GLADUE PRACTICES IN THE PROVINCES AND TERRITORIES

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2013

The views expressed herein are solely those of the author and do not necessarily reflect those of the Department o

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ISBN 978-1-100-22459-6

Cat. No. J2-378/2013E-PDF

1. Executive summary

This study is intended to provide a status report on policies and practices in the provinces and territories that reflect the principles set out in the Supreme Court decision in *R. v. Gladue* regarding (1) specialized courts for Aboriginal accused; (2) training and awareness activities for judges, probation officers, courtworkers and duty counsel; (3) procedures for sentencing, bail and parole hearings when a case involves an Aboriginal offender; and (4) community justice programs and resources for Aboriginal offenders. A questionnaire was sent to key informants who had been identified in 11 jurisdictions and the Parole Board of Canada. In total, 16 questionnaires were collected. The responses were compiled and analyzed so as to highlight the participants' opinions on the key challenges, issues and successes that various sectors of the criminal justice system have experienced in dealing with Aboriginal accused/offenders.

It is important to point out that this research is based on the perceptions of the participants and that the results of this research are not to be construed as the official position of the federal, provincial or territorial governments on the issues raised.

Overall, initiatives and programs that comply with the *Gladue* decision were identified in all the jurisdictions that took part in the study. Specialized courts for Aboriginal persons seem to be one of the most exemplary initiatives in terms of applying the *Gladue* decision. In total, 19 specialized courts (whether or not they deal exclusively with cases involving Aboriginal persons) were listed in eight jurisdictions. *Gladue* training and awareness activities for justice system officials, including judges, are provided in roughly half of the participating jurisdictions. However, one of the participants questioned the quality of the training. Most jurisdictions stated that bail and parole decision-making processes involving Aboriginal persons are informed by *Gladue* type information. Community justice programs appear to exist in the majority of jurisdictions. However, one of the participants observed that inadequate information sharing, coordination, integration and communication between the various stakeholders in the justice system and the persons in charge of community justice and health programs (e.g. substance abuse and mental health treatments) may prove to be a significant obstacle to the effectiveness of these programs. Another participant pointed that the need for more effective information sharing must also be balanced with privacy and confidentiality considerations. In addition, establishing partnerships between non-governmental organizations (NGOs) and the justice system seems to be an approach that a number of jurisdictions have adopted to jointly identify solutions to the situation experienced by Aboriginal persons in the justice system. Last, legal aid programs may also play an important role in applying *Gladue* principles as shown by certain exemplary practices established by Legal Aid Ontario.

It may be noteworthy to mention that while the research did not include caselaw review of the various interpretations of *Gladue* by the provincial and territorial judiciaries, the approach taken in different provinces and territories with respect to the implementation of Gladue like policies and practices has likely been influenced by the way each provincial and territorial appellate court has interpreted *Gladue*.

2. Introduction

During 2010, the Research and Statistics Division (RSD) of the Department of Justice Canada prepared a literature review whose objectives were to define the key challenges raised in the literature regarding the application of section 718.2(*e*) of the *Criminal Code* and the *Gladue* decision, and to identify the legal initiatives and the programs consistent with that decision that have been implemented in various Canadian provinces and territories.[1]

The review found that there was no documentation providing a status report on the initiatives that reflect the principles in the *Gladue* decision and that are currently in place in the provinces and territories.

In light of that finding, this exploratory study aims to determine to what extent the various sectors of the justice system in the provinces and territories have implemented policies and initiatives consistent with *Gladue*.

3. Objective

The objective of this study is to prepare a status report on provincial and territorial policies and practices that reflect the principles set out in *Gladue* regarding the following:

- specialized courts for Aboriginal accused;
- training and awareness initiatives for judges with respect to *Gladue* and Aboriginal people in Canada, and for probation officers, courtworkers and duty counsel on the preparation of sentencing reports;
- procedures for sentencing, bail and parole hearings when a case involves an Aboriginal offender;
- community justice programs and resources for Aboriginal offenders.

4. Methodology

With a view to identify possible research participants, the RSD asked Aboriginal Law and Strategic Policy and the Aboriginal Courtwork Program to draw up a list of key informants working in the area of Aboriginal justice policies and representing each of the provinces and territories. A key informant from the Parole Board of Canada was also identified and contacted. The key informants had to be able to provide information on the policies and practices in place in various sectors of the justice system that comply with *Gladue* principles. The researchers contacted these individuals by e-mail and invited them to participate in the study by completing the questionnaire either electronically or by telephone.

The questionnaire (see appendices) contained multiple choice and open-ended questions and was divided into four sections: (1) the existence of specialized courts for Aboriginal accused/offenders; (2) sentencing procedures when a case involves an Aboriginal offender; (3) bail and parole hearings; and (4) other programs designed to assist Aboriginal persons throughout the justice process.

[1] M.M. Orsi and S. April. "Spotlight on *Gladue*: Controversies, Possibilities and Experiences in Canada's Criminal Justice System", unedited report (Ottawa: Department of Justice Canada, Research and Statistics Division, 2011).

The responses were compiled and analyzed so as to highlight the participants' opinions on the key challenges, issues and successes that various sectors of the criminal justice system have experienced in dealing with Aboriginal accused/offenders.
In conjunction with this research, we conducted a brief survey with the key informants on how legal aid programs apply the *Gladue* provisions. Unfortunately, the participation rate for the legal aid survey was low, and we are unable to draw any conclusions on the issues addressed in the survey. Nevertheless, section 5.5.3 of the report presents some exemplary practices of Legal Aid Ontario (LAO) at the time of this brief survey.

4.1 Participants

This research relied on the participation of representatives from 11 jurisdictions.[2] In some jurisdictions, two or more professionals participated, which enabled us to collect a total of 16 questionnaires. The respondents worked in areas involving Aboriginal justice policies and in one of the following sectors:

- justice and criminal prosecutions;
- public safety;
- legal services;
- correctional services;
- court support services;
- community-based programs and policies.

In addition, a representative from the National Parole Board of Canada responded to the questionnaire only with respect to the questions that deal with paroling Aboriginal offenders.

5. Limitations of the study

The study is limited in particular because key informants did not necessarily have full knowledge in all areas where *Gladue* has implications. For example, on a number of occasions, some participants stated that they were not familiar with the subject covered in certain questions.
Moreover, the criteria used in the definition of "specialized court for Aboriginal accused/offenders" in this research were developed as a result of the literature review on the application of the *Gladue* decision. Since it is quite recent, this definition had not yet been validated when the interviews were conducted. Thus, the list of specialized courts provided (see section 6.1) remains a preliminary list of courts that, according to the participants, could be considered "specialized courts for Aboriginal accused/offenders". The list should not be used for statistical purposes, and we recognize that it may either over- or underestimate the number of these courts. However, we believe it is useful in the process of developing criteria to define what is meant by "specialized courts for Aboriginal accused/offenders" although further consultations with the jurisdictions will be required to refine the definitional criteria for this type of court.
The study is based on the perceptions of the participants and is not the official position of the federal, provincial or territorial governments on the issues raised. Most of the results are based

[2] Manitoba and Quebec did not participate in the study.

on one response per jurisdiction, so it is possible that there is some missing information about how the principles of *Gladue* are being applied in each jurisdiction.

6. Results

The analyses of the data obtained through the questionnaire are presented in the following six sections of this research report. The first section addresses the existence of specialized courts for Aboriginal accused/offenders. The second deals with the training offered to court officials. The third section pertains to sentencing procedures while the fourth covers the procedures at bail and parole hearings where Aboriginal individuals are involved. The fifth section explores some community justice programs and resources consistent with *Gladue* that have been established in certain jurisdictions and, last, the sixth section discusses the limitations of the study.

6.1 Specialized courts for Aboriginal persons

Participants from eight jurisdictions (Alberta, British Columbia, Nova Scotia, Nunavut, Ontario, Saskatchewan, Yukon, and Northwest Territories) stated that there was at least one specialized court for Aboriginal accused/offenders in their jurisdiction that satisfies the criteria established by the researchers.[3] Table 1 lists the names of the courts cited by the participants and their locations.

[3] Subsequent to the literature review mentioned above, the researchers established two minimum criteria for the definition of specialized courts for Aboriginal accused/offenders:

a) A specialized court is supported by a range of services that ensure that information about an Aboriginal accused's/offender's background and the kinds of non-custodial sentences available to Aboriginal accused/offenders are incorporated systematically into the bail and sentencing decision-making procedures in order to allow the court to prepare decisions in keeping with the directive of the Supreme Court in *Gladue*.
b) Those working in the court (e.g. defence lawyers, Crown attorneys/prosecutors and judges) are knowledgeable of the range of programs and services available to Aboriginal people.

