Applying *R v Gladue*:

The use of Gladue reports and principles

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Executive summary

Indigenous adults and youth continue to receive custodial sentences more frequently than non-Indigenous people in Canada (Statistics Canada 2023a). In 1996, section 718.2(e) was added to the Criminal Code, which introduced the principle of restraint in the use of imprisonment during sentencing with particular attention to the circumstances of Indigenous offenders (Department of Justice Canada 2017a).

The Supreme Court of Canada (SCC), in 1999, first interpreted section 718.2(e) in R v Gladue. Through this case, the SCC clarified that judges need to consider the unique systemic factors which may have played a part in bringing an Indigenous offender before the courts. To support courts in applying what are now considered Gladue sentencing principles in their decision-making, judges require relevant information about the Indigenous offender before the court. This information can be provided through comprehensive Gladue reports, which include information about an Indigenous person’s background and experiences with colonization, intergenerational trauma, racism, and discrimination (Aboriginal Legal Services 2022).

This study was undertaken by the Department of Justice Canada to better understand how Gladue reports are being prepared across the country and how they and Gladue principles are being considered by the courts. The study involved an environmental scan of public websites and a review of 530 cases listed in CanLII between 2000 and 2021.

Highlights

Since the 1999 SCC Gladue decision, a number of court decisions have helped to clarify that Indigenous offenders have the right to have Gladue factors considered in their case, however, they do not have an absolute right to have a Gladue report in all jurisdictions. Courts can use substitutions such as pre-sentence reports (PSRs), oral or written submissions to obtain the required information to make decisions.

Each jurisdiction has its own approach, process, or programs for Gladue reports. In some jurisdictions Indigenous organizations provide the Gladue services, while other jurisdictions have a centralized Gladue report service with a roster of contracted writers. Some of the jurisdictions that do not have a publicly funded Gladue report program, train probation officers to include Gladue factors in PSRs.

Whether a Gladue report is requested by the courts depends on a number of factors including: the availability of resources to prepare Gladue reports; judges deeming them only necessary in exceptional circumstances; perceptions that PSRs, oral or written submissions were sufficient substitutions; concerns over the inconsistency and lack of national standards for Gladue reports and training; or the offender waiving or declining a Gladue report or submission due to either delays in sentencing or reluctance to re-live traumatic events in court.

The review of 530 cases found that there has been a significant increase in the application of Gladue principles in cases involving Indigenous people since 2000. There were 9 cases that referenced Gladue in 2000 compared

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2 Gladue letters require less research and focus on confirming the Indigenous offender’s background information and assisting them on more immediate issues while in custody. However, both documents require considerable time, resources and effort to complete (Aboriginal Legal Services, 2022).
3 CanLII: The Canadian Legal Information Institute offers through the CanLII website public access to court judgements and legislation from all courts in Canada. This includes the Supreme Court of Canada, federal courts, and all of Canada’s provincial and territorial courts. (Available at: https://www.canlii.org/en/info/about.html).
4 In R v Mattson, 2014 ABCA178 and R v Napesis, 2014 ABCA 308, Alberta courts interpreted Ipeelee to mean that Gladue reports should be mandatory submissions in cases involving Indigenous offenders.
5 See for example R v Desjarlais, 2019 SKQB 6
to 154 cases in 2020. There was also an increase in the use of Gladue reports with 40% of the cases reviewed referencing the reports between 2018 and 2021 compared to only one case in 2010. Although most cases reviewed involved sentencing decisions (for mostly violent offences), there was increased use of Gladue reports in other areas, including bail hearings, long-term and dangerous offender applications, as well as Charter challenges.

Cases where Gladue principles were applied, either by taking judicial notice or considering specific Gladue factors, had an impact on the outcome of the case. In 23% of these cases, the sentences were reduced or varied (e.g., conditional sentences, intermittent sentences, and suspended sentences); there was a stay in the execution of the remaining incarceration period; a reduced length of time for parole eligibility or probation; or bail conditions were varied. In some cases, courts also permitted bail to be granted based on an offender’s Gladue factors. However, in cases where a comprehensive Gladue analysis was undertaken by the court, the availability of programming, proximity of custodial facilities to the offender’s community and the likelihood of rehabilitation and rehabilitative resources were all considered as part of the decision-making process and may have impacted the outcome of the case. If these factors were mitigated, the application of Gladue principles could further help reduce custodial sentences for Indigenous offenders.

Future research could examine what impacts the increase in ongoing support for the implementation of Gladue principles and preparation of Gladue reports, as well as a growing body of case law may have on future court decisions. In addition, it would be beneficial to examine whether there are any differences in how section 718.2(e) and the associated Gladue principles are applied based on the official language used in the case or between Indigenous and non-Indigenous courts in Canada.

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6 There was a decrease in the number of cases between 2020 to 2021, which may be due to court restrictions and closures during the COVID-19 pandemic.
7 In addition, 39% of these cases also included a Gladue report.
8 Investments made by the Government of Canada, to support the implementation of Gladue principles and Indigenous-led responses to help reduce the overrepresentation of Indigenous people in the criminal justice system and support for the preparation of Gladue reports and the integration of Gladue report recommendations and principles in criminal justice system practices (Department of Justice Canada 2021).
1. Introduction

Since the 1970's, the overrepresentation of Indigenous people in Canada’s correctional system has been a critical concern and has been documented through numerous government and academic studies.\(^9\) Despite legislative, policy and programmatic efforts to address the issue of overrepresentation,\(^10\) Indigenous adults and youth\(^11\) continue to receive custodial sentences more frequently than non-Indigenous people. In 2021/2022, although Indigenous adults represented 5% of the adult Canadian population, they accounted for 31% of all adult provincial and territorial custodial admissions and 33% of all federal custodial admissions. The situation was worse for Indigenous women, who accounted for 43% of all women admitted to provincial and territorial custody, and 51% of all women admitted to federal custody. In the same year, Indigenous youth accounted for 48% of provincial and territorial custodial admissions, while representing only 8% of the youth population in Canada (Statistics Canada 2023a; Statistics Canada 2023b).

In 1996, section 718.2(e) was added to the Criminal Code, as part of significant reforms to sentencing provisions. It required judges to consider “all available sanctions other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders”\(^12\) when sentencing. This provision introduced the principle of restraint in the use of imprisonment during sentencing with particular attention to the circumstances of Indigenous offenders (Department of Justice Canada 2017a).

The Supreme Court of Canada (SCC), in 1999, first interpreted section 718.2(e) in R v Gladue.\(^13\) Through this case, the SCC aimed to establish “a framework”\(^14\) for judges to use when sentencing Indigenous offenders and clarified that judges need to consider the unique systemic factors which may have played a part in bringing an Indigenous offender before the courts. The decision also clarified that section 718.2(e) “applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term “community” must be defined broadly.”\(^15\) This expanded the definition of communities and networks of support, so that the section is applicable to all Indigenous offenders regardless of where they reside.

To support courts in applying what are now considered Gladue sentencing principles in their decision-making, judges require relevant information about the Indigenous offender before the court. This information can be provided through comprehensive Gladue reports,\(^16\) which include information about an Indigenous person’s background and experiences with colonization, intergenerational trauma, racism, and discrimination (Aboriginal

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11 Youth are defined as those between the ages of 12 and 17 by the Youth Criminal Justice Act.

12 Criminal Code, RSC, 1985, c C-46, s. 718.2(e).


14 Ibid at para 28.

15 Supra note 5.

16 Gladue letters require less research and focus on confirming the Indigenous offender’s background information and assisting them on more immediate issues while in custody. However, both documents require considerable time, resources and effort to complete (Aboriginal Legal Services, 2022).
Legal Services 2022). Gladue reports take considerable time and cost to prepare due to the extensive research required to gather the information and write the report.

