency Act*) take steps:

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<sup>29</sup> Office of the Premier of British Columbia, Attorney General Minister Mandate Letter, Honourable David Eby, July 18, 2017, <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/eby-mandate.pdf>; Office of the Premier of British Columbia, Public Safety and Solicitor General Minister Mandate Letter, Honourable Mike Farnworth, July 18, 2017, <https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/premier-cabinet-mlas/minister-letter/farnworth-mandate.pdf>.

<sup>30</sup> British Columbia Justice Council, Strategic Plan for the Justice and Public Sector 2019-2022, March 31, 2019, p. 9.

<sup>31</sup> *Justice Reform and Transparency Act, 2013*, (BC) Chapter 7

<sup>32</sup> British Columbia Justice Summit. Tenth Justice Summit: Indigenous Justice, Musqueam, May 31-June 2, 2018, Report of Proceedings.

<sup>33</sup> British Columbia Justice Summit. Eleventh Justice Summit, Vancouver, November 2-3, *Report of Proceedings*

<sup>34</sup> *Ibid.*, p. 3.

<sup>35</sup> *Ibid.*, p. 44.

(a) to ensure that each Indigenous defendant and any other relevant participants in related criminal procedure are routinely made aware of that person's Gladue rights, including the right to submit a Gladue report and the means of doing so;

(b) to ensure that information sufficient to meet the expectations of the SCC in Gladue is routinely made available to the court, and subsequently to other parties at the discretion and under the control of the client, in a timely manner and in ways which are respectful of the client, are culturally safe and trauma-informed, and do not otherwise cause harm to the client's interests; and

(c) to ensure that appropriate standards, training, education and awareness, consistency of approach, and necessary structures for the process of Gladue reporting, are maintained and supported in such a way as to allow (a) and (b) to be realized.<sup>36</sup>

All of these discussions contributed to and have informed further consultations and discussions about the Indigenous Justice Strategy and issues about the delivery of Gladue reports and services in the province.

## **2.2 Gladue Knowledge Sharing Gathering**

The already mentioned Gladue Knowledge Sharing Gathering initiated collaborative and future-focused discussions on the effective implementation of Gladue principles in BC.<sup>37</sup> The report summarizing the conclusions of the gathering emphasized the following interconnected themes apply to Gladue rights and programming: capacity building, coherent Gladue programming, education and training, and appropriate sentencing and sanction alternatives.<sup>38</sup> Within each theme various areas requiring attention were highlighted, including several relating specifically to the production of Gladue reports. They were:

### Capacity Building

- Attract and retain Gladue writers
- Establish support structures for Gladue writers
- Establish credentials for Gladue writers
- Invest in community-based client and community support and wellness services

### Coherent Gladue Programming

- Clarify and communicate the Gladue report process
- Establish a single organization to coordinate Gladue reports and support Gladue writers

### Education and Training

- Indigenous community education regarding the potential of Gladue
- Broader public education
- Gladue education for justice and social service providers

### Appropriate Sentencing and Sanction Alternatives

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<sup>36</sup> Ibid., pp. 48-49.

<sup>37</sup> Aboriginal Justice Council, Gladue Knowledge Sharing Gathering Report, An initiative of the British Columbia Indigenous Justice Strategy, October 3-4, 2018 – Vancouver, British Columbia.

<sup>38</sup> Ibid., p. 5.

- Invest in alternatives
- Reinvigorate traditional laws/ legal traditions and incorporate them into sentencing
- Infuse Gladue principles into the systems where there is Indigenous overrepresentation<sup>39</sup>

Gathering participants discussed the need for a coherent Gladue program and identified immediate steps to be taken to clarify the Gladue report process (for the benefit of all users) and ensure that process is available to all Indigenous people regardless of their status as a legal aid client. The judiciary, it was suggested, must be confident that a high quality Gladue report will be produced and returned in a timely fashion when ordered; defence and Crown counsel require clarity regarding their roles and responsibilities; and, Gladue writers need to be provided with the structure, resources and flexibility to complete reports in an effective and culturally-appropriate way.<sup>40</sup> The report noted:

For comparison purposes, many participants saw a Gladue program operating in a similar fashion to pre-sentence reports or forensic psychiatric reports, where the ordering process and funding mechanisms are clearly understood by all parties. These suggestions were nested within a broader discussion about establishing the policy, structural (and possibly legislative) backing required to sustain an effective Gladue program.<sup>41</sup>

Gathering participants emphasized the need *Establish a single organization to coordinate the production and delivery of Gladue reports when ordered by the court, and to support Gladue writers:*

According to the participants one organization could provide central oversight, coordination and contracting for Gladue-related services and would ideally be Indigenous-led. These services could be offered by either (a) Indigenous community organizations, (b) local/regional independent Gladue writers from a roster or (c) staff writers and/or service providers. During the Gathering, this potential organizational model was commonly referred to as “the Provincial Coordinator”.<sup>42</sup>

### **2.3 BC First Nations Justice Council and the Métis Nation of British Columbia Consultations**

The FNJC and the MNBC were involved in the organization and execution of the Tenth and Eleventh Justice Summits, as well as the Gladue Knowledge Sharing Gathering. Both the FNJC and the MNBC have embarked on their own consultation processes with Indigenous peoples and communities in British Columbia with respect to the Indigenous Justice Strategy. The FNJC held the First Nations Provincial Justice Forum on April 24-25, 2019. The FNJC invited one representative from each First Nation in BC to attend to engage in discussions meant to inform the Justice Council’s approach to the Indigenous Justice Strategy. The FNJC also held Regional Forums in Chilliwack, Nanaimo, Prince George, and Vernon through June and July 2019. The MNBC also engaged in Justice Strategy Regional Consultation Sessions across the province from June 25-July 16, 2019. MNBC Minister responsible for Justice, Lissa Smith, invited MNBC

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid., p. 8.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

citizens to attend any of the seven regional consultations that took place in each region. Over 100 people participated in the consultations. During the Justice Strategy Regional Consultation Sessions, over 100 participants were engaged to gather their input.

## **2.4 Legal Services Society's Gladue programs**

The Legal Services Society (LSS) is the provincial legal aid provider in BC. As a non-profit organization, LSS' goal is to provide legal information, advice, and representation services to people with low incomes in BC. LSS has an Indigenous Services division whose work is focused on ensuring legal aid services meet Indigenous people's needs. As part of its work, the LSS Indigenous Services department is accountable for the administration of the LSS Gladue Report Program.

Despite the *Gladue* decision, Gladue reports were not available in British Columbia prior to 2011. Before the LSS Gladue Report Program, judges in BC relied upon standard pre-sentence reports and defence sentencing submissions in order to apply Gladue principles when sentencing Aboriginal people. LSS consultations with Aboriginal communities and the 2007 *Building Bridges*<sup>43</sup> report highlighted the urgent need for more efforts to advance the Gladue rights of Aboriginal people across British Columbia. As incarceration rates of Aboriginal people continued to rise, particularly in Northern British Columbia, LSS was concerned that the application of Gladue principles was not consistent.

In response to this, LSS collaborated with Aboriginal organizations to present training workshops about Gladue rights and report writing in Indigenous communities. A province-wide roster of LSS-trained and approved Gladue report writers from several BC Aboriginal communities was established from these workshops. Once the roster was in place, it became apparent that more resources and funding support was required to maintain momentum, as report writers had very little financial support and many of the clients who needed reports did not have the resources to pay for them. In response, LSS applied for and received project funding from the Law Foundation of British Columbia (LFBC) to fund reports and coordinate the LSS Gladue Report pilot project. The pilot project ran from 2011-2013.

LSS undertook an evaluation of the Gladue Report pilot project in 2013. Although the evaluation completed at the end of the pilot program suggested that Gladue reports were a benefit to the justice system and could help reduce the number of Aboriginal people in the prison system, LSS did not have the funding to scale up the program. However, LSS continued to fund and expand the number of reports within its core LFBC funding envelope. Without additional funding, LSS was only able to fund reports a limited number of reports. LSS also utilized its capacity as a provider of public legal education to develop and deliver publication materials and workshops that focus on increasing public awareness and educating the defence bar about Gladue reports and rights. LSS has also provided targeted outreach education in Aboriginal communities about Gladue reports, rights, and submissions.

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<sup>43</sup> Legal Services Society of British Columbia, *Building Bridges: Improving Legal Services for Aboriginal Peoples*, prepared by Ardith Walkem, October 7, 2007.

Until 2012, LSS was the sole provider of in-depth Gladue report writer training in British Columbia, offering eight one-day workshops called “Understanding Gladue” and two-five day “Gladue-U” boot camps. An evaluation of these training activities was completed in 2010 and found that this initiative was meeting its objectives to raise awareness about Gladue rights and to provide resources and training to enable participants to write reports. In 2012, with the support and work of LSS’ Aboriginal Services (as it was then – now Indigenous Legal Services), this training program was added as a regular course option in the School of Community and Social Justice at the Justice Institute of British Columbia. The first session ran in March 2013; however, the course is no longer being offered.

Gladue reports through the LSS Gladue Report Program are available for self-identified Indigenous persons who qualify for criminal legal aid. Reports can be prepared for sentencing hearings, bail hearings, and sentence appeals. To access services through the Gladue Report program, defence counsel requests a Gladue report for their client by submitting a request form to the Case Management Section of LSS who then forwards the request to the Gladue Coordinator for review and approval/denial.

Next, the Gladue Coordinator assigns a writer from the roster of certified writers maintained by LSS Indigenous Services department and the writer has at least eight weeks to provide a completed report from the date they receive disclosure from defence counsel. The Gladue Coordinator matches the report subject with a writer based on the subject’s residence or correctional facility. If possible, the Gladue Coordinator attempts to assign a writer from the same community, but this is not always possible due to conflicts and subjects or writers not wanting to work with someone from their community. Upon completion of the report, the writer submits an invoice to the report subject’s lawyer for payment and it is the lawyer’s responsibility to pay the report writer from the disbursement payment received from LSS. Reasons for which requests for reports may not be approved include having less than the required eight weeks to complete the report or a lack of available writers or funding.

In 2017, LSS received provincial government funding in addition to the BCLF monies that were previously available, which allowed LSS the ability to fund up to 300 Gladue reports that fiscal year. Since the receipt of new funding, LSS has increased its provision of reports. In the 2016/2017 year LSS provided 78 reports; in 2017/2018 LSS provided 128 reports; and in 2018/2019 LSS provided 215 reports and as of September 9, 2019, 123 reports have been completed and 104 are being worked on. LSS currently has funding for up to 300 reports this fiscal, however, expects to receive more than 300 requests for reports this fiscal year.

The new funding sources LSS received has enabled them to initiate a new pilot project with Prisoner Legal Services (PLS). The PLS pilot program ran for approximately six months providing Gladue reports for security transfers and parole board hearings. The Gladue reports were submitted to the Parole Board of Canada and informed decision making in relation to eligibility for full/day parole, transfers and security classification. However, due to increase in demand for Gladue reports for legal aid subjects, this pilot project has been put on hold.

## 2.5 Law Foundation of British Columbia

The Law Foundation of British Columbia (LFBC) is a primary funder of Indigenous access to justice initiatives in the province, including the initial LSS Gladue Report pilot project and subsequent LSS Gladue report writing services up until 2017.

### 3. Court decisions and Gladue reports

At this time, the SCC has not provided specific direction about the preferred content, structure, and approach of Gladue reports. However, 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 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.

In *Ipeelee* the SCC indicated that judges “must take judicial notice of the systemic and background factors” faced by Indigenous peoples in Canada such as,

...the history of colonialism, displacement, and residential schools, and how that history continues to translate into lower education attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.<sup>44</sup>

The *Ipeelee* decision set out that while these factors provide the “necessary *context* for understanding and evaluating case-specific information presented by counsel” courts require “individualized information... in every case.”<sup>45</sup> The SCC indicated Gladue reports were a means of bringing case-specific and individualized information before the courts. However, other than stating that *Gladue* reports are “a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders” and that “[b]ringing such information to the attention of the judge in a comprehensive and timely manner... is indispensable to a judge in fulfilling his [sic] duties under s.718.2(e),”<sup>46</sup> the SCC did not offer further direction about Gladue reports.

The British Columbia Court of Appeal (BCCA) has provided some of the most specific direction on the content of Gladue reports. In *R. v. Lawson (Lawson)*,<sup>47</sup> the Court determined some specifics flowing from *Ipeelee*:

[26] In *R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433 at para. 60, the Court described Gladue reports as “a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders.” Thus, Gladue reports are specific pre-sentence reports. Their purpose is to provide the court with individualized information about how intergenerational and systemic effects of colonialism, displacement, residential schools, poverty, unemployment and substance abuse have affected the Aboriginal offender. They should also include information about realistic restorative or rehabilitative programs suitable to the particular Aboriginal offender. The Court in *Ipeelee*, at para.

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<sup>44</sup> *R. v. Ipeelee*, para. 60.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *R. v. Lawson*, 2012 BCCA 508.

60, confirmed that this type of information is “indispensable” to a sentencing judge in fulfilling his or her duties under s. 718.2(e) of the *Criminal Code*.<sup>48</sup>

The BCCA in *Lawson* also expressly discussed the parameters of bringing Gladue “information” before the court, including by way of a Gladue report:

[27] A Gladue report may be provided by a variety of people of diverse experience and background who have access to, or can obtain, information that is reliable and relevant. A formal Gladue report is not necessary to provide the court with Gladue information; Gladue information may also be provided to the Court through a pre-sentence report. This was well articulated in *R. v. Corbiere*, 2012 ONSC 2405 (CanLII), where the sentencing judge observed:

[23] There is no magic in a label. A “Gladue Report” by any other name is just as important to the court. Its value does not depend on it being prepared by a particular agency. Its value *does* hinge on the content of the document and the extent to which it has captured the historical, cultural, social, spiritual and other influences at play in this context.

[26] If a pre-sentence report is lacking in its richness of detail or historical/systemic background, it is incumbent upon the sentencing judge to make further inquiries. The court may direct that the report be supplemented in writing or it may direct the attendance of witnesses that can offer the information and perspective that is needed.

I also agree with the following comments of Chief Judge Cozens of the Yukon Territorial Court in *R. v. Blanchard*, 2011 YKTC 86 (CanLII) at para. 25:

In the absence of a true Gladue Report, it is critical that pre-sentence reports contain some details about an offender’s aboriginal status and circumstances. Where the pre-sentence report does not contain sufficient relevant information, defence and Crown should be prepared to make submissions and, if necessary, call relevant evidence.

[28] Finally, as a form of pre-sentence report, *Gladue* reports should be subject to the same general requirements of balance and objectivity as conventional pre-sentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions. While *Gladue* reports may offer suggestions or proposals about potential restorative or rehabilitative programs or sentences, and particularly those tailored to Aboriginal offenders, they should not strongly recommend specific sentences. The sentencing function belongs to the judge.<sup>49</sup>

The BCCA added to its discussion of Gladue reports and their criterion in *R. v. Florence* (*Florence*),<sup>50</sup> indicating:

Although, as stated in *R. v. Lawson*, 2012 BCCA 508 (CanLII) at paras. 28-30, 294 C.C.C. (3d) 369, Gladue reports are not expert reports, they must be balanced, objective, and contain detailed and accurate information with respect to an offender’s Aboriginal heritage and its impact on the offender. These reports are not immune from challenge if either the Crown or the offender has reason to believe any of those requirements have not been met. To the extent statutory authority

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<sup>48</sup> *R. v. Lawson*, 2012 BCCA 508, para. 26.

<sup>49</sup> *R. v. Lawson*, paras. 27-28.

<sup>50</sup> *R. v. Florence* [2013] B.C.J. No.216.

may be necessary to compel the author of a Gladue report to appear and be examined, it can be found in s. 723(4) of the *Criminal Code*, which provides:

Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.<sup>51</sup>

In *R. v. Power (Power)*,<sup>52</sup> the perspective was also advanced that Gladue reports are a “form of pre-sentence report” and ought to be “subject to the same requirements of balance and objectivity as conventional pre-sentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions.”<sup>53</sup> This perspective echoed the BCCA’s direction in *Lawson* that Gladue report writers should maintain neutrality in writing a Gladue report in both content and tone.

Courts have also clearly articulated that in addition to Gladue information that is case-specific and individualized with respect to the report subject, they also require particularized information about how the other purposes and principles of sentencing may be engaged. This includes addressing deterrence and denunciation with respect to accountability to a person’s own community and how alternatives to jail may be appropriate within the context of that community. This may include engaging Indigenous legal institutions or practices, and the resources within a person’s community that may be available to support such approaches.<sup>54</sup>

Some case law<sup>55</sup> also points to the differences between PSRs with Gladue components and Gladue reports. In *R. v. Legere (Legere)*,<sup>56</sup> the Prince Edward Island (PEI) Court of Appeal stated that the PSR with a Gladue component was “detailed and apparently thorough.”<sup>57</sup> Although the direction from the court about PSRs with Gladue components perhaps appears contradictory, the court was clear about the difference between same and Gladue reports. The Court indicated why the PSR was not adequate in illuminating Gladue factors as required by the SCC in *Gladue* and *Ipeelee*:

[21] The Pre-Sentence Report certainly gives the court a snap shot of Legere’s unhappy life. However, it does not quite meet the standards set out in *Gladue* and *Ipeelee*. It does not deal with the unique systemic or background factors that played a role in bringing this offender before the courts nor does it make reference to particular programming which may be appropriate to this Aboriginal offender.

[22] The Gladue Report delves deeply into the unique systemic and background factors that played a role in bringing this offender to this point in his life. The Gladue Report canvasses the harm done to Legere’s mother by residential schools and the Government policy of forcefully integrating Aboriginals into white society. It speaks of the effects of inter-generational and multi-generational trauma. Children, like Legere’s mother, removed from their parents and culture,

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<sup>51</sup> Ibid.

<sup>52</sup> *R. v. Power*, [2016] NSJ No. 299

<sup>53</sup> Ibid., para.14.

<sup>54</sup> *R. v. Laliberte*, 2000 SKCA 27, para. 59.

<sup>55</sup> For example: *R. v. Lawson*, *R. v. Florence*, *R. v. Corbiere* [2012] ONSC 2405; *R. v. Blanchard* [2011] YKTC 86; *R. v. Corbiere* [2012] ONSC 2405; *R. v. H.G.R.* [2015] B.C.J. No. 848; and *R. v. Legere* 2016 PECA 7.

<sup>56</sup> *R. v. Legere*, 2016 PECA 7.

<sup>57</sup> Ibid., para. 20.

abused and belittled, often turn to substances such as alcohol to dull the pain. Legere’s mother turned to alcohol. She was a mean alcoholic, and not a good mother. She was a product of that system. The pain and suffering that Legere suffered was a direct result of that system.

[23] Additionally, in preparing the PSR the author did speak to counsellors in Summerside while the authors of the Gladue Report spoke to addictions counselling and mental health counsellors as well as employment opportunities in the Aboriginal community on Lennox Island. The authors of the Gladue Report also interviewed several members of the Aboriginal community as well as non-Aboriginal relatives. The only members of the Aboriginal community with whom the authors of the Pre-Sentence Report spoke were Legere and his brother.

[24] The upshot of all of this is that the sentencing judge did not have the information required to sentence Legere in accordance with the Gladue principles. This then, constitutes a reviewable error.<sup>58</sup>

The direction from courts to date about the preferred content, structure, and approach of Gladue reports has been accepted and incorporated into most service delivery models. The preferred content, structure, and approach of Gladue reports set out by the courts is followed in order to ensure that judges have confidence in the reports they receive and that the information contained in the reports is properly considered at the time of sentencing.

#### **4. Focus of this comparative analysis and the issues considered in this report**

In *Ipeelee*, the SCC referred to Gladue reports as a “form of pre-sentence report tailored to the specific circumstances of Aboriginal Offenders”:

Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.<sup>59</sup>

The reports generally tell the story of the Indigenous person’s life and addresses the systemic and background factors that have brought that individual before the court, and provides information and sometimes information about options that may be available as alternatives to incarceration, such as services and/or restorative justice programs that may also be culturally appropriate.

Ultimately, the purpose of Gladue submissions is to allow the court to craft a more responsive and thoughtful sentence that can best address the needs of the offender for healing and reintegration into the community. Sometimes this may be accomplished with a non-custodial sentence, on other occasions a period of custody is necessary, but the length of that period of custody must be seriously considered.<sup>60</sup>

In addition to informing sentencing decisions in cases involving Indigenous people, Gladue reports often have a therapeutic value for the subjects. The latter often do not recognize the impact of systemic factors on their own life. In some cases, individuals are not even aware of all the information about their own or their family’s history or community’s circumstances. Gladue

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<sup>58</sup> *Ibid.*, para. 21-24.

<sup>59</sup> *R. v. Ipeelee*, para. 60.

<sup>60</sup> This reference to Gladue submissions includes information obtained through Gladue reports. Jonathan Rudin, *Indigenous People and the Criminal Justice System*, (Toronto: Emond, 2019), p. 131.

reports may help them situate themselves in relation to the broader events that have played a part in their life as well as traumatic incidents and other circumstances that contributed to the fact that they are now facing a criminal sanction. Often, the Gladue report subjects are not really aware of these events and are not clear about how these events have affected them. In the words of a Gladue writer: “It is a bit of a revelation for some individuals to link their personal circumstances to the past and to broader events and factors. It often tends to be a very emotional experience for individuals”. A Crown attorney observed that “the benefits of Gladue reports go way beyond the actual contents of the reports. What people do not always realize is that it is not just the final product, but also how for many offenders it is often the first time that they can connect with the court process, connect with their own history, feel that people actually care about them and see them for the first time.”

#### **4.1 Who is Responsible for the Production and Delivery of Gladue Reports?**

The process of producing and delivering Gladue reports can be complex and differs in each jurisdiction. At present, there is no national approach, guideline, or policy with respect to the production and delivery of reports. For some, the question is: Who *should* be responsible for, in the sense of funding, the production and delivery of reports?

It has been suggested by some of those interviewed for this report, and by others<sup>61</sup>, that the federal government should provide funding and also adopt standards to ensure that quality Gladue reports are produced for all individuals who self-identify as Indigenous throughout Canada. However, investigating the merits and feasibility of promoting a national plan for the provision of Gladue reports is beyond the scope of the present project.

There is substantial variance across the country in terms of who assumes responsibility for the production of the 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. A high-level overview of the different models studied is found in Table 2.

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. In addition to these various programs, there are also independent contractors in most provinces who offer private Gladue report writing services. There are no available data on their activities.<sup>62</sup>

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<sup>61</sup> For example, the National Inquiry into Missing and Murdered Indigenous Women and Girls, *supra* note 23 at Call 5.15.

<sup>62</sup> Notably, the results of this study indicate there may be more independent Gladue reports produced in British Columbia, though it was reported that independent contractors also work in Ontario and Québec. In jurisdictions where everyone has access to a Gladue report as soon as the court orders it, such as Alberta, Prince Edward Island, Québec or Nova Scotia, there is less of a need obviously for someone to hire his/her/their own writer.

It is important to note that organizations identified as Indigenous or Indigenous-led organizations are not always *exclusively* led and staffed by Indigenous people. It is the approach to service delivery as predominantly informed by Indigenous perspectives that seems to be a determining factor in whether the organization is considered Indigenous. Two examples that arose in interviews were Aboriginal Legal Services (ALS) in Ontario and Indigenous Legal Services at LSS in BC. Although ALS is not exclusively an Indigenous-led or staffed organization its commitment to service provision as “Aboriginal controlled and culturally based”<sup>63</sup> is not questioned. Despite the Indigenous Services department at LSS in BC not being an organization at all, but rather an Indigenous staffed department within the Indigenous Services division of LSS with a mandate to deliver Indigenous content grounded in Indigenous experiences, perspectives, and ways of knowing, it is generally recognized as an Indigenous initiative. These are two examples of Gladue service providers that, although not exclusively Indigenous-led or staffed, are typically identified as working with an Indigenous mandate to empower Indigenous peoples in their encounters with the justice system.