TABLE 1: SPECIALIZED COURTS BY PROVINCE ACCORDING TO THE PARTICIPANTS

Province	Specialized court	Location
Alberta	Stony Plain Glenevis Court Hinton Tsu Tina Lethbridge/Ft. MacLeod	Edmonton Edmonton Hinton Calgary Lethbridge
British Columbia	Circuit Court First Nations Court	Northern British Columbia New Westminster
Nova Scotia	Regular provincial courts	Eskasoni
Nunavut	Nunavut Court of Justice	Iqaluit
Ontario	Aboriginal Persons (Gladue) Court Aboriginal Persons (Gladue) Court Aboriginal Persons (Gladue) Court Aboriginal Persons (Gladue) Court	Old City Hall, Ontario Court of Justice Toronto 1000 Finch, Ontario Court of Justice, Toronto College Park, Ontario Court of Justice, Toronto Ontario Court of Justice, Sarnia 2 additional Aboriginal Persons (Gladue) Courts are under development in Scarborough (Toronto) and London
Saskatchewan	Cree Court Party Aboriginal Court Party Domestic violence courts Drug treatment court	North-east Saskatchewan North-west Saskatchewan Regina, Saskatoon, and North Battleford Regina
Yukon	Yukon Community Wellness Court Domestic Violence Treatment Option Court	Whitehorse Whitehorse
Northwest Territories	Domestic Violence treatment Option Court	Yellowknife

It should be noted that in Nova Scotia, the specialized court for Aboriginal accused/offenders operates as a satellite court of the Sydney court. Five jurisdictions (Nunavut, Saskatchewan, Yukon, British Columbia, and Northwest Territories) point out, however, that some of their specialized courts do not deal exclusively with cases involving Aboriginal offenders but that these offenders are involved in most cases that come before the courts. That is the situation with the Nunavut Court of Justice (Iqaluit, Nunavut), the Domestic Violence Court and the Drug Treatment Court (Regina, Saskatoon, and NorthBattleford, Saskatchewan), the Yukon Community Wellness Court (Whitehorse, Yukon), the Circuit Court (Northern British Columbia), and the Domestic Violence treatment Option court (Yellowknife, Northwest Territories).

Participants from three jurisdictions (New Brunswick, Newfoundland and Labrador, Prince Edward Island) indicated that there is currently no specialized court in their jurisdiction. The representative from Newfoundland and Labrador noted, however, that court officials who work in predominantly Aboriginal communities are usually familiar with the background of the community and often of the offender. The participant from PEI added that jurisdictions with small demographics of Aboriginal people may face barriers of cost implementing this type of approach. And finally, New Brunswick stated that a specialized court is being created in the Elsipogtog First Nation community.

6.2 Training for judicial officials

The participants were asked whether there were training sessions for two groups of judicial officials: on the one hand, judges, and on the other hand, probation officers, courtworkers and duty counsel.

6.2.1 Judges

Two questions were asked concerning judges: (1) whether training (or awareness initiatives) is provided regarding the application of section 718.2(*e*) of the *Criminal Code* and the *Gladue* decision, and (2) whether formal training or educational sessions[4] are provided regarding Aboriginal people in Canada (e.g. their history, culture, experience of discrimination).

With respect to the first question, six jurisdictions (Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island) responded in the affirmative. For most of those jurisdictions (British Columbia, Ontario, Newfoundland and Labrador, Prince Edward Island), training is given in the form of workshops offered at national (e.g. Osgoode Conference on *Gladue*) or provincial (e.g. Provincial Court Judges Association Conference of British Columbia) conferences. In Nova Scotia, a non-governmental organization (Mi'kmaw Legal Support Network) gives information sessions on this subject. Newfoundland and Labrador and Prince Edward Island mentioned that their judges have the opportunity to visit and observe the *Gladue* Court in Toronto. Moreover, in some jurisdictions (Nova Scotia, Ontario), training is also offered internally by the courts. The participants from New Brunswick, Northwest Territories and Saskatchewan said they did not know whether this type of training is available.

Nunavut and Yukon emphasized the specific context in the territories, noting that their judges are faced with cases involving Aboriginal persons every day. As a result, they are very familiar with the *Gladue* principles and thus no "formal" training is necessary. However, Nunavut indicated that there is informal internal training for deputy judges who arrive from the South to work in the territory.

As for training or educational sessions on the history and culture of Aboriginal peoples in Canada, five jurisdictions (Alberta, Newfoundland and Labrador, Prince Edward Island,

[4] While the term "formal training" was used in the questionnaire, comments received suggested that "educational sessions" would better reflect and accurately depict the type of activities aims to increase judges' knowledge about Aboriginal people in Canada.

Saskatchewan and Ontario[5]) stated that information sessions are provided to judges in this regard. For most of them, the training is made possible through provincial or national organizations or in-house judicial educational sessions, such as the National Judicial Institute, the Department of Justice of the Government of Newfoundland and Labrador, the Canadian Judicial Education Council, the Canadian Association of Provincial Court Judges and the Saskatchewan Association of Provincial Court Judges. The Prince Edward Island participant added that the judges who sit in districts with an Aboriginal population have had the opportunity to participate in the Osgoode Conference on *Gladue* and to visit the *Gladue* Court in Toronto.

The participants from three jurisdictions (New Brunswick, Nunavut, Yukon) reported that there is no formal training for judges on the history and culture of Aboriginal peoples in Canada. Similar to the preceding question, Nunavut and Yukon noted that their judges are well versed in this subject because of their daily practice in Aboriginal communities. Participants from British Columbia and the Northwest Territories stated that they do not know whether this type of training for judges exists.

6.2.2 Probation officers, courtworkers and duty counsel

Participants from seven jurisdictions (British Columbia, Newfoundland and Labrador, Nova Scotia, Northwest Territories[6], Ontario, Prince Edward Island, Saskatchewan) said that they provide training for probation officers, courtworkers and duty counsel on the preparation of independent sentencing and pre-sentence reports involving Aboriginal offenders.

Nova Scotia reported a partnership with the Mi'kmaw Legal Support Network, which provides training to the professionals who prepare Gladue reports. The Mi'kmaw Legal Support Network works closely with Aboriginal Legal Services of Toronto to develop material for this type of training.

With respect to the quality of the training available in British Columbia on preparing pre-sentence reports, the two participants of this province offered different perspectives. One of the participants explained the training in detail:

> Probation officers complete a fourteen hour on-line *Gladue* report course as part of their required training. The *Gladue* report course is in addition to a required pre-sentence report course. The *Gladue* report course looks at the principles of sentencing mandated in the Criminal Code that relate to Aboriginal offenders. The course examines the legalities of the *Gladue* case and explores the impact of the *Gladue* decision, especially as it relates to the building of trust between the Aboriginal community and the courts. The course considers the unique circumstances about Aboriginal offenders and their communities that led to the legislative changes. The course also explores how to contact Aboriginal communities when preparing a *Gladue* report for court, including what specific factors to examine during the investigation. The course covers what format to follow when writing a *Gladue* report for court and how other jurisdictions in Canada are responding to the *Gladue* decision.

[5] In Ontario, Crowns also receive *Gladue* related type of training. An annual Crown Attorney training conference is held that provides sessions on the history and culture of First Nation, Métis and Inuit communities and also on *Gladue* sentencing principles and services.

[6] Within the Northwest Territories, the term "Probation Officer" encompasses "Youth Worker" and are often used interchangeably.

However, another British Columbia participant questioned certain aspects of the implementation of the training provided:

> The training is not coming from people that know the communities. Also, the training offered to probation officers is very limited in its usefulness because of the context. Probation officers receive training on writing PSRs[7] at the Justice Institute. Part of this training includes an Aboriginal component which is very small. There are a number of issues with the training: (How?/Who?/Any follow-up?) who are the trainers, the amount of training. What about training updates/refreshers and the frequency of the training?

Most of the participants emphasized how important *Gladue* type information is in an Aboriginal accused's sentencing process, as illustrated in the comments by the Northwest Territories participant:

> There is training for probation officers as *Gladue* forms a part of their standard reporting (PSR) information. These are KEY factors when probation officers do the report in large part due to the fact the NWT has a high Aboriginal population. It is a standard part of reports as they are relevant to the individual and communities within the NWT. They are integral factors which must be acknowledged in an effort to ensure the best interests of the individual, victim and community are addressed in sentencing, reintegration and rehabilitation.

