

ADMN 598 Master's Project

School of Public Administration, University of Victoria

Recommendations for a Formalized Gladue Report Ordering System in British Columbia

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Table of Acronyms

ALS	Aboriginal Legal Services
BCFNJC	British Columbia First Nations Justice Council
BCFNJS	British Columbia First Nations Justice Strategy
CAJ	Administrative and Judicial Centre
CCC	Criminal Code of Canada
CCD	Court Clerk Desktop
CDAS	Criminal Defence Advocacy Society
CNG	Cree Nation Government
CSB	Court Services Branch
CYFN	Council of Yukon First Nations
DJCS	Department of Justice and Correctional Services
FPSC	Forensic and Psychiatric Services Commission
GIA	Gladue Implementation Agency
GIB	Gladue Informed Bail
GWS	Gladue Writers Society
IJC	Indigenous Justice Centre
IJSS	Indigenous Justice Strategy Secretariat
JEINS	Justice Enterprise Information Network
JSB	Justice Services Branch
LFBC	Law Foundation of British Columbia
LSB	Legal Services Branch
MAG	Ministry of Attorney General
MLSN	Mi'kmaq Legal Support Network
MoJ	Ministry of Justice (Quebec)
SCC	Supreme Court of Canada
PSB	Prosecution Services Branch
PSR	Pre-sentence Report
PSSG	Ministry of Public Safety and Solicitor General
SPAQ	Services Native Courtworkers of Quebec

1. INTRODUCTION

Indigenous over-incarceration is a widely recognized concern of the Canadian criminal justice system. In 1996, the *Criminal Code of Canada* (CCC)¹ was amended to include section 718.2(e), a sentencing provision that directs judges to consider all available sanctions other than imprisonment with particular attention required to be paid to the circumstances of Aboriginal offenders.

In 1999, the Supreme Court of Canada (SCC) in *R. v. Gladue*, [1999] 1 S.C.R. 688, addressed this provision and the issue of Indigenous over-incarceration, defining it as a crisis. The court emphasized the importance of judges considering the unique systemic and background factors that may have contributed to indigenous offenders being before the court and to be informed about the types of sentencing sanctions and procedures that may be appropriate in the circumstances due to the heritage or connection of the specific offender. The requirement for this information led to the development of reports providing this information for judges sentencing indigenous offenders. These reports have come to be known as Gladue reports and although they have not by themselves resulted in a reduction in the rate of indigenous incarceration, they have provided the necessary information to assist judges in complying with section 718.2(e). However, in British Columbia, the current uncertainties and challenges with how Gladue reports are obtained, along with the absence of a formal report ordering system, have presented difficulties with this necessary information being provided to the court as often as it should be in order to help address the over incarceration of indigenous offenders.

In November 2018, the Indigenous Justice Strategy Secretariat (IJSS), a division of Justice Services Branch (JSB) of the Ministry of the Attorney General (MAG), was created to facilitate relationships between government and Indigenous people in the justice and public safety sectors. In February 2020, the Government of British Columbia endorsed the BC First Nations Justice Strategy (BCFNJS) thereby declaring its commitment to transforming the justice system for Indigenous people through strategic initiatives and plans for action. The concept of formalizing the process for initiating and preparing Gladue reports emerged in the context of ongoing collaboration between the Ministry of Attorney General (MAG) and the BC First Nations Justice Council (BCFNJC) in the development of the BCFNJS. More particularly, this process sought the formalization of Gladue report ordering, which aligns with Strategy 6 of the BCFNJS calling for standardization of the Gladue reporting process in this province.

While the MAG and BCFNJC have strategies and action plans defined for Gladue reports, there remain barriers to the logistical and operational implementation of a report ordering process. The purpose of this Master's project is to provide some insight and clarity into what a more efficient and effective future state should be for BC's Gladue report program.

This Master's project is divided into the following sections:

- *Background* – describes what a Gladue report is, provides contextual information on the current problems with BC's process for ordering Gladue reports, and offers an overview of the recently approved strategy for improving the delivery of Indigenous justice services.

¹ All acronyms are listed in the *Table of Acronyms* at the outset of this project.

- *Methodologies and Methods* – outlines the empirical framework and the tactical approach to gathering information.
- *Findings* – describes the information gathered from the interviews and documents during the research including the strengths and weaknesses and conclusions reached.
- *Discussion and Analysis* – synthesizes and summarizes the information presented in the findings section.
- *Options and Recommendations* – provides a list of potential improvements to the current Gladue report ordering system in BC and is informed by the discussion and analysis section.
- *Implementing the Recommendations* – explores a detailed consideration of potential challenges to the implementation of the recommendations as part of the consultation process and identifies the stakeholders that must be involved in this process.
- *Future Research and Conclusion* – identifies some areas in need of future exploration, a conclusion of the ideas covered in this project, and a list of the appendices.

This Master's project was prepared for the IJSS to determine effective options for delivering an efficient and effective Gladue report program for BC in order to help fulfil Strategy 6. Most of the research for this project was conducted between January and April 2020 while I was interning with MAG. At the conclusion of that internship, I provided Timothy Scolnick, a senior policy analyst with JSB, with a preliminary version of this master's project. Some of the recommendations in that version have been adopted and implemented in the new Gladue regime in BC while other recommendations are in the process of being implemented. The status of these is indicated in the Options and Recommendations section of this project.

2. BACKGROUND

The purpose of this section is to provide the reader with the necessary context to understand what a Gladue report is and the problems that BC's Gladue report program currently face. This context is provided by examining relevant legal precedents on Gladue reports and sentencing of Indigenous people, outlining the strategies that have been endorsed by the BCFNJC that address the current issues with the Gladue report program in BC, and exploring the existing literature on Gladue reports and sentencing Indigenous offenders.

Gladue Reports

A Gladue report is a written document personalized to an Indigenous client² that connects the impacts of colonization with the circumstances that has resulted in a client's involvement in the criminal justice system. A Gladue report documents the unique systemic or background factors that may have played a part in the client appearing before the court. It also describes the types of sanctions that would be appropriate in the circumstances for the client given their unique background³. The contents of a Gladue report typically include background information about the client, the social history of their community, their personal history and family relationships, their current circumstances, available community supports and resources, the impact of residential schooling and colonization, and restorative justice options and sentencing recommendations. Gladue reports are a tool for sentencing judges to help address Indigenous over-incarceration in Canada by providing possible alternatives to incarceration consistent with section 718.2(e) of the CCC.

Gladue reports are predominately used at sentencing. However, across Canada the principles in *Gladue* are being considered for other purposes, such as bail hearings. The unique systemic or background factors in Gladue reports⁴ apply to all situations where an Indigenous person's liberty is at stake. In BC, a Gladue submission can be made as part of a bail hearing⁵. However, the frequency of their use at bail hearings is not recorded so the extent that Gladue submissions are currently being used in BC is unknown.

Problem context

Despite the ruling in *Gladue*, the over-incarceration of Indigenous populations has increased across Canada, particularly over the last 10 years. In BC, the total incarcerated population in federal institutions from 2009-10 to January 2020 has slightly increased from 1,903 to 2,036. However, when the demographics of the prison population are identified, it shows that the population of non-Indigenous incarcerated has declined 8% from 1,421 to 1,307. In that period, the incarcerated Indigenous population increased by over 51% from 482 to 729⁶. While the SCC suggested that Gladue reports can be a means to divert the Indigenous offender away from incarceration⁷, rates of Indigenous incarceration have continued to rise. This suggests that

² The term "client" is used to identify a defendant who identifies as Indigenous.

³ *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 SCR 688. Para. 66

⁴ The unique systematic or background factors in Gladue reports are often referred to as Gladue principles or Gladue factors.

⁵ Gladue Rights. Aboriginal Legal Aid in BC. <https://aboriginal.legalaid.bc.ca/courts-criminal-cases/gladue-rights>.

⁶ The specific data set is not available on the Office of the Correctional Investigator website and was provided by email correspondence. See: Email correspondence with Office of the Correctional Investigator, Government of Canada, January 28, 2020.

⁷ *R. v. Ipeelee*, 2012, S.C.R. 433. Para. 60.

Gladue reports may not have helped to address this problem, although it may only be one factor in that determination.

A major issue connected with the failure of Gladue reports to divert Indigenous people away from incarceration is the operational and procedural uncertainties that hinder their use. There is a lack of clarity throughout the process of obtaining Gladue reports leading to delays in sentencing and impeding access to justice. Such delays strain not only the court system, but also cause hardships on the client, their family, and victims who are often looking for closure in order to move forward in their life. Moreover, if a client is in custody facing a shorter sentence, the excessive amount of time it takes to have the report written can exceed the time they would spend serving their sentence. For example, if it takes eight weeks to have a Gladue report written and the client only faces a four to six-week jail sentence, it may not be worthwhile for the client to obtain a Gladue report. Accordingly, having a Gladue report produced in a timely manner is important to their success as a tool for sentencing judges.

Issues with Gladue Reports: Time-Consuming, Uncertainty, Insufficient Flexibility

There are several efficiency and procedural challenges that contribute to the time it takes to prepare a Gladue report. Three main problems can be linked to the process of ordering a report: they take too long to produce, there is uncertainty and inconsistency surrounding the current ordering process, and the process lacks the flexibility to expand the uses of Gladue reports beyond sentencing.

Obtaining a Gladue report is a time-consuming process for those seeking them. Primarily, it is defence counsel's responsibility to initiate them, including obtaining relevant information about their client. This can be challenging as some clients do not have a fixed address, often relocate, or do not have a reliable means of communication. The time-consuming nature of the process to order a report is considered frustrating by some defence counsel. This can dissuade defence counsel from initiating and putting in the time required to obtain a report. It is unpaid work for defence counsel – in effect creating a disincentive to ordering a report. Finally, there is very minimal technology in place to assist in having a report produced faster. The current system for ordering a Gladue report is unsophisticated and uncoordinated. A lack of technological infrastructure compounds the issues associated with ordering and producing a Gladue report in a timely manner.

There is no simple way to order a Gladue report; there are several avenues and the process can vary, as set out in *Appendix A – Current State of Gladue in BC*. Legal Aid BC currently facilitates the ordering of most Gladue reports. If a client qualifies for legal aid, Gladue reports are arranged through and paid for by Legal Aid BC. If a client does not qualify, Legal Aid BC may assist with obtaining the report but the responsibility for paying for it falls on the client or their counsel. Legal Aid BC has a process through which reports are ordered, however, attempting to navigate it can be burdensome for Indigenous people. A Gladue report can also be ordered privately without involving Legal Aid BC. However, there are no guidelines as to who can write it nor any reasonable certainty that the report will be provided to the court.

Gladue principles are not exclusive to sentencing. They apply to criminal procedures, including bail, in which potential detention of Indigenous accused is being considered⁸, but there is no

⁸ *R. v. Bain*, [2004] O.J. No. 6147 (S.C.J.); *R. v. Crawford*, (2007) 76 W.C.B. (2d) 445 (Ont. S.C.J.)

process for obtaining the information about an Indigenous accused that the court requires for those hearings.

More Recent Court Decisions

Following the *Gladue* decision in 1999, the issue of Indigenous over-incarceration was again addressed by the SCC in *R. v. Ipeelee*. 2012 S.C.R. 433. This decision highlighted that context is necessary for understanding and evaluating the case-specific background of the accused. The SCC elaborated:

When sentencing an Aboriginal offender, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples⁹.

The SCC identified that a Gladue report is an indispensable tool to inform sentencing hearings for Aboriginal offenders to ensure a judge fulfills their duties under s. 718.2(e) of the CCC¹⁰.

The 2015 case, *R. v. McCook*, 2015 BCPC 1, provides a high-level description of the Gladue report ordering process in BC¹¹. It offers some insight into the participants involved in the process, the funding of Gladue reports, and a list of criteria that prioritize who may obtain a Gladue report. While this case does not go into the granular operational and logistical details of the Gladue report service Legal Aid BC provides, it identifies the fundamental challenges with the complexity of the ordering system and the involvement of Legal Aid BC.

With respect, the present process of having LSS¹² act as a "gatekeeper" is unacceptable. It clearly interferes with the Court's and individual Judge's independence in the sentencing process by subjecting those persons who are the most adversely affected by the systemic negative impact of the criminal justice system (Aboriginal people) to further potential negative impacts through the actions of a bureaucracy that is fiscally constrained in how it decides whether a report of the importance of a *Gladue* report is prepared.

It is imperative that the Provincial Government give earnest consideration to re-examining the present procedures for obtaining *Gladue* reports and provide the appropriate and adequate funding to allow the Court to properly carry out its duty in the sentencing of Aboriginal offenders as mandated by the Supreme Court of Canada¹³.

In *R. v. Gamble*, 2019 S.J. No. 542, the judge refused to consider a Gladue report due to the uncertainty of who wrote the report and what authority they had to write it¹⁴. This precedent highlights the need for regulation and standard procedure to ensure that the reports coming before the court are consistent and organized. An absence of a formalized Gladue report system creates uncertainty around the origins and validity of a Gladue report. While there is currently no

⁹ *R. v. Ipeelee*, 2012, S.C.R. 433 at para 60

¹⁰ *R. v. Ipeelee*, 2012, S.C.R. 433

¹¹ *R. v. McCook*. 2015 BCPC 1. Para 61-64.

<https://www.provincialcourt.bc.ca/judgments.php?link=https://www.canlii.org/en/bc/bcpc/>

¹² The LSS (Legal Services Society) is the former name for Legal Aid BC. LSS and Legal Aid BC are the same organization, however Legal Aid BC is the current correct term for this organization.

¹³ *R. v. McCook*. 2015 BCPC 1. at Para 77-78.

<https://www.provincialcourt.bc.ca/judgments.php?link=https://www.canlii.org/en/bc/bcpc/>

¹⁴ *R. v. Gamble*. 2019 S.J. No. 542. <https://www.canlii.org/en/sk/skqb/doc/2020/2020skqb16/2020skqb16.html>

recognized standard or accreditation for Gladue report writing, having an established systematic process for ordering these reports would ensure that an individual assigned to write a Gladue report has the proper training and experience once a credentialed system for writers is in place in BC.

Preparing Gladue Reports: The Role of Legal Aid BC and Other Actors

Legal Aid BC is an organization created by statute (*Legal Services Society Act*) in 1979 to support people with low incomes to obtain legal advice and services. With the mandate to provide increased access to justice, Legal Aid BC services cover family matters, child protection, immigration issues, and criminal charges¹⁵. Legal Aid BC has a separate department for Indigenous populations¹⁶. That department helps Indigenous people in BC understand their legal rights by providing information and connecting individuals to legal support. This includes educating Indigenous people about their Gladue rights and how indigeneity needs to be applied throughout the justice system.

In 2011, Legal Aid BC¹⁷ received funding from the Law Foundation of British Columbia (LFBC) to launch a pilot Gladue report writing program. The pilot ran from June 2011 to March 31, 2013¹⁸. The results from the pilot project highlighted the value that Gladue reports add to the justice system and assist Indigenous clients. Additionally, it identified areas for improving the Gladue program and in particular, the quality of reports. The recommendations from this project include providing writer training and certification, aftercare for clients, and practical and feasible sentencing recommendations in Gladue reports. It also recommended hiring the necessary support staff, offering more supports and services for Indigenous clients and their lawyers, and enhancing communication with stakeholders involved in producing a Gladue report¹⁹. Since that time, Gladue reports have become more common as a method for communicating case-specific background information of Indigenous persons in the justice system to assist judges with sentencing alternatives.

Legal Aid BC currently coordinates the majority of Gladue reports in BC. It has a roster of Gladue report writers who produce reports when requested by a Legal Aid client and approved by Legal Aid BC. Numerous educational materials on Gladue reports have been provided by Legal Aid BC. These resources on the content and process associated with a Gladue report that are publicly accessible on their website²⁰. Legal Aid BC's Indigenous department is responsible

¹⁵ Legal Services Society. About us & Mandate. <https://lss.bc.ca/about> <https://lss.bc.ca/about/ourMandate>

¹⁶ Legal Aid BC uses the term "Aboriginal" on their website to refer to this department. For consistency, the term "Indigenous" will be used to describe this department in this report.

¹⁷ Legal Aid BC was known as Legal Services Society (LSS) at the time of the Pilot Project. In this project, Legal Aid BC will be used instead of LSS.

¹⁸ Legal Services Society of BC, *Gladue Report Disbursement: Final Evaluation Report*, 2013, p. 5, <https://icwrn.uvic.ca/wp-content/uploads/2013/12/gladueReport.pdf>.

¹⁹ Legal Services Society of BC, *Gladue Report Disbursement: Final Evaluation Report*, 2013, pp. 68-71, <https://icwrn.uvic.ca/wp-content/uploads/2013/12/gladueReport.pdf>.

