GLADUE HANDBOOK

A RESOURCE FOR JUSTICE SYSTEM PARTICIPANTS IN MANITOBA

University of Manitoba | Faculty of Law

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This Gladue Handbook will be updated periodically, and additional relevant materials will be made available, at http://chrr.info/resources/gladue-projec

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A. Introduction

The idea for this handbook came from faculty and students at the Faculty of Law, University of Manitoba, as well as members of the bench, bar, and Aboriginal communities in Manitoba, following a symposium, "Implementing *Gladue*: Law and Policy 20 Years after the Aboriginal Justice Inquiry" held at the Faculty of Law, University of Manitoba in March 2011. Twenty years after the Aboriginal Justice Inquiry, the over-representation of Aboriginal people in Manitoba prisons and jails has gotten worse, rather than better.[1] While it is the view of the authors that broader systemic changes are needed to address this state of affairs which the Supreme Court has rightly called a "crisis", s 718.2(e) with its admonition to consider "all available sanctions other than imprisonment that are reasonable in the circumstances… with particular attention to the circumstances of Aboriginal offenders" requires that justice system participants do things differently in sentencing Aboriginal people. In a very recent decision of the Supreme Court of Canada in *Ipeelee*, Lebel J. noted that the "cautious optimism [expressed in *Gladue*[2]] has not been borne out. In fact, statistics indicate that the overrepresentation and alienation of Aboriginal peoples in the criminal justice system has only worsened."[3]

The Supreme Court took the opportunity in *Ipeelee*, a case dealing with the application of s. 718.2(e) and *Gladue* principles to sentencing for breach of a condition of a Long Term Supervision Order (LTSO), to address what Lebel J called a "fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court's decision in *Gladue*."[4] As will be further discussed below, the court attempted to resolve those misunderstandings, particularly with respect to the relationship between "*Gladue* factors" and other sentencing principles, the obligations of various justice system participants under *Gladue*, and the application of *Gladue* to "serious offences." The court also strongly endorsed the practice of producing "*Gladue* reports" and affirmed that *Gladue* applies to <u>all</u> sentencing decisions involving Aboriginal people unless there is an explicit waiver. It is difficult to see the *Ipeelee* decision as anything other than a call to action for justice system participants across the country.

[1] In 2007/2008, Aboriginal persons comprised 21% of all admissions to provincial jail in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories: Samuel Perreault, *The Incarceration of Aboriginal people in adult correctional services*, Juristat 29:3 (Ottawa: Statistics Canada, 2009) at 20. The 1990 *Gladue* decision cited a 1995 stat that pegged Aboriginal representation in Manitoba jails at 55%.

[2] *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].

[3] *R v Ipeelee*, 2012 SCC 13 at para 62 [*Ipeelee*].

[4] *Ibid* at para 63. Rothstein J. dissented, seeing little room for the application of s. 718.2(e) and *Gladue* to the LTSO regime which, in his view, prioritizes protection of the public over all other sentencing principles.

For a variety of reasons, *Gladue* has not had the impact one might have hoped for in Manitoba. In a recent decision,[5] Judge Sandhu summarized the reality in this province:

> Unfortunately, the *Gladue* process outcomes in Manitoba are rendered generally weak and ineffective due to a lack of resourcing to put the *Gladue* principles into action in a manner than inspires confidence, both by the court and the public … that will permit the court to confidently send an offender back into the community, confident in the knowledge that community resources would be, if not immediately, shortly and generously made available to the accused, under supervision … Without that confidence, the application of *Gladue* principles is little utilized by the courts in Manitoba and is little respected by the public. The root of the problem of such a lack of confidence in *Gladue* principles and its application is the matter of resources.

The problem of lack of resources is two-fold: (1) there is a dearth of justice system resources dedicated to providing courts with the information they need to apply s. 718.2(e) and *Gladue* in a meaningful way to the Aboriginal people who come before them; and (2) the amount of resources going to community-based Aboriginal justice initiatives, healing programs, and other community supports necessary to achieve success for Aboriginal people in the community is inadequate.

This handbook is largely aimed at the first problem and is intended for lawyers, judges and other justice system participants to facilitate awareness about, and practical tools for the implementation of, s. 718.2(e) of the *Criminal Code* regarding the sentencing of Aboriginal people in Manitoba. There is still, in our view, a great need for a properly resourced *Gladue* reporting and/or *Gladue* court program (even on a pilot basis). In addition to the imperative that s. 718.2(e) and the *Gladue* decision place on justice system participants, such a program could actually save money through limiting the costly use of incarceration.

The pages that follow provide a guide to the decisions of the Supreme Court of Canada in *Gladue* and *Ipeelee* and their application and development in courts across Canada, with a particular focus on the guidance offered to judges and lawyers tasked with implementing s. 718.2(e). At a broader level, it is hoped that this project will, together with other initiatives, encourage more systemic changes and the infusion of resources into needed programs that can truly make a difference, both in the lives of individuals (and their families and communities) coming before courts, but also in reducing the overall level of Aboriginal over-representation.

[5] *R v Mason*, [2011] M.J. No. 347 (QL) at para 32.

B. Aboriginal People in Manitoba and the Crisis of Over-Representation

Recent statistics reveal that Aboriginal people accounted for 27% of admissions to provincial and territorial sentenced custody, 18% of admissions to federal custody and 21% of admissions to remand, even though Indigenous peoples represent only 3% of the Canadian population.[6] The statistics are even more shocking when it comes to admission to provincial jails. In 2007/2008, Aboriginal persons comprised 21% of all admissions to provincial jail in Newfoundland and British Columbia, 35% in Alberta, 69% in Manitoba, 76% in the Yukon, 81% in Saskatchewan, and 86% in the Northwest Territories.[7]

The over-representation is even more pronounced, and growing faster, for Aboriginal women than Aboriginal men. In 2008/2009, Aboriginal women represented 28% of all women remanded and 37% of women admitted to sentenced custody. In comparison, Aboriginal men represented 20% of remanded men and 25% of men admitted to sentenced custody.[8]

To some extent, the statistics on over-representation speak for themselves: 70% (or more) of those in Manitoba jails are Aboriginal people. Clearly, something is very wrong if a group of people is so disproportionately represented. However, in thinking about the ways to address and reduce that over-representation, including through *Gladue*, it is important to consider the reasons for that over-representation. The Royal Commission on Aboriginal Peoples (RCAP) discussed three theories that are most commonly cited as explanations for this crisis, namely culture clash, socio-economic, and colonialism.[9] The RCAP concluded that colonialism and its ongoing impact provided the most convincing explanatory force.

Briefly, the *cultural clash theory* is based on the reality that Aboriginal peoples have different conceptions of justice and accountability than does the mainstream, Euro-Canadian legal system. While this is true, it does not fully explain Aboriginal over-representation. As Jonathan Rudin has noted,

> If the culture clash theory largely explained Aboriginal overrepresentation, then one would expect that the Aboriginal people who were behind bars would be those who were raised in a traditional way, who lived on the reserve, and who spoke their Aboriginal language. While certainly those people are among the Aboriginal people in jail, many Aboriginal people in the system have very little knowledge of Aboriginal traditions—the only worldview they know is the

[6] Donna Calverley, *Adult Correctional Services in* Canada*, 2008/2009,* Juristat 30:3 (Ottawa: Statistics Canada, 2010) at 10. See also Samuel Perreault, *The Incarceration of Aboriginal people in adult correctional services*, Juristat 29:3 (Ottawa: Statistics Canada, 2009) at 20.
[7] *Ibid* at 21.
[8] Calverley, supra note 6 at 11.
[9] Canada, Royal Commission on Aboriginal Peoples, "Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" (1995) at 39-53 (RCAP).

> Western worldview. Under the culture clash theory you would not expect these individuals to be before the courts, but they are there, in ever increasing numbers.[10]

However, many Aboriginal people who are in conflict with the law were raised in foster homes or otherwise away from their families and cultural traditions.

A second theory is the *social dislocation theory*, which focuses on the reality and consequences of deep poverty and socio-economic disadvantage experienced by Aboriginal peoples. Seen this way, the solution lies in addressing poverty and its material consequences, rather than implementing Aboriginal justice programs or otherwise reforming the criminal justice system.[11] Jonathan Rudin has noted that "[t]he problem with the socio-economic theory is that it begs a larger question. … [W]hat must be looked at are the factors that have continued to keep Aboriginal people at the bottom of all socio-economic indicators and to determine how those factors can be overcome."[12]

For these reasons, the RCAP concluded that the best explanation was the impact of colonialism. While the Aboriginal Justice Inquiry discussed the realities of the culture clash and social dislocation experienced by Aboriginal people in Manitoba, they noted the central problem of colonialism and its ongoing impact, stating "Aboriginal peoples have experienced the most entrenched racial discrimination of any group in Canada. Discrimination against Aboriginal people has been a central policy of Canadian governments since Confederation."[13]

Just some of the Canadian government policies and practices of colonialism that were aimed at the destruction of Aboriginal peoples include:

- the relocation of Aboriginal people to often marginal land bases,
- criminalization of Aboriginal spiritual practices,
- severe restrictions on fundamental rights and liberties of Aboriginal people with respect to freedom of speech and assembly, mobility, and voting
- Indian Act provisions regarding enfranchisement which forced Aboriginal people who had ambitions to move outside of the reserve community and to give up their status, and which discriminated against Aboriginal women and their children on the basis of the status of the man the woman married.
- the Residential school system, and

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[10] Jonathan Rudin, *Aboriginal Peoples and the Criminal Justice System*, online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Rudin.pdf> at 23.

[11] *Ibid* at 24.

[12] *Ibid* at 25.

[13] Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba by Murray Sinclair & Alvin Hamilton* (Winnipeg: Aboriginal Justice Inquiry, 1991), Vol 3 Justice System at 96.

- the "Sixties Scoop" of Aboriginal children into child welfare authorities and to adoption.

Understanding over-representation in the context of colonialism and its ongoing impacts assists in developing strategies to reduce the over-representation, including through the sentencing process.

C. Criminal Code s. 718.2(e), *R. v. Gladue* and *R. v. Ipeelee*

One policy change that was introduced by Parliament in response to the over-representation of Aboriginal peoples in Canadian prisons relates to sentencing. In 1996, Parliament added a new section to the *Criminal Code*, which reads in part:

> A court that imposes a sentence shall also take into consideration the following principles: …
>
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.[14]

R. v. Gladue

The first Supreme Court of Canada case to consider s. 718.2(e) involved Jamie Gladue, a young Aboriginal woman who pled guilty to manslaughter in relation to the stabbing death of her common law partner, Reuben Beaver, who had been violent toward Jamie (and had recently been convicted for the assault of her). The Court held this provision was enacted in response to alarming evidence that Aboriginal peoples were incarcerated disproportionately to non-Aboriginal people in Canada. Section 718.2(e) is thus a remedial provision, enacted specifically to oblige the judiciary to do what is within their power to reduce the over-incarceration of Aboriginal people and to seek reasonable alternatives for Aboriginal people who come before them.[15] Justice Cory adds:

> It is often the case that neither aboriginal offenders nor their communities are well served by incarcerating offenders, particularly for less serious or non-violent offences. Where these sanctions are reasonable in the circumstances, they should be implemented. In all instances, it is appropriate to attempt to craft the sentencing process and the sanctions imposed in accordance with the aboriginal perspective.[16]

A judge must take into account the background and systemic factors that bring Aboriginal people into contact with the justice system when determining sentence. Justice Cory describes these factors as follows:

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[14] *Criminal Code,* RSC 1985, c C-46, s 718.2(e).
[15] *Gladue, supra* note 2 at para 64.
[16] *Ibid* at para 74.