The Ontario participant indicated that in their province, a pre-sentence report writing guide has been distributed to probation and parole officers to assist in identifying specific information that should be included for Aboriginal offender in satisfying the requirements of s718.2 (e) of the Criminal Code of Canada. New Probation and Parole officers are trained in the policy and procedures at the Ontario Correctional Services College. Duty counsels in Ontario also receive a five hour extension from Legal Aid Ontario on criminal certificates for bail and sentencing cases where clients have identified themselves as Aboriginal in order to factor in any additional time required for collecting *Gladue* type of information. For additional information on Legal Aid Ontario's *Gladue* related practices, please refer to section 6.5.3.

Participants from four jurisdictions (Alberta, New Brunswick, Nunavut, Yukon) said that they were not familiar with the availability of this type of training. However, the Nunavut participant stated that a request to the court had been submitted, unsuccessfully, to incorporate "*Gladue* type information" into pre-sentence reports:

> My office has specifically requested that probation officers be requested by the Court to include *Gladue* type information in pre-sentence reports (i.e. community views about criminal sanctions) and the court has refused to do so… Courtworkers in Nunavut are involved in assisting defence counsel - they do not play an independent role as is frequently the case in the south.

[7] Abbreviation for "pre-sentence report".

6.3 Information for the sentencing court

This research also explored how the provinces and territories have integrated the three principles set out in *Gladue*[8] into their sentencing procedures, and specifically

1. how the information requested in *Gladue* is provided for sentencing procedures, who may be assigned the responsibility for collecting this information and the type of information collected about an Aboriginal offender's background;

2. whether the sentencing recommendations made by the Crown are systematically informed by the kinds of non-custodial measures available to Aboriginal offenders;

3. whether there are any formal administrative directives/policies asking Crown prosecutors to systematically submit the information requested in *Gladue* to sentencing judges;

4. whether there are partnerships between courts and non-governmental organizations to ensure that the information requested in *Gladue* is incorporated systematically into the sentencing decision-making procedures.

6.3.1 Gladue type information for the sentencing process

According to the *Gladue* decision, two types of information are particularly relevant in the process of sentencing Aboriginal persons: (1) information on t heir background and (2) information on alternatives to incarceration.[9]

6.3.1.1 Background of Aboriginal offenders

The research asked the participants questions about how (i.e., the type of document/report normally used) information about an offender's background is provided to the court; who may be assigned the responsibility for collecting this information; and what type of information is usually collected.

All jurisdictions, with the exception of Nunavut, said that this information is normally provided to the court through pre-sentence reports.[10] Five jurisdictions (Alberta, British Columbia,

[8] In the *Gladue* decision, the Supreme Court of Canada provided an excellent summary of its decision in 13 points. The following three points are taken from that summary *(R. v. Gladue*, [1999] 1 S.C.R. 688):

(i) Section 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.

(ii) Section 718.2(*e*) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also to consider the unique circumstances of aboriginal people by examining

- the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts;
- the types of sentencing procedures and sanctions which may be appropriate because of the offender's aboriginal heritage or connection.

(iii) In order to undertake these considerations, the judge will require information pertaining to the accused. Generally, case-specific information will come from counsel and from a pre-sentence report . . . which in turn may come from representations of the relevant aboriginal community. The accused may waive the gathering of that information.

[9] We have appended the *Gladue* type information that is normally collected for sentencing procedures as reported by the participants.

Nova Scotia, Northwest Territories, Ontario) noted that this information may also be provided to the court through independent sentencing reports (sometimes called *Gladue* reports).[11] However, Nova Scotia mentioned some limits regarding the preparation of independent reports:

> Although the opportunity to request *Gladue* reports is available, access to this service is limited due to the current cost recovery model which has resulted in the Mi'kmaw Legal Support Network placing constraints on the cases for which they are able to provide reports.

For their part, the British Columbia representatives stated that independent reports are prepared rarely because (1) most judges are not familiar with the availability of this type of report; (2) most judges believe that pre-sentence reports will include all the information relevant to *Gladue*; and (3) funding for this type of report is very limited. One of the British Columbia participants noted: "I have not heard of any Crown Counsel requesting such a report. I have heard of Crown Counsel objecting to an independent *Gladue* report and arguing for a simple PSR." The other representative from that province added that, in addition to the fact that the financial resources available for preparing *Gladue* reports are quite limited, only professionals trained by Legal Services Society are eligible to provide this type of report. This participant questioned the relevance of this eligibility criterion given the quality, length and frequency of the training provided (on this topic, see this participant's point of view in section 6.2.2 of this report). Moreover, this participant seems to regret the infrequent use of *Gladue* reports: "The vast majority (of the information) comes under the PSRs under probation. However, it is not the same/useful information that would be collected under a *Gladue* report. For example, the PSRs do not tend to provide information from important collaterals in the community including family members, elders etc. Neither is there information provided about the particular culture and historical background of the First Nation involved."

With respect to "who" may be assigned the responsibility for collecting information about an Aboriginal offender's background for sentencing purposes, all jurisdictions replied "probation officers and defence lawyers" and eight (Alberta, British Columbia, Ontario, and Labrador, Nova Scotia, Nunavut, Northwest Territories, P.E.I., Saskatchewan) also said "Aboriginal courtworkers and/or an Aboriginal organization" (e.g. courtworkers in Nova Scotia).[12] British Columbia noted that an independent contractor (e.g. a trained consultant, an Aboriginal organization, etc.) may perform this function. Also, some participants added that this responsibility may be assigned to others, such as community justice committees (Northwest Territories); police and Crown prosecutors (Prince Edward Island); and youth workers (Saskatchewan). In the Northwest Territories and British Columbia, the judge may also request an oral report from probation officers.

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[10] One of the participants suggested that it could be very useful if pre-sentence reports were shared with Correctional Services.

[11] The main difference, according to the authors, between a pre-sentence report and an "independent *Gladue* report" is that the latter is prepared by an independent organization and submitted to the court on behalf of the accused by the defence while the pre-sentence report is prepared by a government organization such as Correctional Services.

[12] Currently, there are Aboriginal courtworker programs in every province and territory, with the exception of Prince Edward Island and New Brunswick. While PEI does not have a Courtworker program, the PEI participant indicated that they have an Aboriginal Case Worker who works in Community and Correctional Services and whose role covers many of the roles carry out by Courtworkers in other provinces and territories.

The participant from Newfoundland and Labrador explained how the process for collecting information about an Aboriginal offender's background can be complex and fluid:

> Probation officers provide information through the pre-sentence reports. Legal Aid has community workers in many of the Aboriginal communities who can assist with collecting such information. Most information is channelled through defence counsel and, on occasion, crown attorneys. Aboriginal Court workers are available and while in this province they do not speak to sentencing they are a valued resource. Police may also provide additional information as they become familiar with the community and may have community constables or detachment assistants from the community.

Concerning the information collected about the Aboriginal accused's background, all the participants stated that, in their jurisdictions, information on the accused's mental health and his or her family history of violence, sexual abuse and addictions is collected. All jurisdictions except Prince Edward Island include information about maternal alcohol or drug use. Most jurisdictions, with the exception of New Brunswick and Prince Edward Island, indicate in the pre-sentence report whether the individual went to a residential school and, other than Alberta and Prince Edward Island, all other jurisdictions include information as to whether the accused was adopted and/or involved in the child welfare system. In addition, seven jurisdictions (Alberta, British Columbia, Nova Scotia, Nunavut, Northwest Territories, Ontario, Saskatchewan) said that they collect information about the overall historical and societal systemic factors likely to have come into play in bringing the offender before the court (e.g. reference to past government assimilation policy).

Participants from four jurisdictions (British Columbia, Nova Scotia, Northwest Territories and Saskatchewan) identified other factors that are also taken into account when obtaining information about an Aboriginal accused's background. With respect to the accused, they cited, for example, socio-economic, professional and educational status; knowledge of the culture and history of the Aboriginal home community; the impact of the home community's displacement (if appropriate); family circumstances (e.g. breakups); support of family or significant persons (such as extended family, peers, elders and other members of the community); language(s) spoken or understood and experiences with violence (as a victim or witness). Information is also gathered about the accused's home community, for example: work and educational opportunities; economic position; statistics on the level of education; the presence of racism and the relationship the accused maintains with his or her home community (i.e., the community in which the accused was raised or with which the accused keeps in contact, separate from his or her place of residence).

