# INDISPENSABLE SENTENCING TOOL *OR* INCONSISTENT SENTENCING TECHNIQUE? GLADUE PRE-SENTENCE REPORTS IN CANADA

By

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## Abstract

Two decades have passed since section 718.2(e) of the *Criminal Code of Canada* was enacted and subsequently interpreted by the Supreme Court of Canada in the landmark case *R v. Gladue* (1999, 1 SCR 688). This section requires judges to consider the unique systemic and background factors of an Aboriginal offender during the sentencing process to establish a proportionate sentence, thereby emphasizing restorative justice. Since the Supreme Court's judgement in *Gladue*, a special form of pre-sentence report, known as a *Gladue* Report, has emerged to provide a tailored, comprehensive assessment of an Indigenous offender's circumstances to assist sentencing judges in complying with their statutory obligations. Reviewing *Gladue* and subsequent jurisprudence, as well as numerous reports, the author argues that *Gladue* Reports are not being administered consistently across Canada, with many Aboriginal offenders not receiving the proper consideration into their unique circumstances, known as *Gladue* factors. This constitutes a pervasive systemic problem of unequal access to justice. Analyzing the current use of traditional pre-sentence reports and the various models to produce and deliver *Gladue* Reports across jurisdictions, this thesis maintains that Parliament of Canada should consider amending the *Criminal Code* and develop a national framework for *Gladue* Reports to be made available for all Indigenous offenders.

## Dedication and Acknowledgments

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*Kinanaskomitin (I am grateful to you)*

## Preface

My name is Tisa Keller and I identify as a Métis - *Nehiyaw Iskwew* (A Cree Indian Woman). I am from a small city in southern Vancouver Island, British Columbia but most of my life and work has been carried out in Treaty 7 Territory. I would like to acknowledge that Mount Royal University is situated on the traditional territories of the Siksikaitsitapi (Blackfoot Confederacy), comprised of the Siksika, Kainai, Piikani, and Amskapi Piikani First Nations; the Tsuut'ina First Nation; and the Îyârhe Nakoda, including the Chiniki, Bearspaw, and Wesley First Nations. Treaty 7 is also home to the Métis Nation of Alberta, Region III. The university is located on land adjacent to where the Bow River meets the Elbow River, traditionally named the "Mohkinstsis" by the Blackfoot people. Post-secondary is where I have developed a deep love and passion for my people, and an urge to heal and liberate them. This acknowledgment is to recognize the adversities these Nations have experienced and the sacredness of this land. I acknowledge and respect the resilience, perseverance, and history my people carry all while moving through the intergenerational trauma, surviving, and thriving.

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**Indispensable Sentencing Tool or Inconsistent Sentencing Technique: *Gladue* Pre-Sentence Reports in Canada.**

Indigenous people are overrepresented in Canada's criminal justice system as both victims and offenders, particularly with respect to the disproportionately of incarcerated Aboriginal offenders. In 2017/2018, Aboriginal adults accounted for 30% of admissions into provincial/territorial custody and 29% of admissions into federal custody, while only representing approximately 4% of Canada's adult population (Malakieh, 2019, para. 24). These numbers have continued to increase despite efforts to address what the Supreme Court of Canada (SCC) has referred to as "a crisis in the Canadian justice system" (*R v Gladue*, 1999, 1 SCR 688 at para 64). Statistics Canada found that in comparison to 2007/2008, the number of Aboriginal males admitted into provincial penitentiaries increased 28%, while the number of Aboriginal females increased 66% (Malakieh, 2019, para. 66).

In 1999, the Supreme Court of Canada provided an interpretation of s. 718.2(e) of the *Criminal Code of Canada* in *R v. Gladue ("Gladue")*, specifically addressing the disproportionate representation of Indigenous adult offenders in the prison system. The SCC instructed that when an Indigenous offender is being sentenced, judges are to consider the systemic factors that impact their lives due to colonialism. These systemic factors have come to be identified as *Gladue* factors. To further address this problem, the SCC also directed the Courts to give thought to alternatives to incarceration whenever possible when sentencing an Indigenous person.

The Supreme Court of Canada in *R v. Ipeelee* (2012) then marked that a *Gladue* Report, which contains case-specific information tailored to the specific circumstances of the Indigenous offender, is an "indispensable sentencing tool to be provided at a sentencing hearing of an

Aboriginal offender." (1 SCR 433 at para 5). These unique reports are written by *Gladue* Report writers and may be achieved in a variety of ways depending on the province or territory the Indigenous offender is being sentenced in. However, despite the fact that *Gladue* Reports have been used in Canada for over 20 years, there is little research and data that investigates the development, delivery, and influence of *Gladue* Reports (Barkaskas et al., 2019, p. 12). Further, there is a lack of data on the funding models used to organize *Gladue*-related services throughout Canada and the advantages and disadvantages of each method.

The *Gladue* sentencing principle recognizes that Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders and is therefore intended to remedy such failure. The purpose of this research is to determine if the variances in *Gladue* Report programs and practices are a consequence of inadequate funding and resources from the Federal Government. Through secondary data analysis, this examination will explore pre-existing research that focuses initially on the historical context of Canada's sentencing law and relevant Supreme Court Cases that set the foundation for *Gladue* Pre-Sentence reports (*Gladue* Reports). Then it compares *Gladue* approaches to traditional pre-sentence reports with respect to its value, explores several *Gladue* Report delivery models across Canada, and the resulting barriers to administering *Gladue*-related services as a result.

## I. Methodology

The aim for this thesis is to determine if insufficient funding is responsible for the lack of *Gladue* Reports being written which systematically disadvantages Indigenous offenders, as opposed to addressing the crisis of Aboriginal overrepresentation in the prison system. This paper uses a qualitative meta-analysis method by way of examining a multitude of scholarly articles, precedent Supreme Court cases, government reports, as well as case studies to complete

a systematic review and identify any trends. Meta-analytic research can provide enlightening information to address a wide variety of aims as it is an attempt to conduct a rigorous secondary qualitative analysis of primary qualitative findings (Levit, 2018, p. 376; Timulak, 2008, p. 591). Various search engines were exercised such as the Criminal Justice Data Base, CanLII, The Department of Justice, ProQuest and other relevant databases, along with scholarly textbooks, to acquire the information that shapes this thesis.

Key terms used within the listed databases include "Aboriginal" and "Indigenous," *Gladue* factors (principles), *Gladue* Reports, pre-sentence reports and risk. As per the University of Southern California (2020), "A well-designed meta-analysis depends upon strict adherence to the criteria used for selecting studies and the availability of information in each study to properly analyze their findings" (para. 14), and thus it is pivotal the terms used throughout the thesis are defined.

**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, therefore both terms are used interchangeably within this report.

***Gladue* Factors (Principles)**

When sentencing an Aboriginal offender, these are 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." (*R v Gladue,* 1999 1 SCR 688 at para 6). These factors "are mitigating in nature in that they may have played a part in the Aboriginal offender's conduct." (*R v Wells*, 2000 SCC 10 at para 38). "Failing to take these circumstances into account would violate the fundamental principle of sentencing", as the sentence must be proportionate to

the gravity of the offence and degree of responsibility of the offender (*R v. Ipeelee,* 2012 1 SCR 433 at para 73).

### *Gladue* Report

A specialized pre-sentence report prepared for the Court by a Gladue Report writer that's "tailored to the specific circumstances of Aboriginal offenders." (*R v. Ipeelee,* 2012 1 SCR 433 at para 60). A *Gladue* Report provides the Court with information about an Indigenous person who is being sentenced with a particular focus on the unique systemic background or *Gladue* factors (Barkaskas et al., 2019, p. 8). Furthermore, a *Gladue* Report provides the Court with viable information about alternative sentencing options to incarceration and/or restorative justice inclusive options that are culturally appropriate (Barkaskas et al., 2019, p. 8).

### Pre-Sentence Report

According to Hannah-Moffat and Maurutto, this is a type of report that is submitted to a judge prior to sentencing in a case that requires more detailed background information about the accused containing life history and occasionally information about the victim(s) (2010, p. 266). The purpose of a pre-sentence report is to assist the Court in coming to a sentencing decision by presenting 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 offender's age, maturity, character, behaviour, attitude and willingness to make amends." (*Criminal Code of Canada*, RSC 1985, c C-46, s. 721.3(a)).

### Risk

Risk can have multiple definitions depending on the academic discipline and contexts to which it is applied such as medical problems, exposure to danger (i.e., domestic abuse), unwanted loss (i.e. employment), and engaging in criminal behaviour. "Scholars have recently

raised concerns about how criminal law, and sentencing in particular, is increasingly being shaped by the proliferation of actuarially based knowledge about risk" (Hannah-Moffat & Maurutto, 2010, p. 262). This thesis focuses on the criminogenic risk perspective, often referred to as a risk-assessment approach (Hannah-Moffat & Maurutto), which assesses and classifies an offender's criminogenic need(s) and predicts the likelihood of recidivism (2010, p. 263).

**Limitations.** As all research designs have limitations, this thesis has the following. It does not allow for a definitive argument that the inconsistent production of *Gladue* Reports is a by-product of deficient funding as it is limited in its scope, nor is it generalizable as most existing research has been conducted from a non-Indigenous perspective. The main criticism of qualitative meta-analysis research is it often captures local knowledge, as opposed to the definitive generalizable view often searched for in a more traditional meta-analysis (Timulak, 2014, p. 492). Furthermore, this thesis worked only with publicly available data and only identifies the problems in the original studies and scholarly articles. Thus, it may not necessarily provide a definite answer, but rather offer a unique systematic, in-depth analysing portrait (Timulak, 2014, p. 492). As this study did not involve any interaction with human subjects, no ethics approval was needed. This thesis also received no funding and was written in part for the completion of the Bachelor of Arts: Criminal Justice (Honours) program at Mount Royal University.