> The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.[17]

In *Gladue*, the Supreme Court made it clear that s. 718.2(e) requires a "different methodology" for assessing a fit sentence for an Aboriginal person.[18] Justice Cory said that a judge must consider the role of systemic factors in bringing a particular Aboriginal accused before the court.[19] A judge is obligated to obtain that information with the assistance of counsel, or through probation officers with pre-sentence reports, or through other means. A judge must also obtain information on community resources and treatment options that may provide alternatives to incarceration.[20] In *R. v. Kakekagamick*, the Ontario Court of Appeal noted pointedly that Crown prosecutors and defence counsel alike are under a positive duty to provide information and submissions on *Gladue* factors where appropriate.[21] The presiding judge, even when faced with an inadequate report or inadequate assistance from counsel, is still obliged to try and obtain the information necessary for a meaningful consideration of *Gladue*.[22]

R. v. Ipeelee/R. v. Ladue

More recently, in *Ipeelee*, a majority of the Supreme Court held that it was an error to not give *Gladue* principles significant weight in sentencing for breach of a condition (abstention from alcohol) of a Long Term Supervision Order (LTSO). The three-year sentence for the breach (which had been upheld by the Court of Appeal) was overturned and a one-year sentence was substituted. The companion case of *Ladue*[23] was similar in the sense that it involved an Aboriginal man with a tragic history and a lengthy record, including for violent offences usually committed while intoxicated. Like the judge in *Ipeelee*, the sentencing judge in this case had taken the view that *Gladue* had little application in a sentencing for breach of a LTSO. The Supreme Court majority agreed with the BC Court of Appeal that the three-year sentence was unfit and that the judge had made an error of law in not giving meaningful effect to *Gladue*.

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[17] *Ibid* at para 67.
[18] *R v Wells*, [2000] 1 SCR 207 at para 44.
[19] *Gladue, supra* note 2 at para 69.
[20] *Ibid* at paras 83-84; *R v Bodaly*, 2010 BCCA 9.
[21] *R v Kakekagamick* (2006), 81 OR (3d) 664 at para 53 (Ont CA) [*Kakekagamick*]. With respect to defence counsel's obligations, Legal Aid Ontario has taken steps to develop competence among defence lawyers to represent Aboriginal clients in criminal matters, including through the implementation of "Gladue Panel Standards": http://www.legalaid.on.ca/en/about/fact_aboriginalservices.asp.
[22] *Gladue*, *supra* note 2 at para 46.
[23] *R v Ladue; R v Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433.

Justice Lebel's brief description of Manasie Ipeelee's background and criminal record reveal a tragic childhood and a long history of involvement with the criminal justice system:

> Mr. Manasie Ipeelee is an Inuk man who was born and raised in Iqaluit, Nunavut. His life story is far removed from the experience of most Canadians. His mother was an alcoholic. She froze to death when Manasie Ipeelee was five years old. He was raised by his maternal grandmother and grandfather, both of whom are now deceased. Mr. Ipeelee began consuming alcohol when he was 11 years old and quickly developed a serious alcohol addiction. He dropped out of school shortly thereafter. His involvement with the criminal justice system began in 1985, when he was only 12 years old.
>
> Mr. Ipeelee is presently 39 years old. He has spent a significant proportion of his life in custody or under some form of community supervision. His youth record contains approximately three dozen convictions. The majority of those offences were property-related, including breaking and entering, theft, and taking a vehicle without consent (joyriding). There were also convictions for failure to comply with an undertaking, breach of probation, and being unlawfully at large. Mr. Ipeelee's adult record contains another 24 convictions, many of which are for similar types of offences. He has also committed violent crimes. His record includes two convictions for assault causing bodily harm and one conviction each for aggravated assault, sexual assault, and sexual assault causing bodily harm.[24]

Lebel J. cited with approval the words of Bennett J.A. in the BCCA decision in *Ladue*: "If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed."[25]

Clarifying Principles and Addressing Criticisms/Misconceptions

The court acknowledges that "[s]ection 718.2(*e*) of the *Criminal Code* and this Court's decision in *Gladue* were not universally well-received"[26] and addresses three "interrelated criticisms":

(1) that sentencing is not an appropriate means of addressing overrepresentation;
(2) that the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and
(3) that providing special treatment and lesser sentences to Aboriginal offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s. 718.2(*e*) of the *Criminal Code*.

[24] *Ipeelee, supra* note 3 at paras 2-3.
[25] *R v Ladue*, 2011 BCCA 101 at para 64 [*Ladue*], cited in *Ipeelee*, *ibid* at para 30.
[26] *Ipeelee, supra* note 3 at para 64.

In response, Lebel J. states that "sentencing judges can endeavour to reduce crime rates in Aboriginal communities by imposing sentences that effectively deter criminality and rehabilitate offenders. These are codified objectives of sentencing. To the extent that current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities."[27]

Acknowledging the enormity and multi-faceted nature of the problem of Aboriginal over-representation, Lebel J. states that this reality does not detract from the obligations imposed by s. 718.2(e):

> Certainly sentencing will not be the sole — or even the primary — means of addressing Aboriginal overrepresentation in penal institutions. But that does not detract from a judge's fundamental duty to fashion a sentence that is fit and proper in the circumstances of the offence, the offender, and the victim. Nor does it turn s. 718.2(*e*) into an empty promise....
>
> Despite the magnitude of the problems, there is much the justice system can do to assist in reducing the degree to which Aboriginal people come into conflict with the law. It can reduce the ways in which it discriminates against Aboriginal people and the ways in which it adds to Aboriginal alienation. … Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.[28]

In rejecting the oft-stated criticism that s. 718.2(e) authorizes a "race-based discount," Lebel J. states that attention to the two sets of "*Gladue* factors" furthers sentencing principles and is consistent with the requirement that sentencing judges engage in an individualized assessment of all the relevant factors and circumstances:

> Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence. … First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. … In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means. … The second set of circumstances — the types of sanctions which may be appropriate — bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself. … The *Gladue* principles direct sentencing judges to abandon the presumption that all offenders and all communities share the same values when it comes to sentencing and to recognize that, given these fundamentally different world views, different or alternative sanctions may more effectively achieve the objectives of sentencing in a particular community.[29]

[27] *Ibid* at para 66.
[28] *Ibid* at para 69 (citations omitted).
[29] *Ibid* at paras 72-74 (citations omitted).

Finally, with respect to concerns about parity between Aboriginal and other offenders given that s. 718.2(e) and the decision in *Gladue* require a different methodology for Aboriginal people, Lebel J. states as follows:

> This criticism is premised on the argument that the circumstances of Aboriginal offenders are not, in fact, unique. … This critique ignores the distinct history of Aboriginal peoples in Canada. The overwhelming message emanating from the various reports and commissions on Aboriginal peoples' involvement in the criminal justice system is that current levels of criminality are intimately tied to the legacy of colonialism (see, e.g., RCAP, p. 309*)*. … Furthermore, there is nothing in the *Gladue* decision which would indicate that background and systemic factors should not also be taken into account for other, non-Aboriginal offenders. Quite the opposite. Cory and Iacobucci JJ. specifically state, at para. 69, in *Gladue*, that "background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender.[30]

And further:

> The interaction between s. 718.2(*e*) and 718.2(*b*) — the parity principle — merits specific attention. Section 718.2(*b*) states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances". … Section 718.2(*b*) simply requires that any disparity between sanctions for different offenders be justified. To the extent that *Gladue* will lead to different sanctions for Aboriginal offenders, those sanctions will be justified based on their unique circumstances — circumstances which are rationally related to the sentencing process. Courts must ensure that a formalistic approach to parity in sentencing does not undermine the remedial purpose of s. 718.2(*e*).[31]

Lebel J. also addressed two key errors in the lower court jurisprudence that "significantly curtailed the scope and potential remedial impact of the provision, thwarting what was originally envisioned by *Gladue*,"[32] namely, (1) that the person being sentenced must establish a causal link between the background factors and the commission of the current offence; and (2) that *Gladue* does not apply to "serious" offences.

In rejecting a requirement of proof of a causal connection, Lebel J. stated that this approach "displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by *Gladue*."[33] In similarly rejecting the second proposition that *Gladue* does not apply to "serious" offences, Lebel J. noted that the *Code* does not draw such a distinction and that there is no legal test for doing so. More fundamentally, to limit the application of s. 718.2(e) to "non-serious" cases would

[30] *Ibid* at paras 76- 77.
[31] *Ibid* at paras 78-79.
[32] *Ibid* at para 80.
[33] *Ibid* at para 82.

deprive that section of its remedial power.[34] More about these two points will be said below in the section on "Making *Gladue/Ipeelee* Submissions."

D. Making *Gladue/Ipeelee* Submissions

1. Section 718.2(e) and Gladue/Ipeelee impose obligations on counsel and the court

In addition to the clear direction provided in *Ipeelee*, numerous decisions of appellate courts state that applying *Gladue* to the sentencing of Aboriginal people is a legal obligation on the participants during the court processes.[35] In *R. v. Ladue*, the British Columbia Court of Appeal emphasized that: "If effect is to be given to Parliament's direction in s. 718.2(e), then there must be more than a reference to the provision. It must be given substantive weight, which will often impact the length and type of sentence imposed."[36]

The judicial duty to use *Gladue* in assessing sentence means that the accused does not have the legal burden of proof to establish a causal link between the *Gladue* factors and the crime.[37] Obligations of counsel under *Gladue*, nonetheless, are also mandatory. The Ontario Court of Appeal stated in *Kakekagamick*:

> In order to help the court arrive at a fit and proper sentence, there is a positive duty on counsel to assist the sentencing judge in gathering information as to the aboriginal offender's circumstances. Counsel will assist the sentencing judge by adducing relevant evidence. If an offender does not want such evidence to be adduced, he or she may waive the right to have particular attention paid to his or her circumstances as an aboriginal offender. Such a waiver must be express and on the record, and was not present in this case.
>
> Where counsel does not adduce the evidence, it is still incumbent on the sentencing judge to try to acquire information on the circumstances of the offender as an aboriginal person.[38]

Where relevant *Gladue* evidence has not been placed before the sentencing judge, the Ontario Court of Appeal has also ruled that such evidence may be admissible as fresh evidence on appeal. In *Nahamabin*, the appellate court noted:

> This appellant has had a tragic background that has led to almost continuous terms of imprisonment since a young age. He faces considerable challenges in dealing with substance abuse, anger management and commitment to treatment. That said, it is conceded that the trial judge erred in principle in failing to make further inquiries into

[34] On this point, see also David Milward & Debra Parkes, "Gladue: Beyond Myth and Towards Implementation in Manitoba" (2011) 35 Man LJ 84 (addressing this assumption as a "*Gladue* myth" that is more complex than the reasons in *Ipeelee* seem to acknowledge, while agreeing that it ought not to be used as a bar to the application of s. 718.2(e) in cases involving Aboriginal people).
[35] *Gladue, supra* note 2 at paras 83-84; *Kakekagamick, supra* note 21.
[36] *Ladue*, *supra* note 25 at para 64.
[37] *Ipeelee*, *supra* note 3 at paras 81-83; *R v Collins*, 2011 ONCA 182 at para 8.
[38] *Kakekagamick*, *supra* note 21 at paras 44-45. For a complete review of the duties imposed on judges and counsel see paragraphs 32-55 of this decision.