6.3.1.2 Non-custodial measures

The research asked the participants questions regarding how information about the kinds of non-custodial sentences available is provided to the court (i.e., the type of document/report normally used) and "who" may be assigned the responsibility for collecting this information.

As with the Aboriginal offender's background, pre-sentence reports appear to be the method used most often in all jurisdictions to provide information to the court about the kinds of non-custodial sentences available. However, this type of report has considerable limits according to the Nunavut participant:

> Some of the *Gladue* factors are referenced in PSRs but it tends to be included as a rubber stamp. PSRs frequently reference resources being available in the community that are not actually available. For example, PSRs routinely note that Elders are available for consultation etc. However since the Elders may not be able to speak English and most offenders in the Ktikmeot do not speak Inuinnaqtun, lack of money for translation makes Elders not really available.

It appears that only four jurisdictions (British Columbia, Nova Scotia, Northwest Territories, Ontario) use independent reports. Although independent reports are still rarely used in British Columbia, one of the representatives of that province wrote about their important contribution:

> *Gladue* reports will not recommend a "no contact order" due to a small community environment. It just is not possible to adhere to these conditions. Instead, it may be "a version" of a no contact order which will be tailored to the individual circumstances and community. For example, if there is a case of domestic violence and alcoholism, the condition may be that the individual cannot consume alcohol at home. If they consume it at a friend's house or elsewhere, they must be sober when they return home. The *Gladue* report will be very customized and identify the problem and what is working well. It is important to provide suitable and appropriate conditions. Otherwise, we set people up to fail (breach conditions) and they return to the system within a matter of days.

The information on non-custodial measures may also be provided to the court through justice circles organized by Aboriginal organizations. In some jurisdictions, these circles are organized prior to sentencing, which may assist in preparing a report for the court (Nova Scotia, Prince Edward Island).

As for "who" may be assigned the responsibility for collecting information about the kinds of non-custodial sentences available for sentencing procedures, all jurisdictions mentioned "probation officers". In addition, seven jurisdictions (Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Northwest Territories, Prince Edward Island, Yukon) also indicated "the Crown", seven, "Aboriginal courtworkers and/or Aboriginal organizations" (Alberta, New Brunswick, Nunavut, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan) and three (British Columbia, Saskatchewan, Yukon), "defence lawyers". Saskatchewan added that youth workers sometimes collect this type of information. One of the British Columbia participants specified that "in BC, defense counsel and the Crown are not "assigned" responsibility for collecting this information but they may "choose" to do so… I have not heard of Crown doing so but I certainly know of cases where defense has retained an independent consultant to gather the data and prepare a report. Duty Counsel may solicit the information as best they can from their client and family members, if available."

The Ontario and Nova Scotia participants noted the current situation in their provinces. The Ontario participant:

> In Ontario 18 court locations have access to dedicated Gladue services from specifically funded Aboriginal organizations and these services are not provided by courtworkers. Legal Aid Ontario, as noted earlier, provides additional hours for defence counsel to provide Gladue information for self-identified Aboriginal clients and as a default, probation officers are to include the information in PSRs. Crowns may also assist in some

> locations – and may consult courtworkers about non-custodial culturally appropriate services that might be available.]

And the Nova Scotia participant:

> The Public Prosecution Service reports that at present no one is assigned this role. Anyone may be assigned to this role in the future. At present the Mi'kmaq Legal Support Network (MLSN) has a courtworker in court whenever Eskasoni sits and on a regular basis in the Baddeck court which deals with Wagmatcook. They have the responsibility for monitoring Restorative Justice Programs and conducting circles, and routinely make informal representations to the court when they are being considered at the court level. Correctional Services (probation) also times their appointment dates in Eskasoni so that they are in the other end of the building when court is in session and they can be available on very short or no notice to provide information on their programs, which they do on a regular basis. Often, this information comes to the court in the recommendations portion of the pre-sentence report.

As a territory, Nunavut seems to experience a somewhat unique situation with respect to the role of prosecutors in collecting information about non-custodial measures:

> The Crown does not generally buy into *Gladue* other than by way of discounted sentences and there is no sense that the Crown has an obligation to provide alternatives. On the other hand, an important additional complicating factor is that the territory is supposed to be providing alternatives, so I don't know to what extent the Crown can be faulted for something that does not fall institutionally into their area of responsibility. The division of powers between the feds and the territories creates significant problems in prosecutions and corrections.

Finally, the British Columbia participants provided additional interesting comments on the aspects or challenges related to the non-custodial measures that may be presented to the court: the availability and ability of the Aboriginal community to assume responsibility for promoting restorative approaches for offenders; the existence of sentencing and healing procedures unique to the Aboriginal community (even where the offender has a fragmented connection with it); the availability and willingness of the victim and the accused to participate in a restorative justice program as a non-custodial measure, which may sometimes take place outside the Aboriginal community.

6.3.2 Recommendations of the Crown regarding non-custodial measures

With respect to non-custodial measures, the participants were asked whether, within their jurisdiction, sentencing recommendations made by the Crown are systematically informed by the kinds of non-custodial measures available to Aboriginal offenders. Five jurisdictions answered in the affirmative (Newfoundland and Labrador, Nova Scotia, Ontario, Saskatchewan, Yukon). Nova Scotia pointed out: "The Public Prosecution Service reports that the Crown leans strongly toward accepting the recommendations for non-custodial measures available to Aboriginal offenders where no danger to the community exists."
Two jurisdictions gave negative responses because the respondents were not sure whether non-custodial measures were "systematically" considered (New Brunswick, Northwest

Territories). The other jurisdictions were not aware of the Crown's procedures or were uncertain how to answer the question. Prince Edward Island and Nunavut explained their reluctance to answer this question:

> Difficult to answer as the officers of the courts in smaller communities become aware of sentencing options therefore the measures are not formally sought in each case but are known to the Crown. (Prince Edward Island)

> This is problematic. At the outset, Crown sentence positions are almost always appropriately informed by *Gladue*. However, Crown positions on repeat offences (like substance abuse, administration of justice offences) quickly become jail which is as likely to resolve alcohol abuse as it is to resolve tuberculosis. Given the huge number of these offences, it is easy to just apply the "step principle" and say "kick it up a notch judge; maybe this time he will get the message" which ignores the fact that, in addition to all of the other *Gladue* issues, there appear to be more administration of justice offences in Aboriginal communities than elsewhere which means that Aboriginal offenders get kicked up a notch faster than non-Aboriginal offenders. It also ignores the huge detection disparity. We have such a high police/population ratio in the north that breaches are readily detectable; in the south this is not the case. The real problem is that the prosecution side of the piece needs to be more therapeutic in its focus. From a therapeutic perspective, the fact that the accused has three more breaches of probation is not as important as the fact that the last time he was in court he had eight breaches of probation (i.e., he has only three charges instead of eight) - he is not perfect, but he is getting better and the breaches are going down. The punitive perspective is "I don't care if he is racking up fewer breaches; he is still breaching - kick it up a notch." (Nunavut)

6.3.3 Formal policies/directives

Only some jurisdictions have formal administrative policies/directives requesting Crown attorneys/prosecutors to systematically submit information to the court about an Aboriginal person's background or the availability of non-custodial sentences. With respect to an Aboriginal offender's background, only two jurisdictions out of eleven reported that they have formal directives: Ontario and Newfoundland and Labrador. Regarding non-custodial sentences, three jurisdictions (Newfoundland and Labrador, Ontario, Yukon) said that they have formal directives on this subject. The Newfoundland and Labrador representative cited an official document, *Guidebook for Crown Attorneys,* which formally directs prosecutors to take into consideration Aboriginal background and the availability of non-custodial measures at sentencing.
Some jurisdictions that reported not having formal administrative directives for Crown attorneys/prosecutors explained that this type of information is normally submitted to the court through pre-sentence reports (Nova Scotia, Saskatchewan), by defence counsel (Nunavut) or by prosecutors as a result of their daily experience, despite the lack of formal directives (New Brunswick, Saskatchewan).