## II. A Review of Canada's Sentencing Law

### Section 718.2(e) of the *Criminal Code of Canada*

As part of the 1996 Bill-C41 amendments to the *Criminal Code of Canada*, Parliament enacted section 718.2(e) as a remedial provision aimed at reducing Indigenous over-incarceration through sentencing. The provision attempts to achieve this by requiring judges to consider the

circumstances that may have brought a particular Indigenous offender into contact with the criminal justice system and before the courts. Prior to these reforms, information of an offender's background alongside their cultural and racial narratives were for the most part, hardly ever considered as relevant evidence in judicial proceedings. 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. (RSC 1985, C-46).

Bill C-41 did not provide judges with specific sentencing guidelines, leaving it up to the courts to clarify the use of conditional sentences as well as the application of s. 718.2(e). Nevertheless, it imposes a statutory obligation on sentencing judges to take into account the purpose and principles of sentencing in striving for a sentence that is fit for the offender and the offence (*R v. Gladue*, 1999 1 SCR 688 at para 93). The section began having an impact on judicial decisions after the Supreme Court of Canada first interpreted it in 1999 in *R v. Gladue*.

## III. Relevant Supreme Court Cases

### *R v. Gladue* [1999]

Jamie Tanis Gladue, an Aboriginal woman, was born in McLennan, Alberta in 1976, of a Cree mother and a Métis father. On the evening of September 16th, 1995, Ms. Gladue was celebrating her nineteenth birthday with her friends, family, and her common-law spouse Reuben

Beaver (*R v. Gladue*, 1999 1 SCR 688 at para 2). Ms. Gladue and Mr. Beaver shared one child together, and at the time she was five months pregnant with their second. They had been living together in a townhouse complex in Nanaimo, British Columbia, with the appellant's father and two of her siblings. Ms. Gladue suspected that her partner was having an affair with her older sister, Tara Chalifoux, as he had fooled around with other women previously. Witnessing them leave the party together, Ms. Gladue eventually located her sister and Mr. Beaver coming down the stairs with one another in Ms. Chalifoux's suite. The appellant and Mr. Beaver, already having a history of domestic violence, returned to their townhouse, and started to quarrel, during which Ms. Gladue confronted him about his infidelity and he replied to her with vulgar insults. A witness from the neighbourhood saw the appellant running out of her suite toward Mr. Beaver with a large knife in her hand, eventually striking him once in the left of his chest penetrating his heart. With a blood-alcohol content between 155 and 165 milligrams of alcohol in 100 millimeters of blood during the time of the offence, the witness expressed that Ms. Gladue did not appear to have realized what she had done (*R v. Gladue*, 1999 1 SCR 688 at para 2).

On June 3, 1996, Ms. Gladue was charged with second degree murder, and in February of 1997 she later entered a plea of guilty to manslaughter. Her sentencing took place 17 months after the stabbing, and in his submissions on sentence at trial, Ms. Gladue's counsel did not mention that she was an Aboriginal offender but, when asked by the trial judge, replied that she was Cree. After knowing this and that the appellant grew up off-reserve in a "just a regular community", no other submissions were made regarding her Aboriginal heritage (*R v. Gladue,* 1999 1 SCR 688 at para 12). There was evidence however, that Mr. Beaver had physically abused Ms. Gladue in June of 1994 while she was pregnant with their first daughter when he was given a 15-day intermittent sentence and one year's probation. Ms. Gladue appealed her sentence

of three years imprisonment and a ten-year weapons prohibition to the British Columbia Court of Appeal, which was dismissed by majority. The Supreme Court of Canada, concerned about the over-representation of Indigenous offenders in the prison system, in 1999 considered whether the sentence of three years of incarceration was a correct interpretation and application of s. 718.2(e) of the *Criminal Code*.

**Systemic Bias Against Aboriginal People**

Although the SCC did not think it was necessary to change Ms. Gladue's sentence, the Court recognized the disproportionate number of Aboriginal people being imprisoned flows from several sources, but most notably the systemic bias against Aboriginal people. The SCC further clarified that this section applies to all Aboriginal offenders, regardless of where they reside and whether they had maintained connections with their Indigenous heritage. In its decision, the SCC maintained that sentencing judges are among the limited decision-makers who have the power to influence the treatment of Aboriginal offenders in the justice system and thus instructed them to consider two sets of factors:

(A) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (*R v. Gladue*, 1999 1 SCR 688 at para 66).

The SCC concluded that there is absolutely no discretion as to whether to consider the unique situation of the Aboriginal offender, rather the only discretion the sentencing judge does have concerns the determination of a just and appropriate sentence. "Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this

accused for this offence in this community" (*R v. Gladue*, 1999 1 SCR 688 at para 93). Another important outcome of the *Gladue* decision was the establishment of specialized courts for Indigenous offenders, known as "*Gladue* Courts", which employs a unique sentencing approach to support the application of s. 718.2(e).

***R v. Ipeelee* [2012]**

Although the legislative framework had been in place since the late nineties, there was a great deal of confusion regarding how the *Gladue* principles should be applied. Thirteen years after the *Gladue* decision, two cases of Long-Term-Supervision Orders (LTSOs) were appealed to the Supreme Court. The cases of Inuit man Manasie Ipeelee and Frank Ralph Ladue, a Ross River Dena Council Band member, were both addressed in the 2012 *R v. Ipeelee* decision, in which the Court examined if whether s. 718.2(e) was applicable to the breaching of LTSOs. In the decision, the SCC reaffirmed its commitment to *Gladue* sentencing principles stating that "proportionality is the *sine qua non* of a just sanction" and that sentences must be "proportionate to both the gravity of the offence and the degree of responsibility of the offender" (*R v. Ipeelee,* 2012 1 SCR 433 at para 37). As criminal liability depends on voluntary conduct, the reality is that Indigenous offenders have been restrained by their systemic and background circumstances, which could perhaps diminish their moral culpability. When sentencing an Aboriginal offender, "courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration of Aboriginal peoples." (*R v. Ipeelee,* 2012 1 SCR 433 at para 60).

The Court maintained that these matters do not operate as an excuse for criminal behaviour, nor does s. 718.2(e) create a "race-based discount on sentencing", rather it provides necessary context to enable a sentencing judge to determine an appropriate sentence (*R v. Ipeelee*, 2012 1 SCR 433 at para 75). The SCC emphasized that counsellors (both defense and Crown) have a duty to bring that individualized information before the courts in every case, further highlighting *Gladue* Reports as the current practice to do so. The Supreme Court's decision in *R v. Ipeelee* referred to the significance of *Gladue* Reports in the following manner:

> "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 [their] duties under s. 718.2(e) of the *Criminal Code"* (*R v. Ipeelee,* 2012 1 SCR 433 at para 1).

**Beyond *Gladue***

The Court's verdict is seen as a reaffirmation and expansion of the Supreme Court's decision in *R v. Gladue.* Additionally, the unique information provided in a *Gladue* Report addresses that Indigenous people are less likely to be rehabilitated by incarceration being that prisons are often rampant with racial discrimination and culturally inappropriate. Rudin (2012) notes "the decision goes beyond *Gladue* in its analysis, its acknowledgment of the realities of colonialism and its strong defence of the need to sentence Aboriginal offenders differently" (p. 375). Therefore, the process of sentencing is to be considered an appropriate forum for addressing the overrepresentation of Aboriginal people in Canada's correctional system (*R v. Ipeelee*, 2012 1 SCR 433 at para 70). According to Hebert (2017), such language suggests that s. 718.2(e) of the *Criminal Code* demands that *Gladue* Reports be made available to all Indigenous offenders, much like a pre-sentence report (PSR), which does not systematically include

Aboriginal social history as required by law (p. 156). In order to understand the current state of *Gladue* Report writing programs and to consider the future state and delivery of these services throughout Canada, it is crucial to understand the differences in the fundamental approaches of a *Gladue* Report and a PSR.

## IV. Risk-Based Approaches

### Traditional Pre-Sentence Reports

*Gladue* Reports epitomize restorative justice, which some scholars such as Howard Zehr, feel is best described as a theory or philosophy. As Van Ness and Strong write, "Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that includes all stakeholders" (Zehr, 1990, p. 44). For example, in Zehr's *Changing Lenses* (1990) he states it is a "lens" through which we can view crime and justice (p. 44). This is paramount in understanding the importance of *Gladue* Reports being that when restorative justice is understood in such way, it becomes less about the specific practices and processes that we associate it with, and more so about articulating how we see crime, offenders, victims, communities, and even the experience of justice. In it, Zehr also critiques the modern approaches to criminal justice by labeling it "retributive justice", which he argues leaves victims, offenders, and communities injured and unsatisfied (Roche, 2007, p. 75). According to Zehr (1990), the retributive approach "defines the state as victim, defines wrongful relationship as violation of rules, and sees the relationship between victim and offender as irrelevant" (p. 184; Roche, 2007, p. 76). Similarly, Shepherd and Anthony (2018) argue that the existing risk assessment tools used to assess an offender's criminogenic need(s) and likelihood of recidivism, excludes broader socio-historical factors and

culturally specific phenomena, which may have adverse implications for certain populations (i.e., Indigenous people) (p. 212).

**Risk Indicators**

Risk indicators inform decisions in various justice interventions as they permeate assessments and diagnoses on an individual's prospects of reoffending and seek to control risk elements to prevent future harm (Shepherd & Anthony, 2018, p. 211). Sentencing in particular, is an important aspect of legal decision making, in which information about an offender's risk and needs is produced and used to prepare the forthcoming sanction. To 'evaluate' this risk, judges use information from a variety of sources including but not limited to, criminal history, professional assessments, offender statements, *Gladue* Reports, but primarily pre-sentence reports (Hannah-Moffat & Maurutto, 2010, p. 262). Although the SCC identified *Gladue* Reports as a form of a PSR tailored to the specific circumstances of Aboriginal offenders in *R v. Ipeelee* (2012 1 SCR 433 at para 60), PSR's and *Gladue* Reports are profoundly different. Granted they are both meant to inform the sentencing judge's decision and may vary in the overall quality and coverage; they are distinct in several ways.