> the appellant's aboriginal background and failing to take into account s. 718(2)(c) of the *Criminal Code*. In fairness to the trial judge, it does not appear that defence counsel at trial wished to have a *Gladue* report. The fresh evidence before this court in the form of a *Gladue* report and an updated report suggests a planned response to the appellant's treatment needs resulting from the impact of systemic factors and the appellant's personal needs.[39]

There is also a need for greater awareness among defence and Crown counsel of the clear direction from the Supreme Court that s. 718.2(e) be addressed in every case involving an Aboriginal person (unless there is an informed and explicit waiver[40]). The extent to which this matter is regularly ignored in Manitoba courtrooms is a cause for serious concern. This does not mean that there needs to be a full *Gladue* report in every case, but counsel – particularly defence counsel – should, at a minimum:

1. familiarize themselves with the relevant law;
2. explain s. 718.2(e) and *Gladue/Ipeelee* to their client and gather relevant information to make useful submissions on the *Gladue* factors highlighted by the SCC in *Ipeelee*;
3. address s. 718.2(e) in their submissions; and
4. where appropriate, request a *Gladue* report (*e.g.,* where the Crown is seeking jail time).

Crown counsel also have obligations to understand the way that s. 718.2(e) has been interpreted by the Supreme Court and to make submissions that reasonably address those factors and the developing law.

The following cases address the roles of the various participants in a sentencing hearing involving an Aboriginal person:

R v Kakekagamick (2006), 81 OR (3d) 664 (CA).
R v Napesis, 2010 BCCA 499.
R v Robinson, 2009 ONCA 205.
R v Sutherland, 2009 BCCA 534.
R v Jack, 2008 BCCA 437.

2. Section 718.2(e) and Gladue/Ipeelee should be considered in all cases where an Aboriginal person is being sentenced

There is a common misconception that s. 718.2(e) does or should only apply to Aboriginal people who are living on reserve or have ongoing ties to an Aboriginal community. In a number of cases, appellate courts have dispelled this myth and noted

[39] *R v Nahmabin*, 2010 ONCA 737 at para 1.
[40] Given the remedial nature of s. 718.2(e), as discussed at length by the Supreme Court in both *Gladue* and *Ipeelee*, it will rarely be in the accused person's interest to waive the application of s. 718.2(e) and *Gladue/Ipeelee*.

that the imperative in s. 718.2(e) applies to *all* Aboriginal people. Most pointedly, the Supreme Court of Canada in *Ipeelee* made it clear that "application of the Gladue principles is required in *every case involving an Aboriginal offender*… and a failure to do so constitutes an error justifying appellate intervention."[41]

In the following sample cases, various courts have made it clear that *Gladue* applies in cases involving urban Aboriginal people or those who might not be seen as having a connection to their home community.

***R v Bodaly*, 2010 BCCA 9.**
Bodaly was sentenced to 3 months in prison after he pled guilty to one count of possession of marijuana for the purpose of trafficking. The Court of Appeal substituted a conditional sentence, stating: "It is true that Mr. Bodaly has lived apart from his Aboriginal community since he was able to remove himself from the care of his obviously dysfunctional family. That does not mean he is any the less a victim of his upbringing or disentitled to have s. 718.2(e) given due consideration in this case" (para 11).

***R v Brizard*, 2006 CanLII 5444 (ON CA).**
Brizard, a 45 year old Aboriginal man, received a sentence of 8 years imprisonment for manslaughter. Brizard pled guilty as a party to manslaughter in a beating death perpetrated by a 14 year-old boy. Brizard, who was extremely intoxicated at the time of the offence, admitted to helping dispose of the body and cleaning the scene. Brizard appealed the 8-year sentence. The Court of Appeal overturned the decision and substantially reduced the sentence to 15 months imprisonment with 12 months' probation. The Court of Appeal ruled that the trial judge had erred in failing to give adequate weight to s. 718.2(e), stating that "[a]lthough the appellant, like many native offenders, does not reside on a reserve, the principles enunciated in those cases apply" (para 3).

***R. v. Norris*, 2000 BCCA 374.**
Norris, a 27-year-old Aboriginal woman, pled guilty to 4 charges: possession of cocaine for the purpose of trafficking (x2), failure to appear in court pursuant to an undertaking, and breaching a bail condition. She was sentenced to 4 months of imprisonment and 1 year of probation. She was addicted to heroin and cocaine and was selling the drugs in the Main and Hastings area of Vancouver to support her own habit. She also had a lengthy criminal record, and was living with Hepatitis C and HIV. The Crown appealed the decision, asserting that the sentence was inappropriate and unfit, failing to give effect to the principle of deterrence. The Court of Appeal dismissed the Crown's appeal and acknowledged that although the sentence was lenient, it was appropriate in the circumstances of this offender and in light of s. 718.2(e) of the Criminal Code, even though Norris did not reside in her home community.

[41] *Ipeelee*, *supra* note 3 at para 87 (emphasis added).

***R v Pangman*, 2001 MBCA 64.**

Four Aboriginal accused appealed sentences imposed on them after being convicted for conspiracy to traffic in cocaine. They were all charged as a result of "Operation Northern Snow" carried out by the Winnipeg Police Service. They were all found to be members of the Manitoba Warriors criminal organization and had been under surveillance for some time before the charges were laid. The accused appealed on the grounds that the judge did not properly take into account their aboriginal status and the sentences they received harsh and excessive. The Court of Appeal allowed the appeal for one accused, Cook, and not the others as Cook had a lower degree of involvement in the conspiracy, had no prior drug convictions and had proposed a reasonable rehabilitation plan. Cook's sentence was reduced to 4 years 10 months of imprisonment, less 40 months for pre-trial custody. Importantly, the Manitoba Court of Appeal points out that "[t]his methodology must be applied even to aboriginal people living in urban centres and even to those with fragmented connection to the community" (para 41).

3. Gladue reports and submissions: judicial notice and individualized information

In *Ipeelee*, Lebel J. clarified the role of judicial notice in sentencing Aboriginal people (*i.e.*, judicial notice of colonialism and its ongoing impact) and the need for individualized information about the accused person, in the form of a *Gladue* Report or at least significant *Gladue* submissions. He stated:

> To be clear, 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 for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered. In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.[42]

In "*Gladue*: Beyond Myth and Toward Implementation in Manitoba,"[43] we (David Milward and Debra Parkes) discuss the general lack of fulsome *Gladue* reports in Manitoba, where a majority of those accused and sentenced are Aboriginal people. The lack (or inadequacy) of *Gladue* reports to assist judges in sentencing Aboriginal people

[42] *Ipeelee, supra* note 3 at para 60.
[43] *Supra* note 34.

has been a source of frustration for Manitoba judges for some time.[44] We note that even despite these limitations, some judges have given effect to s. 718.2(e) in ordering non-custodial sentences based on *Gladue* information and factors.[45] However, there remain many concerns expressed by judges throughout Manitoba that they simply are not getting the information they need, or even submissions from counsel, to assist them in applying s. 718.2(e) in cases involving Aboriginal people. Given the clear direction in *Ipeelee*, it is time for that standard to change.

The recent decision of McCawley J. in *R v Knott*[46] demonstrates the problems associated with attempts to date to incorporate information relevant to *Gladue* into a pre-sentence report (PSR). This case involved a 25 year-old member of the Wasagamack First Nation who was a party to the aggravated assault of another Aboriginal man. The victim was badly beaten and left with lasting, debilitating injuries. The Crown was seeking a six-year penitentiary term. Knott had no criminal record, despite growing up in extremely difficult circumstances, and was caring for his very ill mother and his siblings in addition to having cared for his grandparents who were residential school survivors and who had recently died. In ordering a suspended sentence, McCawley J. addressed the inadequacies and contradictions in the PSR which cited some generic "*Gladue* factors" without linking those to the circumstances and experiences of the accused (including the fact that his grandparents – who had been his primary caregivers while his mother was unavailable due to addictions – were residential school survivors, a fact that was not mentioned in the report). Even more problematically, the report assessed Knott at a high risk to reoffend, a conclusion which McCawley J. found to have been erroneously reached through the "indiscriminate application of [personal stability factors] which ignore the context in which they arose."[47] In short, the "*Gladue* factors" actually contributed to the accused being assessed as a high risk to reoffend, rather than

[44] See, for example, Chief Justice Scott in *R v Thomas*, 2005 MBCA 61, 195 Man R (2d) 36 and Judge Lismer in *R v Irvine*, [2007] MJ No 102 (QL) at para 22 (Prov Ct). Our review of reported Manitoba cases turned up many more which indicated that the accused was an Aboriginal person but where a standard pre-sentencing report was relied on, including *R v Travers* (2001), 16 MVR (4th) 113, 2001 CarswellMan 227 (WL Can) (Prov Ct); *R v LEM,* [2001] MJ No 62, 49 WCB (2d) 233 (Prov Ct); *R v Armstrong* (2004), 189 Man R (2d) 162, 66 WCB (2d) 726 (Prov Ct); *R v Monias*, 2004 MBCA 55, 184 Man R (2d) 93; *R v Renschler*, [2005] MJ no 542 (QL), 2005 CarswellMan 546 (WL Can) (Prov Ct); *R v Bussidor* (2006), 235 Man R (2d) 177, 2006 CarswellMan 876 (WL Can) (Prov Ct); *R v Hall*, 2007 MBPC 27, 217 Man R (2d) 185; *R v Bird*, 2008 MBCA 41, 225 Man R (2d) 304; *R v Scott*, 2009 MBQB 300, 246 Man R (2d) 297; *R v Audy,* 2010 MBPC 55, [2011] MJ no 13 (QL); *R v Guimond*, 2010 MBQB 1, 249 Man R (2d) 75; and *R v WRB*, 2010 MBQB 102, 253 Man R (2d) 207.

[45] See, for example *R v Mason, supra* note 5 where Judge Sandhu sentenced the accused to a conditional discharge in relation to a break and enter offence; *R v Audy,* 2010 MBPC 55, where Judge Slough meted out a $1,000 fine plus 18 months probation in respect of an impaired driving causing bodily harm offence; and *R v Knott*, 2012 MBQB 105 in which Justice McCawley handed down a suspended sentence for an aggravated assault. In all cases, the judges worked with the *Gladue* information that was provided in the PSR and with the submissions made by counsel.

[46] 2012 MBQB 105.

[47] *Ibid* at para 22.

providing context to better understand his needs and capacity for rehabilitation and success in the community.

We suggest that the time is right to pilot some new initiatives to meet the obligations on justice system participants outlined by the Supreme Court in *Ipeelee* and, in particular, to increase the quality and quantity of *Gladue* reporting in Manitoba. One option would be to implement a pilot "*Gladue/Ipeelee* Court" program (perhaps with dedicated judges, Crown, defence as in Ontario and BC[48] - but at a minimum, *Gladue* report writers and aftercare workers who can assist with implementation or orders). The project could be followed and outcomes examined. If it is successful, it could be rolled out more broadly. The Onashowewin restorative justice program[49] has recently begun to build capacity to write *Gladue* reports. However, they have done so without any dedicated funding, which is laudable but is not a sustainable path for the future. There may also be other community-based agencies that would be interested in building capacity to deliver this much-needed service to the courts.