6.3.4 Partnerships

Participants were asked if they are aware of any types of partnerships in their jurisdictions between courts and non-governmental organizations whose work is to ensure that Gladue type of information is incorporated systematically into sentencing decision procedures for Aboriginal

offenders. Feedback received has pointed to the need to clarify the meaning of "partnership" in this context. Specifically, "partnership", if understood as a funding agreement, may be between a Ministry (not the court) and a NGO who would then be expected, as part of its agreement, to provide Gladue type of services to select court locations. Conversely, "partnership" may also be understood as the "service delivery relationship" between a court and a NGO independently of any provincial funding agreement. Evidently, the term "partnership" may have been interpreted differently by the participants, thus for the purpose of this study, "partnership" should be interpreted as broadly as possible. Seven jurisdictions (Alberta, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island, Yukon) reported the existence of some types of partnerships in their jurisdictions with NGOs whose role is to ensure that information about an Aboriginal offender's background and the kinds of non-custodial sentences available to Aboriginal offenders are incorporated systematically into sentencing decision-making procedures in selected court locations (see Table 2 for the NGOs mentioned by the participants and their characteristics).

TABLE 2: PARTNERSHIPS WITH NON-GOVERNMENTAL ORGANISATIONS WHOSE WORK IS TO ENSURE THAT GLADUE TYPE OF INFORMATION IS INCORPORATED SYSTEMATICALLY INTO THE SENTENCING DECISION-MAKING PROCEDURES BY JURISDICTION ACCORDING TO THE PARTICIPANTS

Province	Name of NGO	NGO receives government funding (federal, provincial/ territorial)	NGO is an Aboriginal organization[13]
Alberta	Native Counselling Services of Alberta	Yes	Yes
Newfoundland	Innu Band Council	Yes	Yes
Nova Scotia	Mi'kmaw Legal Support Network	Yes	Yes
Northwest Territories	Community Justice Committees	Yes	Community Justice Committees may be considered Aboriginal organizations, but that depends on their source of funding.
Ontario	Osgoode Professional Development Aboriginal Legal Services of Toronto United Chiefs & Councils of Mnidoo Mnishing Ontario Federation	Yes Yes Yes Yes	No Yes Yes Yes

[13] The question did not specify what was meant by "Aboriginal organization". The responses reflect the participants' point of view on this question.

	of Indian Friendship Centres Thunder Bay Friendship Centre	Yes	Yes
Prince Edward Island	Mi'kmaq Confederacy of PEI Aboriginal Justice Program	Yes	Yes
Yukon	A number of community justice committees e.g. Teslin, Haines, Junction.	Does not know	Yes

The participants from the Northwest Territories and Yukon feel that the community justice committees in their territories may be considered Aboriginal organizations. The Northwest Territories participant explained:

> From time to time Community Justice Committees are involved with courts for specific cases. Community Justice is funded (both federal and territorial). Community Justice Committees may be considered an Aboriginal organization but it depends on who sponsors the committee. Some Community Justice committees are funded through the federal Aboriginal Justice Strategy and some through the Government of the Northwest Territories.

The Nova Scotia participant noted that all their courts may ask the Mi'kmaw Legal Support Network to prepare reports and that it also provides information on the available resources in Aboriginal communities.

6.4 Bail and parole hearings

6.4.1 Bail hearings

The participants from eight jurisdictions (Alberta, New Brunswick, Newfoundland and Labrador, Nunavut, Ontario, Prince Edward Island, Saskatchewan, Yukon) stated that bail decision-making processes are informed by the accused's background. The Newfoundland and Labrador participant noted:

> Where appropriate, this is considered. The considerations under the *Criminal Code* are the primary consideration. Often, Aboriginal accused in the jurisdiction are from small, largely (mostly) Aboriginal communities. The risk to re-offend and determination of the risk to public safety are considered in the context of the entire community and the circumstances of the accused, as with every bail hearing.

However, it appears that access to personal information about the Aboriginal person or his or her community may be difficult to obtain in the context of bail hearings, as the British Columbia participant explained:

> Bail decision-making processes in provincial court include a bit of information on a n Aboriginal accused's background but not much time is spent on it. I often ask the accused to "Tell me more?" At the Justice Centre – there is very little information provided. It is often by video or telephone. There is the issue of distance; the individual is often stood over by the police officer, representing the Crown during the call. The call takes place from within a cell at the local police detachment. The accused does not know the judge. It is just a strange voice over the phone. The environment does not lend itself to sharing personal details/background that would help the individual.

Moreover, seven jurisdictions (Alberta, New Brunswick, Newfoundland and Labrador, Ontario, Prince Edward Island, Saskatchewan, Yukon) reported that bail decision-making processes are informed by information about the kinds of non-custodial measures available. In some regions of Ontario, there is currently a pilot program called the Bail Consultation Program, which facilitates communication between Crowns and Aboriginal communities. A participant from that province explained:

> Bail consultations help to ensure First Nations accused in remote communities are not transported to urban centres for bail hearings without consideration being given to other forms of release that could respond to the offence committed, while keeping the accused in or near the community where they have access to the support of their family and other community members. A bail consultation process exists in Kenora, Timmins and Cochrane and increases collaboration between designated Crown attorneys and the Nishnawbe-Aski Police Service. In these communities, investigating officers in remote communities have an opportunity to consult by phone with designated Crowns before an Aboriginal accused is removed from the community to assess the suitability of other release options. The goal of this new process is to reduce the number of accused who are removed from remote communities where other options exist and to enhance relationships between Crowns and Nishnawbe-Aski Police.

In the vast majority of jurisdictions, the professionals responsible for providing this type of information to the judge are defence counsel, Crown prosecutors or Aboriginal courtworkers. However, one of the representatives from British Columbia noted: "A native court worker may be able to gather information. Generally only superficial information is available through Crown and defence."

Two provinces (New Brunswick, Ontario) replied that Aboriginal organizations may also collect and provide this information. The Saskatchewan participant stated that probation officers and youth workers may also provide this type of information on a bail hearing. Last, the participant from Newfoundland and Labrador mentioned community counsellors and representatives of the band council may also be involved in this processes. That participant added: "Bail hearings can include evidence from any number of sources including family, community members, counsellors etc. This varies depending on the individual and the circumstances."

Moreover, it is worth noting that, in most jurisdictions, information for bail decision-making is not standardized (e.g. in a standard form). Only two jurisdictions (Yukon, Saskatchewan) stated that this type of information is standardized.

6.4.2 Parole hearings

In Canada, the Parole Board of Canada (PBC) makes decisions under the *Corrections and Conditional Release Act* for all parole decisions for federally sentenced offenders in all jurisdictions and for provincial offenders in those jurisdictions that do not have a Provincial Parole Board. Of the thirteen Canadian jurisdictions, only Quebec and Ontario have their own Provincial Parole Boards.

Participants were asked if parole decision-making processes are informed by an Aboriginal offender's background and by the kinds of reintegration measures available. According to the PBC participant, the decision-making processes for federally sentenced offenders are informed by *Gladue* type information in all jurisdictions. The PBC participant noted:

> When making conditional release decisions, Board members make a thorough assessment of all relevant aspects of the case, including the offender's social history, and systemic or background factors that may have contributed to the offender's involvement in the criminal justice system. Board members receive specific training on Aboriginal offenders and assessments. An offender can also request an Elder Assisted Hearing (EAH) that provides a culturally sensitive hearing process in which Elders can provide the Parole Board of Canada (PBC) members with information about Aboriginal cultures, experiences and traditions that assist Board members when making quality decisions on conditional releases and the safe re-integration of offenders in the community as law abiding citizens.
>
> As part of the decision making process, Board members consider information on different re-integration measures when assessing the offender's release plan and community management strategies, including restorative justice measures, stressors/factors, community programming and interventions, and the Aboriginal community's plan for a *Corrections and Conditional Release Act* Section 84 release when the offender is released to an Aboriginal community.

According to the participants, in most jurisdictions parole officers or other correctional service employees are responsible for collecting information on the available reintegration measures and presenting it to the Parole Board. British Columbia explained that Elders, psychologists and program delivery officers as well as Aboriginal community development officers may also play a role in obtaining and presenting this type of information. The representative from Prince Edward Island stated: "The process commences at the time of sentence, if the offender agrees. Information accumulates during the sentence and is shared with PBC for their decisions."

Information for a parole decision is standardized in at least[14] five jurisdictions (British Columbia, Nova Scotia, Northwest Territories, Prince Edward Island, Saskatchewan). A British Columbia participant stated: "Information is compiled in accordance with Commissioner's Directive 712-1, Annex B (Pre-Release Decision Making) in a standardized format." Similarly, the Parole Board added: "PBC compiles all relevant information of the offender's file in a standardized package that is utilized by Board members when making conditional release decisions."