## 4.2 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. Most provinces have data on the number of pre-sentence reports produced as a result of a court order, but data on the frequency with which courts order Gladue reports or PSRs with a Gladue component is harder to find.

Some of the judges interviewed who regularly ordered or requested Gladue reports were not necessarily clear about the authority under which they ordered these reports. Some of them simply knew that they could do so and that reports would be produced. However, in some instances, for example in British Columbia, judges were clear about their inability to order a Gladue report. This was due to what they acknowledged as an inability to force the provincial government, or LSS in some cases, to provide funding for a report. Despite this, some of these same judges expressed a willingness to order reports and indicated that they did so regularly.

Jonathan Rudin expressed the view that a Gladue report cannot be ordered in the same way as a PSR can be ordered; they can only be requested. Rudin argues that, unlike PSRs, there is no provision in the *Criminal Code* to empower a judge to order a Gladue report. He also argues that the reports cannot be ordered because there is no direct relationship between those responsible for production of these reports and the courts.<sup>64</sup> However, Tim Quigley, who had previously raised that same issue, actually admits that the dispositions of the *Criminal Code* is “broad enough to encompass the Gladue requirements and such other matters as risk assessments, psychological assessments, FASD assessments, and other assessments.”<sup>65</sup> In fact, there is a basis for the courts to “order/ require” a Gladue report. Section 723 (3) of *Criminal Code* provides that “the court may,

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<sup>63</sup> <https://www.aboriginallegal.ca/vision-mission.html>

<sup>64</sup> Rudin, *Indigenous People and the Criminal Justice System*, p. 114.

<sup>65</sup> Tim Quigley, *Gladue Reports: Some Issues and Proposals*, 31 C.R. (7th) 405, (2016).

on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.” That would certainly include a Gladue report. Note that the language is “require”, not “order”, both in this section and in s. 721(1) concerning the court requiring a probation report.

Notwithstanding that argument, it is important to note that s. 721(2) of the *Criminal Code* provides that “(t)he lieutenant governor in council of a province may make regulations respecting the types of offences for which a court may require a report, and respecting the content and form of the report.” It is therefore clear, in the view of the authors, that it falls within the prerogative of provincial governments to determine *who prepares* the different kinds of pre-sentence reports (including Gladue reports). As will be discussed later, some provinces have already adopted policies in that regard.

Quigley also suggests that “there is a constitutional separation of powers issue that may prevent judges from simply ordering a Gladue report if its preparation is dependent on the province (or federal government in the case of a federally prosecuted offence) providing the necessary funding.”<sup>66</sup> However, in the authors’ view, this is not as much a funding issue as it is a program policy issue that can and should be addressed by provincial regulation.

Rudin<sup>67</sup> mentions another important fact. He explains that in some cases where a defence counsel is trying to get the court to order the production of a Gladue report, the Justice Ministry often sends counsel to argue against such an order (the cases he cites are mostly from BC).

In Alberta, Québec<sup>68</sup>, PEI, and Nova Scotia, there is a consensus that a court may “order” or require a report and that it then becomes the responsibility of the government to make sure that a report is produced, and the requirement satisfied.

In PEI and Nova Scotia, courts order the production of Gladue reports and these requests are sent directly to the local Indigenous organizations responsible for the production of Gladue reports.

In Québec, once a report has been ordered by the court, a form requesting the report is sent by the court registrar to the Ministry of Justice’s Centre Administratif et Judiciaire which then transmits the request to the Services Parajudiciaires Autochtones du Québec (SOAC). SOAC, as soon as it receives a request for a Gladue report, assigns the task to one of its writers or transmit the request to another Indigenous organizations with a Gladue report writing program.

In Ontario, the Crown, defence counsel, or the judge can request a Gladue report from one of the Indigenous organizations that produce them. Legal Aid Ontario (LAO), the Ministry of the Attorney General, the federal government, or a combination of these agencies, can provide funding to the Indigenous organizations to produce the reports. However, there is not necessarily sufficient funding to satisfy every request for a report.

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<sup>66</sup> Quigley, *Gladue Reports*, 31 C.R. (7th) 405.

<sup>67</sup> Rudin, *Indigenous People and the Criminal Justice System*, p. 115.

<sup>68</sup> In Québec, the Ministry of Justice uses the words “ordonnance de la cour” (court order) to designate the process.

In BC, the primary provision of Gladue reports is through LSS, though privately contracted Gladue reports are also available to those who can afford to pay for them.<sup>69</sup> Even if a judge were to require a Gladue report for the sentencing of an Indigenous person, there is no mechanism through which LSS could receive such an order. Prior to 2017, there was no provincial funding for Gladue reports. Presently, LSS funds the Gladue Report Program and provision of Gladue reports through a combination of provincial and federal funds that the organization receives.

Currently, this means that funded Gladue reports are generally only available to those who are eligible for legal aid through LSS. Defence counsel can make a request for a Gladue report on behalf of their client “by submitting a Request for Authorization of Disbursements to the Case Management Section”.<sup>70</sup> The approval of such a request is handled by the Indigenous Services division at LSS. All Gladue reports provided through LSS are reviewed by a contracted lawyer for legal review and quality assurance. There are some recent cases in which LSS has provided reports through their organizational model that are directly funded by the Ministry of the Attorney General. This happens via the Ministry of the Attorney General when Crown counsel requests a report. This is a fairly recent development. The LSS/PLS partnership referenced earlier is also another recent development that assists prisoners to access Gladue reports for transfer hearings.

In Alberta, the Ministry of Justice and Solicitor General currently coordinates and administers the Gladue report writing program, known formally as the Gladue Pre-Sentence Report Program. To procure a Gladue report for an Indigenous person, a request must be made by counsel or the court for a report to be prepared. If granted, defence counsel is required to prepare a referral form and send it to the report coordinator. The referral is reviewed by the coordinator who then assigns the report the appropriate report writer. During the assignment process, a contract is drafted and signed between the writer and the Ministry of Justice and Solicitor General on a fee-for-service basis. Once the final draft of the report is written, the writer submits their final draft to the coordinator for review. The coordinator review is completed as a means to maintain quality control over the final product and to ensure that any legal or grammatical errors are revised before being submitted to counsel and the court. Once necessary revisions have been made, the coordinator submits the final report to counsel and the court through the courts services system, at which point it is used as part of the sentencing hearing.

In Yukon, the delivery model has recently shifted to provision through the Council of Yukon of First Nations (CYFN) with funding provided from the territorial government for a limited number of Gladue reports each year.

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<sup>69</sup> The University of British Columbia Indigenous Legal Clinic, Peter A. Allard School of Law has also provided some pro bono Gladue reports for clients when they have the capacity to do so and there are Gladue report writers throughout the province who provide privately contracted reports. Through our interviews, we were also able to determine that some Native Courtworkers and First Nations Justice workers provide oral and written Gladue submissions for Indigenous peoples before the courts. Access Pro Bono has also developed a Gladue Report Clinic program with intention of running volunteer Gladue report writing clinics on a regular basis as coordinated through Access Pro Bono, though we were unable to find out whether any clinics had been run to date. See: Access Pro Bono Society of British Columbia, “Gladue Report Writing Program Guide,” Jeffrey Ma, Doreen Hess, and Rojin Lamae, 2018.

<sup>70</sup> Legal Services Society, Gladue Report Writer Roster, p. 2.

To obtain a Gladue report for an Indigenous person, an application is sent to the CYFN's Gladue Management Committee (GMC) by defence counsel. It is not common practice for the courts to order Gladue reports in the Yukon. When stable funding is obtained, a dedicated coordinator position will be established so applications will not have to go through the GMC. If approved, one of three approved report writers are assigned the report. Report writers are contracted by the CYFN and paid under the standard fee-for-service model. Because the writer works for the Yukon First Nation Justice Department, their payment fee is made payable to their employer and absorbed into their regular salary. They provide Gladue reports routinely as part of their employment responsibilities. Once the final report draft is ready, it is submitted to another contractor for legal review and quality assurance. Once reviewed, and any required revisions are completed, the report is submitted to both Crown and defence counsel and to the trial coordinator.

#### **4.2.1 Volume of requests for Gladue reports**

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. This is sometimes attributed to the fact that the courts have become more familiar with the process and have discovered the usefulness of these reports.<sup>71</sup>

#### **4.3 Are Gladue reports produced for bail hearings?**

Despite over a decade of jurisprudence acknowledging the application of *R. v. Gladue* to bail hearings, confusion over exactly how it applies persists. "Courts have found that the above principles are applicable to bail hearings in a number of disparate and contradictory ways, presenting a piecemeal approach to the application of Gladue to bail that lacks cohesion."<sup>72</sup>

The only appellate guidance on the applicability of *Gladue* to bail derives from two brief endorsements of the Ontario Court of Appeal in *R. v. Robinson (Robinson)*<sup>73</sup> and *R. v. Hope (Hope)*<sup>74</sup>.

In *Robinson*, Justice Winkler affirmed that Gladue is engaged in judicial interim release and articulated its relevance as follows:

Application of the Gladue principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.<sup>75</sup>

A very recent amendment to the *Criminal Code*<sup>76</sup> will hopefully bring greater clarity to the issue. In a new s. 493.2 in the part of the Code dealing with judicial interim releases, it states that:

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<sup>71</sup> The numbers of Gladue report requests is discussed at greater length in Section 5 below.

<sup>72</sup> Rogin, J., "Gladue and Bail", p. 332.

<sup>73</sup> *R. v. Robinson*, 2009 ONCA 205.

<sup>74</sup> *R. v. Hope*, 2016 ONCA 648.

<sup>75</sup> *R. v. Robinson*, para. 13.

<sup>76</sup> Statutes of Canada 2019, C. 25, s. 210.

493.2 In making a decision under this Part, a peace officer, justice or judge shall give particular attention to the circumstances of

- (a) Aboriginal accused; and
- (b) accused who belong to a vulnerable population that is overrepresented in the criminal justice system and that is disadvantaged in obtaining release under this Part.

Gladue reports are sometimes 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. Rudin believes that it is inappropriate to require a Gladue report prior to considering bail for an Indigenous accused person. First, it takes time to prepare a Gladue report and it is wrong to leave someone in custody for any longer than necessary. Second, at the bail stage, there has not been a determination of guilt yet and the report may inadvertently lead the court to impose conditions that may be relevant to sentencing but inappropriate for someone who has not been found guilty.<sup>77</sup>

Jillian Rogin also argued that Gladue reports should not be used at the time of a bail hearing.<sup>78</sup> Her review of Gladue bail jurisprudence reveals the ways in which Indigenous people in Canada are improperly “being sentenced via bail proceedings”. She argues that “Gladue bail hearings closely resemble sentencing proceedings in a manner that erodes Charter protected rights and further exacerbates bias in the application of judicial interim release.”<sup>79</sup>

The Ontario Ministry of the Attorney General’s Prosecution Directive, *Judicial Interim Release (Bail)*, directs prosecutors to consider the unique circumstances of Indigenous peoples when an accused self-identifies as Métis, Inuit or First Nation, but explains that, although the prosecutor should keep in mind the principles referred to by the SCC in Gladue, a Gladue report should not be requested by the prosecutor for a bail hearing.<sup>80</sup>

In British Columbia, the Crown Counsel Policy Manual Policy for Adult Bail (Policy BAI 1, April 16, 2019<sup>81</sup>) includes a section addressing “Indigenous Persons.” The Crown policy briefly sets out the context of the over-incarceration of Indigenous peoples in Canada and the history of *Gladue*. Crown counsel are directed to inquire about the Indigenous identity of accused persons for the consideration of Gladue factors at bail:

As such, Crown Counsel must exercise principled restraint in bail matters with particular attention to the circumstances of Indigenous accused and should only seek detention of an Indigenous accused where:

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<sup>77</sup> Rudin, *Indigenous People and the Criminal Justice System*, p. 152.

<sup>78</sup> Rogin, Jillian. “Gladue and Bail: The pre-trial sentencing of Aboriginal People in Canada,” *The Canadian Bar Review*, (2017) 95(2): 324-356.

<sup>79</sup> Ibid. p. 332. See also: Rogin, J. *The Application of Gladue to Bail: Problems, Challenges, and Potential* (LLM Thesis, Osgood Hall Law School: 2014).

<sup>80</sup> Ministry of the Attorney General of Ontario, Criminal Law Division, *Crown Prosecution Manual*, Prosecution Directive, *Judicial Interim Release (Bail)*, November 14, 2017. [https://files.ontario.ca/books/crown\\_prosecution\\_manual\\_english\\_1.pdf](https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf)

<sup>81</sup> Ministry of the Attorney General of British Columbia, Prosecution Services, Crown Counsel Policy Manual, Policy for Adult Bail (Policy BAI), April 1, 2016.

- the accused’s previous history of failing to attend court makes it unlikely the matter will conclude on its merits; or
- the alleged offence is one of violence or bodily harm, or where the release on bail would otherwise reasonably result in risk to the safety or security of a victim, a witness, or the public<sup>82</sup>

Further, the policy advises that with respect to conditions imposed on Indigenous accused persons at bail, the remoteness of a person’s home community and that community’s specific culture and traditions should be taken into account in imposing conditions that are “reasonably necessary” considering these along with an assessment of the other bail factors.<sup>83</sup>

#### 4.4 Access to Gladue reports and eligibility criteria

Hebert<sup>84</sup> discusses disparity in access to Gladue reports. Access to full Gladue reports is limited and not uniform across the country. Judges do not always have the information they need to fulfill their statutory obligations in sentencing Indigenous peoples. Hebert explains in detail how judges in BC and elsewhere have openly denounced this disparity (the judgements are presented and cited).<sup>85</sup> She presents this disparity as an access to justice issue:

...[G]iven this evidence that Indigenous peoples with a Gladue report have a significant advantage in sentencing, the great disparity in access to such reports across Canada creates an access to justice problem.<sup>86</sup>

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.

In British Columbia an Indigenous person must be eligible for legal aid in order for their defence counsel to request a report unless a request is made through Crown Counsel. If they are not eligible for legal aid, they cannot request a report funded through LSS. However, it may be the case that a Crown counsel may request a report through the Ministry of the Attorney General, who funds the report, which is provided through LSS. An accused may also fund their own report by hiring a private Gladue writer to prepare the report. Some reports in BC are also produced by private independently contracted Gladue writers for fees. Pro bono reports may also be available through the Access Pro Bono (APB) Gladue Clinic, Indigenous Community Legal Clinic (ICLC), and/or by advocates and other justice system professionals.

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Alexandra Hebert, “Change in Paradigm or Change in Paradox: Gladue Report Practices and Access to Justice”, 43 *Queen's L.J.* 149 (2017), p. 168.

<sup>85</sup> Ibid, p. 169.

<sup>86</sup> Hebert, “Change in Paradigm or Change in Paradox”, p. 171.

In Nova Scotia all Indigenous offenders are entitled to have a Gladue report produced regardless of the nature and seriousness of the criminal offence they were found guilty of committing. This is also the case for programs in Ontario, except for the ALS program which only offers a full Gladue reports for convicted offenders who face a potential prison sentence of 90 days or more. ALS provides a Gladue letter (which includes the relevant Gladue information but in a less detailed way) when the Crown position regarding the sentence is under 90 days.

In Yukon, Indigenous offenders or their counsel may apply to the Council of Yukon First Nations for a Gladue report. They must complete an application form that relates to specific eligibility criteria. These criteria include: being a Yukon resident or being remanded in custody at the Whitehorse correctional center; entering a guilty plea or having been found guilty; a signed and entered agreement to a statement of facts; and, a minimum of a six weeks period being available before sentencing to allow for a report to be produced. The Gladue Management Committee (GMC) makes the decision about who will receive a report based on the application and need. In making their decision, the GMC takes into consideration the length of sentence the individual potentially faces, the various intergenerational expressions of colonial trauma present in their family history, whether they have a disability that should be accommodated, and if the applicant is interested in rehabilitation and/or treatment.

### ***Can offenders waive their right to a Gladue report?***

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<sup>87</sup> or “Gladue rights” as these are often referred to by justice actors. As noted in the definitions sections of this report, it may be more appropriate to refer to these as the “Gladue factors,” which has become shorthand for the “unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts.”<sup>88</sup>

The SCC has been clear that judges must consider these factors, regardless of how these come before them, unless these are waived: “Where a particular offender does not wish such evidence to be adduced, the right to have particular attention paid to his or her circumstances as an aboriginal offender may be waived.”<sup>89</sup>

The SCC also made it clear in *Ipeelee* that in order for an offender to waive the consideration of Gladue factors these must be “expressly” waived and that unless this happens counsel have a duty to bring the factors before the court: “Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered.”<sup>90</sup> The Court in *Ipeelee* specifically discussed the particular benefit of Gladue reports in bringing this information before the court:

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<sup>87</sup> *R. v. Gladue*, paras. 83-84.

<sup>88</sup> *Ibid*, para. 66.

<sup>89</sup> *R. v. Gladue*, para. 83.

<sup>90</sup> *R. v. Ipeelee*, para. 60.

In current practice, it appears that case-specific information is often brought before the court by way of a Gladue report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.<sup>91</sup>

Offenders can waive their right to a Gladue report (or not consent either directly or through their counsel to a report being produced). Such situations occur with some regularity, particularly when an offender is in detention and is concerned about the length of time required to produce a report, or when the offender is estranged from his/her community or is worried about what other people may say or learn about him through that process. Hebert also makes the point that a *Gladue* report may not be appropriate in all cases and that sometimes offenders have their own reasons for refusing to have a Gladue report prepared.<sup>92</sup> In some cases, individuals are advised by defence counsel to decline the possibility of Gladue report. In these instances, it is quite clear that an offender's decision to waive the right to a Gladue report is not a waiver of the offender's right to have Gladue factors considered. Counsel are still expected to speak to the offender's unique and systemic circumstances as an Indigenous person, unless there was also an *express* waiver of that person's right to have Gladue factors considered.

In PEI, the first question on a legal aid application form is about whether the individual belongs to an Indigenous community. Before a plea is entered, the defence counsel submits to the court that the accused is member of an Indigenous community, that he/she qualifies for a Gladue report and that he/she is either asking for one or is waiving his/her right to one.

#### **4.5 Are other forms of reports produced (PSR with Gladue component)?**

Strictly speaking PSRs and Gladue reports are two different types of PSRs. 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.<sup>93</sup> Maurutto and Hannah-Moffat characterize Gladue reports as "powerful techniques used to package information, in a format that is accepted within the legal structures" and "document the linkages between individual behaviour and socio-cultural, political, historical, and economic processes, not necessarily with the goal of reducing the responsibility of the offender, but rather to understand and contextualize behaviour and actors that may have played a role in the present offender coming before the courts".<sup>94</sup>

The general content of PSRs is prescribed in s. 721(3) and (4) of the *Criminal Code*, and s. 721(2) which clarifies that the lieutenant governor in council of a province may make regulations respecting the types of offences for which a court may require a report, and respecting the content

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<sup>91</sup> Ibid.

<sup>92</sup> Hebert, "Change in Paradigm or Change in Paradox".

<sup>93</sup> Quigley, "Gladue reports: Some issues and proposals".

<sup>94</sup> Maurutto, P., & Hannah-Moffat, K. Aboriginal knowledges in specialized courts: Emerging practices in Gladue Courts. *Canadian Journal of Law and Society*, (2016) 31(3), 451-471, pp. 408-409.

and form of the report. PSRs are written by probation officers from a risk-assessment perspective, most often with the use of actuarial risk assessment methods.<sup>95</sup> They play an important role in informing the court about the offender's risk and treatment potential, and in defining the type, length and conditions attached to the final sentence. By contrast, the Gladue reports generally tell the story of the offender, addresses the systemic and background factors that have brought the specific offender before the court, and provide information about services and programs that may be available to the offender. These reports are meant to help the judge consider applicable Gladue factors in each case. They can contextualize risk factors and help the court consider them with a broader understanding. The challenges and difficulties faced by the offender are presented in the broader context in which they occurred. The author of the report and their training is also an important difference between PSRs and Gladue reports. Probation officers are trained in risk-assessment, and in most cases their training does not include identifying Gladue factors; whereas, Gladue report writers are trained to identify and articulate Gladue factors to the court, along with potential options for alternatives to incarceration.

However, the difference between what constitutes a Gladue factor and what amounts to a risk factor is often a slim one and this sometimes creates complications in terms of how the Gladue reports are used in court and beyond the sentencing process.<sup>96</sup> As, Jonathan Rudin explains, Aboriginal offenders tend to do poorly on risk-assessment measurements.<sup>97</sup>

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. In Québec, a PSR with a Gladue component is used when a full Gladue report is not available. Courts have often found this approach wanting.<sup>98</sup>

It is not uncommon in many 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.<sup>99</sup>

The PEI Court of Appeal did not dismiss PSRs with a Gladue component entirely nor did it make formal Gladue reports mandatory when sentencing an Indigenous offender. The Court made it clear, however, that the lack of a report which extensively examines Gladue factors is a reviewable error where the offender has requested that these factors be considered.<sup>100</sup> In so doing, the Court

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<sup>95</sup> Kelly Hannah-Moffat and Paula Maurutto, “Re-contextualizing pre-sentence Reports: Risk and race”, *Punishment and Society*, (2010) 12(3): 262-286.

<sup>96</sup> See: Frank T. Lavandier, *Rule of Law, Settler Colonialism, and Overrepresentation of Indigenous Peoples in the Canadian Criminal Justice (Legal) System: Implementation of R. v. Gladue in Prince Edward Island (PEI)*, Doctoral Dissertation, University of New Brunswick, January 2019.

<sup>97</sup> Rudin, *Indigenous People and the Criminal Justice System*, p. 133.

<sup>98</sup> Ben Ralston and Christine Goodwin, “*R. v. Drysdale*: A gold standard for the implementation of *R. v. Gladue*”, (2017) 33 C.R. (7th) 114.

<sup>99</sup> Rudin, *Indigenous People and the Criminal Justice System*, p. 114.

<sup>100</sup> *R. v. Legere*, 2016 PECA 7, 376 Nfid & PEIR 81.

set a high threshold with regards to the Gladue information that must be provided to a judge for the sentencing of an Indigenous person.<sup>101</sup> It stressed that sentencing reports for an Indigenous person must “be balanced and objective ... [and] must not advocate a particular viewpoint”.<sup>102</sup>

In *R. v. Legere*<sup>103</sup>, an Indigenous person had been sentenced to eight months incarceration for a drug offence. He appealed this verdict on the grounds that the judge sentenced him without a Gladue report, even though a PSR had been prepared for him. He sought to introduce a Gladue report into evidence on appeal. The Court admitted the Gladue report into evidence and found the PSR insufficient in light of the sentencing principles set out by the SCC. The Court held that while the PSR gave a “snapshot” of the appellant’s Indigenous status and life circumstances, it did not “deal with the unique systemic or background factors that played a role in bringing this offender before the courts nor did it make reference to particular programming which may be appropriate to this Aboriginal offender”.<sup>104</sup>

As mentioned above, in PEI, a PSR and Gladue report can both be ordered in the same case. Historically they have both been ordered at the same time, because the Gladue report is often not enough. The two types of reports do not cover the same grounds. The practice may be changing slowly because there have been issues associated with this practice. For example, there are instances where a probation officer and Gladue writer both had to contact the same family members and members of the community, creating some confusion and resentment. Moreover, the recommendations contained in the two reports can sometimes be at odds with each other. A concern is sometimes expressed that the recommendations contained in the PSR may *de facto* take precedence over those contained in the Gladue report. Finally, people sometimes argue that Gladue reports produced by Indigenous writers close to or belonging to the Indigenous community are trusted by that community and that this level of trust may not be available to the probation officers who produce PSRs.