Recognizing that only some accused would benefit from any pilot initiative, it will be important to also improve the level of *Gladue* reporting being done by Probation Services. We are concerned about the fundamental contradiction between a PSR's "risk assessment" focus and a true *Gladue* inquiry which is aimed at understanding historical and systemic connections to the individual with an eye to fashioning a culturally-appropriate sentence.[50] To the extent that any party is producing reports that purport to address *Gladue* factors, they should be researched and written with the key principles stated in *Ipeelee* in mind. We have attached as Appendix III to this paper a "*Gladue* Report Writer's Checklist" prepared by the BC Legal Services Society for use in that province. Preparation of reports containing the kind of information contemplated in that checklist, presented in a manner that is consistent with *Ipeelee*, would be a significant improvement over the current practice.

4. Section 718.2(e) and Gladue/Ipeelee apply to serious offences

Until the recent *Ipeelee* decision, much was made of the statement by Justice Cory in *Gladue* that "[c]learly there are some serious offences and some offenders for which and for whom separation, denunciation, and deterrence are fundamentally relevant."[51] Kent Roach has noted that appellate courts in a variety of jurisdictions have prioritized the seriousness of the offence, thereby denuding *Gladue* of much of its potential promise. He states it this way:

[48] See Appendix II for a description of the Ontario *Gladue* Courts.
[49] http://www.onashowewin.com/
[50] See discussion in Milward & Parkes, *supra* note 34 at 86-90.
[51] *Gladue*, *supra* note 2 at para 78.

> Many of the Court of Appeal decisions revolve around an attempt to resolve the ambiguity in *Gladue* and *Wells* about the relevant importance of offender and offence characteristics in serious cases involving violence and death. This focus on what to do with serious cases may to some extent be a product of the data set of appeal cases. Both the Crown and the accused are probably more likely to appeal in serious cases. Nevertheless, the focus on the serious case has the effect of deflecting attention away from the primary concerns expressed in Gladue about the overuse of prison. In this way, the transformative potential of Gladue may have been blunted by the focus on the most serious cases, in appellate cases at least.[52]

A dividing line between less serious and more serious offences seemed to get reinforced in *R. v. Wells*,[53] a follow up judgment to *Gladue* by the Supreme Court of Canada. In *Wells*, the Court held that a community based sentence will not be appropriate if an offence requires two or more years of imprisonment. The presence of mitigating factors can reduce an otherwise appropriate term of imprisonment to less than 2 years, and thereby make an Aboriginal person eligible for community based sentences.[54] On the other hand, if a judge decides that an Aboriginal person is a danger to the public, that person will not be eligible for community based sentences.[55] The Court in *Wells* did note, however, that: "[t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application."[56]

In *Ipeelee*, the Supreme Court address this persistent myth of "too serious for *Gladue* to apply" and made it clear that the nature or characterization of the offence should not be used to discount the impact of *Gladue* in cases involving Aboriginal accused. In rejecting the proposition that *Gladue* does not apply to "serious" offences, Lebel J. noted that the *Code* does not draw such a distinction and that there is no legal test for doing so. More fundamentally, to limit the application of s. 718.2(e) to "non-serious" cases would deprive that section of its remedial power.[57]

With respect to long term supervision orders (LTSOs), in particular, Lebel J. held that the approach taken by provincial and appellate courts across Canada, namely that the main consideration in sentencing for breaches of LTSOs is protection of the public, is incorrect:

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[52] Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 Criminal LQ 470 at 503-504.
[53] *R v Wells,* 2000 SCC 10, [2000] 1 SCR 207 [*Wells*].
[54] Of course, recent amendments to the *Criminal Code* have made conditional sentences unavailable in number of cases: *Criminal Code*, *supra* note 14, s 742.1.
[55] *Wells*, *supra* note 53 at paras 27-28, 44-50.
[56] *Ibid* at para 50.
[57] On this point, see also Milward & Parkes, *supra* note 34 (addressing this assumption as a "*Gladue* myth" that is more complex than the reasons in *Ipeelee* seem to acknowledge, while agreeing that it ought not to be used as a bar to the application of s. 718.2(e) in cases involving Aboriginal people).

> The purpose of an LTSO is two-fold: to protect the public *and* to rehabilitate offenders and reintegrate them into the community. In fact, s. 100 of the *CCRA* singles out rehabilitation and reintegration as the purpose of community supervision including LTSOs. As this Court indicated in *L.M.*, rehabilitation is the key feature of the long-term offender regime that distinguishes it from the dangerous offender regime. To suggest, therefore, that rehabilitation has been determined to be impossible to achieve in the long-term offender context is simply wrong. Given this context, it would be contrary to reason to conclude that rehabilitation is not an appropriate sentencing objective and should therefore play "little or no role" (as stated in *W. (H.P.)*), in the sentencing process.[58]

The following cases (mostly from appellate courts) are just a few examples of *Gladue* submissions making a difference where serious/violent offences were involved.

***R v Knott*, 2012 MBQB 105** – aggravated assault = 2 year suspended sentence.
***R v Peters*, 2010 ONCA 30** – aggravated assault = 3 year suspended sentence.
***R v Jacko*, 2010 ONCA 452** – numerous offences related to violent home invasion = conditional sentence for one accused; 2 years less a day for the other.
***R. v. Charlie*, 2008 BCCA 44** – possession of cocaine for the purpose of trafficking = 18 month conditional sentence.
***R v John*, 2004 SKCA 13** – criminal negligence causing death = conditional sentence.
***R v Ouelette*, 2010 ABCA 285** – series of robberies = 5 ½ years (reduced from 9 years).
***R v Batisse*, 2009 ONCA 114** – kidnapping a baby from a hospital = 2 ½ years (reduced from 5 years).
***R v Loring*, 2009 BCCA 166** – break and enter; assault = 9 months + 2 years of probation (reduced from 2 years less a day + 1 year probation).
***R v Sackanay*, 47 OR (3d) 612 (CA)** – aggravated sex assault; aggravated assault = 6 years (reduced from 8 ½).
***R v Norris*, 2000 BCCA 374** – possession of cocaine for the purpose of trafficking (x2); failure to appear; breach bail = 4 months of imprisonment and 1 year of probation.

5. Gladue/Ipeelee principles are relevant to proceedings beyond sentencing

Legal developments subsequent to *Gladue* have made it clear that the principles enunciated in that decision have application at virtually every stage of the criminal process other than trials where the question of guilt or innocence is at issue. Courts in Ontario and British Columbia have taken the lead in applying *Gladue* to various other proceedings, including bail, long-term and dangerous offender proceedings, mental disorder review board hearings, and others.

[58] *Ipeelee*, *supra* note 3 at para 50. Since the courts below relied on this erroneous assumption, they gave limited consideration to Ipeelee's circumstances as an Aboriginal person. This error justified the Court's intervention. A one-year sentence was substituted for the three years originally ordered (at paras 89-90).

Bail

Gladue is regularly considered in bail courts in Ontario and BC, and more recently, Alberta. There is an obvious rationale for *Gladue* principles to apply to bail decisions, particularly where the time spent in remand while awaiting trial may exceed whatever prison term is eventually given under a *Gladue* analysis and so pre-empt any possibility of a restorative remedy.

Justice Brent Knazen, one of the judges who has developed and presided over the "Gladue Court" in Toronto, has noted that bail hearings become the key proceeding in many instances, because a detention order tends to effectively pre-determine the sentence as one of imprisonment.[59] Even if the sentence is a sanction other than imprisonment, the result is that imprisonment forms part of the sentence when credit is given for pre-trial custody.[60] A further problem noted by Knazen is the tendency of many Aboriginal people to plead guilty if they are denied bail. In Ontario, as in Manitoba, there has been a significant rise in the remand population, while there has been a reduction in custodial sentences after a finding of guilt, essentially receiving "time-served" sentences.[61]

There are a number of socio-economic factors that make Aboriginal people likely to be denied bail or unable to meet bail conditions. The Toronto Bail Program, which supervises offenders with no sureties, has adapted their guidelines so that Aboriginal people, "even those with histories of failing to appear in court, can qualify for their supervision".[62] There is now an Aboriginal bail program supervisor who interviews and screens defendants without sureties for eligibility for release. The Aboriginal Bail Program supervisor works with the Aboriginal Courtworker and duty counsel to find an appropriate release order so that the issue of alternative reasonable sanctions to imprisonment are not predetermined due to pre-trial custody. Duty Counsel through Legal Aid Ontario have also developed materials to make Gladue-type submissions for clients in bail proceedings.

Knazan suggests that the institutional bias that is more inclined to refuse bail can be addressed when everyone works towards a form of bail even on second and third attempts.[63] At Gladue Court this is achieved by developing a specific release plan that may require the accused to re-appear within 3 days or one week, with the assistance of the Aboriginal Courtworker. Through constant efforts of all involved, this changed attitude towards bail could address pre-trial detention and alternatives to

[59] Hon. B. Knazan, "The Toronto *Gladue* (Aboriginal Persons) Court: an Update" (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, St. John's Newfoundland and Labrador, April 2005), [unpublished, online: ALST <http://aboriginallegal.ca/docs/kazan2.pdf>] at 5 [Knazan, "An Update"].
[60] *Ibid* at 11.
[61] *Ibid*.
[62] *Ibid* at 4.
[63] *Ibid* at 5.

imprisonment. Knazan states that there are many charges, even involving some violence by Aboriginal offenders with criminal records, for which a sanction other than prison may be appropriate. Applying *Gladue* at bail reduces cases with the equivalent of a prison sentence before sentencing and increases the opportunities to explore non-custodial sanctions.

According to the decision in *R. v. Brant,*[64] a judge considering bail for an Aboriginal person where *Gladue* has been raised must consider:

- whether the detention of the Aboriginal accused will have a disproportionately negative impact on them;
- whether that disproportionate impact can be alleviated by strict bail conditions;
- whether Aboriginal law and customs provide the assurance of attendance in court and the protection of the public that are required for release; and
- whether the sureties offered can, in the context of Aboriginal culture, control the accused's behaviour [at para. 21].

***R v Robinson*, 2009 ONCA 205.**

Robinson applied for review of a detention order made in his second application for judicial interim release. Robinson was charged in 2007 with conspiracy to commit murder, attempted murder, and aggravated assault. Judicial interim release was refused because Robinson failed to convince the judge that his detention was not warranted on the secondary and tertiary grounds. The Court of Appeal dismissed Robinson's application because the changes brought forth in the second application did not materially change the circumstances on the secondary and tertiary grounds. One of Robinson's arguments was that the trial judge erred in failing to apply the Gladue principles to the issue of whether or not he could be released on bail. The Court of Appeal stated plainly, "[i]t is common ground that the principles enunciated in the decision of the Supreme Court of Canada in *R. v. Gladue* have application to the question of bail"(para 13). The Court elaborated further on how *Gladue* can shape analysis of judicial interim release, as follows:

> Application of the Gladue principles would involve consideration of the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts. The exercise would involve consideration of the types of release plans, enforcement or control procedures and sanctions that would, because of his or her particular aboriginal heritage or connections, be appropriate in the circumstances of the offender and would satisfy the primary, secondary and tertiary grounds for release.[65]

The Court went on to hold that Robinson did not tender evidence that would assist the judge in a Gladue analysis and therefore no material change had been made out in the

[64] [2008] OJ No 5375 (QL) (SC).
[65] *Ibid* at para 13.

circumstances. The *Robinson* decision was cited with approval (in *obiter*) in a recent Manitoba decision.[66]

***Jocko v Canada* (AG), 2012 ONSC 4219.**
Jocko, an Aboriginal man accused of human smuggling charges in the US, was successful in his bail application under the *Extradition Act*. In deciding whether or not detention was necessary on the primary ground, the Court applied *Gladue* principles, noting that "the principles laid down in the case of *R. v. Gladue* are properly applicable to judicial interim release hearings since these involve an aboriginal offender's liberty being at stake" (para 11). The court found sufficient community and extended supports to warrant bail.