Finally, the participant from Ontario noted that in partnership with the Ontario Parole Board, the Ministry of Community Safety and Correctional Services has piloted Aboriginal Circle Hearings to address the low representation of Aboriginal applicants for early release and parole. The program is being offered at two institutions with plans for future expansion. The majority of

[14] A number of respondents stated that they did not know how this type of procedure was carried out.

applicants under this program have been successful in achieving parole or temporary absence to support treatment plans.

6.5 Other programs

Finally, the respondents were asked whether there are community justice programs/resources and aftercare programs in their jurisdiction.

6.5.1 Community justice programs/resources

Most participants (Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, Yukon) reported that there are a number of community justice programs/resources in their jurisdiction designed to assist Aboriginal accused/offenders throughout the justice process. In Ontario, 10 programs of this type have been established for adults that serve 24 communities (e.g. the Akwesasne Community Justice Program, the Mnjikaning Community Healing Model, the Miikanaake Community Justice Program and the Sagamok Community Justice Program). In addition Ontario provides funding for 41 programs that are responsive to the needs of youth and provide culturally appropriate programming focused on prevention, diversion, rehabilitation, reintegration and reduction of offending and supports Aboriginal community participation in the development of Youth Justice Committee (YJC) Programs with a focus on Northern Ontario communities. YJC sites currently supported by Aboriginal community organizations (Fort Frances, Thunder Bay and Kenora) contribute to increased Aboriginal access to and participation in justice services. They also provide culturally-sensitive and meaningful alternatives to the formal court system for youth.

The participant from Newfoundland and Labrador cited the Aboriginal Courtworker Program, the Community Justice Forum Program (which deal with both young and adult offenders in Labrador) and the Labrador Corrections Liaison Position (which focuses on establishing a link between the penal institution and the community) while Nova Scotia mentioned the Mik'maw Courtworker Program and the Mik'maw Customary Law Program. The Northwest Territories representative stated that the community justice committees work in cooperation with probation officers and victim services. Likewise, Prince Edward Island stated that it has

> . . . consistently concentrated its efforts and resources on supporting a comprehensive approach to Aboriginal justice with emphasis on sustainability. The Mi'kmaq Confederacy of PEI Aboriginal Justice Program (MCPEI AJP) is intended to benefit all Aboriginal people in PEI. There is an emphasis on collaboration and working across the continuum of justice from prevention to reintegration of offenders. . . . PEI also has an Aboriginal Case Worker who works out of Clinical Services, Community and Correctional Services… At this time, we have a multi-year Tri-partite Contribution Agreement, excellent leadership provided by the Director of Aboriginal Justice of the MCPEI and ongoing collaboration of the four main Aboriginal groups in PEI through an advisory committee. This leads us closer to the long term goal of creating an environment that allows Aboriginal people to self administer justice by building a traditional justice system based on holistic community values.

Although the programs are in place, it seems there may be a problem with information sharing and communication among the various institutions, based on what one of the representatives from British Columbia wrote:

> There are lots of community programs available but they are not connected to the courts or police etc. Do the courts know about these programs? No. Everyone operates in silos. . . . There is lots of government money to fund treatment etc. but the information on these programs does not get to the Crown or Defence. There is an information breakdown on a daily basis. There is also a huge information sharing gap between the health systems and the justice system in terms of information sharing. There needs to be a plan in place for individuals which include several components: e.g. medical/detox/psychiatric treatment.

While recognizing the need for more effective information sharing, the Saskatchewan participant indicated that privacy and confidentially considerations must also be factored in which may ineluctably impact on the fluidity of information sharing and communications among the various institutions.

Finally, two jurisdictions did not confirm the existence of community programs designed to assist Aboriginal persons throughout the justice process. The New Brunswick representative indicated that he did not know whether this type of program exists while the Nunavut participant noted that, despite the courtworker program, the services provided are most often limited to the beginning of the process:

> Our Aboriginal Courtworker Program acts to support defence counsel - there are capacity issues that mean that their role is frequently limited to the intake phase of the judicial process; however . . . they can be a very useful source of information about the community and offenders.

6.5.2 Aftercare programs

The majority of participants confirmed that there are aftercare programs or personnel who are assigned the duty of assisting Aboriginal offenders in carrying out the conditions of their non-custodial sentence (Alberta, Newfoundland and Labrador, Nova Scotia, Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, Yukon). In the case of Newfoundland and Labrador, liaison officers, Aboriginal court workers, probation officers and "local friendship centres" perform this duty. The Northwest Territories and Saskatchewan cited probation officers and youth workers. Community partners provide these services in Nova Scotia through the Mik'maw Legal Support Network. Similarly, in Prince Edward Island, the MCPEI AJP provides healing circles for offenders who request them, and the Aboriginal Caseworker's role is to establish communication between clinic and community services, and correctional services. In Ontario, notably in Toronto, aftercare workers carry out this duty.

In British Columbia, it appears that while this service exists in a few locations, it is not fully established:

> Occasionally, a probation officer or native court worker will assist with after care. This is routinely offered in our one First Nations Court and in Victoria's Integrated Court and Downtown Community Court in Vancouver.

The Nunavut participant stated that because of priorities this type of service is unfortunately not provided and that this, in fact, constitutes a deficit:

> We try to do this in our office, but the rate of crime with which we are dealing makes front-line care the best we can do. It would be FANTASTIC!!!! To have something like this in place; this deficit is a huge problem.

6.5.3 Legal Aid Ontario (LAO)

According to our respondent, LAO provides training on Aboriginal culture to its lawyers, but there is no official policy on *Gladue* submissions. Nonetheless, a number of lawyers voluntarily use the forms made available to them when they prepare sentencing or bail submissions. The *Duty Counsel Manual* also addresses the *Gladue* decision and directs lawyers to available resources (e.g. information on programs and services that focus on solutions other than incarceration). Since May, 2009 LAO has asked Aboriginal clients to self-identify. LAO has provided a five-hour extension on criminal certificates for bail and sentencing cases where clients have identified themselves as Aboriginal. LAO also created an information pamphlet explaining the importance of self-identifying as Aboriginal when coming to court.

> Legal Aid Ontario (LAO) encourages certificate lawyers to make submissions on behalf of Aboriginal offenders. The encouragement comes in the form of a five hour certificate authorization. LAO is currently in the process of establishing a *Gladue* lawyer panel (anticipated later this year)[15] and once this is in place, LAO will be able to enforce minimum standards for counsel and panel membership will be required before the five additional hours may be billed. The minimum standards will require that a lawyer meet specific reading and training requirements. . . . We also have LAO LAW (our internal legal research department) memoranda; specific research and web links are available on our LAO LAW Lawyers' Website. We have *Gladue* discussions in our two day Cultural Competency Training sessions in addition to discussing communication with Aboriginal clients and different world views on justice. We have designed and filmed *Gladue* training that will roll out with the *Gladue* panel implementation to the private bar and Duty Counsel will also be able to access this training resource.

And last,

> LAO provides "*Gladue*-type" services to accused parties not just "offenders" due to the application of *Gladue* principles at bail hearings in Ontario. Ontario law requires that *Gladue* principles apply anytime an Aboriginal person's liberty is at stake. However, to date, LAO is unaware of any circumstance in which it has issued a civil or family certificate for the purposes of making *Gladue* submissions in an area other than criminal.

[15] The interviews were conducted in 2010.

7. Conclusion

While the research did not include, as part of its scope, a caselaw review of the various interpretations of *Gladue* by the provincial and territorial judiciaries, it is noteworthy to point to the work of Kent Roach in this area[16] and recognise that the approach taken in different provinces and territories with respect to the implementation of Gladue like policies and practices has likely been influenced by the way each provincial and territorial appellate court has interpreted *Gladue*.

Despite the limitations already noted, this research is a first status report on current practices in the provinces and territories that reflect the principles set out in *Gladue*. The information obtained through the questionnaire that was developed for this study provides a general perspective of the challenges and possibilities involved in adapting the justice system to the circumstances of Canadian Aboriginal peoples and identifies some approaches for future research. The analyses conducted were based on the respondents' knowledge and points of view led to the following findings:

- Overall, initiatives and programs that comply with the *Gladue* decision were identified in all jurisdictions that participated in the study. Some of these initiatives and programs should be explored further and may even serve as models for other jurisdictions.