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.

#### **4.6 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.<sup>105</sup> A recent review of Gladue report templates used in various provinces and territories revealed that there is substantial variation across these templates and the prescribed content of Gladue reports. It also indicated there were similarities between the format used in these reports as well as between their typical contents. There were also similarities between standard PSR headings and contents and those of Gladue

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<sup>101</sup> Hebert, “Change in Paradigm or Change in Paradox”, pp. 166-167.

<sup>102</sup> *R. v. Legere*, 2016 PECA 7, 376 Nfid & PEIR 81.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, para. 21.

<sup>105</sup> For example, the British Columbia Court of Appeal has set out certain criterion for Gladue reports: see *R. v. Lawson* and *R. v. Florence*.

reports.<sup>106</sup> It appears that despite any differences or similarities in format, the general content of the reports is fairly consistent.<sup>107</sup>

The content and format of PSRs produced by probation officers in every province or territory are normally standardized throughout the jurisdiction and guided by correctional policies, guidelines and protocols. The same is true of PSRs with Gladue components. In Québec, for example, a standard format is prescribed for such reports. The same is true of a PSR for adult Aboriginal offenders in New Brunswick.<sup>108</sup>

#### **4.7 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. Many writers demonstrate all of the aforementioned because in many cases Gladue report writers are Indigenous persons with specific expertise about their own Indigenous community/communities, experience working with Indigenous people, and lived experience as Indigenous persons. Considering the demands of the information required for the reports, report writers should necessarily, have or be able to make connections to Indigenous communities and organizations. They also require a foundational knowledge of the histories and experiences of Indigenous peoples and colonialism in Canada.

Report writers interviewed for this comparative analysis 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. Some writers were not originally from a specific community, but as either an Indigenous or non-Indigenous person, had lived in and become a part of the community. Other writers, both Indigenous and non-Indigenous, were not connected to the home or chosen Indigenous communities of their report subjects. In these cases, the determining factor connecting the writer and the report subjects was mostly determined by geographical proximity. Writers who did not have a connection to particular Indigenous communities appear nevertheless very knowledgeable about the circumstances and histories of Indigenous people.

#### **4.8 Selection, recruitment, training, remuneration of writers**

In Ontario, Québec, Nova Scotia and PEI, the task of writing a Gladue report is assigned to a writer by the Indigenous organizations mandated to produce the report. In many instances, the writers are employees of the organization that produces the report. For example, ALS and other service providers in Ontario have full time and/or part time employees responsible for producing Gladue reports. In PEI, the writers are contracted individually by the organization. Sometimes this includes employees of the organizations who have been trained to write reports and are willing to do so in addition to their regular responsibilities. During the study interviews, the authors came to

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<sup>106</sup> National Working Group on Gladue (n.d.). *Discussion Paper on a Universal Gladue Report Structure*.

<sup>107</sup> Ibid.

<sup>108</sup> New Brunswick, Department of Public Safety, Policy on Pre-Sentence Reports for Adult Aboriginal Offenders, September 21, 2018.

understand that, in Ontario, Québec, Nova Scotia and PEI, recruitment of Gladue writers is not difficult so long as the funding is available.

Alberta, BC, and Yukon use a roster system of contracted writers to assign Gladue reports. In Alberta the roster is managed by the Department of Justice and Solicitor General and in BC the roster is managed by the Indigenous Services department at LSS. In the Yukon the roster is managed by the Council of Yukon First Nations.

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. Instead they came to the work of writing reports with the particular skill set required as a result of previous education, employment or 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.

#### **4.9 Support for writers**

Writing Gladue reports is very demanding, emotionally difficult, and runs the risk of causing vicarious trauma.<sup>109</sup> Across jurisdictions, it was indicated that a component on self-care is usually included in the training of Gladue writers. Informal networking with other writers, to develop a support system, is also encouraged by the program coordinators. However, in the course of seeking information for this comparative analysis, many of the people interviewed, particularly writers and representatives of service delivery organizations, pointed to a need for more support for writers. There is a dearth of literature on the impacts of writing Gladue reports and how writers should be supported. This is an area of future research that should be considered.

#### **4.10 Perceived usefulness of the reports**

Gladue reports are useful to the courts at sentencing. This fact is not controversial.<sup>110</sup> However, it was important to canvass the perceptions of stakeholders about *how* useful a Gladue report may be. In connection with that the authors wanted to understand the ways that this usefulness was determined and how it could be improved. Data currently available about how Gladue reports specifically (as opposed to Gladue factors) impact sentences is extremely limited. For this reason, gathering stakeholder perceptions about usefulness was particularly important.

Anecdotally, and as set out in some case law, there is a general sense that Gladue reports are the best way for Gladue information to come before the courts. This was also the consensus of stakeholders consulted for this comparative analysis. To determine the utility of a report the stakeholders interviewed referred to the same criteria set out originally in *Gladue*. That is, first, the

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<sup>109</sup> Aboriginal Justice Council, Gladue Knowledge Sharing Gathering Report, Appendix E, pp. 41-42.

<sup>110</sup> *R. v. Ipeelee*, para. 60.

extent to which the Gladue report provides the case-specific and individualized circumstances of the Gladue report subject within the context of Gladue factors. Second the stakeholders considered the extent to which the report is able to set out a healing plan that engages resources and services and offers when appropriate some viable alternatives to incarceration.

#### **4.11 Advantages and disadvantages of different models of service delivery**

This comparative analysis was able to focus at a general level on the advantages and disadvantages of the different delivery models in the jurisdictions examined. The views expressed by study participants about the advantages and disadvantages of the model(s) they were familiar with provided a basis for some comparisons between the models. These are explored in greater detail below. Since evaluation data, as well as cost-effectiveness and cost-benefit data, are generally not available for these various service delivery models, the comparisons made in the present report do remain somewhat limited. However, while they do not constitute a complete economic analysis, they can nevertheless assist in informing future discussions about potential improvements to Gladue report service delivery in British Columbia.

#### **4.12 Who is responsible for funding for the production of Gladue reports**

Responsibility for Gladue report funding varies greatly across jurisdictions. 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 was an exception in that writers were paid indirectly. LSS contracts with the writers to produce the reports and the funds come from the LSS budget, however the payment is made to defence counsel who then disburses it to the writer.

#### **4.13 Access to Gladue reports, 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 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. The subject of a Gladue report and others who have contributed information to the report writer may have disclosed information that they have a right to protect. Furthermore, information contained in the report may unfortunately be used out of context and reduced to serving as proof of the presence of high-risk factors or as an excuse for further discrimination.

The subject of the report may consent to the release of the report, but even if that consent is full and informed, it does not include the consent of other people who have contributed sensitive information for the report. The agencies have their own rules about release, distribution, and safekeeping of reports they produced.

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.

## 5. Description of Provincial Programs

Gladue report service provision is still unstructured in many parts of the country. There are three primary means through which the courts receive Gladue information at the time of sentencing: Gladue reports, PSRs with Gladue components, and oral submissions. 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).

The following are descriptions of existing programs in six provinces (British Columbia, Alberta, Ontario, Québec, Prince Edward Island, and Nova Scotia) and one territory (Yukon) and the methods used for the production and delivery of Gladue reports there. The seven jurisdictions were chosen for comparison in this study because they each had at least one Gladue reports delivery program (whether through government, stand-alone organizations, or a combination of the two).

### 5.1. British Columbia

British Columbia uses a mixed model to provide and deliver Gladue report services. Services are provided either through BC's Legal Services Society or privately contracted Gladue report writers.<sup>111</sup> Recently, pro bono reports have also become available through the Access Pro Bono Gladue Clinic, Indigenous Community Legal Clinic, and/or through advocates and other justice system professionals.

The initial LSS Gladue Pilot Project funded through the LFBC ran from June 2011-March 2013.<sup>112</sup> After March 31, 2013, the LSS Gladue Program continued in a more limited capacity due to a lack of stable funding. Until very recently there has been no provincial funding for Gladue reports.

Since the receipt of new funding in 2017, LSS has greatly increased its provision of reports. In 2016/2017 LSS provided 78 reports; in 2017/2018 LSS provided 128 reports; and in 2018/2019 LSS provided 215 reports. For this year, as of September 9, 2019, 123 reports have been completed and 104 more are underway. LSS currently has funding for up to 300 reports this fiscal year, however, they expect to receive more than 300 requests in that time.

As of 2018/19 the Attorney General of British Columbia, the Honourable David Eby, articulated several priorities that involve Gladue report services. These include: ensuring LSS is working to increase Indigenous access to justice services, implementing the TRC and UNDRIP<sup>113</sup>, and enhancing the Gladue report services offered through LSS.<sup>114</sup>

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<sup>111</sup> It may be worth noting also that several Gladue report writers who are contracted through LSS and are on that roster are also producing privately funded reports.

<sup>112</sup> Legal Services Society of British Columbia, Gladue Report Disbursement: Final Evaluation Report, 2013, p. 2.

<sup>113</sup> Honourable David Eby, QC, Attorney General of British Columbia, Mandate Letter to LSS, May 1, 2019 and Mandate Letter to LSS, December 12, 2018.

<sup>114</sup> Ibid.

Currently, LSS funded Gladue reports are primarily available to those who are eligible for legal aid through LSS.<sup>115</sup> Defence counsel makes a request for a Gladue report on behalf of their client “by submitting a Request for Authorization of Disbursements to the Case Management Section”.<sup>116</sup> The approval of such a request is handled through the LSS Indigenous Services department in the Indigenous Services division.

There are some recent cases in which LSS has provided reports through their organizational model that are directly funded by the Ministry of the Attorney General when Crown counsel requests a report. The LSS/PLS partnership is another development that has assisted some prisoners to access Gladue reports for transfer hearings and parole board hearings. However, due to increase in demand for Gladue reports for legal aid subjects, this pilot project has been put on hold.

LSS maintains a Gladue Report writer roster. Report writers are independent contractors who are vetted and approved by LSS. After the Gladue report is requested by the Indigenous person’s defence counsel, through an Expert Report Disbursement Request Form, that request is provided to the Gladue Coordinator for approval. The report writer is contacted by the Gladue Coordinator, who then puts the writer in contact with defence counsel for the subject of the report. Ultimately, the counsel is responsible for billing LSS and paying the writer, as per LSS Expert Disbursements policy. Reports are assigned by the Gladue Coordinator to an appropriate writer. However, it is possible for defence counsel to request a specific writer in order to meet the following criteria: (a) familiarity with the report subject’s culture and community, and (b) location of the writer in proximity to the subject’s home location or correctional facility.<sup>117</sup>

Reports are typically produced within eight weeks from the date defence counsel provides the writer with disclosure, but it is sometimes necessary for writers to seek an extension to complete a report. This also usually means that defence counsel must seek an adjournment of the sentencing date. While the subject of the report does not necessarily control who will be contacted and interviewed for the purposes of preparing the report, writers do take a list of initial contacts provided by the subject when they begin research for the report. Although it is the expressed preference of the Indigenous Services department, writers do not universally review the contents of the report with the subject when it is complete. Most writers indicated they generally confirm various information with subjects as the report develops and before it goes to a legal reviewer contracted by LSS to ensure the report is ready to be filed with the court. As writers in BC provide the report directly to defence counsel, most view it as the responsibility of the subject’s legal counsel to complete a review of the final report with the subject. However, there is no guarantee that a defence counsel will take the time or has the time to review the report with a client before the sentencing hearing. When discussing this topic, defence counsel, Crown counsel, judges, and report writers concurred that it is the case that report subjects often do not know the exact or totality of information contained in the report that concerns them.

Once a draft report has been completed by a writer, it is reviewed by a legal reviewer contracted by LSS. The writer has the opportunity to accept or reject the suggestions of the legal reviewer before

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<sup>115</sup> In some cases, there may be instances where Crown counsel can request a report through LSS that is funded by the Ministry of the Attorney General of BC.

<sup>116</sup> LSS, Gladue Report Writer Roster, p. 2.

<sup>117</sup> Ibid.

finalizing the report and sending it to defence counsel who provides it to Crown counsel and is supposed to file it with the court. All LSS managed reports are subject to a legal review, which often also includes a review of grammar, language, and style for consistency with the LSS Gladue report guidelines.

The authors' interviews with defence counsel, Crown counsel, and judges in the province determined that there is some inconsistency in terms of quality and content of Gladue reports produced in BC. These may be attributable to issues with control of the quality of writing ability, training for Gladue report writers, or individual writer's knowledge of or connection to a particular Indigenous community. However, interviewees also noted that the overall quality of Gladue reports provided through the roster maintained by LSS has seen consistent improvement over time. Most stakeholders expressed general satisfaction with the reports at the time interviewees were consulted. It was also expressed by the majority of interviewees from BC that the LSS program specifically as managed and coordinated through the Indigenous Services department in the Indigenous Services division of LSS was a trusted source of quality Gladue reports.

Currently, the LSS Gladue report writer roster has a total of 40 writers. Report writers generally indicated that training provided through LSS was desirable and helpful. Some were critical of the Indigenous Perspectives Society's online course offered through Royal Roads University. Writers reported that the LSS mentorship program, along with the community and mentorship offered through the BC Gladue Report Writers Society was beneficial and necessary for their work and in dealing with the heavy toll writing Gladue reports takes on them personally.

The Gladue Writers Society of BC (GWSBC) was established in 2016 by Gladue Report writers in BC. The GWSBC is partnering with FNJC and LSS, through a formal MOU, to advance the systemic implementation of Gladue principles across the criminal justice system. The GWSBC's mandate is to ensure the meaningful application of s. 718.2(e) of the *Criminal Code*, ensuring the rule of law is upheld through the application of the SCC decision in *Gladue* and subsequent jurisprudence and increasing Indigenous autonomy and capacity in the criminal justice system.

The following is a summary of their current activities:

- Training and professional development (CPD/CLE) to BC Prosecution Services, the Judiciary, defence counsel, and Community Corrections and Indigenous Nations;
- Mentorship to new and experienced writers to produce objective reports;
- With LSS, development of a "Short Form Gladue Report" or "Gladue Letter" in British Columbia;
- Research grant on "Gladue Approaches to Diversion: A Handbook" (in progress);
- Transformative Justice Pilot Nanaimo: Gladue Approach to Diversion; and
- Working with post-secondary institutions to develop Gladue-specific content.

The GWSBC has indicated they see a number of key areas that require attention in BC and Canada including dealing with the crisis of overrepresentation of Indigenous Peoples incarcerated in BC and across Canada, the lack of a national strategy for the fulsome implementation of Gladue principles, the lack of sufficient government funding to meet the need for Gladue implementation,

and the absence of necessary Indigenous-controlled justice infrastructure to ensure the fulsome implementation of Gladue principles.

BC Corrections is presently working with its Indigenous justice partners<sup>118</sup> to create a tool that will assist probation officers working with Indigenous clients, called the Community Narrative Template (CNT). It is meant to be shared with and completed by the IJPs to tell the stories of their own communities. Corrections staff can then use the information in many ways, including orienting staff to local Indigenous communities, writing PSRs for Indigenous peoples, and as a source of information for BC Corrections clients about their own communities and the resources within them. The CNT is intended to provide critical information about Indigenous communities in BC, including the rich history, the strength of culture within the community, the unique needs and socio-economic challenges the community may be facing, available programs and services, and other resources that BC Corrections may want to draw on to support their clients to be successful.

Some of the people interviewed for the present study who were familiar with the CNT or had had some experience with it, deplored its lack of nuance or community specificity. They also noted the lack of training for corrections officers and the difficulty that officers encounter in receiving and translating the CNT information in culturally appropriate ways. Because the information available through the CNT is not specific to individual Indigenous persons, there is possibly also a risk that this information may remain fairly “boiler plate” and not very useful for the preparation of a truly individualized PSR.

## **5.2. Yukon**

In Yukon, as of August 1, 2019, the CYFN is responsible for the coordination and preparation of Gladue reports through their Gladue Pilot Program. Report writers formally trained in the CYFN’s Gladue report writing program prepare reports as they are requested and approved. To date, approximately 47 reports have been produced since the start of the formalized program. The Yukon territorial government has provided \$530,000 to fund the pilot program from April 2017 through March 2021.

The authors were informed that, before the Gladue Pilot Project began, reports had no formal oversights or form of standardization. Rather, Gladue reports were completed on an ad-hoc basis, most often by First Nations justice workers, or whomever the court ordered in certain circumstances. Those who took on report writing did so with no formal Gladue report training, funding, or supports and did so in addition to their existing job tasks. As such, not all requests for reports could be met due to time constraints. Furthermore, when the court ordered a report the writers assigned to the task were not always from the Yukon. This caused issues around adequate information gathering as these report writers did not have access to or knowledge of relevant resources and/or supports in community and were potentially lacking in Yukon First Nations history and context.

Prior to the CYFN accepting sole responsibility for managing and administering the program, Yukon Legal Services Society (YLSS) had been a partner in the program’s administration. YLSS

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<sup>118</sup> For more information see: <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/corrections/reducing-reoffending/aboriginal-justice>

was initially selected to house and administer the pilot program because CYFN had concerns around the lack of information regarding what the project would entail and unanswered questions about the potential costs associated. Another reason the CYFN hesitated to administer the program was their concern over the dynamics of small communities and the potential for conflicts of interest and mistrust to arise without an adequate plan for consultation in place. In addition, the YLSS already had the administrative infrastructure in place to carry out a project of this scope. Although YLSS housed and administered the pilot project initially, there was always a clear expectation that the *Gladue* program would eventually be First Nations led.

Currently, when defence counsel requests a Gladue report they must make an application to the Gladue Management Committee (GMC). It is not common practice for the Court to order Gladue reports in Yukon. The GMC was created in 2014 to assist the research project that ultimately led to the creation of the Gladue Pilot Program in Yukon. The GMC has been an important facet of the pilot program since its inception. It acts as a forum for all stakeholders to voice their opinions. The GMC has representation from the Yukon courts, the Yukon Public Prosecution Services Office, the Yukon Government's Department of Justice, the Yukon Legal Services Society, the Council of Yukon First Nation's Justice Program, and Kwanlin Dun First Nation's Justice Department.

In order to be responsive to and respectful of the needs of its members, the CYFN has structured its application form to provide applicants with the ability to state which of the three writers they would prefer to write their report. While efforts are made to match the applicants and their desired writer, no guarantee is made. A set criteria must be met for an application to be approved. Applicants must: be a Yukon resident, have entered a guilty plea or have been found guilty, agree to the statement of facts, and must have applied at least six weeks before the sentencing date, in order to allow enough time for the report to be prepared. Priority and consideration are provided for applicants: who face a sentence of three or more months, whose family has a history of involvement in residential schools, who have community support, whose family has a history of child welfare involvement, who have a history of victimization, who have disability that should be accommodated, and who have an interest in rehabilitation and/or treatment.

When an application is approved, the task of producing the report is contracted to one of three report writers approved by the CYFN. The report writer engages in interviews with the offender and their relevant members of their family and community. Once a draft of the report is written, the writer reviews the report with the offender for accuracy. The report is then sent to a different contractor for legal review and quality control oversight. Once reviewed, and any required revisions are completed, the report is submitted to Crown and defence counsel and to the trial coordinator.

In terms of remuneration, report writers on the roster are paid \$2,500 per a completed report with available reimbursement of mileage disbursements. Although the writers work on contract, some roster writers are employed by First Nation Justice Departments within the Yukon. When possible, the fee is made payable to the First Nation that employs the writer, and the fee is absorbed into their regular salary. Where an applicant has previously received a report, they are neither turned away nor provided a new report. Rather the existing report is reviewed updated for a prorated fee.

To be a CYFN approved Gladue report writer, individuals must take the CYFN Gladue report writing training course and shadow a current writer during the interviewing and writing portion of a Gladue report. The training program includes education on vicarious trauma, proper interviewing and writing skills, explanations of the legal history and principles surrounding *Gladue*, and an awareness of current local resources. There are aspirations to expand the roster to have a writer from each of the 14 First Nations communities. It is hoped that this will provide a choice with regard to the variety of people available from different communities and the representation of gender. The CYFN and GMC plan to limit the roster of writers to Yukon First Nations members, in order to prevent the perpetuation of systemic and colonial issues that can accompany outsiders doing this work and ensure competency in Yukon history and culture.

### **5.3. Alberta**

In Alberta, the Ministry of Justice and Solicitor General coordinates and administers the Gladue report writing program, known formally as the Gladue Pre-Sentence Report Program. Gladue reports are written by individuals who contract with the Ministry of Justice and Solicitor General. Funding for the program is provided by the Alberta Government.

Since May 2015, the Ministry of Justice and Solicitor General's Justice Services Division assumed responsibility for the coordination and administration for Gladue reports in the province. Prior to that, in May 2014, the Alberta Government launched a pilot project with Native Counselling Services of Alberta to develop a province-wide cadre of community-based Gladue report writers. As awareness of the availability of funded reports grew, so did the number of report requests. Eventually report requests were greater than what could be accommodated with the available funding, creating a serious problem.

The Gladue Pre-Sentence Report Program can ultimately be described as a community-based approach. The program currently consists of a roster of 45 report writers located in Indigenous communities throughout the 11 court districts in Alberta. By only contracting with report writers who come from, or are closely connected to, an Indigenous community, the Ministry of Justice and Solicitor General ensures that the writers have an in-depth knowledge and understanding of the information being shared by the offenders. To avoid criticism from Indigenous communities, it is important for the program to recruit only Indigenous community members, or non-Indigenous writers who have an extensive understanding and connection to communities.

The Ministry of Justice and Solicitor General selects report writers through an Alberta Government Procurement Pre-Qualification Request. Applicants must provide: a criminal record check with no pardonable convictions, show they have experience working with multi-barrier Indigenous clients within two years of applying, and that they have a demonstrated connection with the Indigenous community for whom they want to write reports. It is beneficial for applicants to speak a relevant Indigenous language and understand or practice Indigenous culture and spirituality. Once selected to join the roster of writers, Alberta Justice provides 12 hours of guided distance learning, which is broken down into three four-hour modules, and includes reading assignments and skill checks. The modules explain the court process and importance of Gladue reports in sentencing and provide a detailed explanation of the content of reports. After successful completion of the modules, the new report writer is mentored by the Gladue Report Provincial Coordinator (GRPC).

In order to procure a Gladue report for an Indigenous person before the court, a request for a report must be made by counsel or the court. If the request is granted, defence counsel is required to prepare a referral form and send it to the GRPC. The referral is reviewed by the GRPC who then assigns the report to the appropriate writer. While the GRPC usually prioritizes location, sometimes an out-of-community writer may be assigned due to their specific expertise. For example, a writer may have experience with designated dangerous offenders, in which case they may be assigned to individuals with this designation despite not having a direct connection with the offender's community of origin.

During the assignment process, a contract is drafted and signed between the writer and the Ministry of Justice and Solicitor General on a fee-for-service basis. The contract establishes a timeframe for completion of the report. Currently the length of time between when the report is ordered to completion and submission to the court is six to eight weeks.

Upon assignment, the writer interviews the subject of the Gladue report and attempts to contact individuals who are close to the subject and can provide additional or corroborating information regarding the subject's background and circumstances. The writer must also include any relevant and appropriate options for rehabilitation and or alternatives to incarceration. The final draft of the report must be submitted by the writer to the GRPC for review. The report is reviewed as a quality control measure to ensure that any legal or grammatical errors are addressed and revisions are made prior to the final report being submitted to counsel and the court. At that stage, the report is used by the sentencing judge as part of the sentencing process.