While PSR's focus on assessing future risks, *Gladue* Reports focus on delving into the past to understand the impact of systemic factors and individual circumstances on the problematic behaviour (Barkaskas at el., 2019, p. 38). Maurutto and Hannah-Moffat characterize *Gladue* Reports as "powerful techniques used to package information, in a format that is accepted with 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" (2016, p. 465). In contrast, the traditional PSRs purpose is to prevent recidivism by conducting a

risk assessment of the offender, focusing on criminal behaviour and risk factors (Hebert, 2017, p. 159). This kind of approach contradicts the SCCs analysis mandated in *Gladue* to understand an Indigenous offender's unique circumstances that may have led to their offending as well as community-based options for rehabilitation.

**Assessment of Risk**

In Canada, PSRs are written by probation officers on the request of a sentencing judge, using standardized actuarial risk assessment instruments to identify "criminogenic" factors which are "treatable" and statistically correlated with recidivism (Hannah-Moffat & Maurutto, 2010, p. 263). Criminogenic factors are characterized by the variety of problems or needs that interfere with an offender leading a prosocial lifestyle. These factors include, but are not limited to criminal attitude, associates (friends), education, employment, substance abuse, family/marital relationships, and recreational activities (Bonta, 2011, p. 1). The general content of PSRs is prescribed in s. 721(3) and (4) of the *Criminal Code*, as well as s.721(2), which specifies 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 and form of the report (*Criminal Code*, RSC 1985, c C-46). It further stipulates that unless otherwise specified by the court, the PSR must, whenever possible, contain the information about the following:

(a) the offender's age, maturity, character, behaviour, attitude, and willingness to make amends;

(b) any history of previous dispositions under the Young Offenders Act and of previous findings of guilt under this Act and any other Act of Parliament; and

(c) any history of alternative measures used to deal with the offender, and the offender's response to those measures (*Criminal Code*, RSC 1985, c C-46 s. 721(3)(a)(b)(c)).

The racially situated framing of the offence that is found within *Gladue* Reports is often not present in the PSR, rather racial considerations are simply added on to actuarial methods of evaluating 'risk/need' (Hannah-Moffat & Maurutto, 2010, p. 274). Hannah-Moffat and Maurutto further argue that as a result of following an actuarial assessment model, the offender's profile is categorized into a series of risk factors to be "isolated, targeted, and treated" in the PSRs recommendations on sentencing (2010, p. 272). Within this framework, *Gladue* factors and its relationship with the Indigenous offender's criminal behaviour are merely secondary as PSRs focus solely on the offender's behaviour separate from its historical and socio-economic context (Hannah-Moffat & Maurutto, 2010, p. 274). This may have an "unintended discriminatory effect," and as a result Aboriginal offenders continue to be characterized by the Canadian criminal justice system as both "high risk and high need" (Hebert, 2017, p. 160). To be specific, since *Gladue* factors are positioned and itemized alongside (and sometimes interpreted as) risk factors, Indigenous people are often recognized as presenting a higher risk precisely because of their circumstances as Indigenous people. Thus, PSRs risk assessment analysis is not only incompatible with the holistic, contextualized approach mandated in *Gladue,* but it also perhaps undermines s.718.2(e) of the *Criminal Code*'s objective to reduce incarceration and promote restorative justice in the sentencing of Indigenous offenders (Hebert, 2017, p. 160).

A pre-sentence report may also be produced with a "*Gladue* component" or from a "*Gladue* perspective". In some provinces such as New Brunswick, the PSR is the primary means through which information on the impact of *Gladue* factors on the offender is made available to the courts, where as in Quebec, a PSR with a *Gladue* component is applied when a full *Gladue* Report is not available (Barkaskas et al., 2019, p. 39). However, Rudin (2019) explains that the difference between what constitutes a *Gladue* factor and what amounts to a risk factor is often a

slim one which sometimes creates complications in terms of how the *Gladue* Reports are used in court and beyond the sentencing process (p. 133).

***Ewert v. Canada* (2018)**

The Supreme Court's decision in *Ewert v. Canada* (2018) acknowledged that Correctional Service of Canada (CSC)'s actuarial risk assessment tests were not proven to be accurate when applied to Indigenous offenders. The SCC also reminded us that, indeed, "identical treatment may frequently produce serious inequality" (*Ewert v. Canada*, 2018 2 SCR 165 at para 54). On June 13, 2018, the SCC delivered its decision in *Ewert v. Canada* in which the majority held that CSC breached its statutory obligation to Jeffrey G. Ewert, a Metis man, under s. 24(1) of the *Corrections and Conditional Release Act* (CCRA) (2 SCR 165 at para 27). The Court ruled that by assessing the risk level presented by Indigenous offenders with impugned tools established for non-Indigenous individuals, CSC failed to meet its duty to utilize only accurate information in their assessments (*Ewert v. Canada*, 2018 2 SCR 165 at para 72).

In its decision, the SCC provided specific examples as to how the overestimation of risk contributes to the disadvantages Indigenous offenders are subjected to, such as unnecessary harsh conditions while serving their sentences, including custody in higher security settings and unnecessary denial of parole (*Ewert v. Canada*, 2018 2 SCR 165 at para 65). Furthermore, it may contribute to the reduced access to rehabilitative opportunities that offer culturally appropriate programs or adequate release plans that return Indigenous offenders to their communities where they have positive support. Thus, the clear danger posed by the CSC's continued use of assessment tools that may overestimate the risk posed by Aboriginal offenders, may unjustifiably contribute to disparities in correctional outcomes that Indigenous offenders are already

experiencing (*Ewert v. Canada,* 2018 2 SCR 165 at para 65). In the decision of *Ewert v. Canada* Chief Justice Richard Wagner emphasized the following:

> "Although this Court is not now in a position to define with precision what the CSC must do to meet the standard set out in s. 24(1) in these circumstances, what is required, at a minimum, is that if the CSC wishes to continue to use the impugned tools, it must conduct research into whether and to what extent they are subject to cross-cultural variance when applied to Indigenous offenders. Any further action the standard requires will depend on the outcome of that research. Depending on the extent of any cross-cultural variance is discovered, the CSC may have to cease using the impugned tools in respect of Indigenous inmates, as it has in fact done with other actuarial tools in the past. Alternatively, the CSC may need to qualify or modify the use of tools in some way to ensure that Indigenous inmates are not prejudiced by their use" (2018 2 SCR 165 at para 67).

However, it is significantly concerning that despite the long analysis on how inaccurate actuarial risk assessment tools are, and how they may impact Indigenous individuals within the judicial system, the SCC chose to maintain their constitutionality. This perpetuates an underlying message that regardless of the highest court of appeal in Canada acknowledging the prejudicial treatment of Indigenous offenders in the Canadian criminal justice system, constitutional protection does not apply to everyone equally. In contrast, *Gladue* Reports generally tell the story of the offender before the court as they contextualize risk factors by addressing the systemic and background factors of Indigenous offenders, and help the court consider them with a broader understanding (Barkaskas et al., 2019, p. 39). The variation in the author and their training are also an important difference between *Gladue* Reports and PSRs. Probation officers

preparing PSRs are trained in risk-assessment, and their training generally does not include identifying *Gladue* factors, whereas *Gladue* Report writers are trained to identify and articulate these factors to the court, along with options for alternatives to incarceration (Barkaskas et al., 2019, p. 39).

## V. Who Writes *Gladue* Reports?

The process of producing and delivering *Gladue* Reports can be complex as there is currently no national approach, guideline, or policy, and generally differs in each jurisdiction throughout Canada (Barkaskas et al., 2019, p. 30). Consequently, most provincial jurisdictions do not actually consider *Gladue* Reports mandatory in sentencing Indigenous offenders, nor do they deem the absence of a *Gladue* Report as a ground for appeal (Hebert, 2017, p. 163). In most cases, *Gladue* Report writers have some combination of the following: an expertise on particular Indigenous communities, an educational background working with Indigenous communities or Indigenous peoples within the criminal justice system, and/or lived experience as Indigenous persons (Barkaskas et al., 2019, p. 41). Many writers demonstrate these characteristics for the reason that most are Indigenous persons with specific knowledge about their own Indigenous community and lived experience as an Indigenous person. Considering the demands of the information required for the report it is vital that *Gladue* writers are able to make connections to Indigenous communities or organizations. Furthermore, they also require a foundational knowledge of the histories and experiences of Indigenous peoples and the inter-generational impacts of colonialism in Canada (Barkaskas et al., 2019, p. 41). It may be argued that *Gladue* Reports produced by Indigenous writers close to or belonging to the Indigenous community are far more trusted, and that this level of trust may not be available to the probation officers producing PSRs.

**Training**

Training is another aspect that varies by jurisdiction as there is no one program considered to be the standard training model for educating *Gladue* Report writers. A study conducted by Barkaskas, Chin, Dandurand and Tooshkenig (2019), found that in some instances, writers have received absolutely no formal training, and instead came to write the reports with the particular skill set required as a result of previous education, employment or training (p. 42). In provinces such as Ontario, Québec, Nova Scotia, and PEI, *Gladue* Reports are assigned to a writer who is often an employee of the Indigenous organization mandated to produce the report (p. 41). For example, in PEI, the writers are contracted individually by the organization whereas Aboriginal Legal Services of Toronto and other service providers in Ontario have fulltime and/or part time employees responsible for producing *Gladue* Reports (Barkaskas et al., 2019, p. 41). In cases such as PEI, this sometimes includes employees of organizations who have been trained to write reports and are willing to do so in addition to their regular responsibilities (Barkaskas et al., 2019, p. 41). However, the recruitment of *Gladue* writers and the administration of these reports are only possible so long as the funding is available.

The preparation and writing of *Gladue* Reports may be achieved in several ways depending on the province or territory of where an Indigenous person is being sentenced. Generally speaking, *Gladue* writers conduct lengthy and in-depth interviews with the Indigenous person being sentenced who is considered the subject of the report, and where possible with family members and acquaintances, as well as experts familiar with Aboriginal histories and communities (Hannah-Moffat & Maurutto, 2010, p. 276). The writers may also incorporate research from reliable secondary sources that provide relevant and objective information that assists in contextualizing the life and experiences of the individual, their family and/or

community members (Barkaskas et al., 2019, p. 11). These reliable sources may be 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 (Barkaskas et al., 2019, p. 11).