- The specialised courts identified in this study courts are one of the most exemplary initiatives in the application of the *Gladue* decision in the sense that they appear to have implemented processes that enable them to ensure that information about an Aboriginal accused's/offender's background and the kinds of non-custodial sentences available to Aboriginal accused/offenders are incorporated systematically into the bail and sentencing decision-making procedures hence allowing the court to prepare decisions in keeping with the directive of the Supreme Court in *Gladue* as well as those working in these courts (e.g. defence lawyers, Crown attorneys/prosecutors and judges) are knowledgeable of the range of programs and services available to Aboriginal people. Although the definition of this type of court needs to be further refined, the number of specialized courts identified in this study provides examples of the judicial system's ability to adapt to the needs of Aboriginal persons. In total, 19 specialized courts for Aboriginal accused (whether or not they deal exclusively with cases involving Aboriginal accused) were listed in seven provinces and territories.

- *Gladue* training and awareness activities for justice system officials, including judges, are provided in about half the jurisdictions. The quality of the training particularly on preparing pre-sentence or independent sentencing reports was, however, questioned by one of the participants. In his view, one of the major weaknesses of the training provided in his jurisdiction is that the trainers do not always have an extensive knowledge of Aboriginal culture and background. Since the other participants did not refer to the quality of the training provided, this is an individual point of view that is relevant,

[16] K. Roach. 2009. One step forward, two steps back: *Gladue* at ten and in the Courts of appeal. *Criminal Law Quarterly* 54: 470.

however, insofar as the quality of training services should certainly be evaluated to ensure that their objectives are being met.

- A number of participants highlighted the relevance and importance of *Gladue* type information in the sentencing process of Aboriginal offenders. Pre-sentence reports are the method most often used to provide *Gladue* type information to the court.[17] In five jurisdictions, independent reports (or *Gladue* reports) are an alternative method sometimes used to convey this information. According to one participant, independent reports are more adapted to the reality and the problems experienced by Aboriginal persons and, therefore propose more realistic and appropriate conditions than pre-sentence reports. For another participant, the costs associated with preparing this type of report, the time required and the need to make court staff aware of the usefulness of these independent reports are real obstacles to their more generalized use.

- Less than half the jurisdictions reported that sentencing recommendations made by the Crown are systematically informed by the kinds of non-custodial measures available to Aboriginal offenders. In addition, in two jurisdictions there appear to be formal administrative policies/directives requesting that Crown attorneys/prosecutors systematically submit *Gladue* type information to the court.[18]

- Seven jurisdictions stated that there were partnerships between some of their courts and NGOs. These NGOs are, for the most part, considered Aboriginal NGOs. Moreover, according to the participants, in most jurisdictions these NGOs are responsible for ensuring that *Gladue* type information is incorporated systematically into the sentencing process. They are also involved in preparing independent sentencing reports, in the decision-making processes regarding bail and parole for Aboriginal persons, and in implementing various community justice and aftercare programs. The major challenge raised appears to be establishing and maintaining an effective channel of communication between the justice system and the NGOs. The data suggests that sometimes institutions tend to work in silos, which seems to hinder the efficient operation of the court process.

- Most jurisdictions reported that bail decision-making processes are informed by *Gladue* type information. However, the participants noted that it ma y be difficult to collect quality information within the time frame required for bail hearings. Additionally, communication between the Crown and Aboriginal communities that are a long way from urban centres seems to present a s ignificant challenge. In this sense, Ontario has established a pilot project in some regions, the Bail Consultation Program, to ensure that Aboriginal accused in remote communities are not transported for bail hearings without consideration being given to other forms of release that could respond to the offence committed while keeping the accused in his or her community. Because of this pilot

[17] A list of the key information in these reports regarding on the one hand, the background of the Aboriginal individual and on the other hand, the non-custodial measures, according to the participants, is available in the appendices section of this document.

[18] It should be noted that participants' responses concerning the procedures and directives given to the Crown were particularly influenced by the field in which the participants worked. A number of respondents said that they were not familiar with this subject.

program, police officers can assess directly with a Crown attorney the possibility of an alternative sentence before the individual is transported *from h*is or her community. This program also aims to improve the relationship between the Crown and Aboriginal police.

- Parole decision-making processes also appear to be informed by *Gladue* type information in most of the participating jurisdictions.

- Although there are community justice programs in most jurisdictions, one of the participants commented that one of the major problems is inadequate information sharing, coordination, integration and communication among the various stakeholders in the justice system and those responsible for providing community justice and health programs (e.g. substance abuse treatments, mental health, etc.) This defect, which seems to be one of the key challenges of Aboriginal justice, undoubtedly affects the consistency and effectiveness of the delivery of services for Aboriginal individuals who must make their way through the system. Another challenge that was raised is the inability sometimes observed in some communities to take responsibility for providing services and community justice programs. Last, it should be mentioned that legal aid programs may also play an important role in applying *Gladue* principles in their jurisdiction as demonstrated by certain exemplary practices put in place by Legal Aid Ontario.

8. Areas for Future Justice Research

Establishing partnerships between non-governmental organizations (NGOs) and the justice system appears to be an approach that a number of jurisdictions have adopted in an attempt to find solutions to the situation experienced by Aboriginal persons in the Canadian justice system. In fact, partnerships between NGOs and the justice system seem to be an interesting option for bringing the justice system and Aboriginal communities closer together. It is possible that this rapprochement could encourage the adoption of approaches that are sensitive to Aboriginal circumstances and needs within the justice system. Although analyzing these partnerships was not a goal of this research, the participants' remarks suggest that the effectiveness of these partnerships may vary. By analyzing the conditions and characteristics of the partnerships that seem to show some success (e.g. the Mi'kmaw Legal Support Network) could make it easier to understand the challenges faced by those jurisdictions as well as the preferred solutions for better integrating the justice system with communities. This information could be useful to jurisdictions that continue to seek the integration of services provided to Aboriginal individuals involved in the justice system. Likewise, a study on t he trajectory of Aboriginal persons in the justice system, including their trajectory of using services, could provide a better understanding of the factors preventing the effective delivery of services already provided. In addition, this understanding would not only improve existing services (if required) but would also facilitate the creation of new programs or governance structures that would assist in bringing the justice system and Aboriginal communities closer together.

9. Appendices

Information collected about an Aboriginal offender's background for sentencing procedures, as reported by the participants

(1) Regarding the Aboriginal offender	
• Mental health conditions • History of family violence • History of sexual abuse • Family history of addictions • Maternal alcohol/drug use during pregnancy • Problems with alcohol and/or drug use by accused • Experience at a r esidential school during childhood or adolescence • Adoption or involvement in child welfare system	• Knowledge of culture and history of Aboriginal home community • Effects of displacement of Aboriginal home community • Family circumstances (e.g. breakups) • Support of family and significant persons (e.g. extended family, peers, Elders, members of the community) • Language(s) spoken or understood • Experiences with violence (as victim or witness) • Socio-economic, educational and professional status
(2) Regarding the Aboriginal community	
• Account of the overall historical and societal systemic factors likely to have come into play in bringing the offender before the court • Educational and work opportunities • Economic situation • Statistics on the level of education • Presence of racism • Offender's relationship with the community	
(3) Information collected about non-custodial measures for purposes of Aboriginal offender's pre-sentence report	
• Community's availability and ability to assume responsibility for promoting restorative approaches for offenders • Existence of sentencing and healing procedures specific to community • Availability of victim and accused to participate in restorative justice program • Non-custodial alternatives within or outside of community	

Questionnaire: *Gladue* Practices in the Provinces and Territories

Introduction

On April 23, 1999, the Supreme Court of Canada released its decision in R v. *Gladue* [1999] 1 S.C.R. 688. The decision provided the Supreme Court's first interpretation of s. 718.2 (e) of the Criminal Code of Canada. The section, which was part of a comprehensive series of amendments made in 1996 to the sentencing provisions, states:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

While it has been over ten years since the *Gladue* decision, a 2009 Statistics Canada report indicates that in "all provinces and territories, the representation of Aboriginal adults in correctional services exceeds their representation in the general population." Furthermore, "between 1998/1999 to 2007/2008, Aboriginal adults as a proportion of adults admitted to provincial and territorial sentenced custody grew steadily (from 13% to 18%)".[19]

Despite these findings, *Gladue* related practices (e.g. *Gladue* courts) do exist. With your assistance and input, we are interested in identifying and documenting in the form of a compendium report, any and all existing provincial/territorial practices across the various areas of the criminal justice system that reflect the principles of the *Gladue* decision.

Please note that while the questionnaire is not anonymous, there will be no collection of sensitive information and those providing information will not be named in the compendium report.