In 2017/18, the Gladue Pre-Sentence Report Program cost approximately \$900,000 for the 784 reports requested, inclusive of contracts with 42 community-based writers and the GRPC position.<sup>119</sup>

The Gladue Committee, which includes judges, Crown and defence counsel, academics, Native Counselling workers, members from the Blood Tribe, Yellowhead Tribal Community Corrections workers, members of the Department of Justice, Probation officers, court administrators and Gladue report writers, was formed in 2012 and meets every six weeks. The Committee noted that while all individuals who request a Gladue report receive one, current funding is not inclusive of aftercare or other support programs. The Committee has commented on how the report program lacks sufficient support for both the offenders and the writers (who may each experience re-traumatization in the course of the interview process). The Committee recognized that more needs to be done to provide ongoing support to offenders as well as to writers in order to minimize any additional harm. The province of Alberta is presently developing post-Gladue navigator positions to be located in communities and is considering implementing a Gladue Aftercare program at Aboriginal Legal Services.

#### **5.4. Ontario**

In Ontario, at present, several Indigenous agencies prepare Gladue reports. The funding of reports comes mostly from the Ministry of the Attorney General of Ontario and Legal Aid Ontario, and to

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<sup>119</sup> *Alberta Justice and Solicitor General, Annual Report 2017-18* (2018) p.18

a lesser extent from the federal Department of Justice. Indigenous service providers enter into a service provision agreement with the provincial government, typically for a period of two or three years. There seems to be sufficient funding available at the present time to satisfy the immediate demand for Gladue reports, however respondents have noted that funding for related services (e.g. training, aftercare, support programs) is often insufficient.

Every service provider is different, but they are all based in an Indigenous organization. This study covered the Gladue report writing services provided by Aboriginal Legal Services (ALS), the Nishnawbe Aski Legal Services Corporation, Tungasuvvingat Inuit (TI), and the Kaakewaaseya Justice Services (Grand Council Treaty #3). In some locations, staff from a First Nation or Tribal organization prepare the reports. That service is sometimes limited to report for their own members (e.g. United Chiefs and Councils of Mnidoo Mnising, Akwesasne Community Justice Program). For example, the Akwesasne Community Justice Program (Gladue Unit Services), receives, assesses and responds to requests for Gladue reports for Indigenous offenders who find themselves in the judicial jurisdiction of the Akwesasne Mohawk Territory or are members of the Mohawks of Akwesasne. The Thunder Bay Indigenous Friendship Centre prepares reports for all Indigenous people in Thunder Bay other than Nishnawbe Aski Nation (NAN) because NAN have their own Gladue writers who only prepare reports for their members.

Report writers are typically hired as staff members by the various Indigenous organizations. In some organizations, these staff members may play more than one role. The Gladue reports are requested by the courts, usually at the suggestion or insistence of defence counsel but sometimes also at the insistence of the judge. The requests are transmitted directly to the applicable organization by court personnel.<sup>120</sup> In some parts of the province, it is left to the defence counsel to send the report requests to the Indigenous organization. Reports are typically produced within six or eight weeks, but it is sometimes necessary to extend that period. Files are assigned internally to an appropriate writer. It is not up to the subject of the report to decide who is interviewed for the Gladue report, but writers must start with the contact information provided by the subject of the report. Whenever possible the writer, who already has a relationship with the subject of the report, reviews the contents of the report with the subject before it is finalized. Once a report has been prepared by a writer, it is reviewed internally by someone in the organization before it is transmitted to the court. All reports are reviewed by supervisors or a staff member. For example, ALS has three supervisory staff, all with law degrees, who manage, monitor and closely supervise the production of Gladue reports. ALS currently has a total of 14 writers. Other organizations have between two and four full-time writers. In at least one organization, an external resource person is hired on contract to review the reports. In 2018/19, ALS produced 355 full Gladue reports and 127 Gladue letters (or short-form reports). Based on these numbers and the information provided in interviews the authors estimate that the total number of Gladue reports produced in 2018/2019 in the whole province is about 400 reports. The authors did not receive data on the number of reports produced by other Indigenous organizations.

## 5.5. Québec

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<sup>120</sup> Each contracted Indigenous organization has its own request form.

In Québec, a structured program for preparing Gladue reports has existed since 2015. Gladue reports are ordered by the court at the request of a judge, the prosecution, defence counsel, or a justice committee.<sup>121</sup> A Gladue report can be ordered in any case involving an offence punishable by imprisonment. Once a report has been ordered, the court's registrar sends a form to the Centre Administrative Judiciaire (CAJ) of the Ministry of Justice. The CAJ sends the request to one of three organizations responsible for the production of the reports: les Services Parajudiciaires Autochtones du Québec (SPAQ), the Makivik Corporation (Société Makivik), and the Department of Justice and Correctional Services (Cree Justice) of the Cree Nation Government (CNG) in their respective territories of jurisdiction.<sup>122</sup>

When SPAQ receives a request from the CAJ, it either undertakes to produce the report (it has nine trained writers) or it refers the request to another organization, often an Indigenous Justice Committee, particularly when the matter is in a territory not covered by SPAQ. In the latter cases, SPAQ coordinates the production of the reports, but not their funding. Makivik Corporation, serving Nunavik Inuit, also responds to request from the CAJ and is responsible for a very large proportion of the Gladue reports produced each year in Québec. Finally, Cree Justice, the Department of Justice and Correctional Services of the Cree Nation Government, when requested, produces a Gladue report for Cree clients along with recommendations. The Department's Justice Officers, Reintegration Officers, Justice Committee Members and Native Parajudicial Workers all have been a part of training programs to prepare Gladue Reports for Cree clients.

A list of accredited writers has been drawn up and is managed by the MJQ. As of September 2017, the list contained 56 accredited writers. On average, 123 Gladue reports are produced each year. Some of the subjects of the reports live in an urban area, but the majority are from a more rural Indigenous community.<sup>123</sup> Reports are produced by accredited regionally based writers in: Témiscamingue, Waskaganish, Montréal, Akwesasne, Kahnawà:ke, Listuguj, Mashteuiastch, Gatineau, Outaouais, Gatineau, Opiticiwan, Sept-Iles, Qunev, Nunavik, Baie d'Ungava, Baie d'Hudson, Oujé-Boudoumon, Mistissini, Wasmanipi, Chisasibi, Wemnji, Eastmain, and Val-d'Or. Gladue reports have been produced in every judicial district of the province. From 2015 to 2018, the majority (67.7%) of Gladue reports were prepared for offenders from Abitibi. Most of the

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<sup>121</sup> A Justice Committee is local committee made of representatives of the Indigenous community to collaborate with the justice system in local justice matters. In Québec, there are 26 justice committees serving seven Indigenous people. justice committees can act in areas as varied as dejudicialization and non-judicialization, the recommendation of sentences, probation and suspended sentences, supervised conditional releases, crime prevention, community support (e.g., through healing circles), offender reintegration and citizen mediation.

<sup>122</sup> In the *James Bay and Northern Québec Agreement (JBNQA)* of 1975, the Government of Québec made a commitment to work closely with the Crees and to take into account Cree values and Cree way of life in the administration of justice for the Crees. The Cree Nation Government has built justice facilities in all Cree communities which host every year over 150 days of regular hearings of the Court of Québec and the Superior Court of Québec. Probation, parole, rehabilitation and aftercare services are provided to Crees, in the Cree language, if possible, taking into account their culture and way of life. Over the years, the Justice Department has established various programs and carried out projects and initiatives in the areas of crime prevention, youth engagement, corrections, rehabilitation, conflict resolution and legal information and training. In that context, the Justice Department is also responsible for the production of Gladue reports. Funding for these services is provided by the Québec Ministry of Justice. See: *Brief of the Department of Justice and Correctional Services of the Cree Nation Government to the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: Listening, reconciliation and progress*, Val-d'Or, September 15, 2017.

<sup>123</sup> See detailed data produced by the Ministry of Justice produced in response to a request by CERP received on 23 February 2018.

Gladue reports produced thus far concerned people who belong to the Inuit Nation (40.5%), while 19.7% pertained to Eeyou (Cree), and 10.1% to Innu.

The Gladue reports program is funded by the provincial Ministry of Justice. The Ministry covers the cost of writing Gladue reports, either by directly paying the fees of the designated writer or through funding granted to justice committees for this purpose. Gladue report writers receive, through their agency, a fee/stipend of \$50.00 per hour up to a maximum of 20 hours (\$1,000.00), plus travel and accommodation expenses. When the reports are produced by a coordinator of an Indigenous Justice Committee, or by a social reintegration worker of Cree Justice, the writers are not remunerated by the Ministry of Justice since their positions are already funded by the provincial Ministry of Justice or the Department of Justice Canada through other mechanisms. As a result, these organizations function autonomously in the preparation of Gladue reports.

The three main agencies responsible for coordinating the production of Gladue reports (SPAQ, Makivik, and Cree Justice) do not receive additional funding beyond the maximum fee authorized by their agreement with the Ministry of Justice. When the report is produced by SPAQ employees, the Agency retains 15% of that fee to cover administrative costs and its staff receive a stipend in addition to their regular salary.

When a request for a Gladue report is not accompanied by a consent form already signed by the subject, the consent is ascertained and documented by the writer at the time of first contact with the subject. The writer must also complete an engagement to protect confidentiality form.

Three copies of the Gladue report are delivered to the court in sealed envelopes (for the judge and Crown and defence counsel). The CAJ is notified and receives a form requesting payment to produce the report and associated expenses. There are also private or independent writers whose services are retained by defence counsel, and exceptionally by the Ministry of Justice.

This production of Gladue reports is not currently regulated or supervised. The Ministry of Justice does not review the writers unless it receives complaints, in which case it can review the complaint and remove the writer from the list if necessary. The Ministry is planning to offer a service of support and report revision for independent writers. The Ministry is also planning to launch a digital platform for all Gladue writers which will provide writing advice and information, video information, as well as facilitate exchanges among writers.

PSRs with an Indigenous component (rapports présentenciels avec volet autochtone) are also used in Québec. They are produced by the province's correctional services (Ministry of Public Safety). A common format for the preparation of PSRs was adopted in 2015. The reports are mainly analytic and include a risk assessment, an assessment of the offender's social reintegration potential, and recommendations for social reintegration measures that consider the offender's Indigenous context and reflect the offender's Indigenous culture. Data on the frequency with which Gladue reports with an Indigenous component are used could not be obtained. Probation officers responsible for producing PSR with an Indigenous component receive training on how to produce these reports.<sup>124</sup>

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<sup>124</sup> The report is based on a training guide : “*Services d’éclairage à la cour adaptés aux particularités de la clientèle contrevenante autochtone – Guide du formateur*”.

The Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: Listening, reconciliation and progress (CERP; also known as the Viens Commission) released its final report on September 30, 2019, including a number of specific observations and recommendations concerning the production of Gladue reports in Québec.<sup>125</sup> The Viens Commission concluded that Gladue reports are “very interesting tools for supporting the exercise of judicial power” but that, considering that approximately 13,000 charges are laid each year against people domiciled in Québec Indigenous communities, they are still underused in that province.<sup>126</sup>

“In other words, Gladue reports are of no use to the vast majority of Indigenous offenders who are repeatedly sentenced for minor offences and are grappling with the revolving-door cycle of prosecution and incarceration.”<sup>127</sup>

The Viens Commission also noted that, “while the reports generally contain information on historic and systemic factors, they frequently say little about the resources available in the community, especially Indigenous legal systems and the procedures and sanctions that would be appropriate in light of them”.<sup>128</sup> It referred to a recent decision of the Québec Court of Appeal which observed that: “in the absence of proposals from the parties for alternate sanctions, it is difficult, even impossible for the Court to align the sentence [...] with the principles of corrective justice specific to the Indigenous context”.<sup>129</sup>

The Commission’s calls for action included the following five calls dealing directly with the production of Gladue reports:

No 51: Set aside a budget envelope earmarked exclusively for the writing of Gladue reports and increase the remuneration for all writers

No. 52: Increase the number of writers authorized to produce Gladue reports

No. 53: Fund the organizations involved in producing Gladue reports so that they can enhance and standardize the training provided to accredited writers, in cooperation with Indigenous authorities

No. 54: Periodically review the quality of work done by Gladue report writers, in cooperation with Indigenous authorities

No 55: Provide for Gladue letters to be written automatically whenever an Indigenous person enters the system, and provide funding therefor

## 5.6. Nova Scotia

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<sup>125</sup> The Commission had previously released a document on Gladue reports : *Les rapports Gladue*, document P-839-102, Janvier 2019.

<sup>126</sup> Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Gouvernement du Québec, 2019.  
[https://www.cerp.gouv.qc.ca/fileadmin/Fichiers\\_clients/Rapport/Final\\_report.pdf](https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf)

<sup>127</sup> *Ibid.*, p. 331.

<sup>128</sup> *Ibid.*, p. 331.

<sup>129</sup> *R. v. Denis-Damée*, 2018 QCCA 1251, para. 122.

In Nova Scotia, Nova Scotia Legal Aid is not involved with funding or preparing Gladue reports. When a report is ordered, the Mi'kmaq Legal Support Network (MLSN) oversees the preparation of the reports. The cost is covered by the court, out of the court services budget. MLSN is completely independent from Legal Aid. MLSN maintains a roster of trained writers it contracts with to produce the reports.

MLSN prepares the Gladue reports requested by the courts. MLSN hires contractors to prepare the reports. The writers receive approximately \$2,000 per report and may also receive a travel allowance of up to \$500 per report. Funding for these reports comes from the province. MLSN is the only provider of Gladue reports in the province. It is a non-profit agency that helps Indigenous people navigate the justice system. It offers a range of justice-related services (e.g., courtworkers, social reintegration, restorative justice, Mi'kmaq customary law program, victim support).

The Gladue reports program administered by MLSN started in 2004 and is funded by the Nova Scotia Department of Justice. MLSN has a roster of Indigenous writers who reside throughout the province and are contracted to write the reports. No limit has been imposed by the Department of Justice on the number of reports that may be produced and funded each year.

The process of ordering, preparing and delivering a Gladue report is quite simple. It is detailed in an Appendix to the *DPP policy on the Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia*.<sup>130</sup> Once an individual self-identifies as Indigenous, the court requests a Gladue report and court services staff send the request with other relevant information to MLSN. The MLSN Coordinator of Court Reintegration Services who administers the Gladue reports program documents the request, acknowledges the referral, and assigns the task of writing the report to an independent writer from the roster. The reports are reviewed by the program coordinator before they are transmitted to the court.

The referrals or requests for Gladue reports are often initiated by defence counsel (often a legal aid staff lawyer). Non-legal aid defence counsel are perhaps not consistently canvassing their clients for Indigenous identity. Crown counsel, on the other hand, under the recent policy, must ask defence counsel or ask the court to inquire with the accused about whether they wish to have their case proceed in a Gladue Court (when that is a possibility). Where a Gladue Court is not available, the Crown counsel should ensure that the accused is represented by MLSN or, having been advised of the availability of MLSN's representation, waived that possibility.<sup>131</sup> Crown counsel, under that same provincial policy on the *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia*, must advise the court of an accused's Indigenous status at the earliest possible stage in the criminal proceedings.<sup>132</sup>

The MLSN also operates the Mi'kmaq Customary Law Program, a pre- and post-charge diversion program that serves youth and adults in nine Mi'kmaq communities of the province. Through the Customary Law Program, the MLSN offers a culturally relevant community justice service that holds offenders accountable, offers reparations to victims, and meets the needs of Mi'kmaq

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<sup>130</sup> *Nova Scotia, Public Prosecution Service (October 2, 2018). Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia, Appendix A*, pp. 14-15.

<sup>131</sup> *Ibid.*, p. 6.

<sup>132</sup> *Ibid.*, p. 6.

community members. The MLSN uses justice circles as a form of victim-offender mediation, along with a variety of potential outcomes for the offender, including community and victim service orders, apologies, donations to charities, counselling, writing an essay, thanking police, observing court ruling, and abstaining from alcohol.

### **5.7. Prince Edward Island**

Since 2014, the Mi'kmaq Confederacy of PEI (MCPEI) prepares Gladue reports in PEI. Trained staff from the organization's Indigenous Justice Program<sup>133</sup> prepare the reports when requested by the courts. To date, a total of between 35 and 40 reports have been produced. About 10-20 percent of these reports were ordered by the provincial Supreme Court. The majority of the reports were prepared for drug cases. The subjects of the reports are mostly from the two Mi'kmaq nations of the province.

Gladue reports are ordered by and filed with the courts. The program is administered by the MCPEI Indigenous Justice Program and the program retains the services of trained Gladue writers on contract to produce the report, including writers who also hold a regular position within the Indigenous Justice Program. Report requests are transmitted from the court to the MCPEI Indigenous Justice Program whose Director assigns the task of writing the report to a writer under contract with the organization. The director of MCPEI Indigenous Justice also writes reports. In addition, she reviews and finalizes the reports before they are filed with the courts.

Writers are remunerated \$1,500 per report plus up to \$500 in travel costs. The subjects of reports often live far away, and the organization encourages writers to conduct in-person interviews. Interviews with subjects and other key individuals are usually digitally recorded by the writers and later transcribed. Once transcribed the recording is deleted. The narrative of the Gladue report produces as many direct quotes as possible. MCPEI safely keeps copy of every Gladue report it has produced since the beginning of the program. MCPEI occasionally produces report updates when an offender is being sentenced for a new offence (shorter reports of approximately five pages).

The program was initially a pilot project funded in part by the federal Department of Justice. There is now a tripartite federal-provincial-MCPEI agreement to fund the Indigenous Justice Program. However, the federal government does not directly fund the production of Gladue reports. The funding from the production of the reports now comes from the province's Ministry of Justice and Public Safety and has been sufficient to meet court requests for Gladue reports. A Memorandum of Understanding has recently been signed between the province and the MCPEI to formalize the funding agreement between the two parties and to outline their commitment to continue dialogue and improve the program. The Ministry of Justice and Public Safety sees its role as facilitating the dialogue between the courts and the MCPEI to ensure the ongoing production of quality *Gladue* reports. Once a report has been submitted to the court, MCPEI invoices the province for \$1,500 for the writer's fees, \$500 for MCPEI administrative fees, and up to five hundred for travel costs.

### **5.8. New Brunswick**

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<sup>133</sup> See: MacKinnon (Ed.) (2018). *Bringing Balance to the Scales of Justice: Fulfilling our responsibility to Indigenous People involved in the justice system*, Charlottetown: MCPEI Indigenous Program.

In 2019, a new policy on *Pre-Sentence Reports for Adult Aboriginal Offenders*<sup>134</sup> adopted by New Brunswick Department of Public Safety is meant to ensure that information relevant to Gladue is outlined in PSRs for Adult Aboriginal offenders. It is anticipated that this will assist the court in imposing sentences that are fair to both offenders and the public. The policy details the contents of these specialized PSRs. The Department of Public Safety also published a *Probation Services Handbook: Aboriginal Offenders* to provide guidance to probation officers tasked with including Gladue principles consistent with section 718.2(e) of the Criminal Code of Canada in a PSR.<sup>135</sup> A detailed template was developed by the Department of Public Safety for use by probation officers. All probation officers received training on the implementation of the new policy in the Fall of 2018. The PSR for Adult Aboriginal Offenders are not considered formal Gladue reports.

The PSRs for Adult Aboriginal Offenders can also be used to: (1) provide probation officers/institutional programmers with background information to assist with supervision, assessments, and case management; (2) assist Correctional Service Canada with penitentiary selection; and, (3) provide information to the National Parole Board to assist with the parole process.

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<sup>134</sup> New Brunswick, Department of Public Safety, *Policy on Pre-Sentence Reports for Adult Aboriginal Offenders*, taking effect on January 2, 2019.

<sup>135</sup> New Brunswick, Department of Public Safety (2019). *Probation Services Handbook: Aboriginal Offenders*.

## 6. Comparison Between Programs

Delivering Gladue report writing services is a complex task that involves many inter-connected policy decisions relating to staffing, financing, logistical issues, and the legal norms of a jurisdiction. The way Gladue reports are prepared and delivered generally adheres to one of the following delivery system models:

- Contracted roster of Gladue writers managed by an organization (Indigenous or non-Indigenous) where requests, preparation, and delivery are coordinated through the organization;
- Staff Gladue writers working for an organization, where requests, preparation, and delivery are coordinated through the organization;
- Contracted roster of Gladue writers managed by court services or government department, where requests, preparation, and delivery are coordinated through court services or the government department; or
- Contracted or staff Gladue writers with Indigenous organizations where preparation is coordinated through the organization, but requests and/or delivery are coordinated through court services or a government department.

Across the provinces and territory studied, 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.

There are many possible options to address each of the issues that must be considered when creating a Gladue report service delivery program. Thus, an extremely wide range of possible policy combinations is available. Table 2 provides a high-level overview of the combination of the policies and legal norms that are currently used in the provinces and territory studied for this report.

The following comparison covers 17 different aspects of Gladue provincial models:

- Access to the service
- Eligibility criteria
- Self-care and support for Gladue writers
- Cost efficiency
- Timeliness of delivery of the reports
- Access by writers to offenders in prison
- Format and contents of reports
- Quality control and supervision of writers
- Use made of the reports
- Quality, usefulness and impact of reports
- Confidentiality and protection of information
- Training of writers
- Writers' connection with communities and access to information required for the reports
- Role of the defence counsel and prosecutors
- Links with diversion programs
- Links with aftercare services
- Consideration of impact on victims and community.

The comparison is not meant to determine which one of these models is superior to the others but rather to highlight the models' respective strengths and potential challenges. Since none of these

models has been evaluated by the jurisdiction where it operates, the comparison is based on the perceptions expressed by participants in interviews.

<b>Table 2 High-level overview of Gladue report service delivery models for publicly funded reports</b>					
	<b>Alberta</b>	<b>BC, Yukon</b>	<b>Ontario</b>	<b>Nova Scotia, PEI</b>	<b>Québec</b>
<b>Report requested by</b>	Court, Crown, defence counsel, or accused	Defence counsel (or Crown, BC only)	Court, Crown, or defence counsel	Court or defence counsel	Court
<b>Request sent to</b>	A program coordinator at the Ministry of Justice	Coordinator at CYFN (YK) or Indigenous Services department at LSS (BC)	An individual writer or an Indigenous organization that employs writers	The Indigenous organization responsible for producing the report	A program coordinator at the Ministry of Justice
<b>Report request approved by</b>	All reports are funded by the provincial government	Coordinator at CYFN (YK) or Indigenous Services department at LSS (BC)	Legal Aid, or the Indigenous organization	All reports are funded by the provincial government	All reports are funded by the provincial government
<b>Gladue writer assigned by</b>	Ministry of Justice program coordinator	Coordinator at CYFN (YK) or Indigenous Services department at LSS (BC)	Defence counsel or the Indigenous organization	The Indigenous organization responsible for production of the report	The Indigenous Organization that was in turn selected by the Ministry of Justice coordinator
<b>Writers employed as</b>	Contract workers from roster	Contract workers from roster	Contract workers or staff of the Indigenous organization responsible for production of the report	Contract workers or staff of the Indigenous organization responsible for production of the report	Contract workers or staff of the Indigenous organization responsible for production of the report
<b>Report submitted to the court by</b>	Ministry of Justice program coordinator	Defence Counsel (BC) or Council of Yukon First Nations Gladue Management Committee (YK)	Answer varies according to the practices of each individual Indigenous Organization	The Indigenous organization responsible for production of the report	The Indigenous organization responsible for production of the report

### 6.1. Access to the service

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

Each jurisdiction covered in this report has adopted a different approach to ensuring maximum access to Gladue reports, with different results. In some jurisdictions, such as Alberta, Nova Scotia, and PEI, the stakeholders indicated that anyone who requests a Gladue report can obtain one. It also appears that, in BC, Ontario, Québec, and Yukon, geography (the remoteness or isolation of certain communities) is not necessarily a factor in determining whether a report can be produced, even if it can make the production of such a report more difficult (delays, identifying a writer, communication and travel).