In 2017, the Department of Justice Canada undertook a study, “Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System” (Department of Justice Canada 2017a), to examine the implications of the 1999 Gladue decision and subsequent court decisions on the Canadian criminal justice system. This involved a statistical overview of the overrepresentation of Indigenous people in the correctional system, a literature review, a description of justice system initiatives and programs put in place to support the application of section 718.2(e), along with a summary of research on the experiences of the courts and Indigenous offenders with these initiatives.

Since this 2017 study, there have been further investments to support the preparation of Gladue reports and a growing body of case law that has interpreted section 718.2(e). This current study was undertaken by the Department of Justice to better understand how Gladue reports are being prepared across the country and how they and Gladue principles are being considered by the courts.

2. Background

2.1 Initial tests of the Gladue decision

In 2000, there were three tests of the 1999 Gladue decision, two key Charter application decisions (in British Columbia and Ontario) and an appeal to the SCC regarding the application of section 718.2(e) on a sentencing decision.17 These cases gave a preliminary indication of how Gladue reports and Gladue principles would be treated in Canadian courts.

In the Ontario case of R v Skedden, the defense raised a constitutional challenge against section 753 of the Criminal Code, which provides procedures for designating a dangerous offender.18 The defence submitted that the lack of discretion afforded to judges when deciding dangerous offender designations for Indigenous offenders was inconsistent with section 718.2(e) and was in violation of section 15 Charter rights for equal treatment. The Ontario Superior Court dismissed the case deciding that section 753 was neither inconsistent with section 718.2(e), nor a violation of section 15 of the Charter.

In the British Colombia case of R v D.R.,19 the defense submitted an application to the court that under Gladue, the offender had an absolute right to a publicly funded Gladue report. The British Columbia Supreme Court dismissed the application finding no absolute right to a publicly funded Gladue report.

In R v Wells,20 the defence appealed a 20-month custodial sentence claiming that the sentencing judge had not properly considered the offender’s Indigenous background. The Court of Appeal of Alberta and the SCC both upheld the original sentence. The SCC decision confirmed that section 718(e) does not mean that a sentence will automatically be reduced, and that the specific circumstances of the case need to be considered along with all the sentencing principles and objectives when deciding the appropriateness of a conditional sentence.21 The SCC further affirmed that a judge was not required to make evidential inquiries about the Indigenous offender.

18 Criminal Code, RSC, 1985, c C-46, s. 753.
21 Ibid at para 22.
outside of the evidence provided to the court. However, the sentencing judge must take into account that they are dealing with an Indigenous offender and consider this in their decision.²²

### 2.2 Further court interpretation of Section 718.2(e) since Gladue

In 2012, the SCC in *R v Ipeelee*²³ reaffirmed that when sentencing an Indigenous offender, the courts must take judicial notice of “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.”²⁴ These factors, known as Gladue factors, can provide the necessary context for understanding and evaluating case-specific information presented by counsel. Such considerations may not necessarily result in a lower sentence but will help to determine a fit sentence.²⁵ *Ipeelee* clarifies that judicial consideration of the unique circumstances of an Indigenous offender is absolutely required for the proper application of the fundamental sentencing principle of proportionality.²⁶ The decision also clarified that that section 718.2(e) applies to all Indigenous sentencing decisions, including those involving serious offenders.

In the 2019 Saskatchewan Queen’s Bench decision in *R v Desjarlais*,²⁷ a self-represented Indigenous offender requested that the province to pay for a Gladue report as they did not have the funds to pay for one. The court ruled that a pre-sentencing report (PSR)²⁸ would be sufficient to apply Gladue principles to determine a proper sentence and that it did not have the jurisdiction to order the province to pay for a Gladue report.

Most recently, the 2023 British Columbia Court of Appeal decision, *R v Kehoe*,²⁹ to grant an appeal based on the sentencing judge failing to give meaningful effect to section 718.2(e) and Gladue principles further confirmed the SCC’s holistic rather than restrictive interpretation of the section and principles when sentencing Indigenous offenders, regardless of how connected they are to their communities, cultures and supports.

### 2.3 Calls to implement Gladue principles

In 2015, the Truth and Reconciliation Commission (TRC) of Canada released 94 Calls to Action (CTA)³⁰, four of which directly relate to addressing the over-incarceration of Indigenous people. The CTAs include eliminating overrepresentation of Indigenous people in custody (CTA 30 and 38); implementation of community sanctions as alternatives to imprisonment that respond to the underlying causes of offending (CTA 31); and allowing courts to depart from mandatory minimum sentencing and restrictions on the use of conditional sentencing, with reasons (CTA 32) (Truth and Reconciliation Commission 2015).

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²² Ibid.
²⁴ *R v Ipeelee*, 2012 SCC 12 at para 60.
²⁵ The key to a fit sentence is the proper application of the fundamental principle of proportionality in section 718.1 that requires a sentence “to be proportionate to the gravity of the offence and the degree of responsibility of the offender.”
²⁶ Although outside the scope of this review, most recently *R v Kehoe*, 2023 BCCA 2, further confirmed the SCC’s decision in *Ipeelee* regarding Gladue and the application and proper treatment of Gladue principles and jurisprudence in sentencing Indigenous offenders, which engenders a more holistic rather than restrictive interpretation of Gladue factors.
²⁸ A Pre-Sentence Report is prepared by a probation officer to assist the court decide on an appropriate sentence. The report includes information about the offender’s background.
²⁹ *R v Kehoe*, 2023 BCCA 2.
³⁰ The Truth and Reconciliation Commission was established by the Indian Residential Schools Settlement Agreement to document the experiences of Indian Residential School survivors, their families, their communities and Canadians. The final reports are based on the accounts of more than 6,500 witnesses over a six-year period (2007-2015) and include 94 calls to action to advance reconciliation between Indigenous people and Canadians. Available at: [https://nctr.ca/records/reports/#trc-reports](https://nctr.ca/records/reports/#trc-reports).
In 2019, the National Inquiry into Missing and Murdered Indigenous Women and Girls released its Final Report, with 231 Calls for Justice (CFJ)\(^3\) including four specific to section 718.2(e) and Gladue principles: consider Gladue reports a right, resource them appropriately and create national report standards that include strengths-based reporting (CFJ 5.15); provide community-based and Indigenous-specific sentencing options (CFJ 5.16); evaluate the impacts of Gladue principles and section 718.2(e) on “sentencing equity as it relates to violence against Indigenous women, girls and 2SLGBTQQIA people” (CFJ 5.16); and apply Gladue factors in a manner that meets the needs and rehabilitation of Indigenous women and 2SLGBTQQIA people (CFJ 14.5) (Missing and Murdered Indigenous Women and Girls (MMIWG), 2019).

2.4 Efforts made to respond to calls for Gladue reports

In 2020, as part of its efforts to advance reconciliation, the Government of Canada announced an investment of $49.3 million over five years to support the implementation of Gladue principles and Indigenous-led responses to help reduce the overrepresentation of Indigenous people in the criminal justice system. Ongoing funding of $9.7 million was identified to support the preparation of Gladue reports and the integration of Gladue report recommendations and principles in criminal justice system practices (Department of Justice Canada 2021).

Furthermore, in June 2022, Bill C-5 was enacted, amending the Criminal Code and the Controlled Drugs and Substances Act (CDSA). The amendments included the repeal of mandatory minimum penalties (MMPs) for 14 offences under the Criminal Code and all six MMPs within the CDSA. Many MMPs remain including those for murder, high treason, sexual offences including child sexual offences, impaired driving offences and some firearm offences. The amendments address the striking down of the MMPs of certain drug and firearm offences by the SCC because of cases challenging their constitutionality.\(^3\) These amendments were introduced to “promote fairer and more effective responses to criminal conduct”\(^3\) and in part address the impact MMPs have had on some groups of people including the over-incarceration of Indigenous people.