²⁰ Clear Skies; A Family Violence Story. Legal Services Society. <https://pubsdb.lss.bc.ca/resources/pdfs/pubs/Clear-Skies-eng.pdf>. Your Gladue Rights. Legal Services Society. <https://pubsdb.lss.bc.ca/resources/pdfs/pubs/Your-Gladue-Rights-eng.pdf>. Gladue Report Guide. Legal Services Society. <https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Report-Guide-eng.pdf>. Gladue Submission Guide. Legal Services Society. <https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Submission-Guide-eng.pdf>. Gladue Rights at Bail and Sentencing. Legal Services Society. .

for coordinating the preparation of Gladue reports. In the current state, it takes a minimum of eight weeks and often longer for a Gladue report to be produced through Legal Aid BC²¹.

There are other organizations that also prepare Gladue reports including Cedar Valley Community Living²², the University of British Columbia Peter A. Allard School of Law Indigenous Community Legal Clinic, and Access Pro Bono. These are privately prepared Gladue reports, normally expensed to defence counsel or the client. It is unknown how many private reports are prepared and used in sentencing proceedings each year in BC²³.

Current Strategic Context: The BC First Nations Justice Strategy

On March 6, 2020, the BC provincial government endorsed the BCFNJS²⁴, which draws from a memorandum of understanding between the BCFNJC and the BC government signed in 2017. The focus of the BCFNJS is on:

- reconciling with Indigenous people.
- decreasing the overrepresentation of Indigenous people in the justice system.
- improving the experience of Indigenous people within the justice system.
- addressing violence against Indigenous people, especially women and girls.
- engaging with Indigenous communities and organizations in a respectful and culturally appropriate manner.
- improving access to justice services by Indigenous people.
- designing services that provide Indigenous people with culturally relevant, flexible and user focused processes.

The BCFNJS was developed in a partnership with the BCFNJC, First Nations Leadership, the BC Ministries of Attorney General & Public Safety and Solicitor General, and First Nations communities and service providers²⁵. It provides a clear, well defined and comprehensive road map to a fundamental transformation of the justice system in BC for both Indigenous and non-Indigenous people. The BCFNJS is built on four philosophical foundations. These four foundations guide four pillars which are rooted in the justice system²⁶. Both these four foundations and four pillars can be seen in *Appendix B – Overview of the BCFNJS*.

Each pillar is supported with strategies and lines of action to deliver transformation to the justice system as experienced by an Indigenous person. This project aligns with and contributes to the broad goal of the BCFNJS of restructuring the Indigenous experience in the criminal justice system in BC. The BCFNJS highlights the importance of addressing the problems identified in this Master's project, which uses the recommendations of the BCFNJS concerning Gladue reports as a basis for its analysis, and a baseline from which to analyze the current processes for

²¹ How to Request a Gladue Report. October 2017. Legal Services Society. <https://lss.bc.ca/sites/default/files/inline-files/howToRequestAGladueReport2017.pdf>

²² Cedar Valley Community Living, *Gladue Report Writing*, <https://cvcl.ca/gladue-report-writing/>; Email correspondence with Legal Aid BC, February 11, 2020.

²³ Email correspondence with Legal Aid BC, February 11, 2020.

²⁴ BC First Nations Justice Strategy. February 2020. P. 7. https://news.gov.bc.ca/files/First_Nations_Justice_Strategy_Feb_2020.pdf

²⁵ BC First Nations Justice Strategy. February 2020. P. 3.

²⁶ BC First Nations Justice Strategy. February 2020. P. 5-6.

ordering Gladue reports. The analysis and recommendations of this project are consistent with and grounded in the BCFNJS. This Master's project draws from BCFNJS strategies 1, 4, 6, and 15 and subsequent lines of action. A description of these strategies and lines of action as they relate to this project can be found in *Appendix B – Overview of the BCFNJS*.

Literature Review

There is academic literature on Gladue reports arising from various jurisdictions in articles and program evaluations. The literature selected for review reflects the written work on *Gladue* and the court's consideration of the indigeneity of an offender. While much academic literature addresses the content of a Gladue report and how to better apply it in sentencing, less well documented is the process of ordering and generating a Gladue report and the issues associated with it including timing, credibility, and cost. These are equally important aspects to the importance and efficacy of Gladue reports. The literature was gathered via internet searches or suggested by the client.

Ben Ralston is a leading Gladue scholar based at the University of Saskatchewan. In an article written for Legal Aid BC's British Columbia's Gladue Writers conference, Ralston identified the shortcomings of Gladue reports and highlights the need for a more formalized system of producing the reports²⁷. The system Ralston speaks of examines the variance in availability of Gladue reports for certain regions and the level of detail that is present in Gladue reports²⁸.

Ryan Krahn's "Two approaches to Addressing the Disproportionate Effect of Regulatory Offences on Aboriginal People" identifies the problem and the roots of Indigenous overincarceration²⁹. Krahn presents two approaches to addressing this problem, one focused on sentencing and the other on legislative responses. While the legislative response and applicable legislation is valuable in identifying how the punishment for an offence weighed against the harm caused by the offence affects Indigenous people, this article does not explore the procedural and logistical challenges of ordering a Gladue report.

There is limited research on the potential of expanding the application of Gladue principles beyond sentencing. However, in a Master's thesis, Jillian Anne Rogin explores the use of Gladue principles and their application at bail hearings in Ontario³⁰. This article examines the potential of considering indigeneity at bail and the problems and challenges that exist with it. Rogin lays out the systemic biases within the current bail system and provides suggestions for uncovering this bias to ensure an Indigenous accused has their Indigeneity taken into account at their bail hearing. This article helpfully identifies how Gladue principles can be used effectively in proceedings in the justice system besides sentencing, particularly at bail hearings. However, it does not mention the logistics and procedures that would be required to develop a bail plan that considers Gladue principles.

²⁷ Ralston, Benjamin. (2018). *Making the case for the use of formal Gladue reports*. P. 1-3. https://www.researchgate.net/publication/329972468_Making_the_case_for_the_use_of_formal_Gladue_reports_prepared_for_LSSBC_Gladue_Writers_Conference_Nov_22_23_2018

²⁸ Ralston, Benjamin. (2018). *Making the case for the use of formal Gladue reports*. P. 14. https://www.researchgate.net/publication/329972468_Making_the_case_for_the_use_of_formal_Gladue_reports_prepared_for_LSSBC_Gladue_Writers_Conference_Nov_22_23_2018

²⁹ Krahn, Ryan. (2016). *Two approaches to Addressing the Disproportionate Effect of Regulatory Offences on Aboriginal People*. P. 1.

³⁰ Rogin, Jillian Anne, "The Application of Gladue to Bail: Problems, Challenges, and Potential" (2014). LLM Theses. 14 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1013&context=llm>

Government reports and provincial ordering systems in Alberta offer a comparison to the process for ordering a Gladue report in BC. However, the descriptions are set out at a high level that lack detail and do not address the required resources and infrastructure to create a report. The Alberta Ministry of Justice and Solicitor General released their 2018-2019 annual report which discussed the number of reports ordered and the high-level process for how a report is created³¹. The report discusses the finances of the program, their approach to coordinate and manage the Gladue program using contracted writers, and a qualitative description of the impact the program has had in Alberta. Not discussed in the report are the correspondence, systems, and communication that take place for a Gladue report to be ordered. The report is also lacking detail about how information is transferred between stakeholders, the processes in place to order Gladue reports, the existence of social supports and diversionary programs in Indigenous communities, and the other proceedings in the justice system where Gladue documentation³² could be used.

A general absence of academic work on the topic of Gladue report ordering procedures highlights the importance of this research. Academic research on Gladue reports centers on the content of what is in a Gladue report and its applications to the justice system. Consequently, an academic literature review contributes little in terms of identifying what relevant research has been done on this topic and advancing Gladue report ordering practices.

Background Summary

Gladue reports are an important tool in helping to address the crisis of over-incarcerated Indigenous offenders. They provide sentencing judges with essential information about them. This information is required by law so that a judge may impose a more informed and rehabilitative sentence as an alternative to incarceration.

The problems with the current Gladue report ordering process in BC are that they are not produced in a timely manner, that the ordering process is uncertain, and that its limited flexibility inhibits Gladue reports being used outside of sentencing. Judicial decisions and the current ordering system also highlight where certain issues lie with the current process in ordering and producing Gladue reports. The strategic framework laid out in the BCFNJS offers a guide for how the identified problems can be addressed. This strategy provides the overarching scheme for determining *Options and Recommendations* later in this report (see Section 9, pp. 49-55).

³¹ Alberta Ministry of Justice and Solicitor General. (2019) PDF P. 37,38, 49. <https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/ec0db507-2343-45ef-a39c-7d2fd62fc07c/download/justice-solicitor-general-annual-report-2018-2019-web.pdf>

³² In this report, Gladue documentation refers to all formats of Gladue such as a full Gladue report, Gladue letters, or Gladue informed bail plans.

3. METHODOLOGY AND METHODS

This section describes the empirical approaches and strategies used to gather information for how to improve BC's current Gladue program. A gap analysis and a jurisdictional scan were the two methodologies used in this project and the two methods used were a document review and interviews with relevant actors for Gladue services both in BC and in other jurisdictions.

Methodology

A gap analysis is an examination of the current process and performance to identify the differences between the current state and the ideal future state³³. An examination of other jurisdictions is also used to gather the smart practices used with Gladue report ordering. Smart practices are actions, or expressions of an underlying idea, taken to address problems or achieve goals³⁴.

Gap Analysis

A gap analysis was conducted to understand the current process and to identify the issues and shortfalls with the current process for ordering Gladue reports in BC. Subject matter experts and justice system stakeholders were consulted to document their experiences with the current process of ordering reports. The nature of the gap analysis sought to understand the various stages for ordering a Gladue report and to identify issues and uncertainties in the current system, notably by:

- identifying weaknesses that prevent a Gladue report from being written and returned to court in a more efficient and timely manner.
- identifying procedures in the justice system, such as bail hearings, where Gladue principles can be used besides sentencing and the different forms in which those principles can be delivered.

Jurisdictional Scan

The purpose of the jurisdictional scan is to gather insight into the smart practices demonstrated in various geographic areas. It was conducted to examine court report ordering processes as well as to identify effective supports that can be utilized to improve the timeliness, clarity, and flexibility for ordering Gladue reports in BC. The jurisdictional scan can be broken into three parts:

1. *Alternative reports that already exist in BC.* Forensic Psychiatric/Psychological Assessments in BC were included as part of the scan because like Gladue reports, these assessments assist the court in determining the appropriate sentence for the offender by providing important background information and sentencing recommendations.
2. *Other provinces and territories and their use of Gladue reports.* An evaluation of Gladue services in Nova Scotia, Quebec, Ontario, and Yukon Territory was completed. These jurisdictions were included because they have an established system of ordering Gladue reports. Assessing and evaluating the procedures in other jurisdictions informs this research

³³ Leconte, P. (n.d). Conducting A Gap Analysis: A Four-step Template. *Clearpoint Strategy*. [Webpage]. <https://www.clearpointstrategy.com/gap-analysis-template/>.

³⁴ Bardach, E; Patashnik, E. (2015). *A Practical Guide for Policy Analysis*. Sage. p. 126.

about potential Gladue programming that addresses the current gaps in BC. The jurisdictional scan also identifies required resources for implementing new processes.

3. *Databases in Saskatchewan and Australia.* Saskatchewan and Australia were examined because these jurisdictions have technological supports for storing information on Indigenous histories and culture. This resource provides an opportunity to introduce technology into the future state of Gladue report production in BC. One of the major focuses of this Master's project is to address the timeliness of producing a Gladue report. Having supportive technology could assist a writer in producing a Gladue report more efficiently and quickly.

Using the jurisdictional scan and gap analysis methodologies allows for understanding the weaknesses in BC's current Gladue report ordering procedures and comparing them to the smart practices used by other jurisdictions to inform recommendations to improve BC's Gladue report program.

Methods

A document review and interviews were the two methods used in this study. Research was initiated by reviewing documents to provide background information and context to help inform more thoughtful and informed questions for the interviews and meetings required for this project. Review of documents was also referred to throughout the research undertaken in this project as they were discovered or made available.

Document Review

Research for this Master's project involved reviewing documents relating to Gladue processes in other jurisdictions to assess those processes and their applicability to BC. Documentation obtained for this project included reports from Gladue subject matter experts, government directions, and court forms to understand what information is gathered and shared in other jurisdictions. Documents internal to BC government were used to develop a better understanding of the province's capabilities in order to assist with recommendations for an improved future state of Gladue report ordering. These documents were requested from subject matter experts and were only authorized to be reviewed based on compliance with confidentiality and privacy measures. Information that came from Ontario and its Gladue program, Aboriginal Legal Services (ALS), were interview notes from an interview done by IJSS prior to my involvement with this project.

The greatest benefit of a document review was having the documents to review and study prior to interviews so more informed questions could be asked of the experts to gain clarification on their policies and procedures. A limitation to this method was that certain documents that might have been useful were confidential and not privy to me. The documents that were accessible were not necessarily written for research purposes and may have other focal points other than the topic of this Master's project³⁵.

Interviews

Questions asked and information gathered from interviews inform the process of Gladue report production and the challenges or obstacles experienced by those who work with the current process. These interviews followed a semi-structured format with subject matter experts. A pre-

³⁵ Flick, U. (2015). *Introducing Research Methodology* (2nd ed.). London: Sage Publications Ltd. P. 215.

prepared list of questions was followed³⁶. It is acknowledged that this list may not have included all questions the interviewees would have viewed as essential³⁷. Follow-up questions to clarify information provided by the interviewee were asked during the interviews and in email exchanges following the interviews. However, asking follow-up questions also introduced a limitation as there is a reduction in comparability of responses from the research participants³⁸.

A snowball sampling approach was used to gather additional people to interview based on the recommendation of interviewees. This interview approach provided the writer with primary evidence from experts in the field of Gladue ordering processes. Attempts were made to follow up with interviewees to clarify gaps in information but, in some cases, the interviewees were not available for clarification. Using a snowball sampling approach has limitations where the sample might not be representative of everyone involved with Gladue report ordering and some stakeholders and their opinions may have been omitted from this research³⁹.

The interview sample comprised the following groups:

- *Two members of the Gladue Writers Society.* Gladue Writers Society is the largest body of writers in BC who produce Gladue reports. They are the most informed on what is involved in writing a report. They may also be impacted by any changes made to the delivery of Gladue services.
- *Three lawyers (Crown and defence counsel).* Defence lawyers and Crown counsel are primarily responsible for ordering Gladue reports. They are experienced with legal proceedings and will continue to be highly involved with ordering Gladue reports.
- *One member of the Judiciary.* The judiciary decides the substantive issues in the courts and they control the process in the courtroom and management of the cases before them. Every request for changing court resources or processes necessarily involves consultation with the judiciary.
- *Six Gladue research leaders.* These respondents were chosen from across Canada, including those working as part of other provincial/territorial Gladue programs, to understand smart practices in providing Gladue services.
- *Two individuals from the BC Forensic Psychiatric Services Commission (FPSC).* FPSC produce and distribute court ordered Forensic Psychiatric/Psychological assessments. These pre-sentence reports are ordered pursuant to a system developed in BC. This system is valuable in identifying more efficient ways of making Gladue reports available to the court.
- *Two individuals from the Court Services Branch (CSB), MAG.* CSB is responsible for the logistics and operations of the courts, including courtroom technology, courthouse registry operations, and creating and maintaining all court forms. They provided insight on the capacity needed for a more efficient system of ordering reports within government.

³⁶ [Appendix C – Stakeholder Interview Questions](#). The questions listed and the interview approach have received ethical approval by the University of Victoria Human Research Ethics Board: Ethics Protocol Number 20-0092.

³⁷ Flick, U. (2015). *Introducing Research Methodology* (2nd ed.). London: Sage Publications Ltd. P. 214.

³⁸ Flick, U. (2015). *Introducing Research Methodology* (2nd ed.). London: Sage Publications Ltd. P. 214.

³⁹ Flick, U. (2015). *Introducing Research Methodology* (2nd ed.). London: Sage Publications Ltd. P. 104

Strengths and Limitations

The main research limitation for this Master's project included the difficulty in identifying and contacting potential information providers. Notwithstanding that difficulty, I am confident that this approach allowed for a fair gathering of information from the different models of Gladue reports service delivery.

For the jurisdictional scan, I was not able to speak to anyone from ALS in Ontario, so the analysis on this jurisdiction relied on accessing publicly available documents. Attempts were made to speak with representatives of the provincial-run Gladue program in Alberta. However, they declined to participate. Unfortunately, there is little public information on Alberta's Gladue ordering procedures and its program could not be included as part of this jurisdictional scan.

Gathering and defining smart practices is another limitation associated with the jurisdictional scan methodology of this Master's project. As mentioned in the literature review, the subject of Gladue report ordering is novel, and to define a practice in any jurisdiction as a "smart practice" poses challenges as a practice that is "smart" may not exist under all circumstances⁴⁰.

Given the limited time available for this project, and the effects of the COVID-19 pandemic, gathering complete information and coordinating meetings was difficult as the health and urgent COVID-19 projects for information providers became a priority. While the recommendations are informed to the best of available knowledge based when undertaking the research described above, it would be advisable to follow up with contacts from Ontario, Quebec, and Nova Scotia to gain further evidence if there is any uncertainty when reviewing these recommendations and their potential consequences.