***R v DDP*, 2012 ABQB 229.**
The Aboriginal accused, charged with break and enter, had a criminal record that the judge characterized as "lengthy and horrendous." He had been denied bail on the primary and secondary ground. However, on review, Lee J. agreed with the defence submission that *Gladue* principles were relevant to bail decisions, holding as follows:

> The failure to consider an Aboriginal person's special circumstances during the often lengthy, protracted and stressful pre-trial period would amount to ignoring the important reality of our criminal justice system, which is that pretrial custody can adversely, directly and inevitably affect the Aboriginal offender long before the time he/she is sentenced. If the rehabilitation of the Aboriginal offender is to be deal with meaningfully, it should begin as soon as possible; and if the recidivism rates for Aboriginal offenders are to be brought down, their special and individual circumstances must be addressed at the pre-trial custody stage (para 9).

The accused was ordered released to begin his treatment and rehabilitation plans, rather than "languish" in pre-trial custody.

See also:

***R v TJJ*, 2011 BCPC 155**: *Gladue* principles were applied in granting bail to an Aboriginal accused who has a severe form of FASD and who has a lengthy record, including many breaches.

***R v Green*, [2009] OJ No 1156 (QL) (Ont SC)**: Decision to apply *Gladue* principles in granting bail was overturned on appeal due to lack of evidence about release plans and their relationship to various grounds.

***R v Silversmith*, [2008] OJ No 4646 (QL) (Ont SC)**: It was held to be an error for the judge not to consider *Gladue* at bail. The accused's traditional and Aboriginal community support should have been weighty and powerful assurances based on the individual's

[66] *R v Mason*, 2011 MBPC 48.

close community ties. The Crown did not take issue with applying *Gladue* principles anytime an Aboriginals person's liberty is at stake.

***R v Bain*, [2004] OJ No 6147 (QL) (Ont SC)**: This was the first known case in which *Gladue* principles were held to apply to bail: "clearly the principles of Gladue are overriding principles in the justice system from the time a person comes into the system to sentence." Bail review granted.

***R v Wesley*, 2002 BCPC 717**: It was held that the Crown met the secondary detention burden but the judge commented: "The defence submits that the court in a bail hearing must also be guided by the principles in Gladue, and I am satisfied that that, indeed, is the case" (para 7).

The BC Legal Services Society "Gladue Primer" [67] lists the following considerations for bail:

> Your Gladue report doesn't have to be as detailed or contain as much personal information for your bail hearing as it does for the sentencing hearing. The judge or justice of the peace will need to know that you're Aboriginal and the details of your life that would be relevant to bail — employment, education, whether you have a surety, etc. For example:
>
> - Where are you from? Do you live on reserve or off reserve?
> - Are you employed? What level of education do you have?
> - Do you have a hard time finding work because you lack education or because there are limited opportunities in your community?
> - Do you struggle with any addictions?
> - Have you been affected by racism?
> - Has your life been impacted by colonization in any other significant ways? For example, did you [or your parents/other family members] attend an Indian residential school?
> - Is there someone who can act as a surety for you? (Remember that your Aboriginal community can act as a surety.)
> - Have you taken part in community traditions, celebrations, or family gatherings as a child or as an adult? For example, have you participated in fishing, longhouse ceremonies, or sweat lodge ceremonies?
> - If you haven't had time to prepare a Gladue report, you or your lawyer can tell the judge or justice of the peace these things out loud.
> - You can also include positive aspects of your Aboriginal culture in your bail plan. For example, your bail plan could include a commitment to attend sweat lodge ceremonies once per week; do volunteer work for an Aboriginal elder, your Aboriginal community, or friendship centre; or to participate in the potlatch or any other activities that keep you connected to your Aboriginal culture (big house ceremonies, longhouse ceremonies, winter dance, sundance, berry picking, fishing, hunting, beading, drumming, etc.).

[67] www.lss.bc.ca/assets/pubs/galudePrimer.pdf

Corrections and Parole

Section 80 of the *Corrections and Conditional Release Act* (*CCRA*) mandates that the Correctional Service of Canada (CSC) shall "provide programs designed particularly to address the needs of aboriginal offenders."[68] Behind this provision is a mandate to provide services such as life skills training or substance abuse treatment, but designed to include the inculcation of Aboriginal cultural values as part of the treatment or training. Another mandate is to facilitate inmate participation in cultural activities, such as training in traditional spiritual practices or sweat lodge ceremonies. These services should be delivered by elders or other members of Aboriginal communities with similar cultural authority.

A primary objective of correctional programming is to prepare individuals for parole. Canadian correctional legislation contains directives to consider the circumstances of Aboriginal offenders and alternatives that can lessen terms of incarceration. Section 102 of the *CCRA* sets out the criteria for granting parole as follows:

> 102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,
>
> (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
>
> (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.[69]

The Parole Board's *Policy Manual* provides an additional gloss to this provision by mandating consideration of certain factors as follows:

> Any systemic or background factors that may have contributed to the offender's involvement in the Criminal Justice System, such as, the effects of substance abuse in the community, racism, family or community breakdown, unemployment, income, and a lack of education and employment opportunities, dislocation from his/her community, community fragmentation, dysfunctional adoption and foster care, and residential school experience.[70]

Sections 84 and 84.1 allow Aboriginal people to apply for parole and release, typically under supervised conditions, into an Aboriginal community with a view towards re-integration with that community. Notice to the Aboriginal community is required, which provides the Aboriginal community an opportunity to propose a plan of supervision and re-integration.

The parole hearing process also allows Aboriginal Elders to be present with a view towards providing background information that will assist the Board in reaching appropriate decisions. The *Policy Manual* describes the role of Elders as follows:

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[68] *Corrections and Conditional Release Act,* SC 1992, c 20.
[69] *Ibid*.
[70] National Parole Board, *Policy Manual*, vol 1, no 13 (Ottawa: National Parole Board, 2008) at 2.1 – 2.

> The role of the Elder/Advisor is to provide Board members with information about the specific cultures and traditions of the Aboriginal population the offender is affiliated with, and/or Aboriginal cultures, experiences, and traditions in general.
>
> The Elder/Advisor may be an active participant in the hearing and may ask about the offender's understanding of Aboriginal traditions and spirituality, progress towards healing and rehabilitation, and readiness of the community to receive the offender if return to the community is part of the release plan. The Elder/ Advisor may speak with the offender in an Aboriginal language to gain a better understanding of the offender, and to assist the Board members with gaining further information helpful to achieving a quality decision. The Elder/Advisor will summarise such an exchange for the Board members and others at the hearing before the decision is made.
>
> The Elder/Advisor may also offer wisdom and guidance to the offender and may advise the Board members during the deliberation stage of the hearing to provide insights and comments with respect to cultural and spiritual concerns.[71]

A similar accommodation is allowing parole hearings to be heard in Aboriginal communities, also known as "releasing circles", that allow Aboriginal communities to have input into the determinations.[72]

It is important to note that despite the professed commitment to *Gladue* principles by the CSC, there are serious problems and gaps in the implementation of these principles on the ground. The situation of Aboriginal people in federal corrections has been described recently in the 2009-2010 Annual Report of the Correctional Investigator:

> In November 2009, my Office released an independent report authored by Michelle Mann entitled, *Good Intentions, Disappointing Results: A Progress Report on Federal Aboriginal Corrections*. The Mann Report documents the fact that outcomes for Aboriginal offenders continue to lag significantly behind those of non-Aboriginal offenders on nearly every indicator of correctional performance. In comparison to the non-Aboriginal inmate population, Aboriginal offenders tend to be:
>
> - Released later in their sentence (lower parole grant rates).
> - Over-represented in segregation populations.
> - More likely to be released at statutory release or at warrant expiry.
> - More likely to be classified as higher risk and in higher need in categories such as employment, community reintegration and family supports.
>
> If a *Gladue* lens was fully and consistently applied to decision making affecting security classification, penitentiary placement, segregation, transfers and conditional release for Aboriginal offenders, then one could reasonably expect some amelioration of their situation in federal corrections. The fact that they are almost universally classified as "high needs" on custody ratings scales, the fact that nearly 50% of the maximum security women population is Aboriginal, the fact that statutory release now represents the most common form or release for Aboriginal offenders and the fact that there is no Aboriginal-specific classification instrument in

[71] *Ibid* at 9.2.1 - 1.
[72] Online: *National Parole Board*, <http://www.npb-cnlc.gc.ca/infocntr/factsh/hearings_e.htm>.

use by CSC all suggests that *Gladue* has not yet made the kind of impact one would hope for in the management of Aboriginal sentences.[73]

Gladue and Other Proceedings

Gladue principles have been held to apply to a variety of other proceedings in which the accused's liberty is at stake, including mental health Review Board hearings, dangerous and long-term offender proceedings, parole ineligibility inquiries, and civil contempt decisions. While the protection of public safety is a key consideration in most of these proceedings, courts have noted that *Gladue* information and submissions will be relevant to the other factors that decision-makers must consider (such as rehabilitation and reintegration of the accused) and to shed light on the potential for culturally appropriate interventions to contribute to public safety.

Review Board Hearing for a person found not criminally responsible on account of mental disorder: *R v Sim*, [2005] OJ No 4432 (QL) (Ont CA).

Long term/Dangerous Offender Application: *R v Ipeelee*, 2012 SCC 13.

Parole Ineligibility: *R v Jensen*, 2005 CanLII 7649 (ON CA) and *R v Courtereille*, 2001 BCCA 254.

Civil Contempt: *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534.