3. Methodology

This study involved an environmental scan and a case law review, which expands on an initial review of case law undertaken by Justice Canada in 2019.\(^3\) The environmental scan was conducted between June and July 2023 to identify individuals, organizations and institutions that provide Gladue report writing services or report writing training. Publicly available Canadian websites were searched, including those for provincial and territorial governments, post-secondary institutions, legal aid programs, Indigenous courtwork programs, and friendship centres. The term “Gladue” was used to search these websites followed by a general search using Google for

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\(^3\) National Inquiry into Missing and Murdered Indigenous Women and Girls examined “the underlying social, economic, cultural, institutional, and historical causes that contribute to the ongoing violence and particular vulnerabilities of Indigenous women and girls in Canada.” Between 2017 and 2019, over 2,300 survivors, family members, communities, experts, Knowledge-Keepers, and officials provided testimony and artistic expressions during the Truth Gathering Process. The final reports include 231 calls for justice and provides a pathway to addressing historical, multigenerational and intergenerational trauma; social and economic marginalization; institutional lack of will to change the status quo; and ignoring the agency and expertise of Indigenous women, girls and 2SLGBTQQIA people. Available at: https://www.mmiwg-ffada.ca/final-report/.


\(^3\) The initial review of Gladue case law (2000, 2010, and 2018) was undertaken by Benjamin Markusoff who was a law student interning with the Justice Canada Research and Statistics Division at the time. The review included three years of cases: 2000 (year after the Gladue decision), 2010 (10 years after the first year), and 2018 (the year before the initial review and six years after the Ipeelee decision).
“Gladue report [province/territory name].” Throughout the scan, when additional sources were identified (e.g., LinkedIn), they were also reviewed.

Organizations that provide Gladue report writing and training programs were identified and key information about the programs was collected. This included contact information, program description, program costs, and whether the organization, company or trainers identify as Indigenous. Additionally, for the training programs, information was collected on whether the trainees can obtain a “certification,” and if so, by whom and with what credentials.

The initial 2019 case law review (cases from 2000, 2010 and 2018) was expanded to include all English language cases in CanLII between January 1, 2019, and September 30, 2021 that used the term “Gladue” (excluding administrative tribunals). Only English language cases were included in the review and only cases from Gladue or Indigenous courts were included if the court is linked to a provincial court and was registered in the CanLII system.

Figure 1: Number of cases reviewed and Gladue reports referenced by jurisdiction between 2000 and 2021.

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35 See Barkaskas et al., 2019, p. 41, para 3, which addresses the considerations of who the Gladue writers are and the importance of their connections to Indigenous communities.

36 Although there are formal Gladue report writing training programs and courses, there is no recognized standard for the certification of Gladue report writers.

37 CanLII: The Canadian Legal Information Institute offers through the CanLII website public access to court judgements and legislation from all courts in Canada. This includes the Supreme Court of Canada, federal courts, and all of Canada’s provincial and territorial courts. (Available at: https://www.canlii.org/en/info/about.html).

38 Due to the timing of analysis of the case law for this study, cases in the courts between October 1 and December 31, 2021, were not included in the review.

39 There were five cases in French in Quebec during the study period: R v Labrosse, 2016 QCCQ 6528; R v Kanatsiak, 2020 BCCS 1523; R v Weizineau, 2012 QCCQ 5670; Isaac v Commissaire à la déontologie policière, 2005 CanLII 26460 (QCCQ); R v Petiquay, 2005 QCCQ 506, however, they were not included in this case law review.

In total, 2,688 cases were listed in the CanLII referenced the term Gladue or the *Gladue* decision during the six years reviewed for this study. Of these, only 802 cases involved an Indigenous offender and only 530 cases of the 802 cases included a decision where the court explicitly applied or considered *Gladue* principles and section 718.2(e). These 530 cases formed the sample for this study, with most cases (77%) being heard between 2019 and 2021.

Each province and territory is represented in the sample of cases reviewed. Over half (55%) of the 530 cases that considered Gladue principles were heard in British Columbia, Saskatchewan, and Ontario (see Figure 1). Of the 530 cases, 38% included a Gladue report, with British Columbia, Ontario, Alberta, and Quebec the largest contributors. The lower use of Gladue reports in Nunavut may be a result of not having a publicly funded Gladue report writing program as well as the court’s perception\(^{41}\) that they are unnecessary since the courts are already knowledgeable about the historical and systemic factors impacting Indigenous peoples and that they consider them in their decision-making on a regular basis.\(^{42}\)

4. Findings

4.1 Gladue reports

One of the main ways that the principles laid out in the *Gladue* decision are applied is through Gladue reports or letters. The first documented Gladue report was prepared by Aboriginal Legal Services (ALS) in Toronto, Ontario, in 2001 (Rudin 2019). These reports, when properly prepared, identify relevant systemic and background factors in the individual’s life that can be considered by courts when sentencing an Indigenous offender (Rudin 2008). On average, it can take six to eight weeks to complete a Gladue report, whereas shorter Gladue letters generally take four to five weeks to prepare (Aboriginal Legal Services 2022). The length of time taken to complete these documents are because Gladue report writers must carry out extensive historical research and in-depth interviews with the Indigenous offender, their family and community members (Aboriginal Legal Services 2022).

4.1.1 Gladue report writing programs, organizations, and training by jurisdiction

Each jurisdiction has its own approach, process, or programs for Gladue reports. The following provides a summary by jurisdiction of programs currently available in the provinces and territories that were identified during the environmental scan for this study.\(^{43}\)

**Alberta**

The Ministry of Justice administers a Gladue report writing program that uses contracted Gladue writers. Gladue report writers are located in communities in various court districts within Alberta. A request by either counsel (Crown or defence) or the court must be made during the sentencing process once a finding of guilt has been determined or a guilty plea entered. Defence counsel is required to complete a digital Gladue report request by filling out considerable personal, environmental, and family information. Defence counsel must also complete a digital form that includes biographical details about the offender. Gladue reports are not limited to Indigenous offenders, and Gladue reports can be written for both Indigenous and non-Indigenous offenders.

\(^{41}\) R v G.H., 2020 NUCJ 21; R v Cooper-Flaherty, 2020 NUCJ 43; R v Arnaquq, 2020 NUCJ 14; R v Iqalukjuaq, 2020 NUCJ 15; R v Apak, 2018 NUCJ 1; R v Kippomee, 2018 NUCJ 8; R v Itturiligaq, 2018 NUCJ 31.

\(^{42}\) However, as noted by one defence counsel “time in the territory and exposure to those who use its courts does not translate into deep historical or sociological understanding of the people or the place ... that while Nunavut judges are willing to consider and are capable of applying the context of an Inuit offender’s background, that is not a substitute for the information itself.” See: [https://www.theglobeandmail.com/canada/article-top-nunavut-judge-denies-request-for-territorys-first-written-gladue-2/](https://www.theglobeandmail.com/canada/article-top-nunavut-judge-denies-request-for-territorys-first-written-gladue-2/).

\(^{43}\) This summary is based on publicly available online information, which may not provide an exhaustive list. For a more comprehensive review of Gladue programs across Canada see the study by Barkaskas, P., Chin, V., Dandurand, Y & Tooshkenig, D. 2019. “Production and Delivery of Gladue Pre-Sentence Reports: a review of selected Canadian Programs.” Law Foundation of British Columbia. Available at: [https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL-L.pdf?x71051](https://icclr.org/wp-content/uploads/2020/02/Production-and-Delivery-of-Gladue-Reports-FINAL-L.pdf?x71051).
form after the Court has ordered a Gladue report be prepared for sentencing purposes. Orientation for Gladue writers is provided ‘in house’ by the program. All new writers and their resources participate in a mandatory three-hour orientation. This is followed by direct mentoring to ensure the quality of reports being produced is meeting identified standards and expectations.