⁴⁰ Bardach, E. (2006). "Smart Practice" and the Problems of Interagency Collaboration. In Campbell et al., *Comparative Trends in Public Management* (pp. 28-47). Ottawa, ON: Canada School of Public Service. http://publications.gc.ca/collection_2008/csps-efpc/SC103-26-2006E.pdf

4. FINDINGS: GLADUE REPORT ORDERING IN BC

It is critical to have a baseline understanding of the current processes by which Gladue Reports can be ordered in B.C. Firmly understanding this is challenging. Our initial understanding of the current state of Gladue report ordering in BC relied on document reviews.

While there are facilitators, such as Legal Aid BC, who provide some oversight of Gladue report production in BC, there is no single authority that oversees all Gladue programs in BC. While a formalized process for ordering Gladue reports is offered by Legal Aid BC, there are other organizations who can assist in having a report written. This causes confusion and uncertainty for Crown counsel, defence counsel, the judiciary, and the writers regarding the various processes, particularly because different participants involved with ordering reports do not all communicate with one another and not all of them systematically document their processes. There are common steps and experiences for many who are involved with ordering reports, but there are many possible ways that a Gladue report can currently be produced. It is therefore challenging to understand and map the current procedures and operations for ordering a Gladue report for every Gladue program in BC. Therefore, for the purpose of this Master's project it is productive to generate an educated understanding of the established structures that exist in ordering a Gladue report while acknowledging that there are other less common avenues where Gladue reports are created.

Mapping Gladue report ordering – What is the process?

In BC, to have a Gladue report ordered, the accused must be Indigenous and have either pled guilty or been found guilty of an offence. Once these conditions have been met, defence or Crown counsel will decide whether a report should be prepared. This may be canvassed with the judge. These decisions are usually based on the nature of the crime, the sentencing positions of the Crown and the defence, and whether the potential length of a sentence the client might face is longer than the time it may take for a report to be produced if the offender is in custody.

At this point, how a Gladue report is produced depends on the circumstances of the client and their qualification for legal aid. In most cases in BC, the client's defence counsel is responsible for making the arrangements to have a Gladue report produced. They must either initiate it through Legal Aid BC if the client has qualified for legal aid, engage with a Gladue report writer directly, or request through Crown counsel that the report be ordered through the MAG.

In December 2019, the MAG mapped the Gladue ordering process for Legal Aid BC Gladue reports⁴¹. The MAG was assisted with input from Legal Aid BC, defence counsel, and the GWS. The map includes the description of each stage of the process, the amount of time each stage takes, and issues or concerns that arise at each stage. While the tracked process provides an understanding of the Legal Aid BC Gladue report ordering process, there are informational gaps that would be useful to this project in determining a future state of Gladue report ordering. These gaps include:

- instances when a report is ordered through the MAG (ie: that are outside the Legal Process)

⁴¹ [Appendix D – Map of the Legal Aid Gladue process](#). This government document is best viewed electronically.

- details surrounding when it is necessary to gather information for privacy and confidentiality agreements between a writer and a client,
- responsibilities of the individuals involved in ordering the report, and
- other ways that clients can obtain Gladue reports.

An important consideration of the mapped Legal Aid process is that the first step is for defence counsel to accept a referral for legal aid. While many Indigenous clients that need a Gladue report are legal aid referrals, there are clients who do not meet legal aid requirements because their incomes exceed the threshold for legal aid. In these instances, parts of this mapped out process do not apply.

For this report, a map of the current state of Gladue was made that includes the start of the ordering process for a Gladue report in BC and documents the various avenues in which a report is made available to the court. This map can be seen in *Appendix A – Current State of Gladue in BC*.

Organizations involved in ordering Gladue reports

Document review revealed that, in the current state, Legal Aid BC facilitates the production of the majority of Gladue reports in BC. Beyond Legal Aid BC, other Gladue writing service providers include GWS, Cedar Valley Community Living⁴², and the University of British Columbia Peter A. Allard School of Law Indigenous Community Legal Clinic. Access Pro Bono⁴³ in BC is also developing a service to prepare Gladue submissions. There is no formal accounting of the number of organizations that prepare reports, nor the number of reports that are prepared each year. While Legal Aid BC tracks its Gladue production, it is unknown if private Gladue writing organizations do the same⁴⁴.

Legal Aid BC reports

The most frequent means by which a Gladue report is produced is through Legal Aid BC. As noted above, these reports are produced for clients who have qualified for legal aid. In this situation, the Gladue writer assigned by Legal Aid BC is given the request and the contact information of the defence counsel requesting the report and the contact information for the client. When the report is complete, they send the report to the defence counsel who reviews it. Defence counsel then provides it to Crown counsel and the Court. Defence counsel pays the writer either by cheque or e-transfer. They are later reimbursed by Legal Aid BC.

Government reports

A government ordered Gladue report is not a common way for obtaining a report. This process is triggered when a client does not qualify for legal aid assistance and does not have the resources to pay to have a Gladue report completed privately. When the client determines they want a Gladue report, or the Crown counsel determines that a Gladue report is appropriate in the circumstances, the court can specifically order that the province produce a report at MAG's expense. It is then Crown counsel's responsibility to make a request to JSB to initiate the Gladue

⁴² Cedar Valley Community Living, *Gladue Report Writing*, <https://cvcl.ca/gladue-report-writing/>; Email correspondence with Legal Services Society, February 11, 2020.

⁴³ Access Pro Bono is an access to justice organization that provides legal services to people with limited means.

⁴⁴ Email correspondence with Legal Services Society, February 11, 2020

report⁴⁵. JSB requests the necessary information and documentation from Crown counsel and upon receipt of it, JSB forwards it along with the Gladue report request to Legal Aid BC Indigenous Services, who may ask for clarification of information when required. The government process of ordering a Gladue report undergoes the same process as a Legal Aid BC ordered report while the report is completed by the Gladue writer. When the writer completes the report, they prepare the invoice and email it to Legal Aid BC Indigenous Services who forwards the final copy of the report to JSB. JSB and Legal Services Branch (LSB) arrange to have the report filed at the appropriate courthouse registry. Once filed, JSB provides a copy of the report to Crown counsel, who distributes it to defence counsel. Legal Aid BC Indigenous Services sends the writer's invoice to JSB and JSB pays the invoice to Legal Aid BC Indigenous Services. This process is shown in the Ministry stream of ordering in *Appendix A – Current State of Gladue in BC*.

Private reports

An Indigenous client or their counsel may arrange to have a Gladue report produced without involving Legal Aid BC or MAG. They may approach any of the previously mentioned organizations involved in writing Gladue reports or they may hire their own writer. When defence counsel receives the report from the writer, they are under no obligation to provide the report to court unless they intend to rely on it in the sentencing proceedings.

As these arrangements are private, there is no systematic documentation of them. Some uncertainties arising from this process include the unknown number of reports produced in this manner, the qualifications of the writer, the amount they are being paid, and the absence of any standards, quality control, or procedures for how these reports are created.

Stakeholders Involved in Gladue Reporting

To help inform the future state of Gladue report ordering, we reviewed the opinions, experiences and interests of various stakeholders involved with court operations, relevant to the Gladue report ordering process.

Information was derived from documents from two stakeholders, the BC Prosecution Service Branch and Court Services Branch.

- *Prosecution Services Branch (PSB)*⁴⁶ – PSB plays an essential role in the justice system. That role is not to secure a conviction at all costs, but to ensure justice is done in the public interest. In 2019, PSB updated their policies to expand the consideration of the cultural and historical background of an Indigenous person in the justice system⁴⁷. For example, the charge assessment and bail policies were specifically changed to acknowledge the need to reduce the over-representation of Indigenous people in the justice system. PSB recognizes the need for an improved Gladue system that is consistent with their policies.
- *Court Services Branch (CSB)* – CSB is responsible for the delivery of all court administration services in BC. These services consist of courthouse registry and

⁴⁵ Meeting and written correspondence with JSB legal counsel and Gladue coordinators.

⁴⁶ PSB refers to the branch of MAG that oversees criminal policy and procedure with Crown counsel being lawyers appearing on behalf of PSB in court.

⁴⁷ BC Prosecution Service announces policy changes aimed at reducing overrepresentation of Indigenous persons in the criminal justice system. *Media Statement*. April 16, 2019. <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/media-statements/2019/19-06-policy-changes-Indigenous.pdf>

courtroom support for the judiciary, prisoner custody and escort, courthouse security, and the provision and maintenance of courthouse facilities⁴⁸. Under court administration and operations for the judiciary, CSB is responsible for court clerks and the production and upkeep of court forms. Currently, CSB is not involved in any manner with the ordering of Gladue reports. However, they are involved in the ordering of court reports such as Pre-sentence Reports (PSRs), including ones with a Gladue component, and Forensic Psychiatric/Psychological Assessments. Should a court ordered, or automated system of ordering Gladue reports be included as part of the future of Gladue report ordering in BC, CSB would play an essential role in that process. CSB has no viewpoint on the issue of Gladue reports but is committed to assisting with court operations.

To gather a detailed understanding of the current state of Gladue and to receive input on how a future state of Gladue report ordering should operate, the following stakeholders were engaged in interviews. This provided an opportunity to gather information and opinions that was not present in the documents used for this research.

- *Defence Counsel*⁴⁹ – Defence counsel are interested in a new system being implemented in BC. They have expressed common concerns with the current procedure and specifically the absence of a clear ordering system. Another common concern from most defence lawyers was that payment for these reports comes from either the accused, their counsel, or Legal Aid BC. When the funding for a Gladue report is not provided by Legal Aid BC, defence counsel has expressed their displeasure at the optics of having the accused finance their own report because that may create an appearance that the report will not be balanced and that the system lacks independence and impartiality. Defence counsel view the current landscape of ordering Gladue reports as too heavily reliant on them to ensure that a report is available for the court. They are often busy with other cases and clients and they find it difficult and time-consuming to request a Gladue report through Legal Aid BC.
- *Gladue Writers Society (GWS)*⁵⁰ – GWS is an Indigenous led⁵¹ non-profit organization of writers who produce Gladue reports in BC. Their overall interest is to improve the justice sector for Indigenous people. They expressed frustration with the lack of support they receive with the current process and how it has been handled to this point. Gladue writers have specific interests in ensuring that the use of Gladue considerations is expanded to earlier stages in the justice system, such as bail hearings, in order to ensure appropriate release conditions are placed on clients. Those interests include producing other forms of reports that incorporate Gladue principles. Writers see value in having more supporting resources in place to assist in writing these reports. GWS considers the legal, procedural, and practical parameters that apply to Gladue reports in BC when identifying future areas for Gladue report development.

⁴⁸ Court Services Branch Intranet Homepage. Accessed March 10, 2020.

⁴⁹ Information gathered from defence counsel as a stakeholder comes from several criminal defence lawyers throughout BC who have shared their experiences with Gladue reports. The meetings were done via telephone.

⁵⁰ Meeting with Gladue Writers Society. March 10, 2020.

⁵¹ Indigenous led refers to an Indigenous led organization which has a clear mandate from Indigenous leadership entities (e.g. Union of BC Indian Chiefs, First Nations Summit, BC Assembly of First Nations) to provide services to Indigenous people in a culturally safe and appropriate way. An Indigenous led organization is predominantly staffed and managed by Indigenous people and is accountable to the Indigenous entity or entities in fulfillment of their mandate(s).

- *Judiciary* – The judiciary is interested in a more streamlined process for the production of Gladue reports in order that these reports are more easily accessible and available to judges to assist them in sentencing Indigenous offenders.
- *MAG Privacy Officer* – The MAG privacy officer emphasizes their need to be involved with this project because of the inevitable exchange of private information that occurs when a Gladue report is written.

Together, these stakeholders have distinct roles that contribute to the current Gladue report regime in BC. Their experience within the current Gladue report ordering system, for both performing their own duties as well as how their duties may be intertwined with other stakeholder's roles, is paramount in proposing improvements to a future state of Gladue report ordering.

Conclusion

There is no consistent ordering system for Gladue reports in BC. Many stakeholders in BC have an interest in seeing changes to the current state of BC's Gladue report program. Defense counsel in BC have expressed their issues with the current Gladue program in BC and see a need for an improved procedure of ordering reports. GWS has expressed a similar view with an emphasis on improving the justice system for Indigenous people experiencing it. PSB has not directly expressed an opinion on changing the processes for ordering Gladue reports, however they are making efforts to change the way Indigenous people are prosecuted as is evident from their updated policies.

While Legal Aid BC maintains the leadership role in the general facilitation of Gladue reports, various portions of the process are uncertain. The financial means of an Indigenous person confronted with the legal system plays a determining factor in how their Gladue report will be produced. When an Indigenous offender does not meet the threshold for legal aid, a Gladue report may come from a variety of different sources. This system of ordering is largely unknown and impossible to generalize. There are gaps in knowledge for how organizations might be employed to write a report as well as how reports are ordered outside the legal aid stream. Moreover, limited information is available about the measures and protections that exist with privacy and confidentiality.

5. FINDINGS: LESSONS FROM FORENSIC PSYCHIATRIC/ PSYCHOLOGICAL ASSESSMENT REPORTS IN BC

Developing a better understanding of processes for ordering other reports prepared for sentencing offenders in BC can help inform smart practices for the future state of ordering Gladue reports. A Forensic Psychiatric/Psychological Assessment examines the mental health of the defendant and is provided to assist the judge in determining an appropriate sentence for the offender. Its purpose is similar to that of a Gladue report. Both assist the judge in determining a sentence that factors in the offender's background, the circumstances of the offence, and the connection between the two. The difference is that a Forensic Psychiatric/Psychological Assessment examines the mental state of the accused whereas a Gladue report examines the systematic disadvantage embedded in history and current society that are unique to Indigenous people.

***R v. Blackwell* – background to an automated ordering system**

The BC Supreme Court case, *R. v. Blackwell*⁵² examined the court's ability to order a non-consensual Forensic Psychiatric/Psychological Assessment of an offender. The court ruled that it does have the jurisdiction to order such a report in order to satisfy the sentencing principles in the CCC and specifically for determining an appropriate sentence for the accused⁵³. From this decision, CSB, PSB, and the Forensic Psychiatric Services Commission (FPSC) prepared a formal agreement to manage ordering Forensic Psychiatric/Psychological Assessments.

Ordering processes for Forensic Psychiatric/Psychological Assessments

When a Forensic Psychiatric/Psychological Assessment is ordered orally in court by the judge, it is recorded by the court clerk in the Court Clerk Desktop (CCD)⁵⁴. The Crown and defence counsel can *request* these assessments but only the court can *order* them⁵⁵. An *order* is an enforceable requirement that a report be produced regardless of whether the defendant chooses to participate in the assessment. Once the court clerk has recorded the order in CCD, the courthouse registry is notified of the order and staff prepare a form entitled "Pre-Sentence Report and Psychological/Psychiatric Assessment" (ADM 854)⁵⁶. This form is electronically distributed through the case management system to Corrections via CORNET⁵⁷ and to BC Mental Health via fax⁵⁸. The courthouse registry also sends a copy of ADM 854, as well as the Information setting out the accused's charges and the Record of Proceedings, to Crown counsel, Community Corrections, and the FPSC⁵⁹.

⁵² *R. v. Blackwell*, 2007 BCSC 1486 (CanLII), <<http://canlii.ca/t/1t412>>, at paragraph 13.

⁵³ *R. v. Blackwell*, 2007 BCSC 1486 (CanLII), <<http://canlii.ca/t/1t412>>, at paragraph 39.

⁵⁴ The CCD is the computer interface that is operated by the court clerks in the court room during court proceedings. This system records what happens and orders that are made by the court. The CCD system is connected with JUSTIN, the criminal justice database. JUSTIN is the criminal justice database. This database is an integrated system for managing and administering the criminal justice process. This database is jointly managed by the Attorney General, the judiciary, the RCMP, the Federal Department of Justice, and the Ministry of Child and Family Development. Access to JUSTIN is unique to each stakeholder, who access the database through their own module.

⁵⁵ Email correspondence with Court Service Branch employee. Court report information – introduction. January 17, 2020.

⁵⁶ [Appendix E – Form ADM 854](#)

⁵⁷ CORNET is the corrections Network System. It is connected to JUSTIN which links information on offenders in custody and in the community with court documents. It is used primarily by institutional and community corrections officers to manage adult and youth offenders.

⁵⁸ Email correspondence with Court Services branch employee. Court report information – introduction. January 17, 2020.

⁵⁹ Court Request for a Psychological/Psychiatric Assessment. Court Registry procedure.

It is Crown counsel's responsibility to complete the "Forensic Psychiatric Services General Referral" form⁶⁰ and send it to FPSC along with the circumstances of the offence, any criminal history of the accused, and victim impact information⁶¹. When the accused is in custody, the proceedings are adjourned for approximately five weeks for the assessment to be prepared and seven weeks if the accused is not in custody. Out of custody accused can be assisted by probation officers with scheduling interviews with FPSC staff and doctors⁶².