The appropriate skills a *Gladue* writer must possess are having a 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, train-informed approach to working with particular people, and cultural competency skills (Barkaskas et al., 2019, p. 42). For the most part, *Gladue* Reports characteristically include the following: a synopsis of the offence; the offender's past record; the offender's personal circumstances; the report writer's contact with the offender's family; options for services consistent with the proposed sentence; a plan for services to meet the offender's needs; contextualization of the offender's situation, including a description of the systemic issues affecting Aboriginal individuals; applications to, and arrangements made with, residential treatment facilities; and recommendations for sentencing (Maurutto & Hannah-Moffat, 2016, p. 464).

The BCCA in *R v. Lawson* (2012 BCCA 508) discussed the parameters of bringing *Gladue* information before the court 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, 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.

The following comments of Chief Judge Cozens of the Yukon Territorial Court in *R v. Blanchard*, 2011 YKTC 86 at para. 25 have merit:

> "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 tailed

> to Aboriginal offenders, they should not strongly recommend specific sentences. The sentencing function belongs to the judge (*R v. Lawson* 2012 BCCA 508).

Therefore, the Courts have articulated that *Gladue* writers should maintain neutrality in writing a *Gladue* Report in both content and tone to ensure that the information contained is objective and may be properly considered by the judge at the time of sentencing. Thus, the writer should attempt to remain detached instead of advancing personal opinions. It is important to note that while organizations may be identified as Indigenous or Indigenous-led, they are not always exclusively led and staffed by Indigenous people. Rather it is the approach to service delivery as predominantly informed by indigenous perspectives that is the determining factor in whether the organization is considered Indigenous (Barkaskas et al., 2019, p. 31).

**Detail in *Gladue* Reports**

Hannah-Moffat and Maurutto's analysis of a sample of these reports revealed that *Gladue* Reports include considerably more detailed information regarding the offender's background, family and life circumstances than PSRs (2010, p. 276). For example, although both PSRs and *Gladue* Reports document histories of adoption and/or foster care, *Gladue* Reports point to how these experiences affect attachment to others, and discuss how separation from family, community and traditions may affect an offender's subsequent life experiences (Hannah-Moffat & Maurutto, 2010, p. 276). The following excerpt from a *Gladue* Report connects the Indigenous offender's charge of child abuse to her experiences of violence by her mother and grandmother, the latter a residential-school survivor. It also exemplifies how secondary literature, in this case from the Royal Commission on Aboriginal Peoples (1996), can be used to account for the intergenerational trauma experienced by children and grandchildren of residential school survivors:

> "The residential school led to a disruption in the transference of parenting skills from one generation to the next. Without these skills, many survivors have had difficulty in raising their own children. In residential schools, they learned that adults often exert power and control through abuse. The lessons learned in childhood are often repeated in adulthood with the result that many survivors of the residential school system often inflict abuse on their own children. These children in turn use the same tools on their own children." (Maurutto & Hannah-Moffat, 2016, p. 464).

Such narratives are not used to excuse criminal behaviour but rather to clarify how past experiences linger and continue to affect the Indigenous offender's behaviour. Hannah-Moffat and Maurutto note this in contrast to PSRs, which even with a *Gladue* component or perspective, focus almost exclusively on individual behaviour, devoid of historical or social context (2010, p. 276). Unfortunately, after twenty-plus years, there are still no official statistics that show how often *Gladue* Reports are used in courts across Canada, how effective they have been in reducing the incarceration of Indigenous offenders, and the advantages/disadvantages of the different *Gladue* Report methods. The discrepancies seen in the production and administration of *Gladue* Reports across Canada may be attributed to the current funding of *Gladue* Report programs and services. 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 (Barkaskas et al., 2019, p. 30). These variances are a result of what may be argued as the chronic failure and inaction of the Federal Government to constitutionally implement the invaluable sentencing tool in the same way as PSRs.

# VI. Funding the Production of *Gladue* Reports?

## Who is Responsible?

Many barriers exist across all provinces and territories in accessing *Gladue* Reports which can be attributed to the lack of public awareness; sentencing judge's failure to recognize their statutory obligation under s. 718.2(e) of the *Criminal Code*; the lack of training of *Gladue* writers; and most notably, a funding shortage in *Gladue* programs and services. Much like the training writers receive, the responsibility of funding for *Gladue* Reports vary considerably across jurisdictions in Canada – which means uneven access. Barkaskas et al. (2019) found that in most cases, either a government or independent organization was responsible for the production and administration of *Gladue* Reports, and as a result each province and/or territory had employed different models (p. 43). The different funding models used reflected the ways in which each agency operated, including how writers were recruited and paid, as well as how many reports each region produced annually. For example, most choose to employ *Gladue* writers either directly as contractors or salaried employees (Barkaskas et al., 2019, p. 43). The study identified British Columbia as an exception in that writers were paid indirectly by the Legal Services Society (LSS). The LSS is a non-profit organization and the provincial aid provider in British Columbia. As a part of its work, the LSS Indigenous Services department contracts with *Gladue* writers to produce the reports. The funding comes from the LSS budget, however, the actual payment is made to the defence counsel, who then disburses the funds to the writer (Barkaskas et al., 2019, p. 43).

## *Gladue* Reports and the *Criminal Code of Canada*

Jonathan Rudin argues that unlike PSRs, there is no provision in the *Criminal Code* to empower a judge to order a *Gladue* Report, rather they can only be requested (2019, p. 114).

Similarly, Tim Quigley (2016) notes 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 providing the necessary funding (Barkaskas et al., 2019, p. 32). In some instances, such as British Columbia (BC), Barkaskas et al. (2019) notes judges were conscious of their inability to order *Gladue* Reports (p. 31). This was due to what the judges acknowledged as an inability to force the BC government, or the LSS in some cases, to provide funding for a report. Mark Marsolais-Nahwegahbow, founder of IndiGenius & Associates, an Indigenous consulting firm in Ottawa that provides *Gladue* Reports and other services, expressed in a 2019 interview with Carleton University's Capital Current that unfortunately, many justice practitioners and scholars do not recognize "These reports have to be paid for. So, what they [the provincial government] did is they more or less allowed Legal Aid Ontario, or Legal Aid across Canada to be the gatekeepers of making those decisions on who is eligible for reports," (McIvor & Oag, 2019, para. 10). He further stated that "*Gladue* Reports are only worth the paper they're written on if we don't have the resources available to frame a good healing plan or a healing journey for the individual" (McIvor & Oag, 2019, para. 3). Although the cost of a *Gladue* Report varies in each jurisdiction, generally there is a fee to research and write the report, and any expenses such as travelling to and from a Nation (reserve) or institution for interviews (Marsolais, 2016, p. 21).

In British Columbia for example, until very recently there has been no provincial funding for *Gladue* Reports. Barkaskas et al. (2019, p. 45), found that since the receipt of new funding in 2017, LSS has greatly increased its provision of reports, from producing 78 reports in 2016/2017 to 215 by 2018/2019. In 2019/2020, LSS received enough funding for up to 300 reports for the fiscal year, however expected to receive more than 300 requests in that time (Barkaskas et al., 2019, p. 45). It should be noted that in the case of BC, LSS funded *Gladue* Reports are for the

most part only available to those who are eligible for legal aid through LSS (Barkaskas et al., 2019, p. 46). In Ontario, an Indigenous offender may only obtain a *Gladue* Report if the criminal charge(s) carry more than ninety days in incarceration and if they do not qualify to have Legal Aid Ontario cover the costs, the offender may have to pay for the writer out of pocket (McIvor & Oag, 2019, para. 11). Christine Goodwin, the first *Gladue* writer in Saskatchewan, shared with Capital Current she charges around $5,000 for a report, which includes the cost of travelling across the province and other expenses, such as $500 for an editor (McIvor & Oag, 2019, para. 13). Goodwin, however added that she has heard of privately paid reports costing as much as $8,000 to be completed "because a court refused to pay." (McIvor & Oag, 2019, para. 14). *Gladue* Reports are typically produced within six to eight weeks from the date they are ordered, but it is sometimes necessary for writers to seek an extension if writers or funding are limited (Barkaskas et al., 2019, p. 46).

Hebert (2017) argues that sentencing judges have openly denounced this disparity in accessing *Gladue* reports (p. 169). For example, in Ontario, Pomerance J in *R v. Corbiere* (2012 ONSC 2405) opposed having to transfer the accused, Perry Corbiere, to Sarnia for him to benefit from *Gladue* programs and ordered funding for a *Gladue* Report in Windsor (at para. 8). Justice Pomerance expressed concern that "Mr. Corbiere did not have access to *Gladue*-related services in Windsor that would have been available to him in other city centres" (*R v. Corbiere*, 2012 ONSC 2405 at para 14). In *R v. Knockwood*, the Aboriginal offender, Kathleen Knockwood, requested a *Gladue* Report be written in Quebec and was denied it for the reason that such reports were not available due to "workload constraints" (2012 ONSC 2238 at para 9). Instead, *Gladue* factors were added to the PSR written completely in French, a language Ms. Knockwood did not speak, and as a result was found to be "entirely inadequate" (*R v. Knockwood*, 2012

ONSC 2238 at para 14). Hill J, in a strongly worded judgement, criticized the State's inaction: "The outrageousness of this story is self-evident. A shameful wrong. Contempt for the rights of Aboriginal Canadians. A denial of equality" (*R v. Knockwood,* 2012 ONSC 2238 at para 71). "While regional disparities may well exist in terms of sentencing ranges in various parts of the country, the application of the *Gladue* principles and s. 718.2(e) of the *Code* are matters of federal law applicable in all regions of Canada" (*R v. Knockwood*, 2012 ONSC 2238 at para 56).