**British Columbia**

As of April 1, 2021, the Gladue report program in British Columbia is administered and managed by the British Columbia First Nations Justice Council (BCFNJC), funded by the British Columbia provincial government and the Government of Canada. The program’s transition from Legal Aid British Columbia to BCFNJC is part of the British Columbia First Nations Justice Strategy. A hybrid model is used that includes both full time on-site staff and a roster of independent contractors, to meet the demands. Defence and Crown counsel can apply to the BCFNJC Gladue Service’s Department for Gladue letters for resolution discussions, bail hearings, bail review, sentences less than 90 days; and Gladue reports for sentencing, dangerous or long-term offender hearings, and not criminally responsible hearings. The BCFNJ’s Gladue Services Department has developed training for on-site staff Gladue report writers and Gladue support workers. Gladue report writing training for roster writers is not provided, however mentorship is provided on a case-by-case basis. Since 2017, there are two independent Gladue report writing training programs in British Columbia. The Indigenous Perspectives Society, in collaboration with Royal Roads University, offers “Gladue Writing Training” facilitated by Carleton University professor, Dr. Jane Dickson. This is a 10-week online course and trainees receive certification as Gladue report writers. The Vancouver Community College also offers a two to three year “Gladue Report Writing Certificate” program, and a one-year program called the “Gladue Report Short Certificate.” Both certificate programs deliver courses through a combination of online and face-to-face instruction. However, any on-site or roster Gladue report writers are required to go through the training provided by the BCFNJ’s Gladue Services Department.

**Manitoba**

In the absence of a publicly funded Gladue program in Manitoba, probation officers prepare PSRs that include Gladue factors when ordered by the courts. Manitoba Justice provides a four-day Gladue PSR writing course for probation officers.

**New Brunswick**

Although New Brunswick does not have a publicly funded Gladue program, in 2019 the provincial government introduced a policy, “Pre-Sentence Reports for Adult Aboriginal Offenders”, to provide guidance to probation officers on including Gladue information in PSRs (Barkaskas et al., 2019). Probation officers received training on the new policy when it was introduced (Barkaskas et al., 2019). Justice Canada has also provided funding directly to Indigenous organizations to develop a framework for a Gladue report program. In addition, at the time of writing this report, Justice Canada was collaborating with the Government of New Brunswick to support a sustained, community led Gladue report writing program.

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45 See: https://bcfnjc.com/corrections-and-the-justice-strategy/

46 While affiliated with British Columbia-based IPS and Royal Roads University, this training is open to people across Canada since it is offered in an entirely virtual format.

47 It is acknowledged that there is a difference between Gladue reports and pre-sentence reports; however, the Legislative Assembly of Manitoba uses the term “Gladue pre-sentence reports”; see pp. 3281-3282: https://www.gov.mb.ca/legislature/hansard/41st_2nd/hansardpdf/75.pdf#page=43%0A(p.%203282).
Newfoundland and Labrador
In 2019, the Government of Newfoundland and Labrador’s Department of Justice and Public Safety (JPS) held Justice Summits to discuss improving the criminal justice system within the province.48 Participants in the summit identified a lack of Gladue report writers and a need for Gladue report services in Newfoundland and Labrador. As of August 2023, the Newfoundland Aboriginal Women’s Network confirmed that they are aware of 23 trained writers in Newfoundland and Labrador. In addition, Miawpukek Mi’kamawey Mawi’omi First Nation has also supported training for five Gladue writers. In 2021, JPS coordinated training on Gladue principles with the Indigenous Perspective Society and Royal Roads University in Victoria, British Columbia, for Adult Probation Officers. This training was intended to enhance the provision of PSRs with Gladue Principles. An Adult Probation Officer will prepare the report when the Court has ordered a PSR with Gladue Principles, the offender identifies as Indigenous, and the offender has consented to the provision of information. Newfoundland and Labrador does not offer a publicly funded Gladue report-writing program.

Northwest Territories
In the Northwest Territories, probation officers include Gladue factors in PSRs;49 however, the Aboriginal Legal Services in Toronto worked with the Government of the Northwest Territories to develop a dedicated Gladue report program.50 The territorial government is engaging with stakeholders regarding the recommendations in the report.

Nova Scotia
The Mi’kmaw Legal Support Network (MLSN) oversees the production of Gladue reports in Nova Scotia. The cost of preparing Gladue reports is covered through the court services budget (Barkaskas et al. 2019). The MLSN hires contractors to write the Gladue reports (Barkaskas et al. 2019). The Fair Treatment of Indigenous Peoples in Criminal Prosecutions in Nova Scotia policy specifies that Indigenous offenders are entitled to have a Gladue report prepared prior to sentencing by request of the Crown.51

Nunavut
In 2020, a Nunavut Court judge denied a request for a publicly funded Gladue report for an Inuk offender52, citing that no publicly funded program exists in Nunavut and that information about Inuit offenders and their community usually comes through defence submissions, PSRs, the offenders and Indigenous court workers. The judge also noted that a Gladue report writer from the southern provinces may not be able to translate their experiences serving First Nations and Métis communities to Inuit communities and this disconnect may further delay the justice process for Inuit offenders.53

Ontario
In Ontario, there are Gladue report writers on reserve and twelve Indigenous organizations that provide Gladue report writing services with approximately 40 Gladue report writers, funded through transfer payment agreements by the Ministry of the Attorney General of Ontario, Legal Aid Ontario and the Department of Justice Canada. All Gladue report writing service providers in Ontario are either on reserve or based in Indigenous organizations, such as Aboriginal Legal Services, Tungasuvvingat Inuit, Nishnawbe Aski Legal Services Corporation, Grand Council Treaty #3, Ontario Native Women’s Association and the Thunder Bay Indigenous

49 See: https://www.aptnnews.ca/national-news/n-w-t-examining-whether-to-implement-gladue-reports-into-justice-system/.
Friendship Centre, Gladue reports and Gladue letters can be requested by the Crown, defence lawyer, Court or by an Indigenous offender, where the individual either has pled guilty or has been found guilty of an offence, and the Crown is seeking a custodial sentenced of more than 90 or 120 days (depending on the jurisdiction). Regardless of who requests the report the Indigenous offender must agree to having a report prepared. Some service providers in Ontario will prepare a Gladue letter where the Crown is seeking a sentence of less than 90 days (Aboriginal Legal Services 2022; Legal Aid Ontario 2022) or for a bail hearing The scan also identified a Gladue report writing training program through Carleton University. Their Department of Law and Legal Studies offers a law course in “Gladue Writer Training,” a five-day training course offered by Dr. Jane Dickson. Students learn about how to prepare Gladue reports and are tasked with creating a mock Gladue report. The Ministry of the Attorney General also funds Gladue Aftercare Workers in most locations where there is a Gladue report writer.

Prince Edward Island
The Mi’kmq Confederacy of Prince Edward Island (MCPEI) Indigenous Justice Program coordinates the production of Gladue reports for the court. MCPEI maintains a roster of trained writers to produce Gladue reports when requested and ordered by the courts (Barkaskas et al. 2019).

Quebec
Since 2015, Quebec has offered a structured program for Gladue reports. Gladue reports are ordered by the court at the request of a judge, counsel (Crown or defence) or a justice committee (Barkaskas et al. 2019). Gladue reports can be requested for cases where an offence is punishable by a custodial sentence. Once requested, the court’s registrar submits a form to the Centre Administrative Judiciaire (CAJ) of the Ministry of Justice. The CAJ sends the request to organizations responsible for producing Gladue reports, including: the Mohawk Council of Akwesasne, First Peoples Justice Centre of Montréal (funded by the Department of Justice Canada), the Conseil de la Nation Atikamekw, les services parajudiciaires autochtones du Québec (SPAQ) (The Quebec Native Parajudicial Services), the Makivik Corporation in Nunavik (Société Makivik) which are funded by the Ministère de la Justice du Québec. In addition, the Cree Nation Government’s Department of Justice, and Correctional Services offers both Gladue report writing services and a four-day Gladue Report Writer Training.