In Nova Scotia and PEI, anyone who claims Indigenous ancestry and wants a report can normally get the court to request one and, if so, a report is always produced. In Alberta, Ontario and Québec, a report can be requested and produced anywhere in the province and it appears that all requests can be satisfied. It is possible that there may be circumstances where reports are not requested on the basis that it would be too difficult to produce one.

In BC, LSS reports are provided to Indigenous people in BC who self-identify, regardless if they are from BC or not. For example, from April 1, 2018 to July 19, 2019 LSS provided 299 reports and were in the process of providing another 95. Some of the biographical information available about report subjects is laid out in Table 3. Significantly, reports were undertaken in relation to subjects who identified as having First nations, Métis and Inuit ancestry and for persons who did not provide their ancestry or who’s ancestry was unknown.

<b>Table 3</b>		
<b>LSS Gladue Reports April 2018 – July 2019</b>		
<b>Report Subject</b>	<b>Completed Reports (299)</b>	<b>Reports in Progress (95)</b>
First Nations individual	82.6 %	78.9 %
First Nations individual not from BC	29.1 %	24 %
Métis individual	12 %	9.5 %
Inuit individual	0.3 %	1.1 %
Ancestry unknown or not provided	5 %	10.5 %

It is clear that LSS reports are being provided to many different Indigenous people, which stakeholders agreed was important. However, every person interviewed in BC, also expressed strong opinions that Gladue reports should be available to all Indigenous peoples, if they request one, and not just to those who qualify for legal aid. The opinion was also universally expressed that reports should be funded by the provincial and federal governments. Stakeholders generally suggested that Gladue reports are part of “Gladue rights” and that no individuals should have to pay for them.

## **6.2. Eligibility criteria**

**Conclusion: 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.**

Three main types of criteria are used across the country for determining the eligibility of an accused to a Gladue report: self-declaration as Indigenous, seriousness of the offence, and eligibility to legal assistance.

### *Self-identification as Indigenous (Indigenous ancestry)*

In Québec, the court orders the production of a Gladue report on the basis that the offender self-identifies as Indigenous. Since 2015, at the time of sentencing an Indigenous people, a court may order a Gladue report, a regular pre-sentence report, or a pre-sentence report with a Gladue component.<sup>136</sup> The request that is sent to the Ministry of Justice may not contain significant information about the individual's community/nation or their ancestry. This is usually determined, when possible, during the preparation of the Gladue report by the appropriate Indigenous agency (or the writer to whom this task has been assigned).

It was reported, only in Québec, Nova Scotia, and Ontario, that there were rare instances of misleading self-identification and that this had sometime been difficult for the writers. In some cases, people may claim Indigenous ancestry, but do not have the means to establish it. The writer sometimes cannot identify a home community, or connection with Indigenous ancestry. This happened, for example, in two cases in Prince Edward Island, where MPEI was unable to prepare a Gladue report because they did not have enough information to verify a person's Indigenous ancestry or historical membership to an Indigenous community. In such instances, it is impossible to write a report without a determination of whether the individual's claim of Indigenous ancestry is legitimate. Courts are notified in such circumstances.

In BC, several report writers spoke about the difficulty of establishing a Gladue report subject's ancestral connection to an Indigenous community. This was spoken of as a "disconnection from community", linked to the impact of colonialism, which is a Gladue factor for consideration and was not viewed as misleading or false claims to Indigeneity. However, it was also noted that, for writers who prepare reports exclusively for members of their own Nation, there may sometimes be some "gatekeeping" in relation to whether the subject of a report is perceived as belonging to the community. This was expressed as a concern when the member who was disconnected from the community was perceived as now trying to reintegrate simply as a means to access justice system supports within the community.<sup>137</sup>

In Ontario, establishing a Gladue report subject's Indigenous ancestry can also be very difficult and it is not always possible to do so and produce a Gladue report. An Ontario judge explained:

I am getting a fair number of individuals who are self-identifying as Indigenous (sometimes based on DNA) but whose lived experience is not one that related them to the Indigenous culture. In those cases, we usually receive a letter setting out the writer's efforts to ascertain the individual's Indigenous ancestry without much success, followed by a typical disclaimer at

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<sup>136</sup> Québec, Ministère de la Justice, *Communiqué juridique 04-15*, 10 April, 2015.

<sup>137</sup> The authors acknowledge the historic and ongoing impacts of colonialism, including purpose-built policy and legislation, such as the *Indian Act*, which have resulted in many Indigenous people being disconnected from their communities.

the end of the letter underscoring the view that this inability to trace the Indigenous ancestry does not negate whatever claim there might be by the individual. It then typically requires more probing questions of counsel about how the court might take some of these factors into consideration.

### *Seriousness of Offence*

In BC, determining who qualifies and will receive a Gladue report funded by LSS is not related to an evaluation of the seriousness of the offence. Defence counsel, Crown counsel, and judges noted that based on the realities of the criminal justice system, the utility and impact of a Gladue report was often more significant in more serious cases or cases where the possibility of a first-time jail sentence was being considered. It was suggested by many interviewees that this, combined with the time it takes to receive a report, meant that most of the time Gladue reports are being requested for more serious offences. These same people almost always expressed that there was, in their opinion, always a benefit to having a Gladue report. However, in a province with limited resources allocated to Gladue reports, people indicated that reports seemed to be most significant in more serious cases or cases where an offender might be facing a sentence of incarceration for the first time.

In Ontario, the ALS Gladue report program is only accessible to convicted offenders who self-declare as Indigenous, and in situations where the prosecution is recommending a prison sentence of 90 days or more. A Gladue letter may be produced when the recommended sentence is less than 90 days. Other agencies in Ontario do not apply the 90 days or more criterion as self-identification as Indigenous is usually sufficient. Some variability exists when an individual has to establish membership in a specific Nation or Band.

In Québec, PEI and Nova Scotia, the seriousness of the offence is not part of any eligibility criteria to qualify for a Gladue report. In Québec, however, because it takes up to four months to produce a report, Gladue reports are not normally ordered by the courts if the prosecution is asking for a prison sentence of less than four months.

### *Eligibility for legal assistance*

Limitations to access are also created by the program eligibility criteria in place in BC and Yukon.

In BC, Gladue reports are largely restricted to Indigenous people who are eligible for legal aid. In a small number of instances, a Gladue report may be requested and paid for by the Ministry of Attorney General, although the reports are still produced and delivered through the LSS Indigenous Legal Services department. Private reports are also available in British Columbia for those who can afford to pay for them. Some reports are also being produced pro bono through the ICLC and APB Gladue clinics.

In Yukon, under the new delivery model, it has been suggested that only those Indigenous people who are members of the Nations who are part of the Council of Yukon First Nations will be eligible for reports through that program. However, we were informed that the GMC is looking to

expand the scope of the application criteria to consider applications from non-Yukon First Nations peoples on a case-by case basis.

<b>Table 4 Criteria used for determining eligibility for publicly funded Gladue reports</b>				
	Self-Declaration	Seriousness of the Offence	Legal Aid eligibility	Implications for accessibility
Alberta	Must self-identify as an Indigenous person	Not used	Not used	Results in the broadest accessibility possible
BC	Must self-identify as an Indigenous person	Not used	Must qualify for legal aid unless the report is a Crown request	Will prevent many Indigenous persons from accessing Gladue report services
Nova Scotia	Must self-identify as an Indigenous person	Not used	Not used	Results in the broadest accessibility possible
Ontario (ALS)*	Must self-identify as an Indigenous person	Crown must be seeking 90 days custody or more	Not used	Will prevent some Indigenous persons from accessing Gladue report services
PEI	Must self-identify as an Indigenous person	Not used	Not used	Results in the broadest accessibility possible
Québec	Must self-identify as an Indigenous person	Not used (considered de facto)	Not used	Results in the broadest accessibility possible
Yukon	Must be a member of a Nation that is part of the Counsel of Yukon First Nations	Not a requirement, but funding is prioritized based on the seriousness of the offence	Must qualify for Legal Aid	Will prevent Indigenous persons from accessing Gladue report services, particularly Indigenous persons originating from other jurisdictions

\* There is no standard eligibility criteria across Ontario. Here ALS is used as a representative example of the kinds of criteria that are in use. Other Indigenous organizations that produce Gladue reports may have different eligibility criteria

### 6.3. Self-care and support for Gladue report writers

**Conclusions: Gladue report writers require more supports. Training for writers should include information on self-care. Funding should be provided for culturally appropriate counselling or other support services for writers as requested.**

Gladue report writers stated that the production of a Gladue report can be mentally demanding, emotionally difficult, and that it risks causing vicarious trauma. Across jurisdictions, it was indicated that a component of self-care is usually included in the training of Gladue writers. Many writers stated their desire for more support including access to counselling services and/or culturally appropriate Indigenous therapeutic options. A number of writers who self-identified as Indigenous reported that ceremony and cultural practices assisted them in dealing with the impact of writing reports and its emotional toll.

Stakeholders from MCPEI deplored the fact that there are few resources available to support Gladue writers. In Ontario, ALS writers are entitled to one mental health day per month (to use as they see fit for self-care). ALS managers explained that: “It is easier to provide support for

employees than for independent contractor (you know your employees and they are being supervised)”).

In BC, writers noted that community and mentorship through Indigenous Legal Services at LSS and the GWSBC are sources of support. They also indicated that there was a social media site for writers where they could share their difficulties and seek support from other writers. Indigenous Legal Services has recently expanded its supports for writers through the creation of a full time Gladue mentor position. The GWSBC programs and support for writers was discussed in section 5.1.

Despite the supports mentioned above, BC writers were consistent in their expression of a need for greater work-related support. Many of them indicated that they would not be able to do this work on full-time basis because of the personal emotional burden it carries. Writers in BC also noted that the current invoicing process is a source of stress for them due to the need for them to invoice defence counsel and wait for them to bill LSS. Report writers indicated this system often meant that they were not being paid in a timely manner. Several report writers noted they had experiences of defence not providing payment to them for weeks or even months after a report had been submitted.

Some BC writers discussed the desire for a professional organization that would have funding to provide supports for writers. Moreover, several writers indicated that creating a Gladue report writers’ professional body would assist in easing anxieties about the perception of writer’s qualifications and skills, along with determining desirable educational standards for writers, ongoing professional development requirements, and format and quality control criteria for Gladue reports.

Table 5 Availability of support for Gladue report writers		
	Available supports	Policy Implications raised by stakeholders
Alberta	Alberta Justice provides professional development and mentorship programs	
BC	LSS and GWSBC provide a range of supports including community mentorship.	Writers expressed that they could not work on a full-time basis without additional supports. The current BC funding model was consistently reported to be an additional stress for writers
Nova Scotia	No information	
Ontario (ALS)*	ALS provides staff with mental health days and peer support and mentorship	The contract funding model can make adequately supporting writers more difficult.
PEI	No information	Stakeholders indicated that additional supports are needed
Québec	The Ministry of Justice has plans to launch new on-line resources for writers	
Yukon	No information	

\* ALS is used as a representative example of the kinds of supports that are in use in Ontario. Other Indigenous organizations that produce Gladue Reports may have different supports

#### 6.4. Cost-efficiency

**Conclusion: 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.**

Because of the complexity and wide range of program elements associated with Gladue report delivery services, a comprehensive economic analysis comparing each model was not possible. It is possible, however, to lay out the kinds of inputs that will necessarily contribute to the overall cost of the different models.

One common and somewhat comparable cost across different Gladue report service delivery models is writer compensation. Comparison is most relevant between jurisdictions that employ writers on a contract basis. Table 6 summarizes the available data.

<b>Table 6 Writer fee per report by jurisdiction</b>		
	Writer Fee (per report)	Travel costs paid
Alberta	\$1200	Yes, up to \$300 per report
BC	\$1500 (\$60/hr up to 25 hours)	Yes, up to \$250 per report
Nova Scotia	\$2000	Yes, up to \$500 per report
Ontario	Variable	Variable
PEI	\$1500	Yes, up to \$500 per report
Québec	\$1000	Yes
Yukon	\$2500	Yes

The fees noted above apply to writers who have been hired on a contract basis. Determining similar costs for staff writers would be considerably more difficult. In different jurisdictions report writers are paid varying salaries and may have other skill sets that would contribute to differences in their overall compensation. For example, some Staff Lawyers are trained to write Gladue reports. In many cases, it is impossible to determine precisely how much of each person's salary is allocated to administration, management, production, and delivery of each Gladue report. In these cases, because report writers' hours interviewing, researching, writing, and editing are variable and untracked it is not possible to determine an accurate cost per report breakdown by province.

Other costs of Gladue report service delivery programs include administrative costs associated with:

- Costs to the court and to the Crown associated with ordering or requesting the report
- Processing report requests
- Managing a roster of contract report writers
- Paying, managing and equipping non-writer support staff
- Paying, managing and equipping staff writers
- Reviewing the reports
- Printing reports and submitting them to the Court, Crown and Defence counsel as required

- Public education costs

Stakeholders in every jurisdiction studied were asked about the ways in which Gladue report cost efficiency was measured in their province, territory or jurisdiction. Several respondents had data regarding their own organization, not all of which was publishable or publicly available. However, there were no jurisdictions where a single actor, or combination of actors, could share with the authors all the data that would be required to accurately calculate a complete cost of producing a Gladue report. The implication of this analysis is that Gladue report service delivery models that collect accurate data about costs (including costs in terms of staff time allocated to Gladue reports) will be in a superior position to assess the cost efficiency of their programs.

#### **6.5. Timeliness of production/delivery of the reports (avoidance of unnecessary delays)**

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

Across most jurisdictions, the average time to complete a Gladue report is between six to nine weeks, although systematic data on the timeliness of the report is seldom gathered. Québec's program assumes an average turnaround time of 12 weeks. Producing a Gladue report in complex cases may exceptionally take several months. Inability to locate and/or stay in contact with the subject of the report was consistently expressed as the main reason for delay in producing reports.

In BC, LSS report writers are given a timeline of eight weeks to complete a report from the time they receive disclosure from defence counsel. Most writers, judges, and counsel interviewed indicated that although there had been issues in the past relating to the timely completion of reports, timeliness has significantly improved in recent years. BC report writers generally agreed that the current timeline is reasonable and manageable. An exception was circumstances where the writer could not locate the subject of the report due to issues with housing (e.g. lack of fixed address) or lack of a primary telephone number. Other issues concerned defence counsel not providing needed court case documents or failing to provide contact information for the Indigenous people. LSS Indigenous Services indicated both a high level of confidence in report writers completing their assignments on time and an overall satisfaction with the quality of work. Judges and lawyers noted that when delays occurred, there seemed to be understandable reasons for them. Stakeholders indicated that in cases where the impetus exists to deal with the matter quickly as opposed to extending the timeline to obtain a report, the practice of defence counsel was simply not to seek the report.

In BC, reports are currently delivered to defence counsel, which was an issue some interviewees identified as a significant disadvantage of the BC delivery model. Concerns with this aspect of the delivery model focused on defence counsel being able to play a role in whether a report will be submitted to the court. Crown counsel expressed that Gladue reports are created for the courts, but because reports come through defence counsel there could be a perception that reports are produced for them and not for the courts.

In Yukon, only a handful of Gladue reports have been prepared under the new service delivery model. As such, it is too early to draw conclusions about the timeliness of the delivery of reports. Reports are generally prepared within six weeks of the application being approved. If a report writer requires more time to complete a report, an adjournment is requested and usually respected as a legitimate delay. Some Gladue report writers raised concerns related to the adequacy of the telephone system in the Whitehorse Correctional Facility. Comments were made about both the quality of the phone service and the length of time offenders are permitted to be on the telephone when they are calling out. It was mentioned that writers have had better phone reception when calling from a satellite phone in the middle of nowhere than they have had calling into the correctional facility from a few kilometres away.

In Alberta, the production of full Gladue reports is given a timeline of six to eight weeks. When a full Gladue report has been completed in the past 12-18 months, an update or addendum to the report is expected to be completed at an expedited pace for at a remuneration rate of \$600. The report writers in Alberta are often able to produce reports in six weeks or less and spend on average thirty to forty hours interviewing and writing these reports, depending on the complexity of the case and the amount of information initially provided.

In Québec, the production of Gladue reports is expected to take up to four months. This has been made clear to the courts and the delay is normally taken into consideration when ordering a Gladue report. From time to time, the courts have expressed concern about the fact that some reports were not produced within this timeline. Reports are assigned and produced according to the date of the Indigenous person's court appearance that prompts the need for the report. Attention is paid to avoiding all unnecessary delays when the offender has been remanded in custody pending sentencing. Under current procedures, two weeks often elapse between the court order and receipt of the request by the coordinating agency. This is likely connected to the above average delay for Gladue reports in Québec as compared to other areas.

In Québec, as in most other jurisdictions, the biggest reason for delay of a report is difficulties encountered in locating and meeting the offenders and their family members. The writers or the agency often lack the necessary contact information due to incomplete requests. New processes have been introduced to alleviate the problem (e.g. online requests, new forms).

In PEI, delays in the submission of Gladue reports can sometimes be a concern. The interviewed stakeholders admitted, however, that good reasons often exist for such delays (e.g., the offender is from out of the province and some information needs to be obtained from an out-of-province agency). At the same time, some stakeholders noted the importance they attach to maintaining PEI's short turnaround times for criminal proceedings.

In Nova Scotia, the MLSN usually requires eight to ten weeks to complete a report. On occasion, MLSN must ask the court for an extension, especially when a writer experiences difficulty locating subjects of the reports or their relatives.

In Ontario, most of the service delivery agencies anticipate producing a Gladue report within six to eight weeks. When delays occur, they are often due to difficulties that writers experience in gaining access to information and records concerning their clients. Although the subject of the

report signs a consent form for the release of his/her information, it is sometimes difficult to obtain information from other organizations in a timely way. Other organizations, either in the province or outside the province, are not always eager to cooperate with the writers. In Ontario, for example, some writers discussed the difficulties they experience in trying to get historical or other information from child welfare agencies. Another reason for potential delay is that travel to remote communities may be difficult, particularly in winter.

One Ontario judge explained: “I am concerned about the delays because we are typically looking at eight weeks for the production of the report. But it is almost always worth looking for. I do not purport to know the workload they are under. They are in a better position to know whether the delays are justified than I am.” Another judge, referring to the ALS eligibility criteria, noted that the delays are perhaps less of a concern when the report concerns individuals who are already looking at a potential 90-day sentence and are likely to be sentenced to time served. Yet, as noted by a defence counsel, “when they are informed that a report may take between six or eight weeks (perhaps even more), offenders who have been remanded in custody sometimes decline the opportunity to have a report produced.”

Each Gladue report service delivery model experiences similar timelines with respect to report production and similar reasons for delay. The implication of this comparison is that there are no models that exhibit markedly superior advantages in this regard.

#### **6.6. Access by writers to Gladue report subjects in prisons**

**Conclusion: 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.**

In most jurisdictions discussions with report writers revealed that accessing report subjects remanded in detention was generally not a challenge and that good relationships with correctional agencies usually facilitated this access. In most jurisdictions the report writer requires security clearance, which is often coordinated through the program responsible for the management and/or delivery of the Gladue services.

In those instances where access to the report subject was difficult, the same kind of issues were reported in all jurisdictions: prison lock down, prisoner transfer, and interview scheduling. In some instances, when an subject is moved to a different prison, it becomes necessary for the organization to assign the case to a different writer. This may cause delay.

However, there are reportedly also situations where writers encounter significant difficulties accessing report subjects in detention. Some detention centres are apparently notoriously difficult to work with. Other detention centres are cooperative, but experience difficulties because of overcrowding. None of these issues directly stemmed from the use of particular Gladue report service delivery models.

## 6.7. Formats and contents of the reports

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

Despite the absence of a national program or approach, Gladue reports in the jurisdictions covered for this report generally adhered to the following formats:

- Gladue reports – prepared by a Gladue writer
- Updated Gladue reports – prepared by a Gladue writer either as an amendment to the previous report or as a separate appendix
- Gladue letters: A short form of a Gladue reports prepared by a Gladue writer
- Gladue submissions – prepared by a Native courtworker, or equivalent, or justice worker, or sometimes by the offender themselves
- PSRs with Gladue components – prepared by a probation officer

### *Format and Contents of Gladue Reports*

Gladue reports should provide comprehensive, case-specific information about the Gladue report subject. The reports should assist the court in understanding: factors that may have contributed to bringing the person before the court; how these factors may impact the offender's blameworthiness; and what specific, well-developed options exist for the court's consideration in crafting an appropriate sentence.

The authors' analysis did not include comparisons between actual Gladue reports produced in each province. These reports are confidential and permission is required to access each one. Unfortunately, considering the timeline of the study was not possible for the authors to obtain the required permissions.

In Ontario, the report structure is flexible, but most reports follow a similar format with the same key headings. There are format variations among the different organizations responsible for producing the reports. For example, TI developed its own format based on the BC LSS' format. In addition, several organizations have developed short standard texts about events and issues in various communities that might have had an impact on individuals from these the communities. These short texts can be inserted in, appended to, or integrated into the Gladue reports. In some cases, where relevant, the reports may include a profile or a brief history of the community. Writers are encouraged to use direct quotes from their interviewees as frequently as possible.

In Québec, the general format and content of the report is prescribed in the standard agreement between the Ministry of Justice and the agencies funded by the ministry to produce the reports. The Ministry of Justice has developed a working framework that has appended to the service contracts it enters into with the agencies responsible for preparing Gladue reports.<sup>138</sup> The framework includes: the objectives and contents of a Gladue report and key elements to be covered by the

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<sup>138</sup> Ministère de la justice du Québec, *Framework for the preparation of a Gladue report*.

report; the procedure for the preparation of a report; the assignment of writers; the presentation of the report to the court; and, collaboration following the sentencing of the offender.

### ***Format and Contents of Pre-Sentence Reports***

Many jurisdictions also use PSRs with a Gladue component, instead of or in addition to a Gladue report. The format and content of PSRs with “Gladue components” or “Indigenous components” varies between jurisdictions. This is usually guided in each jurisdiction by policies and guidelines concerning specialized reports prepared for the courts.

In Québec, PSRs with an Indigenous component (rapports présentenciels avec volet autochtone) are also used and are produced by the provincial correctional services (Ministry of Public Safety). A format for these reports was adopted in 2015. The reports are mainly analytic and include a risk assessment, an assessment of the offender’s social reintegration potential, and recommendations for social reintegration measures that consider the offender’s Indigenous context and reflect the offender’s Indigenous culture. Probation officers responsible for producing the PSRs with an Indigenous component receive training on how to produce these reports.<sup>139</sup>

In Alberta, BC, and Yukon, the general consensus about the quality and value of PSRs with Gladue components was that these reports are not appropriate for meeting the standard set out by the SCC and do not assist judges in truly considering the unique and systemic factors of Indigenous peoples. While they appear to make culturally appropriate recommendations for sentencing, one stakeholder indicated that these reports are: “better than nothing, but barely.”

### ***References to the Impact on the Subject of Contacts with the Justice System***

During our consultations, it was suggested that the Gladue reports should also refer specifically to the traumatic experience that the subject of the report may have suffered because of his/her contacts with the police or the justice system.