E. Appendices

Appendix I: Map of Manitoba First Nations Communities and Tribal Councils

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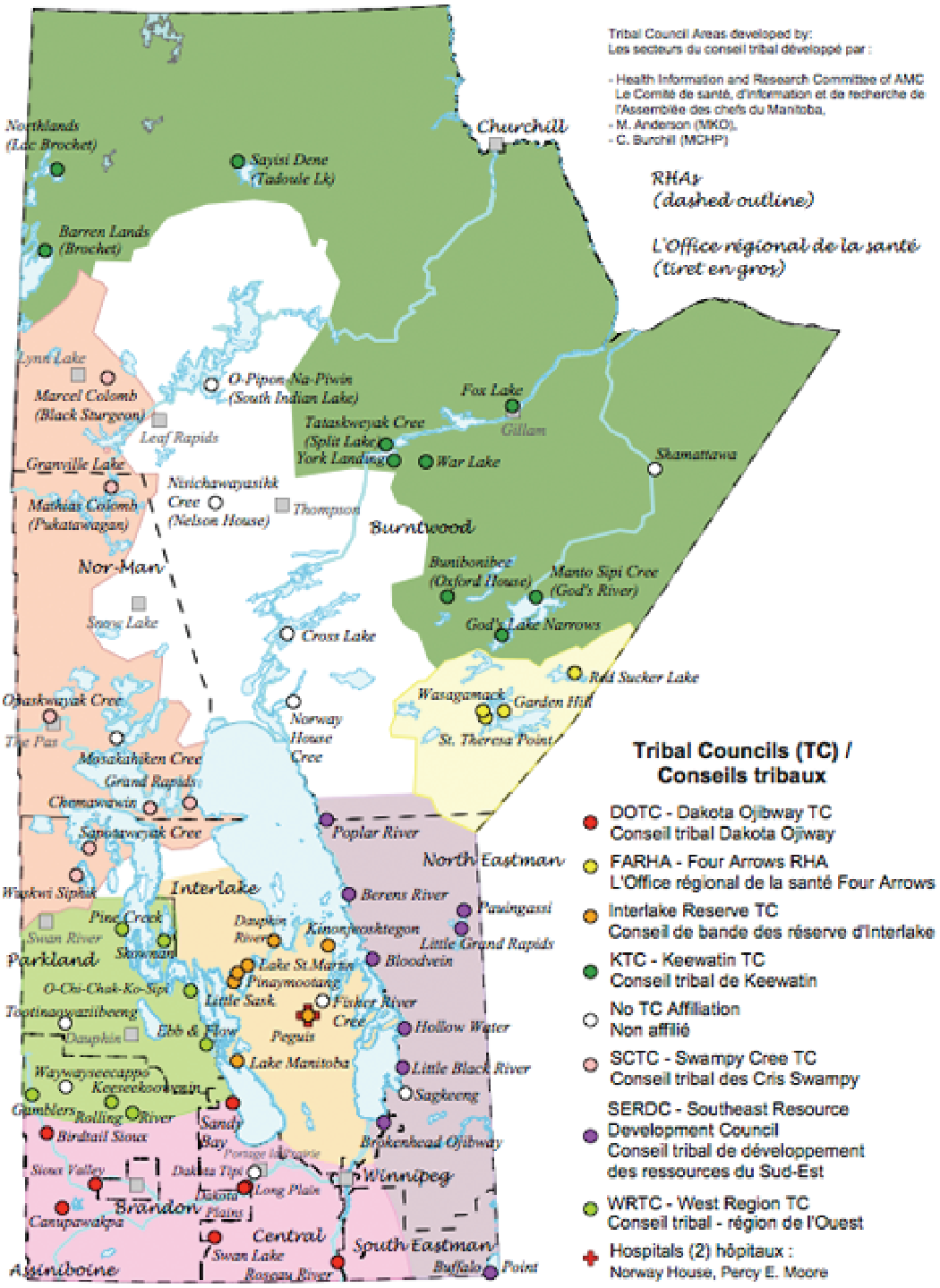
[73] Canada, Office of the Correctional Investigator, "Annual Report of the Correctional Investigator 2009-2010", online: Office of the Correctional Investigator <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20092010-eng.aspx> at 45.

APPENDIX I

First Nations Communities and Tribal Councils in Manitoba /
Les communautés des Premières nations et les conseils tribaux au Manitoba



For more information contact: Health Canada, First Nations and Inuit Health Branch - Health Surveillance and Analysis, 983-4170 January 2006
Pour plus d'information contacter : Santé Canada, Direction générale de la santé des Premières nations et des Inuit - Direction de la santé, surveillance et l'analyse, 983-4170 janvier 2006

Health Canada Santé Canada

Canada

APPENDIX II

Description of the Ontario Aboriginal Peoples Court Program ("Gladue Court")

The Ontario Gladue Court program constitutes one approach to practically apply s 718.2(e)[74] of the *Criminal Code* as directed by the Supreme Court of Canada in *R v Gladue.*[75] It is important to note that "government support … was not a precondition for action"[76] (although it was subsequently forthcoming). Judges, a University Professor, the program director for Aboriginal Legal Services of Toronto and an Aboriginal courtworker developed the *Gladue* Court (Aboriginal Person's Court)[77] program in Toronto. They met over the course of a year to create a court that Aboriginal people and their lawyers could utilize, that would have staff trained to apply the *Gladue* decision, and that would have the required resources to present *Gladue*-specific evidence to judges.

Justice Brent Knazan, one of the judges who developed and presides in the Gladue Court, identified four strategies undertaken there:

> 1. identifying Aboriginal offenders whenever they appear in court and widely publicizing the court so that accused Aboriginal persons know about it;
> 2. training a corps of judges, who have studied the decision in *R v Gladue*, and take a special interest in it;
> 3. developing a liberal interpretation, based in law, of the *Criminal Code* bail provisions so that non-custodial sanctions are not precluded by pre-trial detention; and
> 4. bringing Aboriginal offenders into one court where the resources of the Aboriginal community are readily available.[78]

Gladue Court has been in operation since October 2001 at the Toronto Old City Hall Law Courts. The Court provides bail hearings and variations, remands, trials, and sentencing. Originally there were sittings held two afternoons a week, but this increased to five days a week over the years. Gladue Courts have been established in other courthouses in southern Ontario due to the volume of requests for transfers from neighbouring jurisdictions.

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[74] *Criminal Code,* RSC 1985, c C-46, s 718.2(e).
[75] *R v Gladue* [1999] 1 SCR 688.
[76] Jonathan Rudin, "Aboriginal Overrepresentation Post-Gladue" (2009) 54:4 Crim LQ at 467.
[77] Gladue (Aboriginal Persons) Court, online: Aboriginal Legal Services of Toronto <http://www.aboriginallegal.ca/gladue.php>[ALST].
[78] Hon. Brent Knazan, "Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court" (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, Calgary, 23-25 January 2003), [unpublished, online: ALST <http://aboriginallegal.ca/docs/Knazan.pdf>] at 2.

The Regional Senior Justice of the Ontario Court of Justice supported the Court and allotted court time for Gladue Courts. The Attorney General of Ontario and Attorney General of Canada each co-operated and provided a Crown prosecutor (one for federal and provincial charges) who expressed an interest in the particular circumstances of Aboriginal accused. Legal Aid Ontario provided duty counsel for the Court who expressed an interest in defending Aboriginal people. Legal Aid Ontario also funds Aboriginal Legal Services of Toronto (ALST), which has been essential in the Court operations. The only new position required for the Court, was a Gladue caseworker who is devoted to preparing Gladue reports.

GLADUE COURT ATMOSPHERE

Although it is operated in the courthouse, there are key differences that make Gladue Court a welcoming atmosphere, under the circumstances, for Aboriginal people. A respectful environment, an Aboriginal presence and the Court itself are the three main areas that Knazan highlights.[79] Aboriginal cultural incorporations include; facilities available for smudging in Court, the Court encourages proper pronunciation of peoples' names and First Nation communities to show respect for native languages, an Eagle feather available to any accused who requests it and on occasion an accused will thank the court in their Traditional language. There is also an Aboriginal presence through the courtworkers, defendants, spectators, sometimes duty counsel or the court clerk. A courtworker or caseworker is always in the Court and they are free to walk over to prisoner's box or to talk to an accused out of custody, approach the Crown Attorney or defence counsel and address the Court.[80] This allows for friends or family who are in court to contribute directly. The environmental changes are also achieved by always having the time to stand down a case. This usually occurs when the proposed plan for release is not ready by the time the case is called or an offender chooses to speak at length when asked if they have anything to say pursuant to s.726 of the Criminal Code.[81] All of these factors "create a setting conducive to concepts of sentencing that responds to the needs, experiences and perspectives of Aboriginal people" and where the Aboriginal perspective of justice and "process of achieving justice are to some degree recognized in the non-Aboriginal Canadian legal system".[82] Knazan believes that the best way to achieve this is to make Gladue Court more welcoming to members of the Aboriginal community for ideas to emerge from the community itself.[83]

[79] *Ibid* at 14-16.
[80] *Ibid*.
[81] *Ibid* at 14.
[82] *Ibid.*
[83] *Ibid.*

TRAINING

Training is a key component of the Gladue Court, which occurred not only at the commencement of the Court, but is a continuous commitment for all participants. At the outset, four judges received a one-day training session from ALST staff and an Elder. Gladue caseworkers train the judges about the resources for Aboriginal people in Toronto. Similar but separate training occurs for duty counsel and Crown prosecutors. Public Legal Education Sessions are carried out by the ALST Director who has met with duty counsel, Ontario Parole and Earned Remission Board, Toronto Bail Program and community and planning meetings in other areas in Canada promoting Gladue Court.

IDENTIFICATION OF ABORIGINAL OFFENDERS

The creation of a court for all Aboriginal offenders who choose to use it required that accused know of this option. To create awareness of the Court, there was an announcement sent to every judge and Justice of the Peace in the courthouse, Provincial and Federal prosecutor's office, Criminal Lawyers Association and any community agencies that may have contact with accused persons (such as the Salvation Army and others).[84] The Ontario Criminal Lawyers Association also announced the Court to its members. After these widely publicized initiatives were completed the main people charged with making sure that Aboriginal persons know of Gladue Court are the Legal Aid duty counsel and Aboriginal Courtworker. Now that Gladue Court has been in operation for a decade, it is difficult for an Aboriginal person to proceed with their case without knowing about the Court.[85] With this increased awareness, the Court has increased to full-time operations due to the demand of referrals received from the Defense, Prosecutor and Judges. The program has also expanded to other locations in Ontario. The Gladue Court is available to any person self-identifying as Aboriginal (including Indian, Metis or Inuit) in accordance with s 35(2) of the *Constitution Act.*[86] The issue of Aboriginal persons from other countries has not arisen nor the practical problem of claims that might be based on an Aboriginal relation some generations back, etc.[87] In other words, there has not been a problem of identifying whether a person is Aboriginal for purposes of the Gladue Court. Should such issues arise, ALST is responsible for investigating and addressing the challenges.

GLADUE CASEWORKER

Ministry of Attorney General funded the new position of Gladue Caseworker, to complement the Aboriginal Courtworker already working in the courthouse, another employee of ALST. The role of the Courtworker in relation to Gladue Court is to interview and screen each defendant to see if they qualify for diversion. The non-Gladue Court duties of the Courtworker are; explaining to clients their legal rights and obligations and assisting clients in finding legal counsel and an interpreter, when one is

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[84] Ontario Court of Justice, "Old City Hall Fact Sheet on *Gladue* (Aboriginal Persons) Court" (3 October 3 2001), online: ALST <http://www.aboriginallegal.ca/docs/apc_factsheet.htm>.

[85] Knazan, *supra* note 78 at 7.

[86] *Constitution Act*, *1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[87] Knazan, *supra* note 78 at 6.

required.[88] Initially, the justice personnel were unclear of the difference between the roles of the Caseworker and Courtworker. The Gladue Caseworkers prepare reports for the judge including available resources for sentencing if the defendant is found guilty. In order to prepare the reports, the caseworker interviews the offender and makes contact with community members and resource groups. Caseworkers' training is ongoing and includes education on issues of the law, the Gladue decision, theories of punishment and sentencing as well as the types and operation of programs and services available to Aboriginal offenders.[89] They also observe experienced caseworkers and practice writing reports. The Gladue Caseworker initially sat in court, but this was changed to accommodate a better use of their time. Now, the majority of time is spent on writing and preparing of the reports with court attendance only when there is a scheduled Gladue report. Given the focus of Gladue Caseworkers on report-writing (and therefore not attendance in court), combined with an increase demand for Gladue reports, led to the creation of a new position of Gladue Liaison (to connect the Gladue Courts to the Gladue Caseworkers), which is discussed below.

Caseworkers are heavily supported and mentored by ALST's Program Director, a lawyer and instructor at York University who directly oversees the Gladue Caseworker Program. He directly supervises the Caseworkers including; reviewing every report before it is submitted to the Court, assessing the implications of the Crown's position as to sentence and declining cases, which are clearly inappropriate.[90] Over the years of operation, the number of caseworkers had risen to three, whom hold degrees of law, journalism and social service. The caseworker program is vital in Gladue Court to provide information to the judges and to allow them to fully perform the remedial role of s 718.2(e).