Saskatchewan
In Saskatchewan, defence counsel or an offender do not need to apply for a standalone Gladue report to have Gladue information put before the Court – Community Corrections includes Gladue information in all pre-sentence reports (PSR) for Indigenous offenders. If the Court finds the information in the PSR insufficient, the Court will either request a supplemental report or a separate Gladue report from an independent author. The number of independent reports ordered each year is minimal. Courts in the province have endorsed this

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54 This is not an exhaustive list.
55 In some cases, a Gladue letter can be prepared instead of a Gladue report when the Crown’s position for sentencing is over 120 days if requested or because of time considerations (Aboriginal Legal Services 2022).
58 MCPEI is co-funded by the provincial government and federally through Justice Canada. For information about the Indigenous Justice Program see: https://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/index.html.
59 See: http://www.akwesasne.ca/justice/acip/gladue-unit-services/.
60 See: https://cjppm.org/en/servicesen/.
62 See: https://spaq.qc.ca/gladue-report/?lang=en
63 See: https://www.makivik.ca/
64 See: https://www.creejustice.ca/index.php/ca/community-justice/gladue-reports.
approach in numerous decisions, including the Court of Appeal. In 2021 Saskatchewan Community Corrections revised youth and adult PSRs to ensure Gladue factors were addressed consistently and thoroughly, throughout these reports. Risk assessment scoring information is no longer included in the body of the PSR report and has been moved to an appendix section. All probation officers and community youth workers are provided enhanced and ongoing training on how Gladue principles are applied within PSRs.

Yukon
Gladue reports in the Yukon were administered by the Yukon Legal Services Society prior to 2019 when the Council of Yukon First Nations (CYFN) launched a Gladue Report Writing Pilot Project funded by the Government of Yukon. Through the pilot, Gladue report writing and training is managed by a Gladue Management Committee, comprised of representatives from Yukon First Nations, the Government of Yukon, Yukon Legal Services Society, and the Public Prosecution Service of Canada. After trainees have successfully completed their training, they may be eligible for a mentorship on CYFN’s Gladue Roster. Defence counsel, rather than the court, typically requests a Gladue report by applying to CYFN Justice.

4.1.2 Overview of Gladue report writing and training in Canada

Through a review of publicly available information, Gladue report writing organizations were identified in nine provinces and territories, and Gladue report writing training programs in six provinces and territories, as well as one virtual training program.\(^{65}\) This review provides an overview of the various ways that Gladue report writing and training programs are available across Canada.

The approach used to provide Gladue report writing services varies by province or territory, with some jurisdictions, such as British Columbia and Yukon, using a centralized system for the provision of Gladue reports. While other jurisdictions such as Ontario, use a more decentralized approach where Gladue report writing services are available through many different organizations. Funding for Gladue report writing services also varies by jurisdiction; however, most of the organizations are funded through federal, provincial, or territorial governments.

Although 82% of the organizations identified that offer Gladue report writing services are Indigenous-led, it was not possible to determine if the report writers themselves identify as Indigenous. The identities of individual writers are an important consideration. For example, some participants in Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (2019) were reluctant to be transparent about their past experience with non-Indigenous writers who may not understand the many realities of Indigenous women.\(^ {66}\) Since Gladue reports require extensive information, writers should have or be able to establish connections to Indigenous communities and organizations (Barkaskas et al., 2019). Lived experience as Indigenous persons, an expertise on particular Indigenous communities, and an educational background working with Indigenous peoples or communities with criminal justice system issues are important (Barkaskas et al., 2019). In addition, writers should know about the experiences and histories of Indigenous peoples and Canadian colonialism (Barkaskas et al., 2019).

With regards to the training for Gladue report writing, five of the eight programs are affiliated with non-Indigenous post-secondary institutions.\(^ {67}\) The post-secondary training programs and courses vary in length from 10 weeks to 3 years, costing from $1,800 to $5,616, and are offered in-person, online, and through hybrid (a

\(^{65}\) The Indigenous Perspectives Society course offered in collaboration with Royal Roads University is available virtually.


\(^{67}\) Due to limited information, it was not possible to always identify whether the trainers at the post-secondary institutions themselves identify as Indigenous.
combination of in-person and online) formats. Upon completion, the post-secondary programs offer certificates. University law programs also provide law students with Gladue awareness and cultural competency training.

4.2 Gladue case law

4.2.1 Overview of the cases

Most of the 530 cases reviewed for this study involved male offenders (86%) with the remaining cases female offenders (13%) and one Two-Spirit offender. A total of 516 cases involved adult offenders (97%) and 14 of the cases involved youth offenders (3%).68 Most of the cases included a violent or serious offence69 (73%) with 34% of these cases involving a form of sexual assault or sexual interference. The remaining cases were property, drug-related, or another type of non-violent criminal offence (27%). It is important to note that the cases reviewed are those that went to court and were more serious in nature. Less serious cases with minor offences are more likely to be diverted pre-charge or to alternative resolution mechanisms for Indigenous people such as an Indigenous Justice Program. Cases within the study period were predominately sentencing decisions (68%), followed by appeals (19%), Charter applications (5%), bail hearings (3%), other applications (e.g., motion hearings) (4%), and applications where a Gladue report was ordered (1%). In 314 of the cases (59%) the victim was identified. More than half (56%) of the victims were female, almost one-third (32%) were male, one victim was transgender, and 11% of cases involved multiple victims. Of the cases reviewed, 22% (118) identified the age of the victim, with 84% adults and 16% under the age of 18.

When applying sentencing principles to determine a fit sentence, courts must balance the needs of both the victims and offenders. The same consideration is important for the application of Gladue principles where judges need to balance the likelihood that the victim experienced similar Gladue factors as the offender.70 Issues raised in the Missing and Murdered Indigenous Women and Girls Inquiry final report71 were also noted by some judges in their analysis of the offender’s Gladue factors.72 This was especially important in relation to cases with violence, sexual violence, and intimate partner violence towards Indigenous women and girls. The 2019 amendments to the Criminal Code created new sentencing and bail provisions73 that will also need to be considered in cases that involve intimate partner violence. However, it is unclear at this point what impact these new provisions will have on the application of Gladue principles as judges balance the needs of both the offender and the victim.

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68 The small number of youth cases within the review is due to various factors. Most youth accused of crime are diverted out of the court system (i.e., diversion to community-based resolutions such as a restorative justice program, community service, etc.). See the State of the Criminal Justice System Dashboard for more information about youth experiences in the criminal justice system: https://www.justice.gc.ca/socjs-esjp/en. Youth also have special legal protections under section 110 and 111 of the Youth Criminal Justice Act, where their personal information is kept confidential and sealed from the public in effort to protect them from the harmful effects of publication. There are some exemptions to publication bans, including where the youth is being sentenced as an adult. The cases found within CanLII were related to serious offences wherein the youth had the possibility of being tried as an adult.

69 Violent offences that involve the use or threat of violence against a person. These can include homicide, attempted murder, assault, sexual assault and robbery. Firearm-related violent offences are included where the firearm is fired or used as a threat. Traffic violations including those causing death and child pornography are not included (see Moreau, Greg. 2022. Police Reported Crime Statistics in Canada, 2021. Statistics Canada. Available at: https://www150.statcan.gc.ca/n1/pub/85-002-x/2022001/article/00013-eng.htm).