The Research and Statistics Division, Department of Justice Canada is responsible for this project.

Thank you for your input.

[19] Perreault, Samuel. 2009. "The incarceration of Aboriginal people in adult correctional services." *Juristat*. Vol. 29, no. 3. Statistics Canada. Catalogue no. 85-002-X.

Questionnaire: *Gladue* Practices in the Provinces and Territories

PART A: The Judiciary and Existence of Specialized Courts for Aboriginal Accused/Offenders

1. Are there any specialized courts (as defined in footnote)[20] for Aboriginal accused/offenders in your jurisdiction?

☐Yes

☐No

☐Don't know

1b. If yes, please identify them below:

	Court	District/Region
1		
2		
3		
4		

Please provide additional comments, if needed:

2. Are you aware of any training or awareness initiatives provided to judges regarding the application of section 718.2(e) of the Criminal Code and ensuing *Gladue* decision?

(For example, this may include awareness about their duty to take into consideration information about an Aboriginal accused's/offender's background and the kinds of non-custodial measures available when setting bail for an Aboriginal accused or deciding what sentence to give to an Aboriginal offender.)

☐Yes

☐No

[20] The minimum criteria that we have established to be considered a specialized court for Aboriginal accused/offenders include the following:

A) Those working in the court (e.g. defence lawyers, Crown attorneys/prosecutors and judges) who are knowledgeable of the range of programs and services available to Aboriginal people.
B) A specialized court is supported by a range of services that ensure that information about an Aboriginal accused's/offender's background and the kinds of non-custodial sentences available to Aboriginal accused/offenders are incorporated systematically into the bail and sentencing decision-making procedures in order to allow the court to prepare decisions in keeping with the directive of the Supreme Court in *Gladue*.

Please provide additional comments, if needed:

3. Are you aware of any formal training provided to judges regarding Aboriginal people in Canada including Aboriginal people's history, culture and experience of discrimination?

☐Yes

☐No

Please provide additional comments, if needed:

PART B: Sentencing Procedures when a Case Involves an Aboriginal Offender

4. Are there any formal administrative directives/policies within your jurisdiction requesting **Crown attorneys/prosecutors** to systematically submit information about an Aboriginal offender's background to sentencing judges?

☐Yes

☐No

☐Don't know

Please provide additional comments if needed:

5. Are there any formal administrative directives/policies within your jurisdiction requesting **Crown attorneys/prosecutors** to systematically submit information regarding the availability of non-custodial sentences to sentencing judges?

☐Yes

☐No

☐Don't know

Please provide additional comments. if needed:

6. Are you aware of any types of **partnerships in your jurisdiction between courts and non-governmental organizations (NGOs, such as *Mi'kmaq Legal Support Network***) whose work is to ensure that information about an Aboriginal offender's background and the kinds of non-custodial sentences available to Aboriginal offenders are incorporated **systematically** into the sentencing decision-making procedures?

   ☐Yes

   ☐No

   6a. If yes, can you identify and name the court(s) and NGO(s) and indicate whether the identified NGO(s) receive government subsidies to support their activities and whether the NGO is an Aboriginal organization?

Name of Court	**Name of the NGO**	**Does the NGO receive government funding (federal, provincial/territorial) to support their activities?**	**Is the NGO an Aboriginal organization?**
		☐Yes ☐No ☐Don't know	☐Yes ☐No ☐Don't know
		☐Yes ☐No ☐Don't know	☐Yes ☐No ☐Don't know
		☐Yes ☐No ☐Don't know	☐Yes ☐No ☐Don't know

Please provide additional comments if needed:

7. How is information about an **Aboriginal offender's background** provided for sentencing procedures? (Check all that apply.)

☐As part of pre-sentencing reports

☐As part of independent sentencing reports(sometimes referred to as *Gladue* Reports)

☐Other (please specify)

☐Don't know

Please provide additional comments if needed:

8. What is the standard information usually collected about an **Aboriginal offender's background** for sentencing procedures? (Check all that apply.)

☐Account of the overall historical and societal systemic factors likely to have come into play in bringing the offender before the court (e.g. reference to past government assimilation policy).
☐Whether the offender went to residential school
☐Whether the offender was adopted and/or involved in the child welfare system
☐Family history of violence, sexual abuse and/or addictions
☐Alcohol/drug problem
☐Maternal alcohol/drug use
☐Mental illness
☐Other (please specify)

Please provide additional comments if needed:

9. Who in your jurisdiction may be assigned the responsibility for collecting the information about an **Aboriginal offender's background** for sentencing procedures? Check all that apply.

☐Aboriginal courtworkers
☐Probation officers
☐Independent contractors
☐Defence lawyers/duty counsel
☐Aboriginal organization
☐Other (please specify)
☐Don't know

Please provide additional comments if needed:

10. How is information about the **kinds of non-custodial sentences** available provided for sentencing procedures?

☐As part of pre-sentencing reports

☐As part of independent sentencing reports (sometimes referred to as *Gladue* Reports)

☐Other (please specify)

☐Don't know

Please provide additional comments, if needed:

11. Who in your jurisdiction may be assigned the responsibility for collecting the information about **the kinds of non-custodial sentences available** for sentencing procedures? (Check all that apply.)

☐Aboriginal courtworkers
☐Probation officers
☐Independent contractors
☐Defence lawyers
☐Crown
☐Aboriginal organization
☐Other (please specify)

☐Don't know

Please provide additional comments, if needed:

12. Are sentencing recommendations made by the Crown systematically informed by the kinds of non-custodial measures available to Aboriginal offenders?

☐Yes

☐No

☐Don't know

Please provide additional comments if needed:

13. Are you aware of any training available to probation officers, Aboriginal courtworkers, duty counsel or others on the preparation of independent sentencing reports (sometimes referred to as *Gladue* reports) or pre-sentencing reports involving Aboriginal offenders?

☐Yes

☐No

Please provide additional comments if needed:

PART C: Non-sentencing Proceedings for Aboriginal Accused/Offenders

BAIL HEARINGS

14. Are bail decision-making processes informed by information about an Aboriginal accused's background?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

15. Are bail decision-making processes informed by information about the kinds of non-custodial measures available?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

If you replied "yes" to Question 14 and/or Question 15, please proceed to Question 16 and 17. If you answered "no", please proceed to Question 18.

16. Who may collect and provide this information to the judge? (Check all that apply.)

☐Defence lawyer

☐Aboriginal courtworker

☐Crown prosecutor

☐Aboriginal organization

☐Other (please specify)

☐Don't know

Please provide additional comments, if needed:

17. Is the information standardized (e.g. in a standard form)?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

PAROLE HEARINGS

18. Are parole decision-making processes informed by an Aboriginal offender's background?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

19. Are parole decision-making processes informed by information about the kinds of re-integration measures available?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

If you replied "yes" to Question 18 and/or Question 19, please proceed to Question 20 and 21. If you answered "no", please proceed to Question 22.

20. Who collects and provides this information to the Parole Board? (Check all that apply.)

☐Parole officers/Correctional Services staff

☐Other (please specify)

☐Don't know

Please provide additional comments if needed:

21. Is the information standardized (e.g. in a standard form)?

☐Yes
☐No
☐Don't know

Please provide additional comments, if needed:

PART D: Other

22. Are there **community justice programs/resources** available in your jurisdiction which are designed to assist Aboriginal accused/offenders throughout the justice process? (e.g. Aboriginal Courtworker Program)

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

23. Are there any **after care programs** in place **or** personnel (e.g. through the Aboriginal Courtworker Program) who are assigned with the duty to assist Aboriginal offenders in carrying out the conditions of their non-custodial sentence? (For example, facilitating the offender's contact with required services and making the necessary arrangements for obtaining service according to the sentence.)

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

24. Are there any sample copies of the policies, protocol(s), outreach material and related resources available for sharing with the researchers of this project?

☐Yes

☐No

☐Don't know

Please provide additional comments, if needed:

Demographics

25. Please indicate which province or territory you are from.

☐Yukon

☐Northwest Territories

☐Nunavut

☐New Brunswick

☐Nova Scotia

☐Prince Edward Island

☐Newfoundland and Labrador

☐Quebec

☐Ontario

☐Manitoba

☐Saskatchewan

☐Alberta

☐British Columbia

26. In the event that we would like to contact you for more information or details, we would appreciate if you could include your contact information below.

Name:

Department:

Phone number:

Email Address:

Thank you!