Protocol for delays

When there is a delay in the preparation of an assessment, FPSC must inform the courthouse registry. If the assessment cannot be completed at least five business days before the scheduled hearing date, FPSC is required to send a letter to the courthouse registry to the attention of the judge, informing them of the delay and the reasons why⁶³. The courthouse registry files the letter and forwards a copy to the judge, Crown counsel, and defence counsel. Crown and defence counsel may apply to adjourn the sentencing hearing to another date and if the court agrees, a new sentencing date is set⁶⁴. This is the process until the assessment is received by the court.

Payment

Compensation to FPSC for their services is set out in a contract with the province that is overseen by the Community Corrections Branch of PSSG. The conditions in the contract include payment for conducting the assessment, as well as the fees and expenses for having to attend court to provide expert evidence payment when necessary. An assessment costs approximately \$2,250. The contract defines the maximum amount the province is required to pay FPSC. Individual assessment costs are pre-determined and are provided up to the maximum amount as agreed upon in the contract.

Communication

The interviews with those involved in ordering Forensic Psychiatric/Psychological Assessment reports revealed the importance communication plays in the creation of these reports. Creating the report can be challenging particularly if the defendant is homeless or difficult to get in contact with⁶⁵.

The process for ordering these assessments in BC is built into existing courtroom technological infrastructure. The fast transfer of information via email and fax, and though CCD, which is supported by data systems (JUSTIN, CORNET) allows for information about the defendant to be distributed to the stakeholders efficiently. The Forensic Psychiatric Services Referral form completed by Crown counsel has "smart form" capabilities so that it can be completed on the computer and easily distributed to FPSC⁶⁶. Scheduling issues arise in the ordering process when the assessment is not completed by the scheduled sentencing date. The reasons why the assessment may not be completed are varied and include the accused not showing up for

⁶⁰ [Appendix F – BC Mental Health and Substance Abuse – Court Ordered Assessment Referral](#)

⁶¹ Court Order for a PSR with a Psychological/Psychiatric Assessment as Part of the PSR. Crown counsel office procedure.

⁶² Court Order for a PSR with a Psychological/Psychiatric Assessment as Part of the PSR. Community Corrections office procedure.

⁶³ There are different circumstances that a report can be delayed that are outlined in the Implementation Considerations section of this report.

⁶⁴ Court Order for a PSR with a Psychological/Psychiatric Assessment as Part of the PSR. Forensic Psychiatric Service Commission Clinic procedure.

⁶⁵ Phone interview with FPSC employee. February 26, 2020.

⁶⁶ In-person meeting with CSB employee. February 28, 2020.

scheduled interviews. When that happens, the assessment may need to be reordered and the process repeated.

Conclusion

Ordering a Forensic Psychological/Psychiatric Assessment is an organized and automated system of ordering a sentencing report in BC. There is a policy for communicating the ordering of reports, a payment structure, a protocol when an assessment is delayed, and a technologically sophisticated system for ordering the report in a courtroom.

The existence of an automated ordering system is enabled by an agreement between PSB, CSB, and FPSC to have the assessments completed. All communication is done electronically through forms and through the CCD allowing correspondence and information to be passed efficiently. The policy developed for ordering Forensic Psychological/Psychiatric Assessment reports also incorporates a contingency plan for delays in reports that alerts all relevant stakeholders.

6. FINDINGS: LESSONS FROM OTHER JURISDICTIONS

The Gladue report processes in other jurisdictions provide insight for informing the future state of Gladue report ordering in BC. Mi'kmaq in Nova Scotia, the Cree Nation Government (CNG) in Quebec, and the Council of Yukon First Nations (CYFN) in Yukon Territory were chosen as examples because they have Gladue programs and agreed to participate in this Master's project. Aboriginal Legal Services (ALS) in Ontario was chosen because they had some publicly available documents and information on their Gladue program that is also relevant.

Ordering a Gladue report in Nova Scotia⁶⁷

The Mi'kmaq Legal Support Network (MLSN) is an Indigenous-led organization that coordinates preparing Gladue reports in Nova Scotia. Mi'kmaq community members make up a large portion of the province's Indigenous population. MLSN has 35 active report writers for 13 Indigenous communities and 14 satellite communities.⁶⁸

Many Gladue report writers are based in Mi'kmaq communities. Some writers specialize in certain areas such as working with women or youth clients. Coordinating this program involves extensive document sharing and information collecting which relies on building and maintaining relationships between MLSN, the courts, and Crown counsel.

MLSN provides tools to assist Gladue writers including checklists for gathering necessary information. This checklist is also useful at bail hearings for creating a plan to assist the client's release from custody. MLSN writers conduct risk assessments for bail and Indigenous courtworkers have a copy of this checklist at the courthouse to assist in producing a bail plan. Additionally, an assessment can also be done by police and Crown counsel at bail hearings.

Identifying Indigeneity

The Gladue report ordering process begins with identifying whether the accused is Indigenous. When an Indigenous accused is identified in court, defence counsel, probation services, Crown counsel, or the accused themselves may ask for a report to be produced before their sentencing⁶⁹.

Indigenous courtworkers play an important role in identifying indigeneity, supporting the needs of Indigenous clients, ensuring their Gladue rights are not violated, and determining whether a Gladue report is appropriate for the client. Due in part to the homogeneity of the Indigenous population (Mi'kmaq) and given the small population of Nova Scotia and the geographic distribution of Nova Scotia's Indigenous population, MLSN has found that Indigenous courtworkers are often able to identify someone as Indigenous because of their last name. Early identification of a client as Indigenous in the justice system is important in ensuring that Gladue principles are considered throughout their justice system experience.

Court clerks in Nova Scotia are given a Gladue binder with the most up to date forms and processes for ordering reports⁷⁰. This includes the Gladue Report Request form⁷¹. MLSN is

⁶⁷ This information comes from meetings, follow up emails, and document sharing with Indigenous Courtworkers and the Gladue Coordinator in Nova Scotia.

⁶⁸ Census Profile, 2016 Census Nova Scotia. Stats Canada. <https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/prof/details/Page.cfm?Lang=E&Geo1=PR&Code1=12&Geo2=&Code2=&SearchText=Nova%20Scotia&SearchType=Beginns&SearchPR=01&B1=All&GeoLevel=PR&GeoCode=12&type=0>

⁶⁹ FAIR TREATMENT OF INDIGENOUS PEOPLES IN CRIMINAL PROSECUTIONS IN NS. September 27, 2018. P. 13-14.

⁷⁰ Email with Nova Scotian Indigenous Courtworker. RE: Gladue Processes in Nova Scotia and at MLSN. March 2, 2020

⁷¹ [Appendix G – Nova Scotia Gladue Report Request form.](#)

involved in reviewing report requests. Prior to the start of court, Indigenous courtworkers may sit with the judge to review files to determine which ones could benefit from a Gladue report⁷². In some cases, MLSN will send a report request back to the Court indicating that a Gladue report cannot be completed as Gladue factors do not apply to the offender⁷³. MLSN is in the best position to determine the eligibility of a client.

Ordering process and distributing information to writers

When it is determined that a Gladue report should be ordered, sentencing is adjourned for two months to allow enough time for the report to be produced. The order for the Gladue report is made by the court and sent to the MLSN through the request form.

MLSN forwards the information from Crown counsel to the Gladue writer. If the Gladue writer accepts the assignment, this information is sent with a confidentiality agreement⁷⁴ which is signed by the writer and returned to MLSN. When the Gladue writer has all the necessary information from the Crown counsel to write the report, they will work with the client to learn their history, their connection to their Indigenous community, and the names of any individuals who have been influential in their lives so that they can also be interviewed⁷⁵.

Gladue writers identify potential conflicts of interest when the Indigenous client has been assigned to them. A conflict of interest can emerge when the writer has a direct relationship with an accused or a victim. Gladue report interviews typically include at least three people besides the client, ideally spanning three generations of the client's family. MLSN does not have access to the client's criminal history via Justice Enterprise Information Network (JEINS). Therefore, Crown counsel must gather the client's information from JEINS or any other resources they have and fax that information to MLSN. This information exchange relies on established relationships between MLSN and Crown counsel⁷⁶.

The Gladue writer researches the experiences of the client's community in Canada to understand how community disadvantage and systemic factors have impacted the client. Examples of systemic community impacts could include accounts of the impacts of residential schooling, disadvantage caused by statutes, and treaties or life experiences both on and off reserves. This information is compiled and allows the writer to make recommendations on sentencing for the client by identifying culturally relevant services to assist with treatment and rehabilitation. Most reports take six to eight weeks to prepare.

Once the writer has completed the Gladue report, they are required to send it back to the Gladue coordinator at MLSN. MLSN requests that Gladue reports be received two weeks before a sentencing hearing is scheduled. The Gladue coordinator edits the report. When it is finalized, MLSN saves the original copy of the report as well as a digital copy. The final version of the Gladue report is sent to the province where a copy is stored. Gladue reports are also sent by fax to the court, defence counsel, and Crown counsel. The court requires the report be received one week before sentencing is scheduled.

The Gladue coordinator keeps a copy of everything they are sent by the writer because writers will shred material specific to the client after the report is complete due to privacy concerns.

⁷² Email with Nova Scotian Indigenous Courtworker. RE: Gladue Processes in Nova Scotia and at MLSN. March 2, 2020.

⁷³ [Appendix H – Nova Scotia Collaborative Interview Form](#)

⁷⁴ [Appendix I – Nova Scotia Confidentiality agreement signed by the report writer](#)

⁷⁵ FAIR TREATMENT OF INDIGENOUS PEOPLES IN CRIMINAL PROSECUTIONS IN NS. September 27, 2018. P. 13-14.

⁷⁶ Email with Nova Scotian Indigenous Courtworker. RE: Gladue Processes in Nova Scotia and at MLSN. March 2, 2020

Oftentimes, writers will also keep a library of their community research including texts, newspapers, and community histories

Payment

The province pays \$2,000 per Gladue report and will compensate up to \$500 for the writer's accommodation and travel. In instances where a client has already had a report prepared previously, updates are made to the report to reflect the experience of the client since the report was first ordered. Updated Gladue reports are also valued at \$2,000. MLSN also charges the province a \$395 administration fee per report. In cases where a report might be started but not completed, writers are still compensated for the work they complete. When a Gladue report is provided to MLSN by the writer, MLSN creates an invoice, and a cheque is provided to the writer. Writers are paid by MLSN within a week of submitting the report. MLSN will even compensate writers before the province has paid MLSN. MLSN sends invoices to the province and payment is issued to MLSN within two to four weeks.

Ordering a Gladue report in the Cree Nation Government in Northern Quebec⁷⁷

When an order for a Gladue report is made in court, the courthouse registry receives the request from the judge and sends a form to the Administrative and Judicial Centre (CAJ). When the CAJ receives the request form, it is transmitted to one of three organizations that prepare Gladue reports for Indigenous nations in Quebec. These organizations are the Services Native Courtworkers of Quebec (SPAQ), the Makivik Corporation (Makivik) and the Department of Justice and Correctional Services (DJCS). Each of these organizations have specific Indigenous communities for which they prepare Gladue reports.

Quebec's Gladue program has been developed by the Ministry of Justice of Quebec (MoJ)⁷⁸. Within Quebec there are several distinct Indigenous groups that deliver Gladue reports to their communities. The DJCS prepare Gladue reports for the Cree Nation Government (CNG)⁷⁹. The CNG is an Indigenous-led organization that has the duty of preparing Gladue reports using a combination of their own staff writers or local contracted writers. The CNG Gladue model is the focus of the Quebec portion of this jurisdictional scan because I received the contact information for the experts who deliver Gladue services to the Cree nation and the Cree nation was willing to participate in this research. Documents and interviews were used to compile information about the CNG Model.

Cree Nation Government

The Cree Nation of northern Quebec has a population of approximately 20,000, consisting of nine communities covering approximately 400,000 square kilometers⁸⁰. The CNG is an example of one Gladue delivery model in Quebec that serves a specific region and Indigenous population of the province.

⁷⁷ CERP, *Les Rapports Gladue*, Document synthèse, P-839-102, Déposé en décembre 2018 (Mise à jour en janvier 2019), https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-839-102.pdf, January 2019.

⁷⁸ Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progress (CERP) P-839-102. P. 6. https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-839-102.pdf

⁷⁹ Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progress (CERP) P-839-102. P. 8. https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-839-102.pdf

⁸⁰ Telephone meeting with Cree Nation Government representatives Donald Nicholls, Director of Justice and Correctional Services, and Nelson Mianscum, Coordinator of Justice, October 21, 2019.

The CNG's delivery of Gladue services is supported and provided through the DJCS. The CNG DJCS Justice Administrator will contact a justice committee in a community to obtain the name of a local writer. When a Gladue report request for a Cree member is completed by the courthouse registry, it is sent to the DJCS. The DJCS forwards the request with any special notes to the Justice Administrator who contacts a local writer with knowledge about the community⁸¹. The writer receives a confidentiality document to sign with the report order⁸². The Gladue writer works with the client to write the report. DJCS staff also write Gladue reports as part of their regular duties.

Once a Gladue report is completed, the writer will review the report with the client and deliver it in-person to the court. As a result of a recent update in processes, Gladue reports must be provided to the court two weeks before the scheduled sentencing date. This changed the previous policy where the report was due the day of sentencing⁸³. Since most of the judges that hear CNG cases are itinerant, having reports returned earlier allows for easier scheduling of matters for when the report is required.

Education and Training for writers

There are twenty-three DJCS local or contracted rostered writers that prepare Gladue reports for Cree people⁸⁴. DJCS also has a partnership with the McGill Centre for Human Rights & Legal Pluralism⁸⁵ which runs an internship program that involves training students in Gladue report writing in urban settings (e.g. Montreal, Quebec City). This partnership helps ensure that DJCS staff and other writers are not required to travel as frequently to urban centres in Quebec. Going forward, DJCS is also exploring a team-based model of writing reports which involves having multiple writers working on a report to reduce the need for single writers to travel to do interviews⁸⁶.

When a local community Cree writer or contracted roster writer cannot be identified to prepare a Gladue report, a DJCS staff member is assigned to write the Gladue report. DJCS staff also tend to write reports for more traumatic incidents because of the sensitive nature of the offense and to ensure information is not shared more widely. DJCS Gladue report reviewers, sometimes known as "super writers," provide comments, support, and quality assurance for other writers.

Payment to writers

Writers are reimbursed by DJCS for the costs of accommodation and travel. They are required to mail all expense documentation to the DJCS. The cost of the average Gladue report is \$1,000⁸⁷. DJCS Gladue writers file an invoice with the DJCS to receive payment for their work. Writers are paid within two weeks of the DJCS receiving the invoice⁸⁸.

Gladue Letters

⁸¹ Gladue Reports – P-839-102. Aboriginal Relations Commission of Inquiry and certain public services. P. 13-14.

⁸² Gladue Reports – P-839-102. Aboriginal Relations Commission of Inquiry and certain public services. P. 14.

⁸³ Meeting Notes – Don Nicholls, DJCS, CNG – March 3, 2020

⁸⁴ Subject: Request for information in the context of the work of the *Commission on the relations between Aboriginals and certain public services in Quebec: listening, reconciliation and progress*. P-839-24. Pp. 5-6.

⁸⁵ [International Human Rights Internships. Centre for Human Rights & Legal Pluralism.](https://www.mcgill.ca/humanrights/clinical/internships)
[https://www.mcgill.ca/humanrights/clinical/internships.](https://www.mcgill.ca/humanrights/clinical/internships)

⁸⁶ Meeting Notes – Don Nicholls, DJCS, CNG – March 3, 2020

⁸⁷ Gladue Reports – P-839-102. Aboriginal Relations Commission of Inquiry and certain public services. Pp.17-18.

⁸⁸ Meeting Notes – Don Nicholls, DJCS, CNG – March 3, 2020

It had not been standard practice for the CNG to prepare abbreviated or shortened versions of Gladue reports, often referred to as Gladue letters. However, on September 30, 2019, Quebec's *Commission d'enquête sur les relations entre les Autochtones et certains services publics: écoute, réconciliation et progrès*, also known as the Viens Commission, released its final report on the relationship of Indigenous peoples with public services⁸⁹. It included a call to action to automatically prepare a Gladue letter for Indigenous accused whenever they enter the system and to provide funding for the letters. They are to be used in instances where an Indigenous accused faces a sentence of four months or less. Gladue letters can be written faster than a full Gladue report. The Gladue letter option was proposed to guarantee Gladue rights for Indigenous while also recognizing that there are frequent delays in the preparation of full Gladue reports, which sometimes require up to four months to prepare. The practice in Quebec is to only prepare a full Gladue report if an Indigenous client is or will likely face a jail sentence of four months or more⁹⁰.

Privacy and Storing Gladue reports

CNG Gladue writers are not allowed to keep a copy of the report they prepare. Gladue report reviewers, who perform a quality control check of the reports prior to submitting them to the CAJ, sign a declaration of confidentiality for each report they review and are therefore able to keep copies of them. These copies must be returned to the organization they work for if they leave their employment⁹¹.