70 For example, R v Aklok, 2020 NUCJ 37; R v J.N.P., 2020 BCSC 570; R v Emile, 2019 NWTTC 9.

71 See https://www.mmigf-ffada.ca/final-report/.

72 For example, R v P.M.M., 2019 BCPC 276; R v Poucette, 2019 ABQ8 725.

73 Bill C-75 received royal assent on June 21, 2019, which included amendments to the Criminal Code bail provisions to establish a reverse onus on bail for individuals who have been alleged to have committed an offence involving violence against their partner if they have a previous conviction of intimate partner violence. Additionally, a new sentencing provision was created that allows the Crown to seek higher maximum penalties for offenders convicted on a second or subsequent offence of intimate partner violence. It further created a new section that directs the court imposing a sentence for intimate partner violence to consider the increased vulnerability of female victims, with particular attention to be paid to the circumstances of Indigenous female victims (Department of Justice Canada 2022).
4.2.2 Increase in the use of Gladue principles and reports

Since the initial tests of the *Gladue* decision in 2000, the courts have increased their use of Gladue reports and the consideration of Gladue principles. A review of the 530 cases, for the six years shown in Figure 2, found that the most notable increase in cases referencing *Gladue* came after 2010. This may be a result of the clarifications to section 718.2(e) provided through the 2012 *Ipeelee* decision. There was also an increase in the use of Gladue reports, with 40% of cases referencing the reports between 2018 and 2021 compared to only one case in 2010 (see Figure 2). While most Gladue reports were requested to assist with sentencing decisions, courts have increasingly expanded their use of Gladue principles beyond sentencing to considering Gladue principles in appeal proceedings, judicial reviews of administrative decisions, application hearings in relation to MMPs and other kinds of applications or motions heard in courts.  

![Figure 2: The total number of cases reviewed and Gladue reports referenced between 2000 and 2021.](image)

Courts indicated that Gladue principles are used when considering *Charter* violations and noted that Gladue principles are required to be applied regardless of the seriousness of the offence. Gladue reports were also used in most *Charter* challenges regarding MMPs. However, there was no consistency in the use of reports regarding judicial review of bail hearings or dangerous offender/long-term offender applications even though these types of proceedings impact the offender significantly, as they could affect sentencing lengths and/or parole eligibility. Some of the *Charter* applications challenged the *Criminal Code* MMP provisions for firearm offences. Between 2007 and 2017, the total proportion of Indigenous offenders admitted into federal custody with a firearm-related offence punishable by a MMP increased from 18% to 40% (Department of Justice Canada, 2017b).

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75 For example, a Permanent Guardianship Order decision, wherein the courts decided that Gladue factors would not apply to family matters *Alberta (Child, Youth and Family Enhancement Act, Director) v C.L.*, 2020 ABPC 23.

76 The Challenges were under section 12 of the *Charter of Rights and Freedoms* prohibits cruel and unusual treatment or punishment.
Charter challenges of firearm-related MMPs were successful in most jurisdictions with courts declaring of no force or effect to these MMPs leading to sentences being changed or reduced. Additionally, Charter challenges to drug-related MMPs were also successful with courts declaring of no force or effect with similar impacts on sentences. In late 2022, Bill C-5 An Act to amend the Criminal Code and the Controlled Drugs and Substance Act, received royal assent and repealed 11 firearm-related MMPs and additional drug-related MMPs. Bill C-5 specifically stated that the repeal of the firearm-related MMPs was in part to address the over-incarceration of Indigenous people. This is in keeping with the findings within the study period of courts declaring certain MMPs of no force or effect.

Figure 3: Expanded use of Gladue reports and principles referenced in judicial decision-making by type of decision between 2000 and 2020.

Although there was a decrease in the number of cases heard during the last two years of the study period, coinciding with court closures and delays during the COVID-19 pandemic, between 2000 and 2020, courts expanded the use of Gladue reports and the application of Gladue principles in judicial decision-making (see Figure 3). The greatest increase was seen in sentencing decisions to Charter application hearings, bail hearings appeals and other types of decision-making. However, overall, the greatest increase in reference to Gladue principles and reports during the study period was in sentencing cases followed by appeals cases.

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77 For example, R v Fiddler, 2018 SKQB 197; R v Itturiligaq, 2020 NUCA 6.
79 This decrease could be due to the COVID-19 pandemic and delays in court hearings (see for example: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3607&context=ohlj; https://www150.statcan.gc.ca/n1/pub/11-627-m/11-627-m2023027-eng.htm
4.2.3 Increase in the use of victim impact statements and community impact statements

In balancing the needs of victims and offenders, it is important to understand the offender’s relationship with the victim, as well as their relationship with the community. Victim impact statements (VIS) and community impact statements (CIS) are one element that the courts can consider when making a decision on the appropriate disposition for an offender. Overall, 29% (155 cases) of the cases within the study period included a VIS (94%) and/or a CIS (6%). During the review period, there was an increase in the use of VIS and/or CIS and testimonials beginning as early as 2010\(^80\) (see figure 4). The increase may be attributable to various factors including more awareness regarding VIS and CIS in the intervening years and the introduction of the *Canadian Victims Bill of Rights* in 2015.\(^81\) Additionally, although there was a decrease in the use of these statements beginning in 2020, this may be due to court closures and restrictions during the COVID-19 pandemic.\(^82\)

Figure 4: Number of Victim Impact and Community Impact statements included in the cases reviewed between 2020 and 2021.

![Graph showing the number of Victim Impact and Community Impact statements from 2000 to 2021](image)

4.2.4 Availability of Gladue reports

Most of the cases reviewed (60%) did not include a Gladue report. If there was a mention of a report in these cases, it was to indicate that no report was included in the submission to the court or that a report would not be forthcoming. The reasons provided for not including a Gladue report included a lack of resources or services to complete a Gladue report or the court decided that a report was not required.

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\(^{80}\) The study did not review cases between 2001 and 2009.

\(^{81}\) The *Canadian Victims Bill of Rights*, SC, 2015, c 13, s. 2 establishes the right of victims to participate within the criminal justice process including their right to present a victim impact statement and have it considered by the court. For more information see: [https://www.justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html](https://www.justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/victim.html)

Capacity for reports
Even if a court requested a report to be completed, there might be no trained Gladue report writers available within the region or available at the time. Regardless of the organization or individual preparing a Gladue report (e.g., community organization, independent report writers, or government funded Gladue services), the capacity or ability of these organizations to complete a report was impacted by the availability of resources. In cases where the Indigenous offender requested the report, rather than the court, they had to pay out-of-pocket to have a Gladue report completed and submitted to the proceedings. Generally, information regarding availability or capacity was brought to the attention of the courts after a request or order for a Gladue report was made. This information was then noted within the record to indicate why a report was unavailable.

Necessity of reports
Courts had varying justifications for requesting a Gladue report and how judges used Gladue reports in rendering their decisions. In some jurisdictions, courts relied on previous cases from the early 2000s that indicated Gladue reports were not essential to sentencing and therefore should only be ordered in exceptional circumstances.83 Furthermore, decisions limiting the necessity of a Gladue report led to some jurisdictions denying applications by Indigenous offenders for court ordered Gladue reports in recent years (0.009% or 5 cases).