What the highest court of Canada has declared as an indispensable sentencing tool, in reality, is still scarcely available in every jurisdiction in the country. Across Canada, access to *Gladue* Reports is regionally disparate and limited (Hebert, 2017, p. 168). And while Aboriginal offenders in certain regions may access a fully funded *Gladue* Report, most may only obtain a traditional PSR with a *Gladue* component, which generally does not adequately fulfill *Gladue* and *Ipeelee* requirements. With the lack of funding, it is not surprising that many provincial and territorial jurisdictions do not offer subsidized *Gladue* Report programs and rely mainly on PSRs or non-funded *Gladue* Reports (Hebert, 2017, p. 168). This is evident in Newfoundland and Labrador as the little funding for *Gladue* Reports have resulted in PSRs to be the sole way of bringing *Gladue* factors before the court (McIvor & Oag, 2019, para. 28). In Nunavut, a court even refused a request for the inclusion of *Gladue* components in PSRs (Hebert, 2017, p. 168). It should be noted that even in regions with well-established programs, not all Indigenous offenders obtain a *Gladue* Report due to a lack of awareness and/or an organization's ability to produce a report in every appropriate case. Consequently, sentencing judges do not have all appropriate information to fulfill their statutory obligations pursuant to s. 718.2(e) of the *Criminal Code.*

To further understand how the absence of federal funding has resulted in the variances of *Gladue* Reports across Canada and thus unequal access, the following are descriptions of a few

existing *Gladue* writing programs in two provinces (Alberta and Ontario) and one territory (Yukon) and the methods used for the production and administration of the reports.

## VII. *Gladue* in Action: A Review of Canadian Practices and Programs

### Alberta

In Alberta, since May 2015 the Ministry of Justice and Solicitor General has coordinated and administered the *Gladue* Report Program, formally known as the *Gladue* Pre-sentence Report Program (Justice and Solicitor General, 2018, p. 18). *Gladue* Reports are written by individuals who contract with the Ministry of Justice and Solicitor General, all of which are funded by the Government of Alberta (Barkaskas et al., 2019, p. 50). Prior to this, in May 2014, the Alberta Government launched a pilot project with Native Counselling Services of Alberta to develop a province-wide personnel of community-based *Gladue* Report writers (Barkaskas et al., 2019, p. 50). Unfortunately, as the awareness of the availability of funded reports increased, so did the number of report requests. Ultimately, the amount of requests were far greater than what could be produced with the available funding, creating a profound problem.

Alberta is currently one of the few jurisdictions that has interpreted *Ipeelee* as mandating that a *Gladue* Report be made available for Indigenous offenders at the time of sentencing (Hebert, 2017, p. 164). In the cases of *R v. Mattson* (2014 ABCA 178) and *R v. Napesis* (2014 ABCA 308), Gary Mattson and Daniel Napesis both appealed their respective sentences, claiming that the trial judge failed to sufficiently consider their circumstances as Indigenous people (at para 28; at para 7). At sentencing, neither of the accused had a *Gladue* Report written, and Daniel Napesis did not even have a PSR (*R v. Mattson*, 2014 ABCA 178 at para 37; *R v. Napesis*, 2014 ABCA 308 at para 7). In *R v. Mattson* (2014), the Court of Appeal for Alberta

declared that it was "clear from the decision in *Ipeelee* that when sentencing an Aboriginal it is required that a *Gladue* report be prepared" (ABCA 178 at para 50). The Court further stressed that *Gladue* Reports will be mandatory in all future such cases (*R v Mattson*, 2014 ABCA 178 at para 50). Similarly, in *R v. Napesis*, the Court confirmed that a sentencing judge's *Gladue* analysis "must be informed by a *Gladue* report" (2014 ABCA 308 at para 8).

The *Gladue* Report Program in Alberta may be considered a community-based approach. At the time of study, Barkaskas et al. (2019) found that the program consisted of a roster of 45 report writers located in Indigenous communities throughout the 11 court districts in Alberta, as well as a *Gladue* Report Provincial Coordinator (p. 50; Alberta Justice and Solicitor General, 2019, p. 37). The Ministry of Justice and Solicitor General ensure that by contracting with report writers who are either from or closely connected to an Indigenous community, the writers will have an in-depth knowledge and deeper understanding of the *Gladue* factors being brought before the court (Alberta Justice and Solicitor General, 2018, p. 18). This improves the quality of the report in various ways, for instance, their ability to build a rapport with the subject given the level of trust they may hold within the Indigenous community. Furthermore, it prevents exacerbating the existing strained relationship between Indigenous peoples and the Canadian criminal justice system.

*Gladue* Report writers are selected by the Ministry of Justice and Solicitor General through an Alberta Government Procurement Pre-Qualification Request (Barkaskas et al., 2019, p. 50). The applicants are required to provide: a criminal record check with no pardonable convictions; demonstrate they have experience working with multi-barrier Indigenous clients within two years of applying; and that they have an established connection with the Indigenous community for whom they want to write reports (Barkaskas et al., 2019, p. 50). Although it is not

necessary, it is beneficial for applicants to speak an Indigenous language and understand or practice Indigenous culture and spirituality. Once selected, Alberta Justice provides twelve-hours of guided distance learning that is broken down into three four-hour modules which includes reading assignments and skill checks. These modules explain the court process, the importance of *Gladue* Reports during sentencing, as well as provide a thorough description of the content within the reports. After successfully completing the modules, the new writer is then mentored by the *Gladue* Report Provincial Coordinator (GRPC) (Barkaskas at al., 2019, p. 50).

In order to obtain a *Gladue* Report for an Indigenous person in Alberta, a request for the report must be made by either counsel or the Court. If approved the request is referred to the GRPC, who then assigns the report preparation to a writer within the community the accused is residing in or being held in custody (Alberta Justice and Solicitor General, 2019, p. 37). It should be noted that while the GRPC usually prioritizes location, an out-of-community writer may be assigned due to their specific expertise. For example, a writer may have experience with domestic violence, in which case they may be assigned to individuals with this designation, despite not having a direct connection with the Indigenous offender's community. During the assignment process, a contract between the writer and the Ministry of Justice and Solicitor General is drafted and signed on a fee-for-service basis (Barkaskas et al., 2019, p. 51). The contract establishes a timeframe for completion of the report, which is generally six to eight weeks from when the report is ordered, and averages between seventeen to twenty-five pages (Alberta Justice and Solicitor General, 2019, p. 37). The *Gladue* Report is submitted to the GRPC for "quality control" to revise any legal or grammatical errors and is subsequently submitted to counsel and the court (Alberta Justice and Solicitor General, 2019, p. 37). It is then

used by the sentencing judge as a part of the sentencing process, therefore fulfilling the judge's statutory obligation under s. 718.2(e) of the *Criminal Code.*

The number of requests issued by the courts for *Gladue* Reports increased by eighteen percent over one year, from 784 in 2017-18 to 926 in 2018-19. The *Gladue* Report Program in 2018-19 cost approximately $1.1 million, which included contracts with 42 community-based writers and a GRPC (Alberta Justice and Solicitor General, 2019, p. 37). While the cost of Alberta's *Gladue* Report Program was not available in the 2019-2020 annual Alberta Justice and Solicitor General report, during that fiscal year, 883 *Gladue* Reports were provided to the courts (2020, p. 32). The *Gladue* Committee, which meets every six weeks, recognized that while all individuals who request a *Gladue* Report receive one, current funding is not inclusive of aftercare or other support programs (Barkaskas et al., 2019, p. 51). The Committee was formed in 2012 and 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 (Barkaskas et al., 2019, p. 51). The *Gladue* Committee has previously commented on its concerns with the program's lack of sufficient support for both offenders and the writers, who may experience re-traumatization or vicarious trauma in the course of the interviewing process (Barkaskas et al., 2019, p. 51). The province of Alberta has considered implementing a *Gladue* Aftercare program at Aboriginal Legal Services (Barkaskas et al., 2019, p. 51), however, no further information on this program was able to be found during the writing of this current thesis.

**Ontario**

In Ontario, there are currently several Indigenous organizations that prepare publicly funded *Gladue* Reports. The funding of *Gladue* Reports is provided primarily from the Ministry of the Attorney General of Ontario, Legal Aid Ontario, and to a lesser extent from the Federal Department of Justice (Department of Justice, 2018, 4.1.1, para. 1). According to the study conducted by Barkaskas et al. (2019), Indigenous service providers sign a service provision agreement with the Government of Ontario typically for a period of two or three years (p. 52). Each contracted service provider is different and has its own request form but are all based in an Indigenous organization. *Gladue* Report programs in Ontario include: Aboriginal Legal Services (ALS); N'Amerind Friendship Centre; United Chiefs and Councils of Mnidoo Mnising; Wikwemikong Justice Program; Thunder Bay Indian Friendship Centre; Nishnawbe-Aski Legal Services Corporation; Grand Council Treaty #3 (Kaakewaaseya Justice Services); First Nation Technical Institute (FNTI) – Tontakaierine Tyendinaga Justice Circle; Mohawk Council of Akwesasne (Akwesasne Community Justice Program); Tungasuvvingat Inuit (TI); and the Ontario Native Women's Association (Legal Aid Ontario, 2021, para. 11).

In some locations, an Indigenous service is limited to report for their own members, requiring staff from a First Nation or Tribal organization to prepare the *Gladue* Report (e.g., United Chiefs and Councils of Mnidoo Mnising) (Barkaskas et al., 2019, p. 52). The Akwesasne Community Justice Program's "*Gladue* Unit Services" receives, assesses, and accommodates requests for *Gladue* Reports for Indigenous offenders who are in the judicial jurisdiction of the Akwesasne Mohawk Territory or are members of the Mohawks of Akwesasne (Barkakas et al., 2019, p. 52). In Thundery Bay, the Thunder Bay Indigenous Friendship Centre provides *Gladue* Reports for all Indigenous offenders except for the Nishnawbe Aski Nation (NAN), as the

Nishnawbe-Aski Legal Services Corporation has *Gladue* writers who prepare reports for their own members (Barkaskas et al., 2019, p. 52). While *Gladue* Reports are available and provided by both Indigenous services at either the bail or sentencing process, the Thunder Bay Indian Friendship Center will only consider preparing a report after a client has pled guilty or was found guilty after trial (Legal Aid Ontario, 2021, para. 5). The Thunder Bay Friendship Centre also prioritizes *Gladue* Reports to Aboriginal women and Indigenous offenders who are facing six-months or more in custody (Legal Aid Ontario, 2021, para. 5).