### ***Contents of Reports Relating to the Impact of the Crime on the Victim***

During the consultations, there were also questions asked about whether Gladue reports should contain information on the victim(s) of the offence. Some of the interviewees mentioned that there is not always room in the approved format of the report for information concerning the victim(s) of the offence and the impact the offence had or continues to have on them. Although data are not being collected on this question, it seems that Gladue writers very seldom interview the victim of the offence in the course of preparing their report. Information concerning the victim and his/her concerns is rarely included in Gladue reports unless the victim is a family member of the offender or the information concerns the offender’s reintegration plans. It was frequently pointed out that victims can submit a victim impact statement at the time of sentencing and in some instances received support in doing so from victim assistance services. It was also noted by several interviewees that Indigenous victims, for various reasons, tend to engage less with the justice system and are less inclined to submit a victim impact statement than other victims. However, the

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<sup>139</sup> The report is based on a training guide : “*Services d’éclairage à la cour adaptés aux particularités de la clientèle contrevenante autochtone – Guide du formateur*”.

authors noted that when an Indigenous agency is responsible for overseeing the preparation of a Gladue report, it sometimes also offers victim support services. In this way discussions between the Gladue writer, the caseworker, and the victim assistance worker become possible. This is particularly so for discussions relating to the recommendations that will be made to the court in a specific case. Several people stated that this is an important difference between pre-sentence reports (with or without a Gladue component) and Gladue reports, since the former typically contain information about the victim when relevant. One judge explained that this was specifically why she sometimes felt that she had to order both a PSR and a Gladue report.

In Ontario, ALS writers do not seek victim statements unless there is likely to be an on-going relationship between the victim and offender. In Nova Scotia and in Québec, the perspective of the victim is not routinely included in Gladue reports unless it is relevant to the offender's future plans. In PEI, the Gladue reports do not include victim input in respect of their perspective, although they may be interviewed for the writer to learn more about the history of the offender. The victims are sometimes interviewed by Gladue writers more than once. This may happen when the victim has a close link with the offender or is part of the offender's future plans.

One stakeholder responsible for victim services suggested that this is further evidence that the justice system too often gives only secondary consideration to the needs and rights of victims. One Gladue report service manager mentioned that in some cases victim services providers did not support the inclusion of victim information in a Gladue report because that information may contradict the information included in a victim impact statement. Several people interviewed in different provinces suggested that this is a serious issue that requires further consideration.

### ***Contents of the reports Relating to Community Impact***

Similarly, Gladue reports do not typically contain information on the impact of the offence on the Gladue report subject's community. This kind of information could, at least in some instances, be relevant to an subject's social reintegration plans or the subject's successful completion of a community-based sentence. It should be noted that in 2015, ss. 778.2(e) of the *Criminal Code* was amended by adding the words "consistent with harm done to victims or to the community". Some interviewees referred to ss. 722 (1) of the *Criminal Code* which provides the possibility for a community impact statement to be submitted to the court at the time of sentencing, but also noted that such reports are rarely submitted on behalf of an Indigenous community.

Depending on the situation, there is also the possibility that information on the "impact" of the crime may be revealed through the sentencing process itself (e.g., Indigenous court, sentencing circle). Some interviewees suggested that members of Indigenous communities seldom prepare a victim impact statement or a community impact statement. Interviewees are not sure why this kind of information is not included in Gladue reports since members of the community are often consulted during the preparation of a report.

### ***Contents of the reports relating to family impact***

The best interests of the child should be considered when sentencing Indigenous persons with parental responsibilities. Decision making at the time of sentencing can be improved by ensuring

that the impact of the decision on the individual's children and family is considered. It may be possible to minimize children's separation from their parents involved with the criminal justice system by limiting the use of imprisonment whenever possible and appropriate.<sup>140</sup> However, it cannot be assumed that judges have the information they need to consider the parental obligations of an offender at the time of sentencing. It is important therefore to provide courts with accurate information about an accused's family situation and the potential impact of sentencing on family members, including through a PSR or Gladue report.<sup>141</sup>

According to some of the stakeholders interviewed, this kind of information is not routinely included in Gladue reports, although it may be part of the report in support of a proposed healing plan outlined in the report and the options provided as alternatives to incarceration or for restorative justice.

### *Need for uniform or standardized report structure*

Although it has been suggested that there may be value in considering a uniform national structure for Gladue reports.<sup>142</sup> We have not heard any support expressed for this idea during our interviews. On the contrary, everyone seems to be satisfied with the format(s) currently in use.

## **6.8. Quality control - Supervision of writers/review of draft reports**

**Conclusion: In most Gladue 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.**

Each model has its own mechanism for ensuring the quality of the reports and supervising the writers as necessary. In Québec, the reports produced by SPAQ, Cree Justice and Makivic are reviewed and approved by the individual agency's program coordinator or other resource persons before they are submitted to the court. Input and support are offered to the writers throughout the process. However, since the province's model of service delivery relies in large part on independent writers being contracted on a report by report basis, there may sometimes be insufficient support and supervision offered to independent writers. To mitigate this difficulty the Ministry of Justice, as mentioned earlier, is planning to offer a service of support and report revision for independent writers that will be provided by an independent agency on contract with the ministry. The ministry is also planning to launch a digital platform for all Gladue writers which will provide writing advice and information, video information, as well as facilitate exchanges among writers.

In Ontario where the reports are produced by an Indigenous organization, the organization reviews the reports and is responsible for accuracy and quality control. In Alberta and BC, the reports are

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<sup>140</sup> Millar, H. and Dandurand, Y. The best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities, *Criminal Law Forum* (2018), 22(2): 227-277

<sup>141</sup> ICCLR, EFry Society of Greater Vancouver, UFV School of Criminology (2018). *Enhancing the Protective Environment for Children of Parents in Conflict with the Law or Incarcerated: A Framework for Action*. <https://icclr.org/wp-content/uploads/2019/06/Enhancing-the-Protective-Environment-Framework.pdf?x79172>

<sup>142</sup> National Working Group on Gladue (2018). *Discussion Paper on a Universal Gladue Report Structure*.

reviewed respectively by the Alberta Department of Justice and Solicitor General and the BC LSS. In the Yukon, an independently contracted content reviewer, who is a former newspaper journalist, reviews the final drafts of *Gladue* reports for grammar and quality before they are submitted to Crown and defence counsel and the Court. When necessary, typically for more legally complex cases, a lawyer is consulted to review legal issues in the case.

Overall, there is a general sense of satisfaction across stakeholders with the quality of the reports produced by the various organizations as well as the quality control processes. However, many interviewees indicated this had not always been the case and that the quality of reports had increased significantly in recent years.

In BC, the issue of the difference between LSS reports and privately produced reports was raised as an issue by judges, counsel, and writers themselves, all of whom reported that the legal review process offered through the LSS delivery model allowed for much more confidence in the final report. Writers in BC were grateful for the LSS legal review process. They stated that the process helps ensure that there are no references to other illegal activities in the reports and that sensitive or concerning information is flagged. Judges and Crown counsel, in some cases, mentioned that they saw privately produced reports as an area of real concern, especially in more serious cases where a lengthy jail sentence was a possibility.

The implications of this comparison are that *Gladue* report service models with review mechanisms offer significant advantages in terms of quality of reports.

## 6.9. Use made of the report

**Conclusion: *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.**

Interviews revealed that *Gladue* reports are universally considered useful. *Gladue* reports are considered to be useful to the court as a means for the court to take into account the unique and systemic factors of each Indigenous person in order to craft a sentence that is culturally appropriate and avoids incarceration when appropriate.

### *Report updates*

As Clark noted in his evaluation of a *Gladue* Court, “as many clients have appeared in *Gladue* Court on repeated occasions, once a *Gladue* report has been written it can be referenced again.”<sup>143</sup> The same of potentially true of all *Gladue* reports. In some cases where a *Gladue* report already exists, the organization responsible for the report is sometimes asked to produce an update. In most instances, an effort is made to use the writer who produce the initial report. In some cases, the report consists of shorter submissions with new recommendations. In other cases, the request is treated as a request for a new report.

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<sup>143</sup> Clark, S. (2016). *Evaluation of the Aboriginal Youth Court*, Toronto, p. 29

### *Use of Gladue letters*

In some provinces where the eligibility criteria preclude the production of a full Gladue report, or where time may not allow the production of a full Gladue report, a short form (or Gladue letter) is sometimes produced at the time of sentencing. Such letters may be produced by caseworkers already familiar with the offender and his/her/their community. Even in situations where every Indigenous offender is entitled to receive a Gladue report, there are discussions about the need to come up with a short form of the report to address some specific circumstances where the sentencing cannot or should not be delayed by the production of a full report.

In Ontario at ALS, Gladue reports are only produced in cases where the Crown is seeking a sentence of more than 90 days. As an alternative, a Gladue letter can be produced when a lesser sentence is being sought. A Gladue letter is shorter than a full Gladue report and takes less time to complete.<sup>144</sup> Most other organizations in Ontario do not normally produce these letters.

Gladue letters are used in Yukon Territory. Although full reports are preferable, the letters are typically used when a full report cannot be produced. This occurs when the request for a report comes in a few days before sentencing is to take place, or when there are pressing reasons to not adjourn the sentencing date. When Gladue letters are used, they typically focus on the offender's background rather than on the resources and programs available as part of sentencing options.

In PEI, Gladue letters are not currently being produced but some tentative consideration is being given to developing an abbreviated form of Gladue reports for offenders charged with minor offences. This may be possible given that the agency responsible to produce Gladue reports has, already collected information about many Indigenous communities and their histories, as well as information about the available community resources.

Gladue letters are not used in BC.<sup>145</sup> However, there are various types of Gladue submissions in circumstances where Gladue reports are not available or have not been requested. These submissions can be created by the offender or by someone on behalf of the offender based on information provided by the offender. Gladue submissions often take the form of oral submissions to the court by defence counsel. In some cases, Native Courtworkers or First Nations justice workers will assist in preparing Gladue submissions for the court. LSS Indigenous Services' *Guide to Gladue Submissions* published in 2019, provides a thorough discussion and step by step template for the composition of Gladue submissions.

In Québec, Gladue letters are not currently used, but the Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec, recently recommended that Gladue letters be produced automatically whenever an Indigenous person enters the criminal justice system.<sup>146</sup>

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<sup>144</sup> Gladue letters are also produced sometime for submission to the Parole Board.

<sup>145</sup> With the exception that LSS reports they have recently funded a single Gladue letter for a bail.

<sup>146</sup> Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress, Government of Québec, September 30, 2019, Call for Action No. 55.

Currently, the GWSBC is engaged in co-developing a BC-specific Short Form Gladue Report (known as the “Gladue Letter” in other jurisdictions) in collaboration with LSS. This is to provide a formal mechanism by which Gladue factors can be considered at charge assessment, bail, and sentencing. It is intended to be a unique form of a full Gladue report. It will provide a vehicle for culturally based diversion options to be considered both pre-charge and post-charge.

### ***Gladue reports at bail hearings***

Generally speaking, Gladue reports are not being used at bail hearings. There are a few instances across jurisdictions where a Gladue report previously prepared for another case (or a summary of the report) is presented at the bail hearing. This raised the issue of confidentiality of reports for some stakeholders.

In BC, the Crown Counsel Policy Manual, Policy for Adult Bail (Policy BAI 1, April 16, 2019)<sup>147</sup>, includes a section addressing “Indigenous Persons.” The Crown Counsel Policy briefly sets out the context of the over-incarceration of Indigenous peoples in Canada and the history of Gladue. Crown counsel are directed to inquire about the Indigenous identity of accused persons for the consideration of Gladue factors at bail. Crown counsel interviewed in BC expressed an awareness of the need to address these factors at bail consistent with the policy. Some Gladue report writers in BC indicated that they had written reports for bail processes in some cases, though the percentage of these was quite small compared to reports for produced sentencing. Despite concerns expressed about the potential delay a Gladue report could cause to the bail process, the local consensus was that a Gladue report for bail in a very serious case could be very useful and should be available in BC.

In Ontario, the Crown Prosecution Manual contains the following instructions: “Although the Prosecutor should keep in mind the principles referred to by the Supreme Court in Gladue, a Gladue report should not be requested by the Prosecutor for a bail hearing.”<sup>148</sup> Crown and defence counsel consulted for the present study did not see great value in using a Gladue report at the bail stage of criminal proceedings. Dan Johnson, a practising defence counsel in Ontario, wrote that “An older Gladue Report can often be accompanied by an updated Plan of Care that should identify any steps that have been taken in response to the recommendations in an older Gladue Report.”<sup>149</sup> Plans of Care are documents that outline supports that are in place, and community-based resources, to address whatever issues an Aboriginal person who is seeking bail may be facing.

In Québec, Gladue reports are only ordered for sentencing purposes. During a bail hearing, a letter summarizing a previous report, a presentation by a caseworker or Native Courtworker, or a submission by counsel serve to ensure that Gladue factors are being considered.

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<sup>147</sup> <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>.

<sup>148</sup> Ministry of the Attorney General, Ontario, Criminal Law Division, *Crown Prosecution Manual, D. 20: Indigenous Peoples*. Also, Ministry of the Attorney General, Ontario, Criminal Law Division, *Crown Prosecution Manual, D. 24: judicial Interim Release (Bail)*.

<sup>149</sup> Johnson, D. (2012). Practical Tips for Representing an Aboriginal Accused. *For the Defence*, 33 (3), p. 4.

In PEI, there has never been a request yet for a Gladue report in relation to a bail hearing. PEI justice professionals have not yet identified a need for such reports, but some believe that requests for such reports are bound to be made at some point by the courts.

In Nova Scotia, Gladue reports are normally not requested nor produced for bail hearings. The current practice is for defence counsel to work with the Courtworker to gather relevant Gladue factor information for presentation to the court. A 10-question checklist has been developed in consultation with MLSN that can be used at bail hearings or, in some cases, when the offender does not consent to a full Gladue report. However, provincial policy requires Crown counsel to advise the court of an accused's Indigenous status at the earliest possible stage in the proceedings, including at judicial interim release hearings. When determining a position on bail, Crown counsel must apply the general principles set out in the *Criminal Code* and consider the background and unique circumstances of an Indigenous accused and their connections to the Indigenous community.<sup>150</sup> The new policy on the *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia* is quite specific about the procedure to follow with respect to Gladue reports at the time of bail hearing when the Attorney will oppose bail:

“Where an Indigenous accused is brought to court in custody, the Crown Attorney should:

- If the Crown Attorney will oppose bail, inquire of Defence Counsel for an accused as to whether the accused wishes to have a formal Gladue Report prepared and considered at any bail hearing or alternatively, to have Gladue factors presented and considered by the Court at any bail hearing, without a formal Gladue Report being prepared;
- Inform the Court if an accused expresses interest in having Gladue factors considered at a bail hearing but does not wish to have a formal Gladue Report prepared, and only proceed with a bail hearing when those factors can be presented to the Court through one of the following means:
  - Submissions of Defence Counsel or Agent for the Accused,
  - Representations made by the Mi'kmaw Legal Support Network or another Indigenous organization;
  - The Accused (through assistance of questions from the Court or Crown); or
  - Relatives and/or friends of the Indigenous person who is before the court.”<sup>151</sup>

### ***Gladue reports for young offenders (Youth Justice)***

Gladue reports are infrequently used in cases involving young offenders. In Québec, in such cases, Gladue reports can be requested by the court, by defence counsel, or the Director of Criminal Prosecutions. According to interviewees, to date, there has never been a request for a Gladue report for a young offender, but comprehensive PSRs are prepared when requested. In PEI, Gladue reports are sometimes ordered by the court in cases involving young offenders and the process for producing a Gladue report in those cases is the same as for reports for adult offenders. In Nova Scotia, Gladue reports can be ordered for young offenders, but diversion or a referral to a

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<sup>150</sup> Nova Scotia, Public Prosecution Service (2018). *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia*, p. 8.

<sup>151</sup> *Ibid.*, p. 7.

restorative justice program are the preferred options.<sup>152</sup> In Ontario, Gladue reports can be and are sometimes ordered for young offenders; here too, the process is essentially the same as for adults. In British Columbia, where all youth offenders are provided legal aid services (if required, sometimes parents opt to hire private counsel) a Gladue report is available to them upon request by counsel.

#### **6.10. Quality, usefulness and impact of the reports**

**Conclusion: 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.**

##### *Gladue reports are of good quality, useful and have an impact*

In Prince Edward Island, justice sector professionals interviewed expressed their satisfaction with the high and consistent quality of the reports produced by the Mi’kmaq Confederacy (Justice Program). Judges’ support for the MCPEI Gladue reports program is very strong. Judges, defence counsel and Crown counsel are generally impressed by the quality of the Gladue reports they received. They believe that the reports have had a significant impact on the sentencing of Indigenous people in the province. Some Gladue writers go so far as to say that they personally knew that every report they wrote had an impact on the sentence. Some justice professionals interviewed for the present study attributed some of the broader changes they had observed in the attitude of the whole justice community to the introduction of Gladue reports in the sentencing process.

In Nova Scotia, our consultations for this report indicated that both defence counsel and Crown attorneys are generally satisfied with the quality of the Gladue reports prepared by MLSN and believe that the reports have made an impact on the sentencing of Indigenous peoples. The only concern they expressed was about the delays that sometimes occasioned by the production of a Gladue report, particularly when the offender is remanded in custody. Most justice professionals, however, noted that the Gladue reports are typically produced on time. Judges also expressed their appreciation of the Gladue reports produced by MLSN. One of them said “they are an invaluable tool” and “we have come to rely heavily on these reports”. A Crown attorney from that province explained that Gladue reports have had a noticeable influence on prosecutors and judges, their attitudes, and their understanding of the impact of Gladue factors: “the reports have been a huge positive contributing factor in terms of creating a justice system that is alert to and prepared to consider Gladue factors and address the concerns of Indigenous communities”. Another impact that was sometimes attributed to the introduction of Gladue reports in that province was the noticeable impact of the process on some Indigenous communities’ willingness to facilitate the reintegration of offenders: “Everyone was well meaning, but they had trouble accepting the offender back into the community. It was a regular thing for a Chief to ‘ban’ an individual. In recent years, this has changed. The community is developing alternative responses. Elders are more active. Some of that is the result of the introduction of Gladue reports.”

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<sup>152</sup> For example, the new post-conviction restorative justice program administered by the MLSN for individual who have entered a guilty plea.

In Ontario, most of the judges we consulted noted that the reports are generally of very high quality and that they are very useful. One judge said that the reports were “extremely useful”. Two judges mentioned that the reports were sometimes of “variable quality”, but nevertheless tended to be very useful to the sentencing process.” One judge added: “We know our writers and we trust them. They do a good job”. Another judge observed: “I find that the most helpful reports are those that include a plan to connect that individual with some community-based resources that are specific to his/her needs and where the individual has indicated a willingness to work with these community partners. Such helpful plans are not always there. I do not know why; it is hard to generalize”. Another judge explained:

“Gladue reports matter in three important ways: (1) We have a sentencing system where the more trauma you have suffered the more we reduce the sentence (the court becomes a place where people come and relive their trauma) (the report makes it possible to avoid discussing the trauma in court); (2) the report is useful, meaningful, for the individual himself; and, (3) Gladue reports give the information that I need to assess blameworthiness and craft an appropriate sentence. We would not get that kind of information if we relied on PSR or other submission.”

Ontario Crown counsel agreed that Gladue reports are very effective and useful. Defence counsel saw the reports as very impactful: “The reports are fantastic and have improved considerably over the last several years”; “The reports are extremely useful”. One defence counsel summarized his views as follows:

“The factual knowledge conveyed by the reports is extremely rich and detailed. The fact that the Gladue writers are able to gather are at a level of depth and detail that I would never be able to achieve on my own. The writers are also able to put the facts in the proper context. The Gladue factors jump off the page (residential school, adoption out of the culture, alcohol, child placement, intergenerational basis, racism). The intergenerational aspects of each of these factors is explained by Gladue writers because they have the background knowledge. They are able to provide authoritative information that puts the individual in the context of the experience of their people, and the people in the context of the circumstances of the larger society. (...) The reports allow readers to understand the impact of trauma on the individual.”

In BC, judges, Crown and defence counsel reported that they are generally satisfied with the quality of the Gladue reports prepared through the LSS program and that the program, as it is presently run is a trusted and reliable source of quality reports. All interviewees indicated that the reports make a difference when sentencing Indigenous persons, particularly in more serious offences. Concerns raised by interviewees focused on the timeliness of reports. This was particularly the case if the offender was remanded in custody. There were also concerns about the variable quality of privately produced reports which are not subject to an LSS legal review. Defence counsel, Crown counsel, and judges who regularly participate in particular Indigenous Courts or certain courts stated that in many cases Gladue reports were not necessary for sentencings in some of these courts. They expressed that this was due to community involvement and representation. These things often resulted in the vital information normally contained in Gladue reports being provided to the court by community members. For example, Indigenous Elders from the community were cited as routinely providing Gladue information. It was reported that judges may become very familiar with a certain community’s history over time. In particular Indigenous Courts or certain circuit courts counsel judges learn the Gladue factors that impact

individuals from that community. Stakeholders in BC also indicated that in some less serious cases an offender may not need a Gladue report. They indicated this would be the case if there someone capable and willing to provide competent Gladue information through oral or written Gladue submissions, such as an Indigenous justice worker or Native Courtworker. Stakeholders indicated that Gladue reports are always useful even when the presence of other elements make it less imperative. They also viewed reports as more useful in the sentencing of Indigenous people than regular PSRs. One defence counsel explained: “A Gladue report is superior to a PSR in many ways, including the fact that a Gladue report does not convey the institutional pessimism that one can find in many adult PSRs”.

Most Gladue writers interviewed are convinced that their reports are having “a great deal of impact”; “They make a real difference in the lives of people.”

There was some indication from report writers that defence counsel do not always know how to properly include a report in their submissions to the court. This was echoed by some judges who mentioned that reports are often simply submitted to stand on their own without any sense provided by defence counsel what the court should make of the facts or the recommendations in the report. Many writers expressed the opinion that all justice sector actors should receive training about the use of Gladue reports and how to apply the information contained in the reports in the crafting of a fair and appropriate sentence.

### *Options for alternatives to incarceration and recommendations for restorative justice in reports*

All Gladue reports contain recommendations about resources or programmes that address the need of the Gladue report subject. This sometimes includes a referral to a restorative justice process. Most writers advised that they pay great attention to the formulation of concrete suggestions. They are particularly careful about offering recommendations that “do not set the offender up to fail”. The writers often deplored the lack of resources available in the community, particularly in non-urban contexts. This lack of resources limits what writers are able to recommend.

Both Crown and defence counsel find the options for alternatives to incarceration and recommendations for restorative justice contained in the Gladue reports very helpful. However, some did express that these options are not always novel because the same resources are available to all members to the Indigenous communities, whether the person has a Gladue report or not. Generally, it was noted there is a lack of resourcing for Gladue aftercare services and/or programs, as well as for programs and resources that may provide culturally appropriate alternatives to incarceration for Indigenous peoples and/or restorative justice options.

Judges were quick to draw the same conclusions. They lamented the lack of funding for the kinds of programs that would allow courts to consider meaningful alternatives to jail and would also hold offenders accountable and have them take responsibility for their actions. Interviewees spoke about the need to ensure adequate funding for Indigenous organizations and First Nations. Particularly funding is needed to build more capacity and create and/or support culturally appropriate resources that bring Indigenous legal traditions into sentencing outcomes.

Most writers believe that the courts seriously consider the alternatives to incarceration and restorative justice processes included in their reports. However, it is currently impossible to determine the exact impact of the Gladue reports' recommendations since no one is systematically keeping track of these recommendations nor is there data kept specifically on the sentence ordered by the courts following the production of a Gladue report.