Report substitutions
In some cases, even when Gladue factors were seen to be pertinent to the rendering of their decision, a Gladue report was deemed unnecessary since the information could be gathered through other means. PSRs with Gladue sections or oral or written submissions made by either the defence counsel or the Indigenous offenders to the court acted as substitutions to a Gladue report. These substitutions, provided in most cases, had limited information regarding the Indigenous background of the offender. Courts did make notable comments regarding the breadth of information found within these substitutions, stating the information was scarce or considerably inadequate. In cases where a Gladue report was not forthcoming and substitutions were found to be inadequate, courts ordered more information to be added to PSR submissions prior to rendering a decision. Furthermore, even though courts were aware of the lack of information in the PSRs, many did not order Gladue reports to be prepared at the expense of the government as courts found that orders of this nature were to be used “sparingly and with caution, in response to specific and exceptional circumstances.”84

Pre-sentence reports
Under section 721 of the Criminal Code,85 PSRs are either requested by an offender or ordered by the court. PSRs are not mandatory, but they are usually ordered for more serious cases, and are almost always ordered where a custodial sentence is considered (Maurutto 2020). In 45% of the cases reviewed (241 cases), PSRs were recorded as part of the documents submitted or mentioned within the case record. Similar to a Gladue report, a judge has the discretion to decline the ordering of a PSR where there is sufficient information regarding the offender’s background or where they find no purpose in ordering a PSR. The offender also has the right to waive an order or request for a PSR.

Gladue reports declined or waived
Many cases within the review described in detail the trauma and background factors experienced by the Indigenous offender, some even quoting entire sections from the Gladue reports or PSRs. Since the preparation of a Gladue report requires that the offender agree to the preparation of the report, some offenders were noted

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83 For example, R v Desjarlais, 2019 SKQB 6; R v Angus, 2020 SKQB 205
84 R v Peepeetch, 2019 SKQB 132
85 Criminal Code, RSC, 1985, c C-46, s. 721
to be reticent in providing background information, as it was emotionally traumatic for them to revisit their background and history, especially within a public court process. In some cases, the court did note that including this information on record might cause additional trauma to the offender, while some courts found that it was not in the best interests of the offender to limit their description. Notably, the review found that some offenders or their lawyers (0.013% or 7 cases), even when explicitly asked by the Court if they would like a Gladue report to be completed on their behalf, either declined or waived the Gladue report as it would delay sentencing and lengthen their detention (i.e., pre-sentencing detention).

**Inconsistency of reports**

Courts also noted the inconsistency and lack of national standards for Gladue reports between courts and jurisdictions. Some courts were more hesitant in using Gladue reports given the differences in training between Gladue writers as well as the characterization of offenders as “clients”, placing the Gladue writer in a sympathetic role rather than an objective one. Specifically, when deciding whether the information provided within a PSR was sufficient to forgo a Gladue report, courts found that since there were no national standards for Gladue reports, there was no evidence or support for the claim that PSRs were inadequate.

### 4.2.5 Application of Gladue principles

Regardless of whether a Gladue report was used, courts had varying degrees of application and consideration of Gladue principles in the cases reviewed. At minimum, courts applied Gladue principles by taking judicial notice of the intergenerational trauma and other Gladue factors experienced by the offender. In *Ipeelee*, the SCC held that courts could take judicial notice of systemic and background factors negatively affecting Indigenous peoples in Canada. However, the review of cases has shown that in practice, the taking of judicial notice may have limited the analysis of how these factors apply to the case at hand. In cases where judicial notice was taken, no further analysis regarding the offender’s Gladue factors was documented. Courts provided little more than a note for the record regarding the fact that the offender is Indigenous, and that pursuant to section 718.2(e), they would take judicial notice of the background factors that may have negatively affected the offender. Thus, there was no individualized consideration of which Gladue factors specifically applied to the Indigenous offender in front of the court. Even when there was a Gladue report, the accompanying analysis in relation to the principles was limited. The court either did not give proper attention to the offender’s particular circumstances by not considering how these factors impacted the offender and their criminal history or by not considering whether these factors afforded the offender possible alternatives to incarceration.

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86 *R v Gamble*, 2019 SKQB 327 at para 26  
87 For example, *R v Gamble* 2019 SKQB 327; *R v Gamble*, 2021 SKCA 72  
88 Judicial notice relieves a party from having to prove facts that are not in dispute as they are generally accepted and not debatable among reasonable persons.  
In some cases courts simply stated that the offender’s Gladue factors were mitigating or lessened their moral culpability in some way without specifying how. While in other cases, other factors (e.g., mental health, guilty plea) were taken into consideration even where Gladue factors would have likely applied. Judicial notice was relied on and any analysis or discussion in relation to how the principles or Gladue factors may have affected their reasoning on what would be the best disposition for the offender in the interest of the public and the administration of justice, was not forthcoming.

Many judges made use of paragraph 79 of the Gladue decision to limit or not apply Gladue principles in their sentencing decision for cases that involved a serious offence and other proceedings such as a dangerous offender application. As a result, Indigenous offenders had similar sentences as non-Indigenous offenders. This occurred even when a Gladue report or other documents (e.g., psychiatric assessment, evaluation or informative document) provided to the court presented Gladue factors (e.g., alcoholism, previous trauma, physical or sexual abuse) relevant to the Indigenous offender’s actions. In some of the earlier cases, judges even overturned a lower court’s ruling stating too much emphasis was put on the offender’s Gladue factors and not enough on the principles of deterrence and denunciation. However, it is important to note that these decisions were one of the reasons that in 2012, the SCC provided clarification in R v Ipeelee. In the last decade, there has been a shift in some courts towards making note of the erroneousness of using this particular paragraph in rendering a decision, as it is not in keeping with the goals and intentions of Gladue. This analysis for example played a role in a 2019 Ontario Court of Appeal’s decision to overturn a sentence for a more appropriate length.

Of the cases reviewed, 23% had reduced or varied sentences based on the courts application of Gladue principles and 39% of these cases included Gladue reports. In some cases, where judicial notice was explicitly stated (0.05% or 21 cases) or a notation was made regarding the offender’s Gladue factors, sentences were somewhat reduced. Cases that resulted in a reduced custodial sentence included less total time served (e.g., 7.5 months instead of 15 months or 9.5 years instead of 10 years), staying the execution of the remaining incarceration period (i.e., sentencing the offender to time served), or a reduced length of time for parole eligibility or probation or varying bail conditions. Variations in sentences included sentencing offenders to conditional sentences under section 742 of the Criminal Code (where it was available) instead of custodial sentences, allowing a custodial sentence to be served intermittently within the offender’s community or

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92 For example, R v Desbiens, 2020 BCSC 884; R v Keenan Name, 2021 SKPC 46
93 For example, R v Holt, 2019 BCSC 774; R v McLeod, 2021 BCSC 1004; R v R.W., 2021 NUCJ 29; R v F. (J.M.), 2020 MBQB 161; R v Hilbach, 2019 BCPC 227
94 For example, R v F. (J.M.), 2020 MBQB 161; R v Rousseau, 2019 BCPC 178
95 “[79] ...where an offence is considered serious, the length of the term of imprisonment must be considered. In some circumstances the length of the sentence of an aboriginal offender may be less and in others the same as that of any other offender. Generally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing.” R v Whalen, 2010 ONCJ 501 for example states that the case was not one where the Indigenous offender could be treated differently because of the seriousness of the crimes and their criminal history.
96 For example, R v KNDW, 2020 MBCA 52; R v Hilbach, 2020 ABCA 332; R v Giroux, 2010 ABQB 642; R v Kipp, 2010 BC 584; R v Burke, 2018 SKPC 43; R v Hester, 2019 QCCA 858; R v Poucachiche, 2019 QCCQ 2840; R v Dustin Trevor Sand, 2019 SKQB 123; R v Arcand, 2019 SKQB 131; R v Ooowt, 2020 NUCA 5; R v Herntier, 2020 MBCA 95; R v P.C.M., 2020 SKQB 118; R v Charles, 2021 SKCA 75; R v Sinclair, 2021 MBCA 6; Trans Mountain Pipeline ULC v Mivasair, 2021 BCSC 369.
97 See R v Green, 2019 ONSC 1295 citing R v Martin, 2018 ONCA 1029.
98 “Stay of execution is a [direction or order] by the court to stop some form of enforcement action” (see: https://www.law.cornell.edu/wex/stay_of_execution).
99 “Stay of execution is a [direction or order] by the court to stop some form of enforcement action” (see: https://www.law.cornell.edu/wex/stay_of_execution).
100 R v Pete, 2019 BCCA 244; R v Schafer, 2019 YKTC 41; R v Andersen, 2018 NLCA 41; R v TWS, 2018 ABQB 870; R v Cardinal, 2018 ONCI 253; R v G.F., 2018 BCCA 339; R v Sackanay, 2000 CanLII 1840 (ONCA); R v Jacko, 2010 ONCA 452.
suspending the offender’s sentence. In cases that involved a bail decision, some courts allowed for bail to be granted based on the offender’s Gladue factors.