GLADUE REPORTS

After a finding of guilt, a judge, counsel or prosecutor may request a report about the offender's Aboriginal background and factors in the background that may have contributed to the commission of the offence. The purpose is to not replace a pre-sentence report (PSR). PSRs are prepared by probation officers and contain information about the offence and the offender's previous history with the correctional system that may be helpful to the court in determining sentence. It is usually based on information obtained from the offender's record, arresting officers and other sources who may have an association with the offender. PSRs rarely include the offender's perspective regarding their background and situation, at least not at the level required for a meaningful application of Gladue.[91] The function of probation officers is to assess and

[88] ALST *supra* note 77.

[89] Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program Year One October 2004–September 2005" (Mississauga, 2006) online: ALST <http://aboriginallegal.ca/docs/Year_1.pdf> at 3 [Campbell, "Evaluation Year 1"].

[90] *Ibid* at 2.

[91] Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program Year Three October 2006–September 2007" (Mississauga, 2008) online: ALST

manage risk and monitor compliance with the conditions, not to motivate and assist offenders to get into treatment. Gladue reports, on the other hand, are meant to provide a plan that will help the offender to deal with the problems that have led to their involvement with the justice system. The Gladue reports enable community-based options for sentencing with a detailed treatment plan that responds to the needs of the individual, with focus on s.718(2)(e).[92]

Gladue reports provide the court with a comprehensive picture of both the life and circumstances of the Aboriginal person and emphasize the options available in sentencing. The report is compiled by the Caseworker who interviews the offender, family members, and other people who know the offender and makes arrangements with treatment centres for recommendations for sentencing while taking into consideration the Crown's submission. This allows for a proposed treatment plan and sentencing recommendations, which requires an accused to understand and agree, but does not draw conclusions for the Court.[93] In conducting the reports, the Gladue Caseworker knows what questions to ask and the significance of certain answers, through his or her training, education and background. Rapport is also established to elicit information of the offender's background usually by the fact that the Caseworkers are themselves Aboriginal people.[94] As the recommendations are based on the involvement of the Aboriginal community and the offender's motivation, the treatment plan is very specific and culturally appropriate. The Court is reassured that a referral will be made and the accused is never without help in contacting those services through the Gladue Aftercare Worker (discussed below).

In a 3-year evaluative study of the Gladue Court program, it was found that the number of Gladue reports on an annual basis rose from 50, 75 to 100 reports respectively.[95] Caseworkers aim to prepare them within 4-5 weeks of referral.[96] Referrals for Gladue reports have been requested from the Crown, defence counsel, and judges. Requests from judges had the highest reported increase, composing almost one-half of requested recorded cases in year 3 of operations.[97] Out of the cases studied in year 1, 75% of sentences meted out completely or mostly followed the recommendations of the Gladue reports; in year 2, 75% completely or mostly followed recommendations in the report; and in year 3, 80% of reported sentences closely followed or were in line with

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<http://aboriginallegal.ca/docs/Year_3.pdf> at 16 [Campbell, "Evaluation Year 3"].

[92] Knazan, *supra* note 78 at 11.

[93] *Ibid.*at 10.

[94] *Ibid* at 9.

[95] Campbell, "Evaluation Year 1", *supra* note 89 at 14; Campbell Research Associates, "Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program Year Two October 2005–September 2006" (Mississauga, 2006) online: ALST <http://aboriginallegal.ca/docs/Year_2.pdf> at 10 [Campbell, "Evaluation Year 2"]; Campbell, "Evaluation Year 3", *supra* note 91 at 11.

[96] *Ibid* at 11.

[97] *Ibid* at 14.

the recommendations in the Gladue reports.[98] In cases carrying a mandatory minimum sentence, there was little *Gladue* could do; it was not the report itself but the nature of the charge that dictated the sentence.[99]

Interviews recorded in the evaluation state that the Gladue reports tend to deal with the offender in a holistic and healthy way[100] and are better organized and provide much greater detail than PSRs,[101] especially regarding the Aboriginal culture and history of the accused. However, some documented concerns included the length of time to complete a report as well as the timelines of submitting reports (receiving the report the day before court).[102] It was anticipated that with the new positions of Gladue Liaison and Gladue Aftercare Worker, created after that evaluation report, reduced demands on the Caseworkers' time would facilitate a quicker completion of the reports. The Caseworkers also reported an initial problem with residential treatment centres that often would not accept offenders or make arrangements until after passing of sentence; however the judge requires the specific plans prior to sentencing.[103]

GLADUE AFTERCARE WORKER

In the 2006/07 fiscal year, the Gladue Aftercare Worker was created with funding from Miziwe Biik, an Aboriginal Employment and Training agency. In later years, the Ontario Ministry of Attorney General funded this position. The role of the Gladue Aftercare Worker is to assist the offender in carrying out the conditions of the sentence by facilitating the offender's contacts with required services and making the necessary arrangements for obtaining the service.[104] It is appropriate that the Aftercare Worker is an employee of ALST, since part of their role as an agency is to provide funds (if necessary) to assist offenders in obtaining treatment and/or purchase transportation tickets to get to treatment facilities. In 2008, Legal Aid Ontario provided funding for a second aftercare worker.

GLADUE LIAISON

As previously mentioned, the Gladue Liaison started in 2008 and initially was funded by Miziwe Biik. They act as a liaison between the Gladue courts and the ALST Gladue team, attending court, preparing documentation for the reports ordered, and assist the Caseworkers in developing the reports and providing back-up and filling-in for Caseworkers.[105] Currently, there are two Gladue Liaison positions, both holding university degrees.

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[98] Campbell, "Evaluation Year 1", *supra* note 89 at 16; Campbell, "Evaluation Year 2", *supra* note 95 at 18; Campbell, "Evaluation Year 3", *supra* note 91 at 15.
[99] *Ibid* at 16.
[100] Campbell, "Evaluation Year 2", *supra* note 95 at 11.
[101] *Ibid* at 12.
[102] Campbell, "Evaluation Year 3", *supra* note 91 at 19.
[103] Campbell, "Evaluation Year 2", *supra* note 95 at 14.
[104] Campbell, "Evaluation Year 3", *supra* note 91 at 4.
[105] *Ibid*.

OUTSIDE GLADUE COURT

ALST provides an annually updated resource guide of Aboriginal-specific resources and services to all judges sitting in Toronto as well as Crown Attorneys and duty counsel. The Gladue Caseworker and Aboriginal Courtworker are available to go to other courtrooms if a sentencing of an Aboriginal offender takes place outside the Court. The Caseworkers' knowledge allows for the sentencing judge to have an opportunity to be informed of possible alternative sentences for Aboriginal offenders.[106]

BAIL

Having the Gladue Court facilitates the consistent application of *Gladue*, including at various stages of proceedings. Section 718.2(e) deals with sentencing and there is no corresponding reference to the particular circumstances of Aboriginal offenders in Part XVI of the *Criminal Code* dealing with judicial interim release. However, it has now been established in Ontario (and British Columbia) that *Gladue* principles are applicable to bail decisions for a couple of key reasons.[107] The bail hearing becomes the most important proceeding, because a detention order will effectively pre-determine the sentence as one of imprisonment. Even if the sentence is a sanction other than imprisonment, the result is that imprisonment forms part of the sentence when credit is given for pre-trial custody.[108] In addition, a number of socio-economic factors make Aboriginal people more likely to be denied bail or unable to meet bail conditions. And there is a tendency of many Aboriginal people to plead guilty if they are denied bail.[109]

CONCLUSION

The success of the *Gladue* Court in Toronto (and now at other locations in Ontario) can be seen from all the partnerships and a pooling of resources available for a judge to implement *Gladue* in the way that is legislated by Parliament and directed by the Supreme Court of Canada. The commitment and dedication of all involved enable a judge to acquire information about the circumstance of an Aboriginal accused and find an appropriate sentence alternative to imprisonment. In summary, Justice Brent Knazen provides the following insights and features of the *Gladue* Court experience:

1. A court must consider s. 718.2(e) at the bail hearing in order to pay particular attention to the circumstances of the Aboriginal offender at sentencing.
2. Optimal way to incorporate the Aboriginal concept of justice into a Canadian criminal court is to avoid sentencing entirely and divert the case to a community Aboriginal justice system.

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[106] Campbell, "Evaluation Year 1", *supra* note 89 at 2.

[107] Hon. B. Knazan, "The Toronto *Gladue* (Aboriginal Persons) Court: an Update" (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, St. John's Newfoundland and Labrador, April 2005), [unpublished, online: ALST <http://aboriginallegal.ca/docs/kazan2.pdf>] at 5 [Knazan, "An Update"].

[108] *Ibid* at 11.

[109] *Ibid*.

3. Comprehensive reports about an Aboriginal offender's life prepared by other Aboriginal persons separate from the court or government greatly assist judges in crafting sentences in a manner that is meaningful to Aboriginal peoples and lead to a sentencing process of sentencing of Aboriginal offenders as the actual sentences imposed.
4. The right of an offender to address the court in s. 726 of the *Criminal Code* is important to many Aboriginal persons who perceive that judges have not listened to them in the past.
5. Established sentencing principles may not apply to Aboriginal offenders.
6. There should be a flexible approach in determining who is an Aboriginal person.
7. There are limitations to finding and imposing reasonable sanctions other than imprisonment, but the court can minimize those limitations.[110]

[110] Hon. Brent Knazan, "Time for Justice: One Approach to R v Gladue" (2009) 54 Crim LQ 434.

APPENDIX III

Gladue Report Writer's Checklist

[Excerpt from BC Legal Services Society, Gladue Primer ©2011, Permission Requested]

This checklist is for advocates (or lawyers) who are helping their Aboriginal client prepare a Gladue report. …The following checklist provides a comprehensive outline of all the information necessary for a Gladue report. [Editor's note: Some of the material in this checklist is specific to the Gladue programs available in BC and would need to be altered for Manitoba.]

Preparing a Gladue report

Preparing a Gladue report can be a significant time investment, and may take anywhere from eight to 20 hours. You will need to sit down with your client for several interviews to get all the information necessary for a Gladue report.

You will need to set up an initial interview with your client to go through the information necessary for a Gladue report. The initial interview can take up to three hours, and you may need to set up a second interview to complete the process. Once the initial interview is completed, you will need to get in touch with the community contacts your client provides. This can also take a significant amount of time. After talking with these contacts and compiling any letters of support and certificates, set up a final interview with your client to review the information.

You should have your client's Gladue report finalized one week before the court date. This means you should start preparing your client's Gladue report at least four weeks before the court hearing. Once the report is ready, give it to your client's lawyer.

Your client may become upset or traumatized by the information that comes up in the course of preparing a Gladue report. If your client becomes distressed, please stop the interview immediately. It's a good idea to have the contact information for a counsellor available to pass on to your client.

Before you begin

- Does your client self-identify as Aboriginal? Aboriginal includes status or non-status Indians, First Nations, Métis, and Inuit.
- Is your client interested in having his or her bail or sentencing hearings in the First Nations Court in New Westminster? First Nations Court sits once a month and hears criminal and related child protection matters. Your client will need to apply to have his or her matter heard in First Nations Court, and will need to

travel to New Westminster or get special permission to participate via telephone or videoconferencing.