DJCS writers vary in age and technical abilities so some will send their reports to DJCS electronically and others by fax. However, a copy of the report does need to be brought in-person to the courthouse. DJCS saves a copy of the report in case it is needed in the future. The report can be retrieved and updates incorporated rather than generating an entirely new report. There are confidentiality agreements in place for the Gladue report ordering process that cover updating past reports. Updates to an original report reflect what has happened in the client's life since the report was first produced.

Ordering a Gladue report in Ontario – Aboriginal Legal Services (ALS)

During the course of this research, no actors from ALS were able to participate in an interview. Accordingly, all the findings came from reviewing documents.

There are eleven Gladue programs that provide Gladue reports to different regions and municipalities in Ontario⁹². Each Gladue program is run by an Indigenous organization or community⁹³. The funding for these programs comes from either the Department of Justice, the

⁸⁹ Viens Commission Final Report. (2019). P. 478.

https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf

⁹⁰ Gouvernement du Québec, Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès (CERP), *Échange courriel entre la CERP et le MJQ concernant un document transmis dans le cadre des DG-0085-C et DG-0093-C*, p. 12,

https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_depotes_a_la_Commission/P-839-96.pdf, in Gouvernement du Québec, Commission d'enquête sur les relations entre les Autochtones et certains services publics : écoute, réconciliation et progrès (CERP), Rapport final, 2019, p. 353-4,

https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Rapport_final.pdf.

⁹¹ Telephone discussion with Lyne St-Louis, subject matter expert on Gladue programming at the Makivik Corporation (Société Makivik), March 16, 2020.

⁹² Gladue Report Programs in Ontario. *Legal Aid Ontario*. <https://www.legalaid.on.ca/lawyers-legal-professionals/for-aboriginal-legal-issues/gladue-report-programs-in-ontario/>

⁹³ Tim Scolnick's notes from Meeting with Danny Kazuo Morton. August 1, 2019.

Ministry of Attorney General, Legal Aid Ontario, or a combination of them. ALS serves the largest area and is the longest running Gladue report program, starting in 2004⁹⁴. ALS receives a combination of funding from all three authorities⁹⁵. For this research, ALS and their operations offers the best comparable example to BC amongst Ontario Gladue programs because they serve the largest number of people in Ontario.

ALS is not a government run program. ALS has been an Indigenous facilitated program from its creation⁹⁶. A report can be requested by accessing ALS's online request form⁹⁷. ALS has 14 Gladue writers and 14 caseworkers. The caseworkers perform some writing tasks and are responsible for aftercare when Indigenous offenders are released from custody. ALS offers both full Gladue reports as well as Gladue letters. Gladue Reports are provided when Crown counsel is seeking a custodial sentence of at least 90 days for an out-of-custody client. These reports are generally written by an ALS Gladue writer. When Crown counsel is seeking 90 days or less as a custodial sentence, ALS will write a Gladue letter. This is typically done by caseworkers. In addition to the 14 writers and 14 caseworkers, ALS has a program director, three administrative support workers, and three senior managers - one report reviewer, and two coordinators, one for writers and one for caseworkers, who can also review reports when necessary⁹⁸. There are several offices that ALS uses throughout Ontario. These offices are located in areas with Gladue courts, which are specialized courts for people who identify as Indigenous and have been charged with a crime. These courts deal with criminal matters and only handle bail and sentencing hearings⁹⁹.

Ordering procedure for Gladue reports in Ontario

Ordering Gladue reports and letters is done through a publicly accessible website¹⁰⁰. This website explains whether a Gladue report or Gladue letter is required for the client based on the sentence that Crown counsel is seeking. A general overview of the reports and letters is displayed on the website along with the expected time that it will take for the document to be completed. The Gladue report request form gathers the following information for the Gladue writer:

- the type of report requested,
- the court information,
- the client contact information if they are in or out of custody,
- defence counsel's information and sentencing position,
- Crown counsel's information and sentencing position,
- the judge's information,
- any required documentation and a place to attach it,
- terms and conditions that must be agreed to,

⁹⁴ <https://www.legalaid.on.ca/lawyers-legal-professionals/for-aboriginal-legal-issues/gladue-report-programs-in-ontario/>

⁹⁵ Tim Scolnick's notes from Meeting with Jonathan Rudin. October 15, 2019.

⁹⁶ Tim Scolnick's notes from Meeting with Jonathan Rudin. October 15, 2019.

⁹⁷ Aboriginal Legal Services. *Gladue Court Request Form*. <https://www.aboriginallegal.ca/gladue-request-form.html>

⁹⁸ Tim Scolnick's notes from Meeting with Jonathan Rudin. October 15, 2019.

⁹⁹ What is a Gladue Court or Indigenous Peoples Court? *Steps to Justice; Your guide to law in Ontario*.

<https://stepstojustice.ca/questions/criminal-law/what-gladue-court-or-indigenous-peoples-court>

¹⁰⁰ <https://www.aboriginallegal.ca/gladue-request-form.html>. Aboriginal Legal Services.

- and the name of the individual submitting the request¹⁰¹.

Once this is completed, the individual submitting the documentation hits a submit button and ALS is notified of the request.

Gladue principles at bail

Ontario is an example of a province that applies Gladue considerations for Indigenous clients at their bail hearing. *R. v. Bain*¹⁰² is an example of case law in Ontario that decided that Gladue principles do apply at bail hearings. *R. v. Crawford*¹⁰³ is a decision where the judge determined that a failure to consider Gladue principles at bail hearings is an error of law. Having Gladue principles apply to bail hearings means that all types of release must be examined with detention of the client being a last resort¹⁰⁴. The client's lawyer or duty counsel can help connect the client with an Indigenous court worker who can assist with making a release plan. Release plans examine Gladue principles as they apply to the client and the resources available to them including where they will reside. The plan can be used to negotiate with Crown counsel about the client's release or it can be provided to the court at the bail hearing¹⁰⁵.

Ordering a Gladue report in Yukon¹⁰⁶

The Council of Yukon First Nations (CYFN) began a Gladue report pilot program that was managed by Legal Aid, an independent, non-profit organization funded by the Governments of Yukon and Canada¹⁰⁷. Prior to the pilot project, there was no Gladue report ordering program in Yukon. The CYFN took over the Gladue report pilot project from Legal Aid after approximately one year. There were two reasons for this transition. First, Legal Aid felt that defending the clients as well as writing their reports made Gladue reports appear as documents that advocated for the client, which is not their intention. Second, Legal Aid, being a non-Indigenous organization, did not adequately serve the cultural needs of the First Nations population. Legal Aid and CYFN both identified that it would be more appropriate to have an Indigenous-led organization coordinate and write all Gladue reports in the Yukon.

Under the CYFN, the government of Yukon funds up to 32 Gladue reports annually¹⁰⁸. The payment terms of the agreement between the territorial government and the CYFN are contractual rather than being reimbursed on a "per report" basis. Any additional costs that writers accumulate in order to write a report are paid for by CYFN. Writers are not asked to come to court to deliver Gladue reports orally or provide expert testimony. However, they will often attend court when the report they wrote is being considered by the court. They are not paid for attending on the day of sentencing

Ordering procedures

¹⁰¹ Aboriginal Legal Services

<https://forms.zohopublic.com/aboriginallegalservices/form/GladueRequest/formperma/6ayIT3uzSLdB4ZsXx5flYp1FLCNsabJppVsiuWTKvWc>

¹⁰² *R. v. Bain*, [2004] O.J. No. 6147 (S.C.J.)

¹⁰³ *R. v. Crawford*, (2007) 76 W.C.B. (2d) 445 (Ont. S.C.J.)

¹⁰⁴ Understand how Gladue works at bail hearings. *Steps to Justice; Your guide to law in Ontario*.

<https://stepstojustice.ca/steps/criminal-law/3-understand-how-gladue-works-bail-hearings>

¹⁰⁵ Understand how Gladue works at bail hearings. *Steps to Justice; Your guide to law in Ontario*.

<https://stepstojustice.ca/steps/criminal-law/3-understand-how-gladue-works-bail-hearings>

¹⁰⁶ April 27, 2020 - Phone meeting with Yukon Gladue Project coordinator.

¹⁰⁷ Yukon Legal Services Society. <https://legalaid.yk.ca/about/>

¹⁰⁸ October 18, 2019 – Phone meetings with CYFN

Reports are ordered when a client faces a sentence of 90 days or more and a report is scheduled to be returned to court 6 weeks after it is ordered. The writer files the report with the CYFN and the Trial Coordinator at least three days prior to the scheduled sentencing. The Trial Coordinator distributes the report to Crown counsel, defence counsel, and the judge¹⁰⁹. The CYFN has a Project Coordinator that manages Gladue reports and the operations of the Gladue pilot project. This role is responsible for intake of all Gladue report applications. Regardless of whether the client qualifies for legal aid, they do not pay for the cost of their Gladue report. Approximately 90% of the people ordering Gladue reports qualify for legal aid while approximately 10% do not. The Project Coordinator reviews the application and determines an appropriate writer. A writer is never assigned more than two reports at a time to ensure the reports are high-quality and the writer is not overloaded with too many deadlines¹¹⁰. In instances where the client is difficult to contact, the Project Coordinator acts as the liaison between the writer and the client's lawyer to help in locating the client. When a report is delayed, the Project Coordinator requires two to three weeks of advanced notice. The Project Coordinator informs the Trial Coordinator of the delay.

Confidentiality and Privacy

CYFN has a list of rostered Gladue report writers. All writers sign a confidentiality agreement when they become a rostered writer and when they are assigned a client who requires a report. When the writer has completed the report, they provide the Project Coordinator both the report and the supporting research materials. This is covered under the privacy and confidentiality contract.

Summary

There is value to Indigenous led organizations delivering Gladue reports to their Indigenous populations. The Mi'kmaq in Nova Scotia, the CNG in Quebec, the ALS in Ontario and the CYFN in Yukon territory are all Indigenous led organizations that deliver Gladue services. In BC, the program is delivered by Legal Aid BC. While Legal Aid BC does have a branch that focuses on Indigenous legal support, Legal Aid BC is not an Indigenous-led organization. Yukon provided the most compelling case for having an Indigenous-led organization because the launch of their Gladue program indicated universal need and support for transitioning from a non-Indigenous-led organization to one led by an Indigenous organization.

Timeliness is important and varied across the examined jurisdictions. Of the examined jurisdictions, the ALS Gladue program in Ontario produces reports the quickest on average. Nova Scotia, Yukon territory, the CNG in Quebec and BC are all comparable in report timeliness, though the CNG had a large variance in the time it may take for a Gladue report to be written. In BC, Forensic Psychiatric/Psychological Assessments are ordered through a technological ordering system in which reports can be provided to the court in approximately five to seven weeks.

Defense counsel does not directly pay writers or service providers in other jurisdictions. Under the current ordering system in BC, defense counsel is faced with having the client pay for their own Gladue report if they do not qualify for legal aid. Legal bills are often quite significant and spending several thousand additional dollars for a Gladue report on top of their legal bill can

¹⁰⁹ Schedule A. Gladue Report Writing Pilot Program – Work Plan. Yukon Government – Council of Yukon First Nations Gladue Report Writing Pilot Program Funding Agreement. P. 13.

¹¹⁰ October 18, 2019 – Phone meetings with CYFN

make ordering a report prohibitive. In Nova Scotia, the Cree Nation, ALS in Ontario, and Yukon Territory, a writer is compensated for their work from Indigenous-led organizations. These organizations are funded by their respective governments to pay for the Gladue reports that are written. In BC, when a Gladue report is written through the Legal Aid BC program, defense counsel pays the Gladue writer for the report when it is received and they are later reimbursed by Legal Aid BC. The payment scheme for Forensic Psychiatric/Psychological Assessments differed from Legal Aid BC, the Cree Nation, and Nova Scotia Gladue payment schemes and is most like Yukon territory. FPSC and CYFN are contracted through the government with a budget and payment to the service provider comes from the organization.

The manner in which Gladue programs serve their populations differs within each of the identified jurisdictions. Legal Aid BC will coordinate the writing of a report for any Indigenous person in the province that meets the threshold to receive legal aid. In Nova Scotia, the MLSN will provide a report for anyone that is Mi'kmaq, which in Nova Scotia is the majority of the Indigenous population. In Quebec, Gladue reports are delivered to Indigenous populations depending on the nation they are from. The CNG provides Gladue reports for anyone who is a part of the Cree First Nation in Quebec. ALS in Ontario serves Indigenous people in certain municipalities, most of which are in southern Ontario. Indigenous people living in those locations may receive a Gladue report or a Gladue letter. The CYFN will prepare a report for any Indigenous person living in Yukon Territory that requires a Gladue report.

Each jurisdiction takes their own approach to managing confidentiality and privacy of information for Gladue reports. The research in this Master's project has not resulted in a clear understanding of the current privacy and confidentiality practices in BC nor with the ALS in Ontario. In Nova Scotia, the CNG in Quebec, and Yukon territory, writers are given confidentiality and privacy agreements when they are assigned a Gladue report. The MLSN leaves identifying a conflict of interest to the writer.

Gladue letters and Gladue principles at bail are used to varying degrees across the examined jurisdictions. Ontario is the only jurisdiction examined that uses Gladue letters at sentencing, though CNG in Quebec is currently exploring their use. Ontario has resources to assist with having Indigenous clients connect with Indigenous courtworkers to develop a release plan for bail hearings. Moreover, case law in Ontario has identified it as an error of law for an accused's Indigeneity to not be considered at the bail stage of the justice system. Legal Aid BC has published documents that explain having Gladue submissions prepared and presented at bail hearings is a possibility, however there is no data on the extent that this is done.

7. FINDINGS: GLADUE DATABASES AND REPORT STORAGE

The Gladue coordinator for GWS in BC has been compiling information to be a resource for writers upon request if it will help with researching the client's background. Some of the information gathered includes contact information for treatment centres, counsellors, and opportunities for education. Completed Gladue reports have not been properly stored and efforts are being made to try and locate them. In many cases, the reports have been kept with the client's First Nations community.

The research revealed that there is intermittent use of, or consideration to developing, databases to support Gladue reporting in some jurisdictions. A database in reference to Gladue principles is an online platform where information can be gathered on Indigenous culture and history. It is capable of growth and innovation so it will remain relevant. This platform could include academic research relevant to Indigenous populations and case law that pertains to Indigenous people in Canada. Having these resources in a single location allows for writers to draw on information that will help them write reports more efficiently as known histories will not have to be researched. Some jurisdictions have databases. These will be discussed below.

It does not appear that any jurisdiction is using a database in combination with Gladue reports as part of a formal program. Australia's database, discussed below, is a platform for information that can be used as evidence in court for an Indigenous accused. It is not part of a formalized or structured court process, but rather a resource that can be used by lawyers as evidence for their defence. Saskatchewan's database has information about First Nations communities across their province, specifically about impact of colonization and residential schooling. Saskatchewan does not have a formalized Gladue report program. However, between 2014 and 2016, a pilot program was managed and funded by Legal Aid to produce 30 Gladue reports per year. Since the pilot project, Gladue reports are written by independent contractors under a contract with Court Services in Saskatchewan¹¹¹. The database is publicly accessible and can be used by whoever has a need for the information. Within the legal field, lawyers and contracted Gladue writers would be users of this platform.

Australia – The Bugmy Evidence Library¹¹²

Information gathered for the Bugmy Evidence Library was obtained through publicly accessible documents and websites. No interviews were able to be conducted with representatives of this library, however an email exchange occurred with Mr. Jeremy Styles, a lawyer involved with the Bugmy Evidence Library. Information gathered from that email was used to clarify the information that was publicly available. The information that was gathered through the email is identified in the footnotes.

Background

Australia's database was developed from a High Court case, *Bugmy v. The Queen*¹¹³, a decision on Aboriginality, disadvantaged offenders, and sentencing. William Bugmy was found guilty of assaulting two prison officers and was sentenced to 6 years and 3 months. In an appeal of the decision, it was found that Mr. Bugmy had been in and out of jail since age 13 and came from an

¹¹¹ This information was obtained by Tim Scolnick through telephone interviews done with Saskatoon-based Gladue report writers Lisa Hill and Christine Goodwin and email correspondence with Ottawa-based Gladue report writer Mark Marsolais-Nahwegahbow in late September 2019.

¹¹² The Bugmy Evidence Project. *Aboriginal Legal Services*. https://www.alsnswact.org.au/the_bugmy_evidence_project

¹¹³ *Bugmy v The Queen* [2013] HCA 37

Indigenous community where the average life expectancy for men is 36.7 years old. This demonstrated the need to include the effect of a disadvantaged background on the unique circumstances of an Indigenous offender. The defence's argument for Mr. Bugmy relied heavily on SCC case, *R. v. Gladue*, as well as references to s. 718.2(e) CCC. However, it was determined that the precedent and codified law that exists in Canada does not necessarily apply to Australia¹¹⁴. This decision is what prompted the need for stronger evidence in the area of Indigenous experiences.