The courts considered the following in their decision-making, when they included a comprehensive Gladue analysis: the availability of programming, proximity of custodial facilities to the offender’s community, and the likelihood of rehabilitation and rehabilitative resources. If available, courts were willing to sentence the offender to healing lodges or treatment centres. These analyses also provided considerable discussion in relation to the impact the Gladue factors had on the Indigenous offender and what would be in the best interest of all (the public, the administration of justice, and the offender) in rendering the court’s decision. In many of these cases, the courts made note of the availability (or lack thereof) of resources for the Indigenous offender for programming specific to Indigenous offenders, such as Indigenous-specific therapies, ceremonies or custodial programs (e.g., treatment centres or sweat lodges).

Furthermore, some courts were also aware of proximity issues related to where an Indigenous offender was able to complete their detention relative to where their community was located. In some cases, it was not possible for the Indigenous offender to be detained closer to their community either due to the distance from the community to the detention centres or due to the lack of resources and/or programming at the detention centres close to their community.

4.2.6 Differences between adult and youth Cases

Gladue reports were used in 36% of the youth cases (14 cases) reviewed within the study period, compared to 38% of the adult cases (516 cases). Half of the youth cases were sentencing decisions, the others included appeals of sentences, a bail hearing, and an application hearing to request a Gladue report. However, despite the small number of cases, Gladue principles and factors were considered or applied within youth cases more consistently than within adult cases, possibly because the principles in the Youth Criminal Justice Act directs judges to consider all sanctions besides custody, with particular regard to Indigenous youth. In effect, even if a youth case may not have used a Gladue report, an Indigenous youth’s background and other factors may have been included through documents or statements from caseworkers, defence counsel, the police or other relevant stakeholders (Clark 2016). In cases where the Crown applied for an adult sentence, the court considered Gladue principles and factors of the youth offender. However, a youth offender may still have received an adult sentence depending on mitigating factors of the case.

5. Conclusion

Since the 1999 SCC Gladue decision, a number of court decisions have helped to clarify that all Indigenous offenders have the right to have Gladue factors considered in their case, including those involving serious

101 The COVID-19 pandemic also impacted the availability of programming for Indigenous offenders where a custodial sentence was considered (i.e., shutting down of services and programming in correctional settings).

102 For example, R v Thorassie, 2021 MBCA 37; R v K.D., 2020 SKPC 14

103 R v Neeposh, 2020 QCCQ 1235; R v Évalik, 2021 NUCJ 26; R v A.F., 2021 BCP 204; R v Trudeau, 2021 ONCJ 243; R v Dunn, 2020 MBPC 27; R v Dusome, 2019 ONCJ 444

104 For example, R v Hansen 2019 SKQB 88; R v Runions, 2021 ABQB 67

105 Section 38(2)(d) in the YCJA parallels section 718.2(e) of the Criminal Code codification of the Gladue principles and the consideration of an Indigenous person’s unique circumstances in criminal justice decisions (Youth Criminal Justice Act, SC, 2002, c 1 s. 38.2(d))

106 For example, in R v L.T.N., 2019 SKQB 337 an Indigenous youth offender had committed multiple firearm offences (reckless and intentional discharge of a firearm, discharge of a firearm with intent to wound) within a matter of days. Although they had considerable background information provided to the court cataloging their history and applicable Gladue factors, the court found that the planned and deliberate nature of the crime and the fact that the youth had a high risk to re-offend warranted the youth being sentenced as an adult.
offences. Although Indigenous offenders have a right to have Gladue principles applied, they do not have an absolute right to have a Gladue report in all jurisdictions\textsuperscript{107} as courts can use substitutions to obtain the required information to make decisions.\textsuperscript{108}

The review of 530 cases found that there was a significant increase in the application of Gladue principles and use of Gladue reports by the courts between 2000 and 2021. Although most cases reviewed involved sentencing decisions (for mostly violent offences), there was increased use in other areas, including bail hearings, long-term and dangerous offender applications, as well as Charter challenges. Although there was an increase in the application of Gladue principles and the use of Gladue reports by the courts, each jurisdiction has its own approach. Some provide Gladue report writing through various Indigenous organizations (i.e., Ontario and Quebec). Others use a centralized Gladue report service that includes a roster of contracted writers (i.e., Alberta, British Columbia, Nova Scotia, Prince Edward Island, and Yukon).\textsuperscript{109} In some of the jurisdictions that do not have a publicly funded Gladue report program (i.e., Manitoba, New Brunswick, and Northwest Territories) probation officers are trained to include Gladue factors in PSRs. The variability in how Gladue report writing and training is administered across the country may have an impact on access to justice for Indigenous people, which could be examined through future research.

Whether a Gladue report is requested by the courts depends on a number of factors including: the availability of resources to prepare Gladue reports; judges deeming them only necessary in exceptional circumstances; perceptions that PSRs, oral or written submissions were sufficient substitutions; concerns over the inconsistency and lack of national standards for Gladue reports and training; or the offender waiving or declining a Gladue report or submission due to either delays in sentencing or reluctance to re-live traumatic events in court.

Cases where Gladue principles were applied, either by taking judicial notice or considering specific Gladue factors, had an impact on the outcome of the case. In 23% of these cases,\textsuperscript{110} the sentences were reduced or varied (e.g., conditional sentences, intermittent sentences, and suspended sentences); there was a stay in the execution of the remaining incarceration period; a reduced length of time for parole eligibility or probation; or bail conditions were varied. In some cases, courts also permitted bail to be granted based on an offender’s Gladue factors. When a comprehensive Gladue analysis was undertaken by the court, the availability of programming, proximity of custodial facilities to the offender’s community and the likelihood of rehabilitation and rehabilitative resources were all considered as part of the decision-making process and may have impacted the outcome of the case. If these factors were mitigated, the application of Gladue principles could further help reduce custodial sentences for Indigenous offenders.

Future research could examine what impacts the increase in ongoing support for the implementation of Gladue principles and preparation of Gladue reports,\textsuperscript{111} as well as a growing body of case law may have on future court decisions. In addition, it would be beneficial to examine whether there are any differences in how section 718.2(e) and the associated Gladue principles are applied based on the official language used in the case or between Indigenous and non-Indigenous courts in Canada.

\textsuperscript{107} In R v Mattson, 2014 ABCA178 and R v Napesis, 2014 ABCA 308, Alberta courts interpreted Ipeeelee to mean that Gladue reports should be mandatory submissions in cases involving Indigenous offenders.

\textsuperscript{108} See for example R v Desjarlais, 2019 SKQB 6

\textsuperscript{109} Three private Gladue report writing service providers were also identified in Alberta. However, it is unclear whether these service providers are part of the provincial program because the roster is not publicly available online.

\textsuperscript{110} In addition, 39% of these cases also included a Gladue report.

\textsuperscript{111} Investments made by the Government of Canada, to support the implementation of Gladue principles and Indigenous-led responses to help reduce the overrepresentation of Indigenous people in the criminal justice system and support for the preparation of Gladue reports and the integration of Gladue report recommendations and principles in criminal justice system practices (Department of Justice Canada 2021).
6. References


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