- For more information, contact the First Nations Court expanded duty counsel at 1-877-601-6066 (call no charge from anywhere in BC).
- Does your client agree to have his or her Gladue report used in court? A Gladue report will include detailed information about your client's history and family life, and preparing a Gladue report can bring up painful and traumatic information. Discuss with your client whether he or she is ready to talk about his or her background. If your client is willing to go through the process of preparing a Gladue report, it's a good idea to make sure your client has support available and people he or she can talk to after your interview (family, friends, and counsellors).

Court and case information

- Where is the court located? Who is the presiding judge or justice? (The term judge is used for a Provincial Court case and the term justice is used in a Supreme Court case.)
- Who is the Crown counsel?
- Who is the defence counsel (your client's lawyer)?

Contact information

- What is your client's full name? Does he or she have any aliases (nicknames)?
- Does your client have an Aboriginal name? What is your client's date of birth? Where was your client born ("place of birth")?
- What is your client's home address? Does he or she have a mailing address?
- What is/are your client's phone number(s)? It's a good idea to make sure you have more than one phone number for your client. In addition to his or her home phone, be sure to get any cell phone, work phone, school phone, and emergency (message) numbers where he or she can be reached if you can't reach him or her at the primary phone number.

Offence information

- What files are currently before the court? List the file numbers and the information in the charge.
- What was your client's date of arrest? When is the hearing for the Gladue report (i.e., when is the bail or sentencing hearing)?
- Who are your client's contact people? These might be friends, relatives, support workers, or hereditary or band chiefs. Be sure to get as many contacts as possible from your client, along with their phone numbers and cell phone

numbers. If these people provide you with reference letters in support of your client, you can attach them to the Gladue report.

Documents for review

- Does your client have the particulars (disclosure) from the Crown? If not, you will need to contact your client's lawyer.
- If you're preparing a Gladue report for a sentencing hearing, ask your client if he or she has the pre-sentencing report from the probation officer.
- Does your client have any letters of support or certificates? For example, if his or her community members have written reference letters, or if he or she has a certificate of completion from a course, counselling program, or addictions treatment program, you can attach them to the Gladue report.

Your client's circumstances

- What kind of relationship does your client have with his or her family? Consider describing your client's family relationships in a separate paragraph (or more) for each significant family member.
- Is there a history of child protection issues in your client's family? For example, has your client ever been in foster care? Have members of his or her family been in foster care (his or her siblings or children)?
- Was your client raised by a single parent? Is he or she a single parent?
- What is your client's marital status? What was/is the length of your client's marriage or relationship?
- Does your client have any children? How old are they? Do the children live with your client? Have the children ever lived with your client? If not, why not?
- Who are your client's associates (friends)?
- What are your client's past and present living arrangements? For example, how many siblings and relatives lived in the same house while he or she was growing up? How many siblings and relatives does he or she share a home with now?
- What is your client's education? What is your client's reading ability? Does your client face any challenges that would prevent him or her from learning, such as trauma, learning disabilities, or Fetal Alcohol Spectrum Disorder (FASD)?
- What is your client's past and present employment record?
- Does your client have any special training, skills, or talent?
- Is your client a member of any clubs — social, professional, or religious?
- What are your client's interests, goals, and aspirations — educational, professional, or otherwise?
- What is your client's financial situation? Has your client been impacted by poverty? Does he or she have a history with social assistance, employment insurance, food banks, or shelters?

- Does your client have any mental health issues? What is his or her mental, emotional, and behavioural status?
- Is your client in good health? Does he or she have any health or physical problems?
- Has your client ever struggled with addictions or substance abuse (now or in the past)? Did your client grow up in a home where there was a history of addictions or substance abuse?
- Did your client grow up in a home where there was domestic violence or abuse?
- What is the Court History Assessment for your client? (The Court History Assessment is a listing of your client's past criminal record, which is included in the disclosure package from the Crown counsel.) You should review all of the offences listed with your client. Take note of any patterns. For example, you may notice that every December your client is in trouble. This could reflect a trauma, such as the death of a parent. It's also good to note any long periods of time during which your client wasn't charged with any offences. Discuss with your client the positive things that were happening in his or her life at that time.
- What is your client's attitude with regard to the offence?
- If you're preparing a Gladue report for a sentencing hearing, is your client receptive to any proposed conditions, such as a curfew or working with an elder?

Gladue considerations

- What is your client's Aboriginal affiliation? Is he or she a status or non-status Indian, First Nations, Métis, or Inuit? Does he or she have a band affiliation?
- Where is your client from? Which community or band is he or she from? Does he or she live in an urban or rural area? Does he or she live on reserve or off reserve?
- List the ways in which your client has been negatively impacted by colonization. For example, has your client been affected by racism? Did he or she attend an Indian residential school? This list should be detailed, personal, and specific to your client.
- Has your client been affected by suicides or other deaths of his or her family or friends?
- Does your client have any suicidal tendencies?
- If your client has suicidal tendencies, please stop the interview and refer your client to a trained professional immediately.
- Do you notice a pattern in your client's life that is connected to the anniversary of the death of a loved one (or another trauma)?
- If applicable, note how your client compares to Jamie Gladue.

Your client's Aboriginal community

- For this section, you will need to interview your client, your client's relatives, and a representative from your client's Aboriginal community (such as a band social worker or hereditary chief). These interviews will allow you to confirm the facts of your client's situation.
- What is the general history and overview of your client's Aboriginal community?
- Was there an Indian residential school in or nearby the community?
- Ask your client to describe his or her community. Are there issues of substandard housing, lack of clean water, chronic unemployment, or seasonal employment? Is the community "dry," or are there issues of substance abuse within the community? What is the availability of treatment or rehabilitative services for substance abuse?
- How has colonization impacted the community as a whole? For example, are there issues with community health, unemployment, poor economic conditions, addictions, child welfare, etc.?
- How many people in the community speak the Aboriginal language?
- What are the positive, healing aspects of the community? What resources are available within the community that could help your client? What are the community's strengths? List any community programs, initiatives, successes, and role models.
- Is there anything your client can do to help his or her community? Are there volunteer opportunities?
- Who are the community elders?
- Are there community activities or cultural traditions that your client can participate in or volunteer for? Examples include potlatches, sweat lodges, winter dances, sundances, feasts, berry picking, gathering firewood, hunting, fishing, big house ceremonies, longhouse ceremonies, etc.
- It's also a good idea to ask the community representative about cultural traditions your client can take part in. These activities are important to the recommendations you and your client's lawyer can make regarding your client's release or community sentencing.
- Is there someone in your client's community whom you can contact if your client needs assistance? (For example, the chief and council, elders, family members, friends, etc.)
- Has your client ever been involved with an Aboriginal restorative justice program, or with community elders or teachings? If so, give examples.

Your client's connection to his or her Aboriginal community

- Was your client raised in or does he or she have an awareness of his or her Aboriginal culture/community?
- Is your client connected to his or her Aboriginal community?

- If yes, please explain.
- If no, please explain why not. For example, was your client part of a “scoop” or otherwise placed in foster care? Does he or she have problems with his or her family or community?
- If your client lives in an urban area, has he or she made connections in the city with other Aboriginal people?
- If your client has an Aboriginal spouse or partner, has your client connected with his or her spouse’s or partner’s Aboriginal community?
- Does you client speak his or her Aboriginal language? If not, why not?
- Has your client been affected by dislocation from his or her community, community fragmentation, or loneliness?
- Did your client attend an Indian residential school? Did any of your client’s family members attend an Indian residential school?
- Has your client spoken with an Indian residential school counsellor or therapist?
- Has your client filed a claim with the Indian Residential School Settlement?
- Has the Indian residential school system — including settlement payments — impacted your client’s family or community?
- Has your client participated in Aboriginal community traditions, celebrations, or gatherings as a child or as an adult? Examples include sweat lodges, sundances, winter dances, potlatches, funeral feasts, berry picking, gathering firewood, fishing, hunting, long house ceremonies, family gatherings, etc.

Summary and proposed recommendations

Once you’ve spoken with your client and his or her family, friends, support workers, and Aboriginal community, you should have a clear idea of what’s realistic and appropriate for your client for his or her bail or sentencing plan. Keep in mind that your bail or sentencing plan will need to address your client’s specific situation and should not put at risk any vulnerable members of his or her community, including elders. For example, if your client is charged with assault, his or her sentencing plan should include a condition not to contact the victim. If your client is charged with theft, his or her sentencing plan should include staying away from the business or area where the theft took place.

The more detailed the bail or sentencing plan is, the better chance your client will have of staying in the community. Be as specific as you can. If you’re making recommendations for bail, your plan should ensure that your client attends his or her court dates, that he or she is safe to be in the community, and should prevent your client from re-offending if he or she is released from jail. Standard sentencing recommendations include: keeping the peace, being of good behaviour, reporting regularly to a probation officer, attending personal counselling, attending alcohol or drug counselling, or attending anger management counselling. If appropriate, additional recommendations might include: not possessing firearms or weapons, obeying a curfew

(as long as it doesn't interfere with employment), volunteering, and abstaining from drugs and alcohol.

As this is a Gladue report, it's important to emphasize culturally appropriate interventions, such as Aboriginal residential treatment facilities; Aboriginal restorative justice programs; or volunteering for elders, chief and council, other community members, or a friendship centre. Cultural recommendations (such as attending a sweat lodge once a week, or helping to prepare for a feast) should be specific to your client's Aboriginal community and traditions. Discuss with your client his or her availability to take part in the suggested conditions.

If your client lives in an urban area that's far from his or her Aboriginal community, look into local Aboriginal resources that might be helpful and meaningful to your client.

Once you've made your recommendations, review them with your client to ensure he or she agrees with everything that you've proposed, and that the plan is achievable and realistic. Discuss with your client any potential barriers to following the plan. Once you've written the Gladue report, review the report with your client to make sure it's accurate, and to make sure that your client understands that everything in the report will be shared with the court and that it may be read aloud in court. After reviewing the report with your client, review the report with your client's lawyer.

APPENDIX IV

Selected Secondary Resources on *Gladue/Ipeelee*

1. Debra Parkes, "*Ipeelee* and the Pursuit of Proportionality in a World of Mandatory Minimum Sentences" (2012) 33 For the Defence 22.

2. David Milward & Debra Parkes, "*Gladue*: Beyond Myth and Towards Implementation in Manitoba" (2011) 35 Man LJ 84.

3. Kelly Hannah-Moffat and Paula Maurutto, "Re-Contextualizing Pre-Sentence Reports: Risk and Race" (2010) 12 Punishment and Society 262.

4. Kent Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2009) 54 Criminal Law Quarterly 470.

5. Jonathon Rudin, "Addressing Aboriginal Overrepresentation Post-*Gladue*: A Realistic Assessment of How Social Change Occurs" (2009) 54 Criminal Law Quarterly 447.

6. Brent Knazan, "Time for Justice: One Approach to *R. v. Gladue*" (2009) 54 Criminal Law Quarterly 431.

7. Angela Cameron, "*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism," in John Whyte, ed, *Moving Towards Justice* (Saskatoon: Purich Press, 2007/08).

8. Brent Knazan, "Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court" (Paper delivered at the National Judicial Institute Aboriginal Law Seminar, Calgary, 23-25 January 2003), [unpublished, online: ALST <http://aboriginallegal.ca/docs/Knazan.pdf>].

9. Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 Sask L Rev 1.

10. Mark Carter, "Of Fairness and Faulkner" (2002) 65 Sask L Rev 63.