Bugmy Community Reports

The Bugmy case identified a need for evidence, documentation, and historical information of social disadvantages faced by Indigenous people in Australia. The development of this project was achieved through a partnership with a law firm, Norton Rose Fulbright, and Aboriginal Legal Service in Australia¹¹⁵. The efforts of this project have resulted in the creation of Bugmy Community Reports, fact sheets for different Indigenous communities in New South Wales¹¹⁶. This database also includes specific evidence and academic research on the effects that social and personal issues, such as addiction or mental illness, have on Indigenous populations. The aim of the evidence library is to inform the court of the circumstances of the client, encourage shorter jail terms and parole periods, offer more opportunities for rehabilitation through bonds and other alternatives, and provide a better understanding of recidivism in the context of community and of inter-generational trauma. An important limitation of this database however is that there was an absence of Indigenous involvement in gathering these community histories¹¹⁷. Additionally, there is no publicly available data or evaluation on the extent these aims have achieved and the data from this library is used predominately by lawyers, judges, and government¹¹⁸.

Bugmy Bar Book

The Bugmy Evidence Project has recently expanded beyond community reports and now includes *The Bugmy Bar Book*. It is a resource composed of several chapters summarizing research findings on disadvantaged and deprived experiences of Indigenous people¹¹⁹. Examples of these experiences and impacts include fetal alcohol spectrum disorders, childhood sexual abuse, brain injuries, and homelessness. New chapters are being added to reflect the changing circumstances faced by Indigenous populations in Australia. For example, a chapter released in May 2020 examined COVID-19 and its impacts on Indigenous populations. The Bugmy Bar Book is a resource for lawyers advocating for aboriginal clients to use as evidence explaining the circumstances of their client. There is exploration by the Bugmy Evidence Project team into adopting a Gladue-like report from this project modelled after Gladue reports in Canada¹²⁰. Approval of this new project will rely on receiving the necessary funding.

¹¹⁴ *Bugmy v The Queen* [2013] HCA 37

¹¹⁵ Aboriginal Legal Service NSW/ACT was founded as a response to this injustice, and in acknowledgement of the importance of Aboriginal people designing and delivering services to their own communities.

¹¹⁶ Email with Jeremy Styles - Subject: Bugmy Project – Community reports/ Bugmy Bar Book project. March 23, 2020. Mr. Styles is involved in the development of the development of the Bugmy Bar Book and the lead on the community report project. He was formerly a Criminal Practice Principal Solicitor in New South Wales, Australia. More recently, he has dedicated himself more to Court or in a Managing Advocate role. I run matters in all NSW Courts as advocate.

¹¹⁷ Email with Jeremy Styles - Subject: Bugmy Project – Community reports/ Bugmy Bar Book project. March 23, 2020.

¹¹⁸ Email with Jeremy Styles - Subject: Bugmy Project – Community reports/ Bugmy Bar Book project. March 23, 2020.

¹¹⁹ The Bugmy Bar Book. *The Public Defenders*. <https://www.publicdefenders.nsw.gov.au/barbook>

¹²⁰ Email with Jeremy Styles - Subject: Bugmy Project – Community reports/ Bugmy Bar Book project. March 23, 2020.

Saskatchewan – Gladue Rights Research Database¹²¹

Information for the Saskatchewan Database was only obtained from documents. One document is an email thread and phone call notes between the client and a representative for the database. Because the interview was done prior to my involvement, this email thread is classified as a document and not an interview.

The Gladue Rights Research Database is designed to provide Indigenous people, their legal counsel, and others working within the justice system, with information that will assist in the protection of Gladue rights after conviction and prior to sentencing. It provides some of the information needed to write a Gladue report by providing comprehensive information explaining the unique circumstances that have impacted and shaped Indigenous people. It also offers the essential historical background and context that effect and inform the circumstances faced by Aboriginal people. The database offers several sources such as maps, events, information on communities, residential schools, key concepts regarding government policy, Indigenous people and cultures, settler colonialism, and treaties. The Gladue Rights Research Database is rooted in factual information on the Indigenous populations in Saskatchewan but does not offer the academic or evidence-based documentation that is offered in the Bugmy Evidence Project.

The database was created under the supervision and direction of Professor Keith Thor Carlson from the University of Saskatchewan. As the database has matured, the focus has turned to first-hand sources of information (e.g. oral histories)¹²². It also provides open/public access through sponsorship from the Law Society of Saskatchewan, Legal Aid Saskatchewan, the Saskatchewan Ministry of Corrections and Policing, and the Community-engaged History Collaboratorium in Department of History at the University of Saskatchewan¹²³. In its first three years the database required approximately \$35,000 to operate spent mainly on data collection. That funding was provided by the Law Society and ensured high-quality data collection from students, with an academic lead, and the creation of the database itself. Ongoing funding ensures continued data collection by students, as well as the hiring of a lab manager and funding for honoraria. The database operates on annual contributions of approximately \$10,000 from the Law Society, \$4,000 from the Ministry of Corrections and Policing, \$5,000 from Legal Aid, and \$10,000-\$12,000 from the University of Saskatchewan.¹²⁴ Dr. Carlson indicated to the BC MAG that feedback from judiciary, lawyers and Indigenous communities has been positive, and that the most enthusiastic response has been from judges¹²⁵.

Summary

Databases could be an important tool to support effective research and writing for Gladue reports but they do not exist in any jurisdiction. Databases and Gladue report programs only exist mutually exclusive from one another. MLSN in Nova Scotia, the CNG in Quebec, ALS in Ontario, and CYFN in Yukon have a Gladue program, but do not have a database to provide materials for Gladue writers. BC also does not have a database that would available for use by Gladue writers. Saskatchewan has a database for Indigenous history and impacts of colonization

¹²¹University of Saskatchewan, “Settler Colonial History and Indigenous People in Saskatchewan: A Gladue Rights Research Database,” Gladue Rights Research Database, <http://drc.usask.ca/projects/gladue/index.php>

¹²² Tim Scolnick’s telephone conversation with Professor T. Carlson from University of Saskatchewan, September 4, 2019.

¹²³ University of Saskatchewan, “Settler Colonial History and Indigenous People in Saskatchewan: A Gladue Rights Research Database,” Gladue Rights Research Database, <http://drc.usask.ca/projects/gladue/index.php>

¹²⁴ Telephone conversation with Professor Keith Thor Carlson, University of Saskatchewan, September 4, 2019.

¹²⁵ Telephone conversation with Professor Keith Thor Carlson, University of Saskatchewan, September 4, 2019.

and residential schooling but does not have a formal Gladue program since their Gladue pilot project ended in 2016. Australia has a database, but Gladue reports are not used in Australia. The Bugmy Evidence Project and Bugmy Bar Book serve as educational tools that can be used where an Indigenous person is involved in their justice system. Gladue reports or like documents are not used in Australia.

8. DISCUSSION AND ANALYSIS

The analysis and subsequent recommendations for the future state of Gladue report ordering in BC will adopt some of the smart practices identified from this research and will be guided by the strategic framework laid out in the BCFNJS. While no jurisdiction serves as a model or perfect fit for BC and its future Gladue ordering program, there are concepts from each jurisdiction that can improve areas of ordering reports in a timelier manner, provide a clearer ordering process, and allow for Gladue principles to be considered more widely and more often across the justice system in this province.

The BCFNJS is a key document guiding the future state of Gladue report ordering. It sets out the framework and lines of action for revolutionizing the justice system to improve cultural relevancy and appropriateness for Indigenous people. Insight gathered from the information gathered in this Master's project will assist in providing recommendations and options that align with the BCFNJS in creating an improved future state of ordering Gladue reports.

Summary of Findings

1. *Gladue report findings in BC*

- There is no consistent ordering system for Gladue reports in BC. Many stakeholders in BC have an interest in seeing changes to the current state of BC's Gladue report program.
- While Legal Aid BC maintains the leadership role in the general facilitation of Gladue reports, various aspects of the process are uncertain.

2. *Lessons From Forensic Psychiatric/ Psychological Assessment Reports in BC*

- Ordering a Forensic Psychological/Psychiatric Assessment is an organized and automated system of ordering a sentencing report in BC.

3. *Lessons from Other Jurisdictions*

- There is value to Indigenous led organizations delivering Gladue reports to their Indigenous populations.
- Timeliness is important and varied across the examined jurisdictions.
- Defense counsel does not directly pay writers or service providers in other jurisdictions.
- The manner in which Gladue programs serve their populations differs within each of the identified jurisdictions.
- Each jurisdiction takes their own approach to managing confidentiality and privacy of information for Gladue reports.
- Gladue letters and Gladue principles at bail are used to varying degrees across the examined jurisdictions.

4. *Gladue databases and report storage*

- Databases present an opportunity to support effective and efficient research and writing for Gladue reports but they do not exist in any jurisdiction.

These four sections reflect information that identifies current issues and gaps in BC's Gladue report ordering system, a similar system in BC that operates with efficiency and structure, the practices from other jurisdictions, as well as the prospect of structures that can support the efficient production of Gladue reports.

Addressing the gaps in BC’s current Gladue report program

The following is an analysis and discussion of the nine themes that emerged from the findings of this research. Some of these themes are directly aligned with strategies in the BCFNJS, while others are not. However, themes that do not directly align with the strategies in the BCFNJS support themes that do align with these strategies. A summary of this connection can be seen below in *Table 1*.

Table 1. Identified themes connecting to the BCFNJS

Theme	BCFNJS¹²⁶	Direct or supporting of the strategy
Indigenous Involvement ¹²⁷	Strategy 15, strategy 6	<i>Directly in line with BCFNJS</i>
Ordering process – creating efficient procedure	Strategy 6	<i>Directly in line with BCFNJS</i>
Level of Service Delivery	Strategy 4	<i>Directly in line with BCFNJS</i>
Payment Scheme	Strategy 6	<i>Indirectly in line with BCFNJS – the payment plan for Gladue reports is an inseverable element of a formal Gladue system.</i>
The time it takes for reports to be made in other jurisdictions	Strategy 1, strategy 6, strategy 15	<i>Indirectly in line with BCFNJS – the time required to create Gladue reports is a symptom of the aims of various strategies.</i>
Privacy and confidentiality	Strategy 4, strategy 6	<i>Indirectly in line with BCFNJS – ensuring privacy and confidentiality of reporting is part of a formal Gladue system that operates on a organization wide level as well as regionally</i>
Systematic information – databases	Strategy 6, strategy 15	<i>Indirectly in line with BCFNJS – A database of information relevant for Gladue reports bolsters a formal system and supports expanded programing</i>
Alternative uses of Gladue information	Strategy 1	<i>Directly in line with BCFNJS</i>
Identifying a conflict of interest	Strategy 6, strategy 4	<i>Indirectly in line with BCFNJS – identifying conflicts of interest is part of a formal Gladue system that operates on a organization wide level as well as regionally</i>

¹²⁶ For a detailed explanation of each strategy, see [Appendix B – Overview of BCFNJS](#)

¹²⁷ This strategy has since been implemented by the BC Provincial government and the BCFNJC after this project’s commencement, but prior to its completion.

1. Indigenous involvement

The MLSN in Nova Scotia, the CNG in Quebec, ALS in Ontario, and CYFN in Yukon Territory all have a similar ordering system where the requests for reports are managed by Indigenous-led organizations (MLSN, CNG, ALS and CYFN). *Strategy 15* of the BCFNJS highlights the need for Indigenous community-based justice programming. Of the jurisdictions examined for this research, BC is the only province or territory where their Gladue program is not managed by an Indigenous-led organization and instead has their program led by Legal Aid BC¹²⁸. Transitioning to an Indigenous-led organization that manages the Gladue program in BC would better align with *Strategy 15*. Yukon Territory is an example of a Gladue program transitioning from Legal Aid management to an Indigenous-led organization, CYFN. The result is an Indigenous-led Gladue program that is most appropriate for serving Indigenous communities. *Strategy 6* of the BCFNJS, which outlines GIA managing a formalized Gladue program, is an answer to this need for an Indigenous-led organization in this province.

2. Ordering processes – creating efficient procedure

Ordering processes are the steps taken from the time it is determined that a Gladue report is needed until the report is returned for the judge's consideration. In the BCFNJS, *Strategy 6: Implement a comprehensive Gladue strategy supported by a dedicated First Nations controlled Gladue Implementation Agency, Line of Action D*, describes having a formalized Gladue reporting process¹²⁹. Such a system requires efficient communication where varying formats of Gladue documents can be ordered uniformly.

The process for ordering Forensic Psychological/Psychiatric Assessments is an example of an automated ordering system that already exists in BC. Assessments are ordered through the CCD upon the judge's decision during court proceedings. Using the same ordering process for Gladue reports would be an improvement to the current process. Having Gladue reports ordered in court and processed by CSB staff initiates the order sooner and removes the onus on defence counsel, the client, or Crown counsel to initiate ordering a report after court has adjourned. However, defence and Crown counsel will play a role in identifying an Indigenous client.

An independent service provider like FPSC assists in providing impartiality with the assessments. Taking this smart practice from FPSC and applying it to ordering Gladue reports also aligns with *Strategy 6* of the BCFNJS, where GIA, an organization independent of government, facilitates and provides support for delivering Gladue services.

While the ordering process for a Forensic Psychological/Psychiatric Assessment has demonstrated efficiency, it lacks some insight into the specific needs unique to Indigenous people and Gladue reports. In Nova Scotia, Quebec, Ontario, and Yukon Territory, there is a designated Gladue coordinator who is responsible for receiving the request for a Gladue report, assigning the report to an appropriate writer, and gathering the information the writer will need. Success for a more defined and formal ordering procedure in BC will rely on having a designated person to help coordinate Gladue reports as they are ordered. In BC, where the Indigenous population is large and more diverse, the resources needed will likely be greater than most of the

¹²⁸ It is noteworthy that while ALS in Ontario is an organization that is heavily influenced by Indigenous people, the program is currently managed by Jonathan Rudin, who is not Indigenous. ALS is still, however, an Indigenous led organization as defined in this Master's project.

¹²⁹ BC First Nations Justice Strategy. February 2020. P. 33-34.

jurisdictions examined in this Master's project. The most comparable example for the required human resources is ALS in Ontario. It is likely that with the volume of Gladue reports required in BC, the Gladue coordinator will need assistance from one or two additional people.

Submitting the Gladue report once it is complete varies slightly amongst the researched jurisdictions. In Nova Scotia and Ontario, once a writer finishes the Gladue report, it is returned to the MLSN and ALS program coordinators, respectively. There it is reviewed before being sent to the courthouse where it was ordered. When a report is completed by a writer for the CNG of Quebec or in the Yukon, the writers send a copy of the report to the CNG and CYFN respectively and bring the report directly to the courthouse. The practices in Nova Scotia and Ontario allow for review by someone within the organization prior to being provided to the court. For BC, having a reviewer examine the report prior to being returned to the court assists with ensuring the quality of the report. Submitting a completed Gladue report to GIA, which then sends it to the courthouse, allows for the quality to be monitored and for reports to be confidently and reliably distributed to all participants involved in the case.

3. Level of service delivery

The level of service refers to the granularity of delivery of Gladue services to Indigenous people across BC. *Strategy 4* of the BCFNJS commits to expanding the developing IJCs to help deliver Gladue services on a more intimate level to Indigenous communities across BC¹³⁰. Examining Gladue programs in other jurisdictions can help inform what will best serve the diversity of BC's Indigenous populations.

The MLSN in Nova Scotia and the CNG in Quebec serve their own Indigenous populations (Mi'kmaq and Cree respectively). Their smaller populations allow for headquarter offices to serve the entire province and its population. ALS in Ontario serves Indigenous people in different municipalities outside their headquarters in Toronto. The CYFN in Yukon Territory serves the entire population regardless of the Indigenous community they come from. They can manage this level of service because the size of their program is relatively small as they only have to fund up to 32 reports annually.

Within BC, Forensic Psychological/Psychiatric Assessments are ordered to the forensics clinic located closest to where the client lives if they are out of custody and to the correctional facility if they are in custody. There are six regional forensic clinics clients attend for their assessment. Similarly, regional IJCs throughout BC will serve the legal needs of Indigenous people. Having Gladue writers based at these centres, and thus near the client, will provide more accessible and effective service delivery.

BC is a geographically large province with approximately 200 Indigenous communities. This presents unique challenges that may not be experienced in other examined jurisdictions. Therefore, incorporating IJCs to deliver Gladue services to meet the unique experiences of the Indigenous communities in BC is an important consideration. With the BCFNJS proposing up to 15 IJCs, these centres would be an asset for assisting GIA in supporting orders for Gladue reports. Ordering reports on a regional level across BC, similar to Forensic Psychological/Psychiatric Assessment clinics, would improve accessibility for Indigenous clients

¹³⁰ BC First Nations Justice Strategy. February 2020. P. 31.

to work with writers. Additionally, distributing Gladue report orders from GIA to IJC allows IJCs to assign an appropriate writer.