Report writers in Ontario are generally hired as staff members by the various Indigenous organizations, and in some cases, are responsible for more than one role (Barkaskas et al., 2019, p. 52). This may be attributed to the amount of funding and allocation of such that Aboriginal services receive from the provincial government, Ontario Legal Aid, and occasionally the Department of Justice. The *Gladue* Reports are requested by the courts, primarily at the suggestion of defence counsel, however, judges may also submit an application for a report to be written (Legal Aid Ontario, 2021, para. 1). The requests are directly forwarded to the applicable Indigenous organization by court personnel, or in some parts of the province, the defence counsel. Available files are assigned internally to an appropriate writer and are typically produced within six to eight weeks, although this period may be extended if necessary (Barkaskas at al., 2019, p. 52). While it is not up to the Indigenous offender to decide who is interviewed for the *Gladue* Report, the writers are required to start with the contact information initially provided by the subject. Once the report is completed, it is reviewed internally by another staff member or supervisor in the organization before it is submitted to the court. For example, Aboriginal Legal Services (ALS) as of 2019, had three supervisory staff all with law degrees, whose responsibility was to manage, monitor, and closely supervise the production of

*Gladue* Reports within the organization. At the time, ALS also had a total of fourteen writers and eleven *Gladue* aftercare workers who assist with ensuring *Gladue* Report recommendations are followed, and to provide support to the client (Barkaskas et al., 2019, p. 52; Legal Aid Ontario, 2021, para. 1).

Barkaskas et al., (2019) found that other Indigenous organizations that provide *Gladue* Reports throughout Ontario only have between two and four full-time writers and no external resource personnel to review the reports (p. 52). While there currently seems to be adequate funding to accommodate the immediate demand for *Gladue* Reports, funding for related services such as training for *Gladue* writers, aftercare, and support programs are in many organizations insufficient. In 2018/2019, it was reported that ALS produced 355 full *Gladue* Reports and 127 *Gladue* letters (or short-form reports) (Barkaskas et al., 2019, p. 52). Unfortunately, data on the amount of funding received and reports produced by other Indigenous organizations in Ontario was not readily accessible. Nevertheless, based on these numbers and information provided by respondents, it is estimated that the total number of *Gladue* Reports produced in 2018/2019 in the whole province is about 400 reports (Barkaskas et al., 2019, p. 52).

**Yukon**

In Yukon, the Council of Yukon First Nations (CYFN) as of August 1st, 2019 has assumed responsibility for the co-ordination and preparation of *Gladue* Reports through their *Gladue* Pilot Program. The Yukon territorial government provided $530,000 to fund the pilot program from April 2017 through March 2021 that would develop an adequate *Gladue* service for Indigenous offenders within the territory (Barkaskas et al., 2019, p. 48). Initially, the CYFN had been partnered with Yukon Legal Services Society (YLSS), to manage and administer the pilot program as CYFN held concerns around the lack of information regarding what the project

entailed and unanswered questions about potential costs associated (Barkaskas et al., 2019, p. 48). While YLSS housed and administered the pilot program originally, there was always a clear expectation that the *Gladue* Report service would eventually be First Nations led. As of 2019, approximately forty-seven *Gladue* Reports had been produced since the beginning of the formalized program (Barkaskas et al., 2019, p. 48).

Prior to the *Gladue* Pilot Program, all *Gladue*-type reports were provided on an "ad hoc basis by report writers who received little to no formal training and who took on the responsibility with no additional funding or support to supplement their existing positions" (Council of Yukon First Nations, 2015, p. 4). This approach was proved to be unsustainable as the demands for reports grew and not all requests 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 (Council of Yukon First Nations, 2015, p. 4). This created concerns around adequate information as these writers did not have access or knowledge of local resources and supports and were potentially lacking in Yukon First Nations history and context (Barkaskas et al., 2019, p. 48). It was evident that there was also a high level of uncertainty around the provision of *Gladue* Reports for Yukon Courts, demonstrating a demand for a proper *Gladue* Report program.

Currently, it is not a common practice for the Court to order *Gladue* Reports in Yukon, therefore when defence counsel requests a *Gladue* Report, it is required that they submit an application to the *Gladue* Management Committee (GMC) (Barkaskas et al., 2019, p. 49). The GMC, originally referred to as "The Yukon Gladue Steering Committee," was created in 2014 to assist the research project which ultimately led to the creation of the *Gladue* Pilot Program in Yukon (Council of Yukon First Nations, 2015, p. 4). The GMC, which now acts as a forum for

all stakeholders to voice their opinions and/or concerns, has been an essential component of the pilot program since its formation. The GMC is comprised of representatives from the Yukon Government's Department of Justice, the Yukon courts, the Yukon Public Prosecution Services Office, the Yukon Legal Services Society, the Council of Yukon First Nations Justice Program, and Kwanlin Dun First Nations Justice Department (Barkaskas et al., 2019, p. 49).

While the CYFN has structured its application form to allow applicants the ability to state which of the three writers they would prefer to write their *Gladue* Report, given the circumstances, no guarantee can be made. In the application, a set of criteria must be met for it to be approved. Indigenous offenders seeking a *Gladue* Report ought to: 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 to allow enough time for the report to be prepared (Barkaskas et al., 2019, p. 49). Due to limited funding, the *Gladue* Report Program of Yukon prioritizes applicants who: face a sentence of three of 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 (Barkaskas et al., 2019, p. 49). Once the application is approved, the *Gladue* Report is contracted to one of three report writers who are hired and trained by the CYFN's *Gladue* Report Writing Program. After conducting interviews with the offender and their relevant members of their family and community, a draft of the report is written and reviewed with the subject for accuracy. The report is then sent to a different contractor for legal review and quality control oversight before it is submitted to Crown, defence counsel and the trial coordinator (Barkaskas et al., 2019, p. 49).

Participants in Barkaskas et al. (2019) revealed that *Gladue* Report writers on the roster are paid $2,500 per a completed report, with available reimbursement for mileage and travel costs (p. 49). If an Indigenous offender has previously received a *Gladue* Report, the existing report is reviewed and updated for a prorated fee. Although working on contract, some roster writers are also employed by First Nation Justice Departments within the Yukon. If feasible, the fee for the report is to be paid by the First Nation that employs the writer and is "absorbed into their regular salary" (Barkaskas et al., 2019, p. 49). To become a CYFN approved *Gladue* Report writer, individuals must take the CYFN *Gladue* Report writing training course, as well as shadow a current writer during the interviewing and writing portion of a *Gladue* Report. The training program educates the writers on vicarious trauma, proper interviewing and writing skills, explanations of the legal history and principles surrounding *Gladue,* and an awareness of current local resources (Barkaskas et al., 2019, p. 50). To prevent the perpetuation of systemic and colonial concerns, the CYFN and GMC are committed to limiting the roster to Yukon First Nations members and to eventually have a writer from each of the 14 First Nations communities (Barkaskas et al., 2019, p. 50).

**What About the Remaining Jurisdictions?**

Two other provinces that have well-established *Gladue* Report delivery programs in Canada are British Columbia and Québec. For instance, BC currently uses a mixed model to prepare and deliver *Gladue* Report services, which are provided either through British Columbia's Legal Services Society or privately contracted *Gladue* Report writers. Pro bono *Gladue* Reports have recently become available through the Access Pro Bono *Gladue* Clinic, Indigenous Community Legal Clinic, and other justice system professionals (Barkaskas et al., 2019, p. 45). Ultimately, the counsel is responsible for billing LSS, who as of 2019 had a roster

of 40 *Gladue* Report writers, and paying the writer as per LSS Expert Disbursements policy (Barkaskas et al., 2019, p. 46). In 2016, a group of *Gladue* Report writers in BC partnered with the British Columbia First Nations Justice Counsel and LSS to establish The Gladue Writers Society of BC (GWSBC). The GWSBC's objective is to advance the systemic implementation of *Gladue* principles across the Canadian criminal justice system (Barkaskas et al., 2019, p. 47).

In Québec, a structured program funded by the provincial Ministry of Justice has existed since 2015. The Ministry may cover the cost of writing a *Gladue* Report by directly paying the fees of the appointed writer, or through funding granted to justice committees (Barkaskas et al., 2019, p. 54). *Gladue* Report writers in Québec receive through their agency, a fee of $50.00 per hour up to a maximum of 20 hours ($1,000.00), plus travel and accommodation expenses (Barkaskas et al., 2019, p. 54). The three main organizations responsible for coordinating the production of the reports, les Services Parajudicaires Autochtones du Québec (SPAQ), the Makivik Corporation (Makivik), and the Department of Justice and Correctional Services (Cree Justice) do not receive additional funding beyond the maximum fee authorized within their agreements with the Ministry of Justice (Barkaskas et al., 2019, p. 54). The reports are ordered by the court at the request of a judge, the prosecution, defence counsel, or a justice committee, and may be requested in any case involving an offence punishable by imprisonment (Barkaskas et al., 2019, p. 53). On average, roughly 123 reports are produced each year in Québec, not including the PSRs with an "Indigenous component" (Barkaskas et al., 2019, p. 54).

Other jurisdictions throughout Canada have developed programs to produce the reports through individual non-profit organizations, however PSRs with a *Gladue* component continue to be the primary way of bringing *Gladue* factors before the courts. In 2019 for example, the New Brunswick Department of Public Safety adopted a new policy on "Pre-Sentence Reports for

Adult Aboriginal Offenders", which is meant to ensure relevant *Gladue* information is outlined in PSRs for Adult Aboriginal Offenders (Barkaskas et al., 2019, p. 58). Although Prince Edward Island has not made *Gladue* Reports mandatory when sentencing an Indigenous offender, in *R v. Legere* (2016, PECA 7), the Court strongly expressed how PSRs do not meet the standards set out in *Gladue* and *Ipeelee*, thus constituting as a reviewable error where the offender has requested *Gladue* factors be considered (at para 21). While the Prince Edward Court of Appeal did not dismiss traditional PSRs entirely, the Court set a high threshold with regards to the *Gladue* information that must be provided to a judge for the sentencing of an Indigenous offender (*R v. Legere*, 2016, PECA 7 at para 14).