Publicly funded Gladue report services produce high quality, well-regarded reports. Admiration for the quality of privately funded reports is less consistent. The implication arising from this comparison is that the quality controls currently exercised by publicly funded Gladue report service models are working. Service models that lack such controls are less desirable from the use-of-report perspective.

### **6.11. Confidentiality and protection of information**

**Conclusion: 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 information to all concerned.**

The issue of confidentiality and protection of the information contained in Gladue reports is something to which justice professionals should turn their minds. Given the highly sensitive information contained in these reports there is a real concern about who can access this information and how it can be used. There is a lack of clarity among the stakeholders that the authors consulted regarding access to Gladue reports and their availability to third parties post-sentence.

#### ***Who has access to a Gladue report once it has been produced?***

In Ontario, because the reports are not considered “expert reports”, they are provided to all parties simultaneously. The party requesting the report does not get a first look, nor does it have the opportunity to request edits or the ability to decide not to provide the report at all.

In Québec, the Ministry of Justice never has access to or consults the reports because they are deemed confidential. In Nova Scotia, the Department of Justice does not have access to the Gladue reports, even if it funds their production. Writers and service agencies usually attempt to make the procedures about disclosure clear to everyone who participates in the preparation of a report. They communicate that the report will be delivered simultaneously to the judge, Crown and defence counsel, and that the agency will not be releasing the report to anyone else without the express consent of the subject of the report. This is not the case everywhere.

Every agency responsible for producing Gladue reports, anywhere in the country, has developed means of ensuring the confidential safekeeping of the reports after their submission to the court. They do, however, have different policies about granting access to the reports, with or without the consent of the subject of the report.

In some provinces, judges are playing an active role in trying to protect the further dissemination of Gladue reports.

In Ontario, ALS provides the reports to courts, Crown and defence counsel, and does not release the report to anyone else without the Gladue report subject's express consent. However, justice stakeholders advised the authors that in Ontario, there are issues relating to the protection of the privacy and confidentiality of the information contained in the reports. If a report is filed as a court exhibit, it can probably be accessed, so reports tend not to be filed as exhibits. A judge admitted: "We have struggled about this question."

In BC, the report writer provides the report to defence counsel, who then shares it with Crown and the court. Judges in this jurisdiction indicated that reports are filed as court exhibits, so the reports are accessible upon an application to the court. Some judges admitted that they had not turned their mind to what happens if an application is made for the report by a party that could be seeking the information for other court processes, for example the Ministry of Children and Family Development.

Some Gladue writers, particularly in Ontario and BC, were concerned with the issue of the report subject's privacy. They expressed the wish to have clearer guidance on how far they can honestly go in promising the subject and the collateral interviewees that the information they share with the writer will remain confidential. Some writers are reduced to telling the respondents "don't tell me anything that would not want other people to find out about". Family members who are interviewed by the writers must often be warned that the offender will be reading the report. In one service delivery agency, writers have recently decided to stop referring to individuals' last name in their reports.

### ***Presentation and discussion of Gladue reports in court***

Gladue reports contain sensitive information and offenders are often worried about the presentation of the information in open court. There are also cases where the offender may not be aware of the content of the report at the time of sentencing and the disclosure in court. This may be traumatic for them and for the victim. Local practices concerning any reference to the content of the reports during sentencing hearings vary across jurisdictions, but there is an emerging trend to try to limit the direct references to some of the more sensitive contents of the report during hearings.

Clark, in his report on the Aboriginal Youth Court in Toronto, explained the practice:

As a member of the defence bar told us, the problem is that individuals often do not want the painful details of their life raised in a public forum. Moreover, many accused persons suffer the direct or intergenerational effects of past trauma – most notably residential schooling – and would find open discussion of their problems difficult to endure. In light of this reality, defence counsel who are familiar with Gladue Court and the challenges facing individuals who appear there usually refer in general terms to past trauma when making their submissions and refer the judge to specific pages in the Gladue Report (of which the judge will have a copy). This approach, while providing judges with the kind of information presumably indicated in Section 718.2(e) and in Gladue, offers some protection from additional trauma to particularly vulnerable people in court. Other lawyers, however, continue to raise difficult personal details

in court, which is a problem in view of the common presence of other accused and students in the gallery.<sup>153</sup>

In the case of sentencing circles, participants may sometimes only have access to the recommendations contained in the Gladue report. In Ontario, the judge, defence and Crown counsel receive a copy of the report, but other sentencing circle participants may not have access to that information (depending on the nature of the information).

Some judges reported that given the opportunity, they will discuss with defence and Crown counsel whether it is necessary or desirable to omit reading parts of a Gladue report into the record in open court. The rationale for this approach is to help ensure that Gladue report subjects and/or their family members who may be in the courtroom are not retraumatized by information presented in the report. Unfortunately, in BC it is often the case that Gladue reports are not received by the courts until very close to the sentencing. Sometimes not until the day of the sentencing. As such, judges may not have a chance to read the report thoroughly in advance and address this with counsel. Some judges explained that they were reluctant to make direct reference to any explicit details of a person's life experiences in their oral or written decisions out of respect for and a desire to not re-traumatize individuals.

#### ***Whether the subject of the report necessarily receives a copy of the report***

The practice of sharing a copy of the report with the subject of the report is not generalized. It is true that in all the programs the authors studied, the contents of the report are discussed by the writer and the subject of the report (sometimes more than once). However, programs vary in terms of whether they allow the subject to obtain a copy of the report, and if so, how. In PEI, the offender does not get a copy of the report. The individuals can ask their legal counsel for a copy, but this is sometimes a problem, particularly in small communities, because the reports often contain very sensitive information. In Ontario, most agencies do not provide the offender with a copy of the Gladue report. In the case of ALS, the writers do not automatically share a copy of the report with the offender, but the latter can make a request to the agency for a copy of the report.

In BC, LSS retains a copy of the report (stored on a separate database for confidentiality purposes) that can be requested by the subject. In Alberta, a copy is maintained by the Alberta Ministry of Justice and Solicitor General, so that it may be accessed for an update at a later date if necessary. Copies of reports are not available for any other purpose unless the express consent of the subject is sought and provided. In the Yukon, Gladue writers will provide a copy of the report to the subject if they are expressly asked by the subject. In rare circumstances, when the Indigenous person requests a copy, the writer will spend time explaining the highly sensitive nature of the report and that it is to be treated as confidential.

#### ***The extent to which the confidentiality of the reports and their contents is protected***

In many instances, the service providers rely on the subject's consent to decide whether to release the report. As a result, it is sometimes the case that a probation officer seeking access to a Gladue report convinces the subject of the report to give their consent for the release of the report.

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<sup>153</sup> Clark, S. (2016). *Evaluation of the Aboriginal Youth Court*, Toronto.

In BC, a Gladue report obtained through LSS is viewed by that organization as the Indigenous person’s report and a copy is kept by LSS (in a separate database from other LSS materials), so that it may be accessed by express request of the subject of the report. However, this does not change the fact that if the copy housed with the court is an exhibit on sentence it can be accessed by third parties on application to the court. Judges and counsel reported that the usual practice was that Gladue reports are entered as exhibits on sentence. Some judges admitted that they were concerned about third party access to Gladue reports but had not turned their minds to the consequence of third party applications.

In Alberta, Québec, Ontario, PEI and Nova Scotia, Gladue reports are treated as the property of the court and it is up to the court to approve the release of the report to a third party. In the Yukon, Gladue reports are considered to belong to the subject of the report. Despite reports almost always being filed as exhibits and therefore available to any member of the public who files a request to obtain a copy.

Overall, there seems to be some confusion among various stakeholders about what should be done to protect the privacy of the subject of the report and individuals who provide sensitive information for Gladue reports.

<b>Table 7</b>		
<b>How issues relating to informed consent and confidentiality are handled</b>		
	Who receives the final report first?	Is a Gladue available to a third party?
Alberta	Department of Justice	No information
BC	LSS	Only with consent of the court
Nova Scotia	Court, Crown, Defence counsel simultaneously	Only with consent of the court and the Gladue report subject
Ontario	Court, Crown, Defence counsel simultaneously	The practice of making a report an exhibit is avoided
PEI	No information	Only with court’s consent
Québec	Court, Crown, Defence counsel simultaneously	Only with consent of the court
Yukon	No information	Only with consent of the court

***Access to reports by correctional authorities***

An issue that was consistently raised by interviewees related to whether correctional authorities should have access to the Gladue reports after sentencing. Opinions are divided, but most people consulted expressed some concern about the way that Gladue reports may be used in the correctional setting. Several practices have evolved and are applied differently across the country.

In Québec, the handling of the Gladue reports by justice services is guided by Ministry of Justice working protocols<sup>154</sup> and a directive<sup>155</sup> that calls for the strict protection of the confidentiality of Gladue reports. Completed reports are kept in sealed envelopes by Judicial Services and there is no public access. Similarly, probation officers, after submitting a PSR with an Indigenous component, must keep the report in a sealed envelope and protect its confidentiality. There is no procedure for the transfer of Gladue reports from Judicial Services to Correctional Services and these reports, under an administrative agreement between the Minister of Justice and the Minister of Public Safety, are not available to Correctional Services.<sup>156</sup> On the other hand, while Gladue reports are not available to provincial Correctional Services, they are transmitted to the Correctional Service of Canada (CSC) further to a Canada-Québec agreement relating to information concerning sentences.<sup>157</sup>

In BC, several defence counsel interviewed for this study indicated that they had sought a publication ban or a sealing order to try to keep the information in a report confidential because reports are accessible by BC Corrections, and other third parties. Even less common and only reported in BC were cases where defence counsel indicated they had expressly asked that a report “follow” their client into the corrections system (by being appended or attached to their record as accessible by corrections staff). Some defence counsel explained that the intention in requesting this is to help guide the correctional plan, especially if there were serious mental health concerns or if their client had a specific diagnosis that was contradicted by medical information referred to in the report.

In Ontario, some organizations do not release the reports at all after it has been delivered, as matter of policy, and refer the requesting agencies (including the Corrections Service) to the court or the subject’s defence counsel. A defence counsel summarized the problem as follows: “The problem of attaching a Gladue report to a probation order or sharing it with an institution is that there is a fantastically high chance that the report will be digitized and circulated widely. There is also a problem about the selective use of the information contained in the report and sometimes also its distortion”. Another lawyer noted that “(i)t is problematic when the Gladue reports end up in the hands of correctional officials who essentially treat Gladue factors as risk factors”.

One of the solutions frequently used by service delivery organizations, when the offenders give their consent to release the report to correctional officials, is for the organization to only release the recommendation section of the reports to requesting agency. Some judges have also adopted a similar practice.

In PEI, Gladue reports can only be released with the consent of the court and courts are typically reluctant to release the reports without the consent of the subject of the report.

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<sup>154</sup> Justice Québec, Direction générale des services de justice, *Partie 6 – Les ordonnance diverses*, PO 4.25 (Traitement de la demande d’un rapport Gladue) and PO 4.26 (Rapport présentenciel).

<sup>155</sup> Directive D-13.

<sup>156</sup> Entente administrative sur l’accès des services correctionnels du Québec à l’information contenue dans les dossiers de la cour et dans les dossiers des substituts du Procureur général, Ministre de la Sécurité publique et Ministre de la Justice, Février 2007.

<sup>157</sup> Canada-Québec, Entente relative aux informations concernant les sentences, 1995.

This comparison highlights the confusion concerning confidentiality and consent to release of information. To be effective in terms of these issues Gladue report deliver programs should incorporate clear policies that are responsive to the disclosure sharing practices in their jurisdiction.

## 6.12. Training of Gladue report writers

**Conclusion: 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.**

Qualifications and training of writers varies across jurisdictions. Access to training programs may depend on whether the writers work for an organization or are contracted through government. Gladue writers themselves see the value in training. It was routinely suggested in interviews that more training should be offered. Many BC writers expressed their support for some kind of certification process based on some education and training standards, including ongoing professional development requirements.

In BC, there is no standard for the educational or training requirements of Gladue writers. There are, however, parameters for individuals who wish to apply to become report writers through Indigenous Legal Services at LSS:

In order to be considered to be on the Gladue report writer roster, writers must meet the following criteria:

- a) Successfully completed a Gladue report writing training course approved by LSS.
- b) Be Aboriginal or be closely connected to the Aboriginal community (e.g. an Aboriginal Justice Worker who does not identify as Aboriginal).
- c) Any other relevant factors that LSS deems appropriate, such as training provided by the Native Courtworkers Association, and Correctional Services Canada Aboriginal Liaison program.

At the discretion of LSS, these requirements may be waived or reduced where the applicant has other relevant experience.<sup>158</sup>

New LSS roster writers receive a mentor and guidance for the first one to two reports through the mentorship program. LSS also provides clear policies, guidelines and learning tools for writers, including the *Gladue Report Writers Roster Policy*, *Standards of Conduct Policy*, and the *Gladue Report Guide*. Some writers on the LSS roster reported they had received training, which was paid for through LSS, to take the online Indigenous Perspectives Society (IPS) training course for Gladue report writers offered through Royal Roads University.

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<sup>158</sup> LSS, “Gladue Report Writer Roster” p. 3.

Feedback from the writers we interviewed on the effectiveness of the IPS course was mixed. Some writers indicated the IPS training was helpful while others determined for them it was “too academic” and not helpful for training them to write reports. Some writers expressed that the lack of opportunity to practice interviewing skills in real life scenarios was the program’s biggest deficit to providing adequate training for the actual work of preparing Gladue reports. A few writers suggested that LSS should develop its own training program based on the needs of writers. Others indicated that there should be a Gladue writers’ professional organization that should provide training and certification, in order to ensure that anyone who wants to write Gladue reports, through LSS or privately, is qualified and meets professional standards.

Another training program is the Vancouver Community College’s Gladue Report Writing Program, which has run as a pilot program in 2018 and will be running as of late fall 2019. One program under development by Dr. David Milward at the University of Victoria is the Indigenous Justice Externship third year law course in cooperation with the GWSBC. This course is meant to provide substantive and practical knowledge about the social realities of Indigenous people and issues faced by Indigenous people in the criminal justice system. Some classes will involve experienced Gladue report writers guest lecturing to provide information about the processes that lead to the completion of a fulsome Gladue report. The course will also involve a degree of experiential learning and GWSBC has been invited to provide experiential training on interviewing subjects, preparing Gladue reports, and preparation of Gladue submissions. This course is anticipated to start in 2020.

Other training programs in Canada include an Aboriginal Justice Externship on Gladue Sentencing Principles at the University of Alberta, Faculty of Law. Training about Gladue report writing and the use of Gladue rights also takes place as part of other legal education curriculum including, through the University of British Columbia, Peter A. Allard School of Law’s ICLC program, the University of Saskatchewan’s intensive clinical law program at Community Legal Assistance Services for Saskatoon Inner City Inc., the University of Toronto’s Clinical Legal Education Externship, Aboriginal Legal Services, and an assignment on Gladue report writing for a course that has run through the University of Saskatchewan’s Nunavut Law Program (2017/18 – the present state of this training is unknown).

In Ontario, ALS has been trying to organize a training event that would be open to writers from all Ontario Gladue writing service providers. Other organizations have trained their own writers and usually try to take advantage of the training offered by ALS. Based on our interviews with writers and service providers, some writers in the smaller service delivery organizations of the province have received only minimal training. Several writers interviewed for the present study expressed a wish for much more training (legal, interviewing skills, trauma-informed interviewing and interventions; storytelling, etc.).

In Québec, the recruitment and training of new writers is sometimes a challenge. Training is not standardized but is a requirement for accreditation by the Ministry of Justice. Writers have typically received training from one of the following organizations: les Services Parajudiciaires Autochtones du Québec (SPAQ); Taiga Vision (Ms. Lyne St.-Louis); the Justice Institute of British Columbia, the Legal Services Society of British Columbia, and the Aboriginal Legal Services

(Ontario). SPAQ offers a one-day training followed by tutoring.<sup>159</sup> In the case of Cree Justice, dozens of writers have received training from Ms. Pamela Shield, who assisted in developing the first training in BC. The CAJ (Ministry of Justice) must receive confirmation from the training organization that an individual has successfully completed the training before including them on the roster of writers with whom the Ministry may contract with for the preparation of a Gladue report. Many Gladue writers are asking for additional training.

In Nova Scotia, writers are trained by the MLSN. A training manual has been developed. One-on-one training is provided by the programme manager and group training is offered every two years. The Alberta Ministry of Justice and Solicitor General selects report writers through an Alberta Government Procurement Pre-Qualification Request. Applicants must provide: a criminal record check with no pardonable convictions, show they have experience working with multi barrier Indigenous clients within two years of applying, and that they have a demonstrated connection with the Indigenous community for whom they want to write reports. It is beneficial for applicants if they speak a relevant Indigenous language and understand or practice Indigenous culture and spirituality. Once selected to join the cadre, Alberta Justice provides 12 hours of guided distance learning which is broken down into three four-hour modules. The modules explain the court process and importance of Gladue reports in sentencing. There is also an explanation of the content of Gladue reports and includes reading assignments and skill checks. After successful completion of the modules, the new report writer is mentored by the Gladue Report Coordinator. In PEI, some of the writers received training from ALS (Ontario). Others have been trained by the program manager.

In the Yukon, to be sanctioned as a Gladue report writer by the Council of Yukon First Nations (CYFN), individuals must take the CYFN Gladue report writing training course and shadow a current writer during the interviewing and writing portion of a Gladue report. The training program also includes education on vicarious trauma, proper interviewing and writing skills, explanations of the legal history and principles surrounding Gladue, and an awareness of current local resources. Interviewees informed us that the CYFN would like to keep their training program non-academic and they stated they do not believe there is a need for the program to be 12 weeks in duration. To ensure writing competency, the CYFN requires a writing sample from an academic setting to be submitted in order to be eligible to take the training program. Currently, the CYFN and Gladue Management Committee proactively support Yukon First Nations individuals to take the training as a means of ensuring competency in Yukon history and culture. The CYFN and Gladue Management Committee are planning to limit the roster of writers to Yukon First Nations members, to prevent the perpetuation of systemic and colonial issues that can accompany outsiders doing this work. The CYFN intends to expand the roster of writers to have a writer from each of the 14 First Nations communities. Such representation aims to ensure gender representation and offer communities a choice of available Gladue writers.

Some interviewees mentioned that while writers sometimes receive feedback from the subjects of the report, they do not often receive feedback from the courts or counsel on the reports that they produce. Feedback from judges and counsel about the impact of the report on sentences is rare.

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<sup>159</sup> See: Services Parajudiciaires Autochtones du Québec (SPAQ), *Guide de formation pour la rédaction d'un rapport Gladue*, Août 2015.

Writers indicated that feedback about their reports from all parties would be of great assistance, so that they understand how Gladue reports are received and what impact they have.

In all the provinces that we have reviewed, there is a unanimous message that training must be improved, and that funding will be necessary to develop training resources and offer ongoing training. Some people suggested that this is where the federal government could usefully contribute by making funds available for training programs.

The implication for Gladue report service delivery programs is that programs that incorporate training into their service model will likely see benefits with respect to the retention of report writers and the quality of reports.

### **6.13. Writers connection with communities and access to information required for the reports**

**Conclusion: 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.**

Writers who work closely with members of a particular Indigenous community can build relationships of mutual trust and confidence. For example, in the remote and isolated Mi'Kmaq community of Lenox Island, PEI, there was a rapid shift in the attitude of the community towards Gladue reports and writers. In the words of one justice official:

The process has been a most wonderful gift to the community; in fact, it has been an incredibly therapeutic experience for the whole community. There was initially a reluctance on the part of the community to participate in the preparation of Gladue reports and to talk to Gladue writers. At first, people did not want to talk at all, and then they only agreed to talk anonymously, and eventually they realized that the system required them to talk and own their own comments. There was a great degree of shame and silence about the past and present experience of people. In fact, individuals seldom had an idea of the history of their own family, let alone their community. People did not talk to other people in their community about these experiences. All this changed very quickly.

Almost all interviewees suggested that a Gladue report writer should have an understanding of the communities where they are engaging with people to seek information for reports. However, report writers who are Indigenous and who have written reports for people from their own community indicated that this work can sometimes be very stressful. Writers explained that this was particularly true in circumstances involving violent crimes where the community might be divided because both the offender and victim (or victim's family) were from that same community. Indigenous report writers who had experienced this situation reported that writing a report for the offender under these circumstances was seen as "taking a side". Writers thought that in such situations, outsiders were better equipped to write reports for both the sake of the personal stress (and in some cases actual danger it caused – we heard of writers being threatened by victim's family members) and due to the need to ensure the court has confidence in the neutrality of the report.

The implication of this analysis for Gladue report service delivery programs is that programs should be cognizant of the potential benefits and challenges that may arise on this issue. Service delivery models that have a well thought out strategy or policy in relation to the connection of writers and communities will be more likely to reap the benefits while still appropriately supporting the wellbeing of their writers.

#### **6.14. Role of defence counsel and Crown counsel**

**Conclusion: 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.**

As discussed previously, the SCC decisions in *Gladue* and *Ipeelee* are clear that both Crown and defence counsel have an obligation to assist the court by providing Gladue information. That can be done in a variety of ways. Both Crown and defence counsel can arrange for witnesses to give *viva voce* testimony during the sentencing hearing to shed light on the offender's background, history, community, and future plans. Defence counsel can also make Gladue submissions during the sentencing hearing about the offender's background, history, community, future plans, and alternatives to incarceration. In addition, in some provinces, defence counsel can assist offenders in seeking the production of Gladue report.

In BC, for example, lawyers who have legal aid clients can request a Gladue report by submitting a Request for Authorization to LSS. Defence counsel interviewed in this jurisdiction expressed a general willingness to apply for funding for Gladue reports, except in cases where they determined it would not be in the best interests of their clients; for example, if preparing a report would lead to an unnecessary delay in a court proceeding.

Some Crown counsel expressed discomfort with the current delivery model in BC because the report is delivered to defence counsel and is seen as a "defence report" when the law makes it clear that the report is required by the court in assisting with determination of sentence. Crown counsel in BC generally indicated strong support for government provision of Gladue services in order to ensure the report is properly perceived as a report for the court. This preference was described as utilizing the same delivery system as a PSR, which is ordered and received through court services, but with Gladue reports written by properly trained Gladue report writers.

Some defence counsel indicated that Gladue reports were of assistance in all court proceedings for their Indigenous clients, whereas others indicated that although reports should be available in all cases involving Indigenous offenders, they should only be ordered if it would be beneficial to a client's case. No defence counsel interviewed for this comparative analysis expressed an uneasiness with the notion that government might be somehow involved with provision of Gladue services.

Further, both Crown and defence counsel in BC were united in their overall perception that Gladue reports are necessary and legally required in cases involving Indigenous offenders. The only exception was for Crown or duty counsel who also participate in BC Indigenous Courts. In these cases, counsel indicated that Gladue reports were often unnecessary because the offender and the

local community/communities were well-known to all the justice actors at the table and/or that Elders were almost always able to provide rich context about applicable systemic factors. However, it was also reported that Gladue reports were useful when the offender was not known to the community due to circumstances of disconnection or where the offender was not from the local community/communities.

In PEI, Crown counsel was generally supportive of the Gladue report process. PEI Crown counsel expressed they had no doubt that support has increased for producing information on Gladue factors to the Court (either through a Gladue report or a statement by counsel). Every Crown counsel interviewed seemed to agree that Gladue reports are valuable. In PEI it is extremely rare for a Gladue report to be challenged in court. However, if necessary, crown and defence counsel can ask the writer for clarification or additional information prior to the sentencing hearing. Some of the writers are present in court at the time of sentencing, but this is not usually the case. The stakeholders interviewed only advised of one case in which a Gladue writer had to take the stand to defend the content of a report.