4. Payment schemes

Legal Aid BC is funded by the provincial government, the Law Foundation of BC, and the Notary Foundation of BC¹³¹. Some of the funds they receive from these groups is used for coordinating and paying for Gladue reports. However, as the findings have shown, there are other ways that a Gladue report can be ordered and paid for including directly contacting a writer. In these circumstances, payment is provided to a Gladue writer directly from the client or their counsel requesting the report. The current payment scheme has been identified as a deterring factor by some defence counsel in their decision on whether to obtain a Gladue report.

Payment for Forensic Psychological/Psychiatric Assessments is covered under a contract between FPSC and PSSG. This contract outlines FPSC's obligations and the compensation they receive for their services. This payment scheme is part of a budget rather than payment being issued every time a report is completed. As the province moves to implement the BCFNJS, payment processes for Gladue reports should be part of a contract similar to how it is managed with FPSC as that would be an efficient method for reimbursing the work done by Gladue writers. This compensation arrangement is comparable to Yukon Territory where CYFN has a contract with the Yukon and Canadian governments to receive annual funding to pay for 32 Gladue reports per year.

MLSN in Nova Scotia and the CNG in Quebec follow a payment model where an invoice is sent to the government by the Gladue report writer. These jurisdictions follow a payment scheme where the managing organization pays the writer for each report and the organization is later reimbursed by the government for that payment. For MLSN and the CNG, there is a delay with the reimbursement for these reports. This model of payment also requires frequent interaction between government and the organization managing the Gladue program. Writers in these jurisdictions are also reimbursed travel expenses associated with writing a report. This payment model requires more attention and labour by both the organization and government to manage reimbursement. This would not be necessary if the payment scheme was part of a contractual agreement like those with CYFN in Yukon or FPSC in BC.

5. The time it takes for a report to be produced in the jurisdictions

It currently takes a minimum of eight weeks to have a Gladue report produced in BC¹³² and approximately five to seven weeks for a forensic psychiatric assessment. A Gladue report in Nova Scotia requires approximately six to eight weeks to prepare. In the Cree nation of Quebec, it is not known the timeframe it currently takes for a report to be written, but delays do occur frequently causing a report to require anywhere from two to four months to produce. In Ontario, a full Gladue report can be written in six to eight weeks and a Gladue letter can be written in four to six weeks¹³³. A Gladue report in the Yukon can be returned to the court six weeks after it has been ordered. A summary of the time it takes for a report to be produced can be seen below in *Table 2*.

Table 2. Length of Time to Prepare Gladue Submissions

¹³¹ Legal Aid BC – About Us, Who are we? <https://lss.bc.ca/about>

¹³² Gladue Report Guide. (2018). Legal Services Society. <https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Report-Guide-eng.pdf>

¹³³ Gladue Court Request Form. *Aboriginal Legal Services*. <https://www.aboriginallegal.ca/gladue-request-form.html>

Jurisdiction	Gladue Report	Gladue Letter
British Columbia	8 weeks (minimum)	N/A
ALS Ontario ¹³⁴	6-8 weeks (usually)	4-6 weeks (usually)
Quebec ¹³⁵	2-4 months (estimated)	Call for Action No. 55 of the Viens Commission/CERP ¹³⁶
Nova Scotia ¹³⁷	6-8 weeks (best-case scenario); 10 weeks (more frequently); 12 weeks (heavy workload)	N/A
Yukon ¹³⁸	6 weeks (minimum)	N/A
BC Forensic Psychiatric/Psychological Assessment	7 weeks (minimum) for out of custody offender	5 weeks (minimum) for in-custody offender

This table reveals that BC produces Gladue reports in a comparable time frame to most of the other jurisdictions. However, the ordering system for a Forensic Psychiatric/Psychological Assessment allows for an order to be placed faster than any Gladue reports in other jurisdictions. While the time to prepare a Gladue report and a Forensic Psychiatric/Psychological Assessment are not completely comparable, the way the reports are ordered is more efficient for the assessment. Having a Gladue report ordered in court, like a Forensic Psychiatric/Psychological Assessment, removes the time and effort required by defence counsel or the client to order the Gladue report themselves.

6. *Privacy and confidentiality*

There is no publicly accessible information on the current privacy and confidentiality standards and procedures for Gladue report ordering under Legal Aid BC. Gladue report writers for MLSN in Nova Scotia, the CNG in Quebec, and for CYFN in the Yukon are all required to complete confidentiality agreements when they receive and accept a Gladue report assignment. In the Yukon, when a writer becomes a rostered writer for CYFN, they also sign a confidentiality agreement. In Nova Scotia, a client is also given a confidentiality agreement to sign when they agree to have a Gladue report written for their sentencing.

The MAG privacy officer will need to be consulted for establishing the appropriate confidentiality agreement policy in BC. Privacy and confidentiality should be examined if agreements are required each time a Gladue report is needed, and/or when an individual becomes

¹³⁴ Aboriginal Legal Services, *Gladue Court Request Form*, <https://www.aboriginallegal.ca/gladue-request-form.html> (Last accessed: June 25, 2020).

¹³⁵ CERP, *Échange courriel entre la CERP et le MJQ concernant un document transmis dans le cadre des DG-0085-C et DG-0093-C*, p.12, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-839-96.pdf (Last accessed: June 25, 2020), in CERP, *Rapport final*, 2019, p. 353-4, (Last accessed: June 25, 2020).

¹³⁶ CERP, *Rapport final*, 2019, p.354, https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Rapport_final.pdf (Last accessed: June 25, 2020).

¹³⁷ Conversation with Mi'kmaw Legal Support Network, Nova Scotia, February 4, 2020; Correspondence with Mi'kmaw Legal Support Network, Nova Scotia, March 2, 2020; Correspondence with Mi'kmaw Legal Support Network, Nova Scotia, March 31, 2020.

¹³⁸ Correspondence with CYFN, February 12, 2020.

registered to write Gladue reports. Whether a single privacy agreement would be sufficient for rostered writers when they are hired should be considered.

7. *Systematic information - Databases*

The two databases examined for this Master's project provide insight into developing a resource for BC's Gladue writers to assist them with writing a report in a more timely manner. Gladue reports require that certain information be present for them to have value for a judge. Having some of the required information in a single location could save Gladue writers time that might otherwise be spent researching various histories. An electronic database can continuously store information on Indigenous communities and the socio-economic challenges they face and in doing so will increase the efficiency that reports can be produced.

Australia's database contains academic-based content that reflects the circumstances and social context of Indigenous populations. The resources on their database include academic articles and studies on topics such as mental health, addiction, and diseases including their effect on Indigenous populations. Easy access to this type of information could save Gladue writers time by providing a means to quickly retrieve information that is relevant and applicable to the client's circumstances. This context helps a judge understand the client's experiences as an Indigenous person.

The Saskatchewan database is an online platform that chronicles the history of different Indigenous communities. This platform has a focus on the presence of residential schools and other aspects of colonization and their effect on specific Indigenous communities. For a Gladue report, this information is useful to explain the extent that the history of the Indigenous community has had on the client. Having this information in a single location would reduce the required research time for a Gladue writer.

For BC, a database that includes information on the circumstances and social context of Indigenous people, like the Australia database, and the community history and context, like the Saskatchewan database, would provide the most value to writers. A potential challenge with adding a database to support Gladue writers in BC is that gathering the relevant information will be time consuming particularly given the many diverse Indigenous populations in BC and their experiences with residential schooling and other forms of colonization. However, once this information is collected, it will be available to Gladue writers to help them produce reports more efficiently and quickly.

8. *Alternative uses of Gladue information*

The consideration of the client's indigeneity should be provided for other purposes besides just sentencing. The presumption of diversion, described in *Strategy 1* of the BCFNJS, emphasizes that the indigeneity of a client should be taken into consideration prior to their sentencing. However, for these other purposes, it may not be necessary that full Gladue reports be prepared as there are other means by which Gladue principles can be provided to the court.

Gladue Letters

ALS in Ontario has used Gladue letters as a format for delivering Gladue principles in instances where Crown counsel is seeking jail sentence shorter than required to produce a full Gladue report because it takes less time to produce a letter than a report. The CNG in Quebec has not been preparing Gladue letters; however, the Viens Commission recommended that Gladue letters

should be used when a client faces a jail sentence less than four months. Quebec appears to be adopting this recommendation¹³⁹.

If Gladue letters were to be implemented in BC, legal counsel may need to be consulted to ensure the appropriate content is included. A Gladue letter can be written up to four weeks faster than a full Gladue report. In some circumstances where a client faces a shorter jail sentence, having an option for a Gladue letter can be the difference in having their Gladue principles considered more fully by the court. Having Gladue letters available would help address the current challenge of providing Gladue considerations in a timely manner. Having a letter that can be produced faster helps address instances where a client's indigeneity is not fully taken into consideration because a Gladue report would take too long.

Gladue consideration at bail

Section 493.2 CCC and legal precedent in Ontario¹⁴⁰ establish it is the legal right of an Indigenous person to have their indigeneity taken into consideration upon their arrest and release from custody on bail.

Ontario is a jurisdiction that has been applying Gladue principles at bail hearings. Adopting this practice routinely in BC closely aligns with *Strategy 1* of the BCFNJS and the presumption of diversion. Providing the court with Gladue information at bail hearings, delivered through an automated ordering system for Gladue letters, would allow the client's indigeneity to be considered in a quick and efficient manner reducing the time a client spends in custody. Based on the smart practices identified with Forensic Psychiatric/Psychological Assessments, implementing a similar process for ordering Gladue principles would assist in having bail hearings for Indigenous people completed in a timely manner and with those principles and information before the court.

9. Identifying a conflict of interest

In Nova Scotia, writers identify whether they have a conflict of interest for a potential Gladue report order. Leaving it up to the writer allows for them to determine if they are in a situation where they can write a Gladue report without being influenced by the people involved with the case. In BC, a similar approach of involving the writer in identifying a conflict of interest should be adopted.

Conclusion: Strategic Implementation

To address the gaps and issues in the current Gladue report program in BC, the future state needs to improve the timeliness and clarity for ordering Gladue reports and expand their use beyond sentencing. Doing so will promote a justice system where the Indigeneity of a client is considered more frequently and fully as the law requires. For efficiency, the future state of Gladue reporting requires a single coordinated system that utilizes technology, a simple method of payment, streamlined communication, improved resources for writers, and options for formatting the content of the reports as full reports or letters. A uniform system of ordering reports supplemented with technology is crucial for meeting this objective. While not every jurisdiction demonstrated a technologically sophisticated ordering system, the current court interface in BC is capable of ordering court reports and documents in a proven and efficient manner. Payment schemes, level of service delivery, distributing information with regards to

¹³⁹ Meeting Notes – Don Nicholls, DJCS, CNG – March 3, 2020

¹⁴⁰ *R. v. Bain*, [2004] O.J. No. 6147 (S.C.J.); *R. v. Crawford*, (2007) 76 W.C.B. (2d) 445 (Ont. S.C.J.)

privacy and confidentiality, and providing resources to writers to improve report production efficiency were all important factors that would assist BC in developing a more effective and time conscious Gladue program.

Providing informed and useful options and recommendations requires careful consideration of the BCFNJS, the current specific problems identified with BC’s current Gladue report ordering system, and the smart practices from other jurisdictions.

This analysis has focused on where the problems exist and how they can be address. First, management of Gladue reports needs to be shifted from Legal Aid BC to the GIA. This transition will require a new process in which Gladue reports are ordered. The current process under Legal Aid BC includes many ways that a report can be produced for the court. The new system should follow a uniform approach to ordering so all reports are ordered and returned to court the same way. Accordingly, six areas for program delivery are required to address the gaps in the current system. These include:

- Ordering Gladue documentation
- Level of service for delivering Gladue documentation across province via IJCs
- Payment/reimbursement for Gladue services
- Technology for Gladue writers
- Providing Gladue information at bail hearings
- Using Gladue letters for sentencings

These recommendations are the product of the four lines of evidence that uncovered nine themes within the analysis. These nine themes result in six areas for recommendations. There is a general alignment of the themes and subsequent recommendations that were found amongst the lines of evidence, however there is some overlap and complication. For example, in *Table 3* (below), “privacy and confidentiality” is a theme that overarched all lines of evidence, while other themes aligned more directly with a line of evidence. Moreover, the option/recommendations category of “ordering specific Gladue documentation” and “payment” are the product of information gathered from various lines of evidence and are composed of multiple themes.

A comprehensive explanation of how to build a new Gladue report program in BC will be addressed in the following section, Options and Recommendations as well as Appendix J, Appendix K, Appendix L, Appendix M, Appendix N, and Appendix O.

Table 3. Title (lines of evidence, themes, options recommendations)¹⁴¹

Lines of evidence	Themes		Options/recommendations
1. Gladue report ordering in BC	1. Level of service delivery	9. Privacy and confidentiality	<ul style="list-style-type: none"> Level of service for delivering Gladue documentation across province via IJCs
2. Lessons from other Jurisdictions	2. The time it takes for reports to be made in other jurisdictions		<ul style="list-style-type: none"> Using Gladue letters for sentencing
	3. Alternative uses of Gladue information		<ul style="list-style-type: none"> Considering Gladue factors at bail hearings
	4. Identifying a conflict of interest		<ul style="list-style-type: none"> Ordering Gladue documentation Payment/reimbursement for Gladue services
	5. Indigenous involvement		
3. Lessons from Forensic Psychiatric/ Psychological Assessment Reports in BC	6. Ordering process – creating efficient procedure		<ul style="list-style-type: none"> Technology for Gladue writers
	7. Payment scheme		
4. Gladue databases and storage	8. Systematic information – databases		

¹⁴¹ Numbers for themes are in no particular order. Their sequencing is for practical layout within this table.

9. OPTIONS AND RECOMMENDATIONS

This section examines several areas for transforming BC’s current Gladue program into an improved future state for ordering reports. The options and recommendations were informed by gaps with BC’s current Gladue program and the smart practices from other jurisdictions. They were designed to align with lines of action in the BCFNJS. These categories include:

1. **Ordering Gladue documentation**
2. **Level of service for delivering Gladue documentation across province via IJCs**
3. **Payment/reimbursement for Gladue services**
4. **Technology for Gladue writers**
5. **Considering Gladue factors in bail hearings**
6. **Using Gladue letters for sentencings**

Below is a description of what gap is being addressed by each recommendation along with a description of each recommendation. *Appendix J* through to *Appendix O*, provides a more wholesome and comprehensive explanation of each category. Each category includes two options along with a description of the options, the required resources for each option, the pros and cons of each option, and key contacts who must be consulted to implement that option. Of the two options in each category, one is recommended. *Table 4* (below) lists the category in need of addressing along with a recommended option and an alternative option to address the issue associated with each category. Footnotes 156 and 157, within *Table 4*, also indicate that some of these recommendations have either been completed or are in the process of being completed.

*Table 4 – Table of Recommendations and Options*¹⁴²

Category	Recommendation and alternative option
<i>Ordering Gladue documentation</i> ¹⁴³	An automated ordering system for Gladue reports modeled after the BC Forensic Psychological/Psychiatric Assessment ordering system.
	Keep the same ordering process but transfer the program management from Legal Aid BC to GIA.
<i>Level of service for delivering Gladue documentation across province via IJCs</i>	Gladue documentation coordinated via regional Indigenous Justice Centres with document ordering overseen through the Gladue Implementation Agency.
	All reports are coordinated and delivered through a central Gladue Implementation Agency with no involvement of IJCs for regional delivery.

¹⁴² The bold text in the “Recommendation and alternate option” heading indicates the recommended option.

¹⁴³ At the present time, this recommendation has commenced. The transition of the Gladue regime in BC has been transferred from Legal Aid BC to GIA (The BCFNJC). Effectively, the alternate option has been adopted. No automated ordering system through the CCD has been implemented.

<i>Payment/reimbursement for Gladue services</i> <i>144</i>	Negotiate a contract that gives GIA the finances they need to produce Gladue documentation and allows them to determine how writers are paid.
	The Gladue writer submits an invoice to GIA which pays the writer and recoups the payment from government.
<i>Considering Gladue factors in bail hearings</i>	Having Gladue Informed Bail (GIB) plans
	Defence coordinates the GIB plan by contacting GIA
<i>Using Gladue letters for sentencings</i>	Letters would be ordered when the client faces a shorter jail sentence.
	Do not add Gladue letters for sentencing
<i>Technology for Gladue writers</i>	Gladue database: provide Gladue writers with a resource to assist in writing all future documentation requiring Gladue consideration.
	Status quo: Writers use their own materials to write reports as they do now.

1. Ordering Gladue reports in Court

An automated ordering system for Gladue reports modeled after the BC Forensic Psychological/Psychiatric Assessment ordering system.

This recommendation addresses the slow, inconsistent, and inefficient processes under the current Gladue report ordering procedure. This recommendation also addresses the absence of Indigenous oversight in the current ordering regime. Further, this recommendation fosters improvements for concerns about conflicts of interest, privacy, and confidentiality that exist under the current ordering regime.