The comparison between programs is not meant to determine which one of these models is superior to the others, but rather to highlight the models used by various jurisdictions to better understand the variances seen in the production and delivery of *Gladue* Reports in Canada. Unfortunately, due to the time constraints of this current thesis and the limited availability of information pertaining to *Gladue* services published by provincial/territorial governments, only three jurisdictions were selected to be discussed in-depth. As such, the data on the frequency with which courts request *Gladue* Reports or PSRs with a *Gladue* component in each jurisdiction could not be obtained. Furthermore, comparing the production rate of PSRs and *Gladue* Reports throughout Canada was not feasible, however this warrants further exploration of the extent to which a provision in the *Criminal Code* may influence such figures.

## VIII. Barriers to Administering *Gladue* Reports

Over two decades have passed since the SCC has issued its judgement in *R v. Gladue* (1999 1 SCR 688), and as the statistics demonstrate, s. 718.2(e) of the *Criminal Code* has not had a

distinguishable impact on the overrepresentation of Aboriginal people in the criminal justice system. As jurisprudence and subsequent academic analyses have indicated, this failure can be attributed to some extent a fundamental misunderstanding and misapplication of both s. 718.2(e) and the Court's decision in *Gladue* and *Ipeelee* (*R v. Ipeelee*, 2012 1 SCR 433 at para 63). The reality that *Gladue* Reports vary in accessibility and scope is undeniably evident, which demonstrates that the reports continue to not be used as consistently or comprehensively as they should be. This inconsistency is highlighted in The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, where many Aboriginal women who sought to exercise their right to a *Gladue* Report were either denied or faced challenges (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019, p. 641). While some Indigenous offenders may receive a full *Gladue* Report with assistance in some regions, most can only obtain a traditional PSR with *Gladue* components which are often found to be insufficient in court. Therefore, many sentencing judges fail to fulfill their statutory obligation pursuant to s. 718.2(e) of the *Criminal Code*, and not all offenders receive what they are entitled to under the section and *Gladue* – creating national disparities.

**Not Mandatory**

It is unacceptable that most jurisdictions do not consider *Gladue* Reports as mandatory and to be made available in the sentencing of all Indigenous offenders, despite the SCC declaring it as a right. Entrusting provincial and territorial governments to fund and regulate *Gladue* services has allowed administrations to neglect the development of programs and disregard the necessary resources to produce positive outcomes. This, in-turn, indicates that adherence to *Gladue* principles are also inconsistent, and to some degree, different from region to region. It is well known that adding *Gladue* information to PSRs has proven to be ineffective due to the

fundamental differences in purpose, and if contextualized improperly, may be perceived as risk factors justifying imprisonment. This raises many concerns, particularly in instances such as Québec, whose production of *Gladue* Reports is not currently regulated or supervised unless a complaint is received, in which case, The Ministry of Justice may intervene (Barkaskas et al., 2019, p. 54). Furthermore, the different formats in which *Gladue* information and reports are presented to sentencing judges threatens the consistency and uniformity in the quality and extent of the *Gladue* analysis provided to Indigenous offenders. In the cases where *Gladue* Report writers are without specific training and awareness of the unique background circumstances of Aboriginal offenders, inadequately prepared information can compromise *Gladue* principles and the objective of s. 718.2(e) of the Criminal Code.

**Funding Shortages**

As several scholars have observed, funding shortages and/or cuts exploit already overworked and underfunded *Gladue* Report organizations, which can result in a failure to provide timely *Gladue* Reports and cause sentencing delays. These delays not only contribute to an increase in costs for *Gladue* Report programs and other parties involved (e.g., Crown prosecutions & defence counsel), but more importantly, it can increase the number of court appearances from the time of conviction to sentencing, lengthening the time an accused spends in remand custody. Currently, funded *Gladue* Reports appear to only be available to Indigenous persons who qualify for legal aid and due to a lack of resources and awareness, in districts with established programs the specialized report is not always made available to all Aboriginal offenders who have requested one. This significantly hinders the ability for every judge to consider the background and systemic circumstances that continue to affect Indigenous offenders as a means to determine an appropriate sentence for the accused.

**No National Framework**

The absence of a national framework for the provision of *Gladue* Reports has diminished the impact of s. 718.2(e) in addressing the overrepresentation of Indigenous peoples in the justice system, and prompted the variances in the policy, production and delivery of *Gladue* services across Canada. The differences in funding provided by each provincial/territorial government to produce *Gladue* Reports determines (but is not limited to) who is responsible for organizing and writing the reports; the standard and training writers receive; the total number of reports prepared and submitted to the courts; aftercare and support programs; and certainly, an Indigenous offender's ability to access a *Gladue* Report in each region. The considerably different programs and services offered across the country demonstrates profound unfairness and serious disparity among Indigenous offenders throughout the country. And while there may be advantages in designating the responsibility of *Gladue* Reports to the government of each region, when something is at the Supreme Court level, it becomes a federal matter. That being said, if provincial and territorial governments remain responsible for the administration of *Gladue* Reports, agencies must significantly improve the ways in which they record and publish the costs of producing the invaluable sentencing tool.

Ideally, Court services should be for paying for *Gladue* Reports, which translates into a federal responsibility to allow for more accessibility. Federal support and leadership at the national level will ensure consistent funding and availability. Failure to do so may even lead to a case at the Supreme Court level whose foundational argument establishes that the inconsistency of funding across Canada is a violation of Section 7 of *The Canadian Charter of Rights and Freedoms*. Section 7 of the *Charter* requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice – the basic

principles that underlie our notions of justice and fair process (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982(U.K.), c11 s7). Therefore, as long as the responsibility of administering and delivering *Gladue* services belongs to provincial and territorial jurisdictions, *Gladue* Report programs will remain unstructured and underfunded in most parts of the country.

## IX. Enhancing the Impact of *Gladue* Services

Currently, most Indigenous offenders still cannot access their sentencing rights pursuant to s. 718.2(e) of the *Criminal Code*, and whether an Indigenous offender can obtain a full *Gladue* Report and analysis depends primarily on the *Gladue* Report funding available in their jurisdiction. This disparity in the implementation of *Gladue* Report services is paradoxical seeing as the section, as well as *Gladue* and *Ipeelee* principles aim to address the disadvantages of Indigenous offenders through sentencing.

**Recommendation #1**

First, *Gladue* Reports should be available to all offenders who self-identify as Indigenous (Indigenous ancestry), except in cases where the accused waives their right to have a report produced, however this does not waive the duty to consider *Gladue* factors. Quigley (2016) 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 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" (Barkaskas et al., 2019, p. 95). Considering the inconsistent interpretation of *Gladue* and *Ipeelee* by each provincial/territorial court, Parliament should consider amending the *Criminal Code* to ensure all Indigenous

offenders across Canada equally access and benefit from their *Gladue* rights. More specifically, similar to a PSR, the *Criminal Code* will provide legislative authority and require *Gladue* Reports be offered prior to sentencing of Indigenous offenders convicted of a criminal offence who may be incarcerated. The revision should also specify that the absence of a *Gladue* Report in these particular circumstances, is in fact a ground for appeal.

**Recommendation #2**

Secondly, evidence and research highlighting the large disparity in acquiring *Gladue* Reports points to a pervasive systemic problem of access to justice and denial of equality. While investigating the merits and feasibility was beyond the scope of this current thesis, in addition to amending the *Criminal Code,* the development of a national framework is highly recommended. Responsibility at a national level would require the Federal Government to provide funding and adopt standards to ensure consistent access, production, and quality of *Gladue* Reports throughout Canada. Although it could be beneficial for federal funding to be used to support already developed *Gladue* programs, unless there are national policies and provincial standards in place, this will only magnify the existing disparities considering most jurisdictions still lack a fully structured delivery model for *Gladue* Reports. The ideal implementation of such would be organized and managed by Indigenous organizations currently responsible for the production of the reports, including *Gladue* writers and representatives from the Department of Justice, the courts, and legal aid services. Establishing national policies will formally outline the roles, responsibilities, and expectations for all *Gladue* Report programs, which will lay the groundwork for effective administration in each region. Furthermore, provincial standards will ensure that practices meet the purpose of s. 718.2(e) of the *Criminal Code* and *Gladue* principles, thereby guaranteeing consistency in the quality of reports and services.

Available data indicates that Gladue Reports can achieve the objectives of s. 718.2(e) of the *Criminal Code* and fulfill *Gladue* principles concretely. The British Columbia Legal Services Society's evaluation of its *Gladue* Report pilot project revealed that Indigenous participants with a *Gladue* Report received significantly fewer and shorter incarceration sentences (Hebert, 2017, p. 171). The evaluation involved a comparison of case outcomes for 42 clients with a *Gladue* Report, and 42 non-*Gladue* Indigenous clients, demonstrating that participants with the specialized report received approximately thirty percent fewer, and fifty percent shorter custodial sentences (Herbert, 2017, p. 171). This supports the argument that when sentencing judges have access to *Gladue* Reports, they are thoroughly and appropriately informed on the historical context and life circumstances bringing an Indigenous offender before the Court. With that being said, there remains a need for more data on the impact of *Gladue* Reports on the sentencing process and decisions, as well as the impact on the subjects of *Gladue* Reports and their perspectives. Likewise, a comparison of recidivism rates for Indigenous offenders with and without a *Gladue* Report would be beneficial to further understand the significance of having acquired one. Despite there currently being no conclusive evidence if obtaining a *Gladue* Report effects re-offending, research indicates that they do, however, promote restorative justice by proposing sentencing alternatives that are culturally appropriate and mindful of the unique circumstances and needs of Indigenous offenders.