In Nova Scotia, the DPP policy on the *Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia* directs Crown Attorneys to request a Gladue report on the date a sentencing hearing is scheduled, unless expressly waived by the accused.<sup>160</sup> The DPP Policy also States that:

The Crown Attorney should ask the Court to canvas this directly with all self-represented accused. Or, alternatively, the Crown Attorney should obtain any recently prepared *Gladue* reports from other files involving the accused". (...) The Crown Attorney should not insist on the preparation of both a Pre-Sentence Report and a Gladue Report, If the Indigenous person only wants to have one of the two completed.<sup>161</sup>

In Ontario, a Prosecution Directive concerning Indigenous Peoples directs prosecutors, when determining a position on sentencing, to consider the unique systemic and background factors that may have played a part in bringing an Indigenous offender before the court.<sup>162</sup> The directive adds that in determining a fit sentence, the court must be able to consider information provided by a Gladue report, an enhanced PSR and/or the submissions of defence counsel and the prosecutor. The directive therefore directs prosecutors to provide the court with any relevant information that they are aware of about the Indigenous offender's background or unique circumstances. With respect specifically to the provision of Gladue report, the directive on Indigenous Peoples explains that:

Although a Gladue Report is preferable, where one is not available, information about the offender and their community may be collected and provided to the court in an enhanced Pre-Sentence Report that would contain information about the offender's community obtained from research and interviews.

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<sup>160</sup> *Nova Scotia, Public Prosecution Service (October 2, 2018). Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia.*

<sup>161</sup> *Ibid*, p. 9.

<sup>162</sup> Ministry of the Attorney General of Ontario, Criminal Law Division, *Crown Prosecution Manual*, Prosecution Directive, *Indigenous Peoples*, November 14, 2017.  
[https://files.ontario.ca/books/crown\\_prosecution\\_manual\\_english\\_1.pdf](https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf)

In addition, the Prosecutor may consider requesting a summary Gladue Report, use a past Gladue Report or work with defence counsel to introduce alternative sources of information (e.g. letters from family, friends, service providers and community members).<sup>163</sup>

In Ontario, Gladue reports are almost never challenged in court. This is something that all organizations responsible for producing the reports are trying to avoid. Depending on the organization they work for, writers are rarely present in court at the time of sentencing. One judge explained that: “The Gladue writers typically do not speak during a normal sentencing hearing, there are generally not present in court. However, the report writer may participate and speak during a sentencing circle (it provides everyone a better opportunity to engage and get to know the offender). Unfortunately, sentencing circles are still fairly rare.” However, in at least one organization in Ontario, Kaakewaaseya Justice Services, writers make a point of being present in court at the time of sentencing. These writers see their presence in court as a way to support the Gladue report subject, to receive feedback on the reports, and to keep track of the sentences that are ordered by the courts.

This comparison has implications for Gladue report service delivery programs. Program providers should consider the in-court role that Gladue report writers are likely to take in their jurisdiction, if any. Consideration can also be given to the potential advantages that a Gladue report writer’s presence may have in court in terms of their own professional development, their relationship with the Gladue report subject, and their relationship with Crown and defence counsel. Possible advantages here, can be weighed against the potential time and expense needed to support Gladue writers in attending court.

#### **6.15. Links with diversion programs**

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

Diverting a case out of the criminal justice system does not fall under “types of sentencing procedures or sanctions”<sup>164</sup>, but diversion can also be seen to meet the intention behind s. 718.2(e). The authors found no evidence that a link was being made between production of Gladue reports and pre-charge or post-charge diversion programs in any of the following jurisdictions: Alberta, BC, Québec, Ontario, PEI, Nova Scotia, or Yukon. Gladue reports are not requested in situations where diversion is being considered. Nova Scotia has recently instituted a Post-Conviction Restorative Justice Program and while this may not always qualify as a diversion program, some offenders who participate in that program may become eligible for a “discharge”.

In BC, the GWSBC is engaged in exploring Gladue approaches to transformative justice interventions and is carrying out research to develop a Gladue Approach to Diversion Handbook, for use by all justice system participants. This project is funded by the Vancouver Foundation. The

<sup>163</sup> Ministry of the Attorney General of Ontario, Criminal Law Division, *Crown Prosecution Manual*, Prosecution Directive on Indigenous people, November 14, 2017.  
[https://files.ontario.ca/books/crown\\_prosecution\\_manual\\_english\\_1.pdf](https://files.ontario.ca/books/crown_prosecution_manual_english_1.pdf)

<sup>164</sup> *R. v. Gladue*, para. 66.

GWSBC is participating in the Nanaimo Transformative Justice Pilot, at the invitation of crown counsel, to ensure Gladue approaches are instituted in all diversion plans, on a case-by-case basis.

#### **6.16. Link with aftercare services**

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

In PEI, MCPEI, which is responsible for producing Gladue reports ordered by the courts, also provides other services. It has two Aboriginal Case Workers (in addition to those of the province). It offers services such as: family support workers, employment and life skills programs, health services, reintegration services for former inmates, and specific reintegration programs for federal inmates. MCPEI also offers a range of programs to help clients reconnect with their cultural heritage and spirituality. Some of the services are accessed by the offenders as the Gladue report is being produced. This can be related, when appropriate, in the report itself. The organization's case workers are sometimes involved in making suggestions for the recommendations that are formulated in Gladue reports. As MCPEI connects with the subjects of Gladue reports, it is often able to offer them concrete support and to develop a relationship with them.

In Nova Scotia, the offender can receive some support from the MLSN Courtworker. The Courtworker can communicate with the Gladue writer. However, once the sentence has been pronounced, this is the end of the MLSN's involvement with the individual. There is a great and largely unanswered need for aftercare services in Nova Scotia. At present, post-sentence follow-up with the offender becomes the responsibility of correctional services (very often the probation service).

In Ontario, since reports are prepared by Indigenous organizations that offer other programs, it is common to see offenders being linked to other support and aftercare programs, including while the report is being prepared. The recommendations contained in the Gladue reports often refer to contacts that the offender has already made (or should be making) with the organization's caseworker or other programs.

In BC, Gladue services provided through LSS do not offer aftercare services. Some First Nations do have First Nations justice liaison workers who may be able to work with an individual after sentencing to assist with the completion of the sentence. Offenders may also work with a probation officer to comply with the conditions of their sentence.

In Yukon, the authors repeatedly heard that because aftercare supports are not in place, offenders must rely on informal supports. Stakeholders reported that these are not always sufficient to actually assist with the implementation of the terms of the sentence. The authors heard from one writer that "a report is only as good as you make use of it" and without adequate, or any, aftercare services it is hard to offer the court any certainty and/or accountability when "looking behind the scenes to cobble a menu of informal supports." The writer mentioned that subjects of the report, and their family or community, are often surprised when the plans the court is presented cannot be

fully implemented because of a lack of resources or programs. The authors were informed by the CYFN that they are planning to develop aftercare supports.

Alberta is currently developing a post-Gladue navigators program. Post-Gladue navigators will be located in communities and will have the experience and knowledge to assist Indigenous offenders. The Post-Gladue navigators will assist those serving sentences to connect with services and supports that can help them meet their sentencing conditions. The potential model of such a program is not confirmed at this time, but the program will aim to provide post-Gladue services through locally situated navigators who are Indigenous and connected to Indigenous communities and services.

This comparison has implications for Gladue report service delivery models. In terms of Gladue report utility, it is critical to successfully connect offenders to aftercare supports. Service delivery models that already involve indigenous organizations that provide aftercare supports, may have a head start in developing adequate aftercare connections, policies and programs.

### **6.17. Impact on victims and community**

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

It is important to consider the perspectives of Indigenous communities on how Gladue principles are implemented. Indigenous women and advocates suggested that it is important to be mindful of potential unintended negative impacts on victims and the broader community when determining how to implement Gladue principles.<sup>165</sup>

Several of the Calls for Justice articulated in *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, address Gladue principles. The final report contains specific commentary on the issue of the overincarceration of Indigenous women, girls, and 2SLGBTQQIA people.<sup>166</sup>

The Calls for Justice that speak most specifically to violence and the impacts of sentencing and Gladue principles on victims are calls 5.17 -5.19 which were quoted above in section 1.

Although Call 15.5 is the only specific reference to *Gladue* that deals directly with an assessment of the impact of Gladue principles on women, girls, and 2SLGBTQQIA people, it is clear that the impact of Gladue principles are at play when considering 5.18 and 5.19 as well. An analysis of s. 718.2(e) under 5.17 will need to be considered as to whether and how it may well be necessary to address the tensions between Gladue principles and the amendments called for in 5.18 and 5.19.

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<sup>165</sup> Ministry of the Attorney General (2018). *The Gladue process in British Columbia; An inventory of the various ways Gladue Information gets to court.*

<sup>166</sup> *Reclaiming Power and Place*, p. 40.

## 7. Discussion

### 7.1. Summary of advantages and disadvantages of different models

The advantages and disadvantages of numerous elements of the various Gladue report service delivery models have already been discussed. However, throughout the stakeholder interviews two major issues stood out and merit particular attention here.

One major issue that was raised by the stakeholders consulted for this study was whether the production of Gladue reports should be left to Indigenous Organizations. This is the approach to Gladue report service delivery has already been adopted in several provinces and in Yukon Territory.

Rudin suggests that it is hard to imagine how a centralized government bureaucracy could produce the reports that are currently produced by Indigenous people working for Aboriginal organizations. Referring to the programs in Alberta and British Columbia, he argues that:

“Although independent writers produce the reports in these provinces, the assignment and review of reports is the responsibility of the Department of Justice in Alberta and LSS in British Columbia. The conceptual difficulty with these arrangements is that one of the parties to the case – the Crown or Legal Aid – is responsible for the commissioning and the reviewing of the Gladue reports. While there are no doubt valid reasons for the delivery of Gladue report services in these provinces in this manner, a move toward a model where Indigenous agencies are responsible for these reports in preferable.”<sup>167</sup>

Another argument is that the Indigenous organizations that produce Gladue reports are typically also offering other services such as healing circles, aboriginal courtworkers, and other programs and are therefore in a better position to offer support for the offender before and after sentencing. They are also better placed to identify resources in the community and to support the offender throughout the implementation of the sentence.

A second major issue raised by stakeholders in BC concerned program coverage. In terms of program coverage, one of the justice officials interviewed for this report suggested that it would be a mistake to impose the production of a Gladue report in all cases. Not only, he added, would it create unnecessary delays for minor cases, but it would eventually risk diluting the general quality of the reports that are produced.

In general, the stakeholders interviewed for the present study expressed a preference for programs that do not restrict access on a basis of the seriousness of the offence or other arbitrary criteria. In their view, Gladue reports are important in all cases where an offender is being sentenced.

### 7.2. Gladue reports and *Gladue* as a national issue

Concerning the need for greater leadership from the Federal Government, Quigley suggested that:

“Since Parliament has the constitutional authority with respect to all Aboriginal Canadians, it would be incumbent on the federal government to accompany statutory

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<sup>167</sup> Rudin, *Indigenous People and the Criminal Justice System*, pp. 115-116.

amendments with the provision of resources for the administration and preparation of **Gladue reports**. Although provinces have clear authority over the administration of justice, this is a situation that requires leadership at the national level.”<sup>168</sup>

There has been some discussion about the need for federal leadership in this matter and for provision of federal funding for Gladue programs in the provinces and territories; however, perspectives on this issue vary.

For example, the perspective that the federal government should take responsibility for and execute a national Gladue program or national guidelines was not reflected in the interviews the authors conducted. The agencies responsible for producing Gladue reports consulted for this report seemed to be generally satisfied with the arrangements they had with their provincial government and noted that these arrangements are renegotiated periodically to consider the growing demand for the service. An exception may be British Columbia, where there is some question about ongoing funding and many are considering questions about future state of Gladue services.

Some stakeholders indicated federal funding should be used to support current Gladue programs. Many respondents expressed that the federal government could offer greater funding assistance particularly with respect to funding for training and evaluation. Most stakeholders readily acknowledged that “there is never enough money to take care of all needs” and emphasized the need for greater funding for community-based resources and programmes, including aftercare.

Most of the agencies responsible for producing Gladue reports agreed that there is a need for more writers. This is because writers are frequently overworked, particularly when they worked in a community with a great demand for Gladue reports. Funding for the training and supervision of writers is generally insufficient, particularly in view of the growing demand everywhere for Gladue reports.

### *The need for national standards*

Some of the people interviewed in PEI, Québec, and Nova Scotia suggested that it may be time to develop provincial standards or guidelines for the production of the Gladue reports. Some of the people interviewed in Ontario believed that this should be left to people and organizations who provide the services. Others stated that it might be helpful to start with training standards. Some of the people interviewed in British Columbia suggested that a Gladue writers’ professional body should be created, though whether this would be provincial or national was not clear. No one suggested that national standards for the reports themselves would be useful or necessary. A few people were strongly against the idea.

### **7.3. Gladue writers’ capacity**

It is difficult to know exactly how many *Gladue* writers there are in BC as the profession is not a regulated one. LSS maintains a roster of writers (presently 40 writers) who are active and have participated in training provided by LSS. There are also writers who are trained but are not active as a result of an inconsistent demand for their work.

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<sup>168</sup> Quigley, “Gladue Reports: Some Issues and Proposals”.

The authors heard in most provinces that there is a need for more writers and that in many instances existing writers are overworked. There was general consensus among the people consulted for the study that there needs to be more support and better training for *Gladue* writers. There are a few initiatives in different provinces to improve the training and support currently offered to them.

#### **7.4. Writing teams**

Several report writers in Ontario and two in Atlantic provinces explained that, in their view, *Gladue* report writing is not a one-person job. The writers should have support (transcribing interviews, helping out with research; etc.). Writers also need effective professional supervision. Resources allowing, there should be “*Gladue* report writing teams”. This is not the practice anywhere yet in the country. However, informal teams sometimes form in an agency where there are several writers and other professional service providers. Some organizations arrange for regular meetings of *Gladue* report writers (e.g., once a month in one organization for information exchange, training, etc.). Procedures are necessary to protect the confidentiality of the information discussed during these meetings. Dr. Dickson suggested that:

“Reports should be prepared by teams instead of individuals. The team can offer support, with one member trained in doing interviews and contacting people (unique set of skills are need when trying to locate people who come from disorganized backgrounds), one team member transcribing recorded interviews, and caseworkers (also trained in trauma informed practices) working closely with the interviewer and providing support to the subject as needed.”

In BC there is a mentorship component of the LSS *Gladue* writer roster, as well as a legal review process. So, while there is no official team approach labelled as such, there is a clear team approach to producing reports taking place on the ground. Mentors are able to work closely with new writers in assisting them with challenges such as writing and connecting with people who may be familiar with resources in particular communities. The suggestion was also made, inspired by the participation of Elders in the BC Indigenous Courts, that the creation of an “Elders roster” could perhaps complement the *Gladue* writer roster and be part of a strategy to connect writers to important and necessary community-specific information for each report.

#### **7.5. The need for evaluation of programs**

The authors can confirm that no evaluation of the *Gladue* report writing services has yet taken place in Prince Edward Island, Nova Scotia or Québec. However, there was a partial review of the program in Québec by the Viens Commission discussed in section 5.5, above.

The authors can also confirm that there has not yet been a formal review of the Yukon Pilot Program, as its only in the early phase. However, the CYFN is required to complete an evaluation of the program before March 2021, when the project funding expires. There was no information indicating that the Alberta program has yet been evaluated. In Ontario, the latest evaluation of the ALS program goes back to 2007; a lack of funding has precluded the conduct of further evaluations.

There has been one review of the British Columbia pilot program, which was performed in 2013.<sup>169</sup> The evaluation led to the further funding from the Law Foundation of BC for Gladue program through Indigenous Legal Services at LSS.

Although not a jurisdiction specifically identified for this report, the authors are aware that Saskatchewan has undergone a review of *Gladue* services in the province<sup>170</sup> and that the Native Law Centre at the University of Saskatchewan is presently assessing the province's Gladue services.

### **7.6. How to enhance the impact of reports**

The CYFNs program in Yukon asks on their application intake form whether ordering a report will have an impact on the sentencing process, which may indicate some drive to only fund reports that will have an impact on sentencing. This is interesting because the authors have repeatedly heard about the therapeutic utility of the reports, and that they have been ordered in some jurisdictions for the personal therapeutic reason alone.

Gladue reports would have more impact if the second aspect of the report's purpose, providing viable alternatives to incarceration, were enhanced. Numerous participants interviewed for this study indicated the necessity of properly funding Indigenous organizations and First Nations justice programs, support services, including for victims, and rehabilitative recourses. Capacity building revenue was mentioned over and over as an essential piece of ensuring there are viable, culturally appropriate, community supported, Indigenous led and run programs that offer real alternatives to the Canadian prison systems.

### **7.7. Partnerships with Indigenous leaders and communities**

It is clear that partnerships with Indigenous leaders and communities are necessary for the success of Gladue service delivery models. As the authors heard throughout the consultation process, Indigenous peoples must be directly involved in any conversation and any decision concerning the delivery of Gladue reports and related services. Indigenous leadership and community members have a key role to play in determining the shape of any future planning or implementation of Gladue services, and other issues that directly impact the lives of Indigenous peoples in BC. Further, as the TRC's Calls to Action and the National Inquiry on MMIWG's Calls for Justice emphasize this must be done while also considering the meaningful inclusion of Indigenous laws and the *United Nations Declaration on the Rights of Indigenous Peoples*

## **8. Concluding Remarks and Recommendations**

Although many justice actors in British Columbia expressed general satisfaction with the current model of Gladue report service delivery in the province, the comparative analysis revealed some

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<sup>169</sup> LSS, Gladue Report Disbursement: Final Evaluation Report, 2013.

<sup>170</sup> Jane Dickson, *Gladue in Saskatchewan: Phase I Evaluation of the Gladue Pilot Project*. Evaluation & report completed for Legal Aid Saskatchewan, August 2015.

areas of change and/or improvement that may require attention. This report also identified several aspects of other service delivery models in Canada that may suggest possible new directions for improving Gladue services in British Columbia.

The most significant disadvantages of the current Gladue services delivery model in British Columbia, as identified by the stakeholders interviewed for this report, were:

- 1) Funded Gladue reports are at present overwhelmingly available only to those Indigenous persons who qualify for legal aid
- 2) Almost all Gladue report requests must be made by defence counsel
- 3) Disbursement of funds to Gladue report writers is through defence counsel
- 4) Judges do not presently have an ability, due to policy and procedural barriers, to require or order a Gladue report
- 5) Crown prosecutors, due to policy and procedural barriers, have a very limited ability to request a Gladue report
- 6) Indigenous people, communities, and leadership must continue to be consulted and actively involved decision-making about Gladue services
- 7) The limited involvement of Indigenous organizations and/or communities in policy decisions regarding Gladue services, preparation of the reports, and/or the formulation of recommendations (healing plans), creates barriers for building effective aftercare and support for the implementation of the sentence in the community
- 8) The dearth of funding for capacity-building and/or programs and services offered in Indigenous communities or by Indigenous organizations creates barriers for effective operationalization of Gladue services and supports for Indigenous accused, and victims

The most significant advantages of the current Gladue services delivery model in British Columbia, as identified by stakeholders interviewed for this report, were:

- 1) There have been significant improvements in the quality of Gladue reports provided through LSS over time and, presently, there is generally consistency in the quality of LSS-funded reports
- 2) There have been significant improvements in the timeliness of delivery of Gladue reports provided through LSS over time and, presently, LSS-funded reports are generally delivered within an eight week timeframe from defence counsel providing information to the report writer
- 3) LSS Indigenous Services is a trusted program for the provision of legal services to Indigenous peoples who qualify for legal aid in the province, including Gladue reports, and as a result the Gladue reports produced are credible and accepted as such by the Crown and defence counsel and the courts
- 4) There is an opportunity to build on the learning and expertise that currently exist to further improve the program and the services provided

This review of the delivery of Gladue services in other Canadian jurisdictions has highlighted the benefits of particular policy choices considered in the context of discreet themes. However, there are some changes to the current service delivery model in BC that contain very high potential for improvement in one theme or across multiple themes. In that regard, several characteristics of the other service delivery models should be seriously considered for replication in the BC context. These characteristics are:

- 1) Gladue reports are available to all Indigenous persons who self-identify in all cases where requested or deemed necessary by the accused, defence counsel, Crown prosecutors, or judges
- 2) Gladue report services are coordinated by Indigenous organizations or organizations that meaningfully adopt and consider Indigenous approaches and perspectives and are housed outside of government
- 3) Gladue reports are requested and delivered through court services and can readily be requested by the accused, defence counsel, Crown prosecutors, or judges
- 4) Training, supervision and supports for Gladue writers are available through the organization they are employed by (either as staff or contract service providers)
- 5) Gladue report writers, whether Indigenous or non-Indigenous, have significant connections to and knowledge of the Indigenous communities they may be writing about in reports

### *Summary of Conclusions*

Access to the service

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

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

Quality Control - Supervision of writers/review of draft reports

**Conclusion: In most Gladue 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

**Conclusion: 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

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

## Link with aftercare services

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

## Impact on victims and community

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

## *Recommendations*

Although we were not specifically tasked with making recommendations, there are several conclusions that can be drawn from the research that may lend themselves to recommendations on the future state of Gladue report services in British Columbia. We suggest the following:

1. There is a need for data on the impacts of Gladue reports on the subjects of the reports.  
**Recommendation:** A future study should be conducted, including with appropriate ethical considerations of an Indigenous trauma-informed approach, by interviewing subjects of Gladue reports about their perspectives on the report process and impact of the reports, if any, on them.
2. There is a need for further consultation with Indigenous Communities.  
**Recommendation:** Consultation with Indigenous peoples needs to continue to take place before any changes are planned or implemented with respect to the future state of Gladue report services in BC. This includes meaningful consultation not only with Indigenous leaders or organizations, but also with Indigenous community members, Elders, women, youth, and 2SLGBTQIA individuals.
3. There is need to understand the impact of Gladue reports on victims and consider the perspectives and needs of victims and their support networks.  
**Recommendation:** Meaningful consultation with victims and victim support workers must be conducted to determine the impact of Gladue reports on victims of crimes and the best ways to ensure their safety and that they are supported through justice processes.
4. There is a need for clarity about the confidentiality of Gladue reports and how, when, and by whom they can be accessed.  
**Recommendation:** Additional research should be conducted on the confidentiality of Gladue reports generally, whether and how judges and other justice officials should deal with Gladue reports to protect their confidentiality and developing policies and procedures for the ongoing protection of the confidentiality of these reports and the sensitive information they contain.
5. There is a need for data on the impact of Gladue reports on sentencing decisions.  
**Recommendation:** Research should be conducted on sentencing decisions and the impact of Gladue reports on the sentencing process and sentencing decisions.
6. There is a need for training, and perhaps also training standards, for Gladue report writers.  
**Recommendation:** Consultations should be conducted with Gladue report writers about their educational and training needs. Education and training standards and programs should be established based on the needs of Gladue report writers and in furtherance of their professional skills and expertise.
7. There is a need for supports for Gladue report writers.  
**Recommendation:** Consultation should be conducted with Gladue report writers about their support needs. Supports should be made available to all Gladue report writers based on their expressed needs and in furtherance of their health and wellbeing within their profession.

8. There is a need to consider links between report recommendations, sentences, and aftercare.

**Recommendation:** Further research needs to be conducted on the interconnections between healing plans as set out in Gladue reports, which are culturally appropriate and address the principles and purposes of sentencing, sentences for Indigenous persons who are being sentenced, and assistance for offenders with the navigation of appropriate resources and meeting the conditions of their sentences.

9. There is a need for more 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.

**Recommendation:** Further funding needs to be provided 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.