**Recommendation #3**

Lastly, while *Gladue* Report writers have access to training programs in some jurisdictions, the level of training required of writers is not uniform across Canada, nor are the current training programs standardized, which may be partially attributed to funding and the allocation of resources. It is paramount that there are national training and education standards for *Gladue*

Report writers to provide similar knowledge and skills necessary to write valuable reports. Given the nature of the work, the production of these specialized reports can be mentally demanding, emotionally difficult, and increase exposure to vicarious trauma. As such, *Gladue* Report writers require more support and aftercare, in other words, training for writers should include information on health and self-care, and there must be culturally appropriate counselling or other support services available as requested (Barkaskas et al., 2019, p. 100). To successfully develop and improve the training and resources offered to *Gladue* Report writers additional funding will be necessary, which is where the Federal Government should also usefully contribute. Correspondingly, Indigenous organizations need further financial support to develop culturally appropriate legal resources and alternatives to incarceration that meet the principles and purposes of sentencing. *Gladue* Reports and services offer little value when resources for sentencing alternatives such as healing lodges are not available to support sentencing options for Aboriginal offenders.

It is not surprising that with the current barriers to administering and accessing *Gladue* Reports, the sentencing of Aboriginal offenders in the post-*Gladue* world proceeds very much like it did pre-*Gladue* (Rudin, 2008, p. 703). For instance, the fact that mandatory minimum sentences restrict a judge's judicial discretion and ability to address over-representation, whether an intended consequence or not, only creates more difficulties in reducing levels of Aboriginal over-incarceration and diminishes the significance of s. 718.2(e) of the *Criminal Code.* In many respects, the difficulties implementing *Gladue* Report programs emerges from a profound lack of knowledge and understanding of the decision in *Gladue*, *Ipeelee*, and subsequent jurisprudence, resulting in the misapplication of *Gladue* as a legal right. Therefore, there is a need for Parliament to also adequately acknowledge the fact that *Gladue* is a right that is protected by law

and must be accessible to all Indigenous offenders. Improving the structural conditions surrounding the administration of *Gladue* Report programs is the first step towards creating equal access to justice and greater Indigenous self-determination within the criminal justice system.

## X. Concluding Thoughts

The overrepresentation of Indigenous offenders in Canada is complex, with roots in the ongoing legacy of colonialism and systemic discrimination in the criminal justice system (Department of Justice, 2018, 6.1, para. 2). The conclusion of this study is that the various *Gladue* Report programs and services currently offered across this country reveals a pervasive problem of unequal access to justice among Aboriginal offenders. This is largely attributed to the inadequate funding and resources provided by the Federal Government and lack of national framework.

While the enactment of s. 718.2(e) of the *Criminal Code* did not immediately lead to any changes in the sentencing of Indigenous offenders, the systemic and background factors which figure prominently in the causation of crime are well known by now. "Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack of irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration" (*R v. Gladue*, 1999 1 SCR 688 at para 67). Thus, *Gladue* principles emphasize that to determine an appropriate sentence for an Indigenous offender, judges must have sufficient information regarding the unique circumstances that may have brought them into contact with the criminal justice system. Traditional PSRs with a *Gladue* component which are currently being used in the absence of a *Gladue* Report do not adequately

fulfill the *Gladue* analysis required and thereby continue to disadvantage and deprive Indigenous offenders of their *Gladue* right.

The scarcity of funding for both the capacity and development of *Gladue* Report programs creates various barriers for an effective operationalization of s. 718.2(e) and limits the necessary support for both writers and Indigenous offenders. Although these reports and programs are expensive, they will potentially prove to be cost-effective as *Gladue* Reports emphasize healing through Aboriginal based services, decreasing Indigenous presence in penitentiaries. Additionally, these specialized reports offer a therapeutic value for the subjects as most are not fully aware of the impact of systemic factors on their life and how these events may have influenced their lifestyle and criminal behaviour. Therefore, the benefits of *Gladue* Reports go far beyond sentencing practices as it provides Indigenous offenders an opportunity for greater rehabilitation through self-reflection that is culturally appropriate.

Efforts to better implement *Gladue* principles, increase the production and consistency of *Gladue* Reports, and decrease the over-representation of Aboriginal peoples in the Canadian criminal justice system will require additional resources and awareness at every step of the sentencing process. Nevertheless, real societal change and social justice cannot come solely from the courts – the work of Indigenous organizations, the commitment of funding and programming by the provincial/territorial and Federal Government, along with the continued expansion of *Gladue* initiatives will all play a key role. And while change is difficult, it is also imperative.

## XI. References

Alberta Justice and Solicitor General. (2018). *Annual report 2017-18*. Government of Alberta. https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/551c4547-3897-470b-bbf7-3729eb154382/download/justice-and-solicitor-general-annual-report-2017-2018.pdf

Alberta Justice and Solicitor General. (2019). *Annual report 2018-19*. Government of Alberta. https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/ec0db507-2343-45ef-a39c-7d2fd62fc07c/download/justice-solicitor-general-annual-report-2018-2019-web.pdf

Alberta Justice and Solicitor General. (2020). *Annual report 2019-2020*. Government of Alberta. https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/a1b44b35-12ee-47f5-a4cf-7c70161030b8/download/jsg-annual-report-2019-2020.pdf

Barkaskas, P., Chin, V., Dandurand, Y., & Tooshkenig, D. (2019). Production and delivery of Gladue pre-sentence reports: A review of selected Canadian programs. *International Centre for Criminal Law Reform and Criminal Justice Policy*. https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL.pdf?x64956

Bonta, J. (2011). Research summary: Addressing the needs of offenders. *Public Safety Canada*, Vol 16 No 2 (ISSN 1916-4009). https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/ddrssng-nds/ddrssng-nds-eng.pdf

Council of Yukon First Nation. (2015). *Yukon Gladue: Research and resource identification project*. https://www.cyfn.ca/wp-content/uploads/2013/09/Yukon-Gladue-Report-2015.pdf

*Criminal Code*, RSC 1985, c C-46.

Department of Justice. (2018). *Spotlight on Gladue: Challenges, experiences, and possibilities in*

*Canada's criminal justice system*. https://www.justice.gc.ca/eng/rp-pr/jr/gladue/toc-tdm.html

*Ewert v. Canada*, 2018 2 SCR 165

Hannah-Moffat, K. & Maurutto, P. (2010). Re-contextualizing pre-sentence reports: Risk and race. *Punishment & Society, 12*(3), 262-286. https://doi.org/10.1177/1462474510369442

Hebert, A. (2017). Change in paradigm or change in paradox? Gladue report practices and access to justice. *Queen's Law Journal, 43*(1), 149-174.

Legal Aid Ontario. (2021). *Gladue* report programs in Ontario. https://www.legalaid.on.ca/lawyers-legal-professionals/for-aboriginal-legal-issues/gladue-report-programs-in-ontario/

Levit, H. M. (2018). How to conduct a qualitative meta-analysis: Tailoring methods to enhance methodological integrity. *Psychotherapy Research, 28*(3), 367-378. https://doi.org/10.1080/10503307.2018.1447708

Malakieh, J, (2019). Adult and youth correctional statistics in Canada, 2017/2018. *Statistics Canada*. https://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm

Marsolais, M. (2016). Understanding Gladue reports "A Sacred Story." 28th Annual Criminal Law Conference. *County of Carleton Law Association.* CanLiiDocs 4415

Maurutto, P. & Hannah-Moffat, K. (2016). Aboriginal knowledges in specialized courts: Emerging practices in Gladue courts. *Canadian Journal of Law and Society, 31*(3) 451-471. https://doi.org/10.1017/cls.2016.35

McIvor, L. & Oag, C. (2019). Barriers to justice: Gladue reports underused in Canadas courtrooms. *Capital Current: Carleton University School of Journalism and Communication*. https://capitalcurrent.ca/gladue/2019/04/11/gladue-reports-underused-in-canadas-courtrooms/

National Inquiry into Missing and Murdered Indigenous Women and Girls. (2019). *Reclaiming power and place. The final report of the national inquiry into missing and murdered*

*indigenous women and girls.* The National Inquiry. https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf

Roche, D. (2007). Retribution and restorative justice. *Handbook of Restorative Justice,* 75-90.

*R v. Blanchard,* 2011 YKTC 86

*R v. Corbiere,* 2012 ONSC 2405

*R v. Gladue*, 1999 1 SCR 688

*R v. Ipeelee,* 2012 1 SCR 433

*R v. Knockwood* 2012 ONSC 2238

*R v. Lawson,* 2012 BCCA 508

*R v. Legere,* 2016 PECA 7

*R v. Mattson,* 2014 ABCA 178

*R v. Napesis,* 2014 ABCA 308

*R v. Wells*, 2000 1 SCR 207

Rudin, J. (2008). Aboriginal over-representation and R. v. Gladue: Where we were, where we are and where we might be going. *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, 40*(1).

Rudin, J. (2019). Indigenous people and the criminal justice system: a practitioner's handbook. *Emond*.

Rudin, J. (2012). "Looking backward, looking forward: The Supreme Court of Canada's decision in R. v. Ipeelee." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, 57*(1).

Shephard, S. & Anthony, T. (2018). Popping the cultural bubble of violence risk assessment

tools. *The Journal of Forensic Psychiatry & Psychology*, *29*(2), 211-220. https://doi.org/10.1080/14789949.2017.1354055

Timulak, L. (2008). Meta-analysis of qualitative studies: A tool for reviewing qualitative research findings in psychotherapy. *Psychotherapy Research*, *19*(4-5), 591-600. https://doi.org/10.1080/10503300802477989

Timulak, L. (2014). Qualitative meta-analysis. In U. Flick (Eds), *The SAGE handbook of qualitative data analysis*, 481-495. SAGE.

University of Southern California. (2020). *Research guides*. https://libguides.usc.edu/writingguide/researchdesigns

Zehr, H. (1990). *Changing lenses: A new focus for crime and justice*. Herald Press.