To have Gladue documentation ordered, Crown or defence counsel may request the judge order a Gladue report to assist with determining an appropriate sentence for the Indigenous client. Crown and defence counsel share the onus to identify whether the individual before the court is Indigenous. Crown and defence counsel may both advocate for or against a Gladue report being ordered. If the judge determines a report would assist with sentencing considerations, a report is ordered. Upon the order being made, the court clerk records it in the CCD¹⁴⁵. The software on the CCD notifies the courthouse registry via the JUSTIN inbox that a report has been ordered. The courthouse registry completes a form as they would when a Forensic Psychological/Psychiatric Assessment has been ordered. This form can be modelled after ADM

¹⁴⁴ As part of the implementation of the alternate option as described in footnote 158, a subsequent payment scheme has been established that reflects the recommended option in this area.

¹⁴⁵ Whether a Gladue letter or a full Gladue report

854¹⁴⁶. The courthouse registry sends the form to Crown counsel and GIA, and then places the form in the court file. Upon receipt of this form, Crown counsel completes a form modelled and adapted from the “Court Ordered Assessment Referral”¹⁴⁷ form and sends it to GIA along with all the specified documents. Once GIA has both forms and the documents, the request for the report is provided to the appropriate IJC, which forwards the documents to a Gladue writer.

Once the Gladue report is complete, the writer sends the report to GIA to review the report prior to sharing it with defence counsel, Crown counsel, and the courthouse registry for distribution to the judge. Once the sentence has been imposed, the Gladue report is stored in the client’s file with the courthouse registry. GIA stores a copy for their own record. The general overview of this proposed system can be seen in *Appendix P - Map of the Future State of Gladue in BC*.

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts is described in *Appendix J*.

2. Level of service coordination for ordering Gladue reports (regionally facilitated/centrally facilitated)

Gladue documentation coordinated via regional Indigenous Justice Centres with document ordering overseen through the Gladue Implementation Agency.

This recommendation addresses the slow, inconsistent, and inefficient processes under the current Gladue report ordering procedure. It can also help foster improvements for concerns of conflicts of interest, privacy, and confidentiality that exist under the current ordering regime.

When Gladue documentation is ordered by a judge, the courthouse registry notifies GIA through a form that indicates the type of Gladue documentation that has been ordered, where the order has come from, and preliminary information about the client. GIA files the order and waits for the Crown counsel “Gladue Information Order” form that provides more information about the client and their charges. Once they receive this, they forward the courthouse registry form and the Crown counsel form to the appropriate regional IJC. The IJC the ordered report is referred to is determined by GIA. The IJC receives the request then assigns and contacts the Gladue writer. Once the documentation has been completed, it is sent to GIA along with the invoice where it is reviewed by the coordinator. This option and how it fits into the future state of Gladue is displayed in *Appendix P - Map of the Future State of Gladue in BC*.

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts are described in *Appendix K*.

3. Payment/reimbursement for Gladue writers

¹⁴⁶ *Appendix E – Form ADM 854*. The form used by the courthouse registry to order a forensic psychiatric assessment. Changes can be made to this form to reflect what is needed to order Gladue documentation.

¹⁴⁷ *Appendix F – Court Ordered Assessment Referral*. This form is sent from Crown counsel to BC mental health that provides information about the accused who requires a psychological evaluation. This form could serve as a template for a Gladue specific order form.

Negotiate a contract that gives GIA the finances they need to produce Gladue documentation and allows them to determine how writers are paid.

This recommendation addresses the inefficient payment scheme under the current Gladue ordering procedure.

JSB and GIA operate under a contract that outlines the responsibilities of GIA and the finances they will receive for their services. MAG will provide an annual budget to be determined and GIA will determine where the money would best be allocated. GIA would provide annual reports on their expenses.

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts are described in Appendix L.

4. Gladue at Bail

Gladue Informed Bail (GIB) plans

This recommendation addresses the need for an expansion of Gladue information being made available in various capacities within the justice system.

Strategy 1 of the BCFNJS emphasizes the importance of a presumption of diversion for Indigenous people in the justice system. Bail is a point in the justice system where the indigeneity of a client can be considered in a more formalized manner.

Bail practices have recently undergone some changes in Canada. Bill C-75 created s. 493.2 CCC, which states that special consideration must be given at bail to Aboriginal and vulnerable populations. When a client is arrested and appears in custody, their counsel can ask the judge to order a GIB plan to assist with securing the client's release on bail. A GIB plan would provide some information about the Indigeneity of the client, the factors that may help explain why the client is before the court, and the support and resources available to help satisfy the judge that the client can be released into the community on bail terms that address public safety and the client's requirement to attend court. The Gladue Submission Guide in BC already has information about applying Gladue principles at bail hearings and what needs to be included in a bail plan¹⁴⁸.

There are parameters around what can be included as part of a bail plan. According to s.518(1)(b) CCC, no one except for the client's defence counsel is permitted to ask the accused about the nature of the offence¹⁴⁹. However, under s.518(1)(a) CCC, the judge can inquire about the client. This is the legal basis for ordering a GIB plan. When an order for a GIB plan is made, it will be recorded in the CCD and the courthouse registry will be notified. The courthouse registry will complete a Gladue Information Order form¹⁵⁰ identifying a GIB plan has been ordered. The form will be sent to GIA, which will identify a Gladue writer. The writer will contact the in-custody client and any other resources necessary to complete it. When the GIB

¹⁴⁸ Gladue Submission Guide. *Legal Services Society*. (2017). <https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Submission-Guide-eng.pdf> P. 4.

¹⁴⁹ Criminal Code of Canada. *Government of Canada*. <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-518.html>

¹⁵⁰ The form modelled after ADM 854.

plan is completed, the Gladue writer will email it to the client’s legal counsel, Crown counsel, and the courthouse registry prior to the client returning for their bail hearing.

This recommendation is depicted in *Appendix Q – Map of the BC Bail Process* and *Appendix R – Map of the Gladue Informed Bail Plan*. *Appendix Q* shows the current bail procedure in BC and indicates where new GIB plan considerations would take place. *Appendix R* shows the new steps and process that would be put in place with GIB plans.

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts are described in *Appendix M*.

5. Gladue Letters

Letters would be ordered when the client faces a shorter jail sentence.

This recommendation addresses the timeliness that a report must be made and returned to court.

When Crown counsel seeks a jail sentence for an Indigenous accused that is less than a specific duration¹⁵¹, a Gladue letter can be ordered rather than a lengthier and more comprehensive Gladue report. The judge would order the document they think would be the most appropriate given the potential sentence the client faces¹⁵². The process to order a letter is identical to that of ordering a full Gladue report apart from the court clerk selecting a Gladue letter rather than a full report on CCD. Additional information and considerations about Gladue letters and their potential for use in BC can be found in the *Implementations* section later in this Master’s project under the sub-heading, “When should a Gladue letter rather than a full report be ordered?”

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts are described in *Appendix N*.

6. Technological resources to support Gladue report writers

Gladue database: provide Gladue writers with a resource to assist in writing all future documentation requiring Gladue consideration.

This recommendation addresses the need for a more systematic and technologically advanced support system for producing Gladue reports. It also addressed the timeliness that a report must be made and returned to court.

Modelled after the Saskatchewan Gladue Database and the Bugmy Evidence Project in Australia, a database in BC would provide a resource to writers to assist with writing Gladue documents quicker. This database would house the resources and supports writers need for research in a single location. This resource will provide reliable tools to help writers gather information such

¹⁵¹ A “specific duration” will need to be determined. For reference, Quebec will recommend a Gladue letter when a client faces a sentence of four months or less while Ontario requires a Gladue letter for sentences that have a jail time of three months or less. The time in BC would need to be determined in consultation with the stakeholders.

¹⁵² When determining when a letter should be used, there should be a concrete threshold for when a letter should be ordered rather than a full report. This is to avoid having the inappropriate documentation ordered. Information on this and guidance on how this threshold should be determined is described later in this report under the section titled, “Under what circumstances should a Gladue letter rather than a full report be used?”

as community histories, local supports for Indigenous peoples, case-based evidence, and academic research. These resources will reduce the amount of time that writers require to conduct the necessary research to write a report. The database can be updated and expanded so that its value will grow over time. The database should be government financed and supported with direction for its construction and maintenance provided by GIA. More information on the development of the database can be found in the *Implementation* section of this Master's project under the sub-heading, "Who should be involved in the development and maintenance of the database should it be developed?"

A detailed explanation of the option and recommendation, the pros and cons, the required resources, and key contacts are described in *Appendix O*.

Recommendations Summary

An implementation of the recommended options would result in a more expedient and formalized Gladue ordering process while providing the flexibility to offer full Gladue reports, letters, and GIB plans. Should all these recommendations be accepted, the proposed future state of Gladue report ordering can be seen in its entirety in *Appendices P, Q, and R*.

When an Indigenous person has been arrested and faces a bail hearing, a GIB plan may be ordered to assist the court in determining if release is suitable and the bail conditions to impose. The order is recorded in the CCD, which will notify the courthouse registry that a GIB plan has been ordered. The courthouse registry completes a form modelled after ADM 854 and forwards it to GIA, which processes the order and connects a writer with the in-custody client. The GIB plan will be produced as quickly as possible and available prior to the client's bail hearing¹⁵³.

In instances when a client pleads or is found guilty of their charge(s), a judge after hearing submissions from defence and Crown counsel will determine whether a client should have a Gladue report ordered. The duration of a potential jail sentence will help the judge determine whether a Gladue letter or full Gladue report should be ordered for the sentencing hearing¹⁵⁴. Whichever document is ordered, the ordering process will follow a similar one for the production of Forensic Psychiatric/Psychological Assessments. The order request is received by GIA and information is received from Crown counsel to assist the writer in preparing the report. GIA provides the order information to the appropriate IJC with respect to the client's location and community. The Gladue writer receives and accepts the order as long as they do not have a conflict of interest. The writer will have access to a database of relevant information to assist them in producing a report in a timely manner. When the writer completes the report, they send it to GIA to be reviewed. GIA distributes the completed report to defence counsel, Crown counsel, and the courthouse so that it can be provided to the judge. The payment and budget for Gladue reports will be determined in a contract between GIA and the provincial government of BC.

¹⁵³ To assist with reducing the amount of time it takes for a GIB plan to be made, the recommended Gladue database could include contact information to resources that exist in regions across the province that can support a client's release.

¹⁵⁴ The threshold for length of jail sentence Crown counsel seeks for whether a Gladue letter or a full Gladue report should be ordered will need to be determined. More on this can be found later in the project under the section titled "Under what circumstances should a Gladue letter rather than a full report be used?"

10. IMPLEMENTING THE RECOMMENDATIONS

This section consists of key contacts that will require consultation and assistance to implement these recommendations. Included are questions that will need to be asked once the GIA has been further developed and actions that will need to be considered when implementing these recommendations.

Working Group Members

The members listed in this group are branch leads and would be able to bring in the necessary support staff

To see the complete list of the necessary individuals and actors involved in the development of the future state of Gladue report ordering, see: [Appendix S – Working Group Members](#).

Order of Implementation

This section must be prefaced with the caution that timeframes and duration are subject to variables outside the scope of this report as it is one piece of a larger strategy. Provided below is a recommended order of implementation of the recommended options in this Master's project relative to one another.

1. Meet with the privacy officer and begin privacy assessments and information sharing agreements.
 - Aspects of the process are sensitive to privacy and confidentiality so assessments will be required. This Master's project is a primary assessment of these issues. The MAG privacy officer will need to be involved with conducting privacy and confidentiality assessments throughout the implementation of this project.
2. Begin developing a Database.
 - Develop working group of database contributors.
 - Prompt commencement of the database is advised because it will take time to develop. It will provide greater value as it matures and form the foundation for the success of many other subsequent recommendations in this Master's project.
3. Prepare memorandum of understanding that outlines the future state for Gladue requirements and processes, including adopted recommendation responsibilities for the GIA.
 - Consultation with the key contacts identified in each recommendation must occur so their input and collaboration on action and procedures can be considered.
4. Consult the judiciary with the transformation of Gladue processes. Their feedback and approval are important for implementing the new ordering processes.
5. Begin creating the new forms required for the new ordering processes.
 - Courthouse registry order form (the form modelled after ADM 854).
 - Prosecution Services Branch form (the form modelled after "Court Ordered Assessment Referral").
6. Creating in-court order options for CCD.

- CSB and their IT department will need to add the new options that will be required on the CCD interface so that court clerks can select the appropriate option and add necessary remarks to the Gladue documents that are ordered. Updating to training and CSB operating procedures will also be required.
7. Inform Crown and defence counsel of new protocols for ordering Gladue documentation.
 - The best group to widely distribute this information is through Criminal Defence Advocacy Society (CDAS). CDAS is engaged in advocacy, law reform and education in matters relating to criminal defence work in the justice system¹⁵⁵. The Law Society should be contacted as well to let the broader legal community know of these changes in procedure.
 8. Gladue future state goes live.

What do the judiciary, defence counsel, Crown counsel, clerks and courthouse registry need to know about the new process?

Defence counsel will need to be informed of the transition from having defence initiated Gladue reports to a systematic and automated ordering system, managed and funded through MAG. The key contacts for this are the Law Society of BC and CDAS. CSB will have to update their training and procedure manuals for courthouse registry staff and court clerks to reflect the new ordering processes and their responsibilities.

Representatives from the Supreme and Provincial courts of BC must be informed of the new processes so the new order protocol can be brought to the attention of judges across the province.

Suggested Areas of Performance Monitoring

The following are data points and information that should be tracked following the implementation of the new formalized Gladue program.

- Rates of incarceration for the Indigenous population in BC.
- The number of full Gladue reports, letters, GIB plans, updates, and oral deliveries ordered.
- Stakeholder feedback from users involved with the adopted ordering process. This will include staff at GIA, the IJCs, the writers, court clerks, courthouse registry staff, defence counsel, Crown counsel, and the judiciary.
- The amount of time for the various reports to be produced.
- The ancestry/region/band of clients who are the subject of the various forms of Gladue reports. To meet demand on the IJCs, it will be important to know the volume of reports prepared within the various ancestry/regions/bands within the province.

¹⁵⁵ Criminal Defence Advocacy Society. Home page. <https://www.cdasociety.com/>

- Cost-tracking will need to be kept to better inform which method of Gladue documentation requires the most financial support. Tracking this can help in addressing new ways to find potential cost saving strategies.

Who should be involved in the development and maintenance of the database should it be developed?

Starting the development of the database early is important because its value to writers grows over time as it accumulates content. Without a database, implementing other formats of Gladue documents, such as letters and GIB plans, will be challenging because of their time sensitive nature. Without a compiled list of resources, it may be challenging for writers to produce Gladue documents faster than they currently are.

An organization that could add value to the design and content of a potential database may be the University of Victoria Law School's JID program. Their specialization in Indigenous legal issues will assist in developing BC's Gladue database at a quicker pace. Indigenous law experts at Thompson Rivers University Faculty of Law and the Peter A. Allard School of Law at UBC Indigenous Legal Clinic should also be included.

Gladue writers, many of whom already have some personal or informal library of material accumulated, should also be involved in the development of the database. As the primary users, their input is vital to ensure the proper resources are included so they can work more efficiently. Their feedback is also valuable in ensuring that the interface is user friendly.

IJCs are well connected with their local Indigenous communities and would play a valuable role in developing and gathering content for the database. They are well suited to gather the history of Indigenous communities as they know the contacts who can provide information that is valuable to Gladue writers and therefore the database. As the database matures, its uses can be expanded. For example, with GIB plans, the database can be a valuable resource for gathering community contact information to support networks and programs that Indigenous in-custody clients can access when they are released.

The database needs to belong to an organization. GIA would be an appropriate organization to manage and direct the database's development as they are the lead organization for the future state of Gladue ordering in BC.

Who should not have access – Neither Crown counsel nor defence counsel should have access to this database because of the risk they may circumvent the process and use the database to assist a client without consulting GIA or having Indigenous involvement. Establishing and maintaining the independence of this process is important to its viability and integrity in the justice system. Just as defence counsel should not be involved in conducting the assessment of their client's mental health when a Forensic Psychiatric/Psychological Assessment is ordered, they should not be involved in the creation of Gladue documentation. Further, to maintain integrity of the justice system and an appearance of impartiality, Crown counsel should also not have access to this database. Writing reports and accessing the database should be left to Gladue

writers, as they are the experts in writing about the application of Gladue principles to Indigenous people.

When should a Gladue letter rather than a full report be ordered?

Consulting the judiciary and Crown and defence counsel is necessary to determine when a Gladue letter should be ordered rather than a full report. For reference, ALS in Ontario uses a 90-day jail sentence as a threshold for when a letter would be more appropriate than a full report and the CNG in Quebec is proposing a four-month jail sentence as their threshold.

Crown and defence counsel can help inform what needs to be in a Gladue letter so that it can be created quickly while still providing value. Having the experience of a Gladue writer involved in this discussion can inform what is possible to include in a letter in the time required.

What might be included in a Gladue Informed Bail plan?

Research has been done on how to incorporate Gladue principles in bail hearings. Overly restrictive bail conditions or uncritically applying sentencing principles that are seen in Gladue reports at the bail hearing stage could violate the presumption of innocence, a fundamental pillar to the Canadian justice system¹⁵⁶. Jillian Rogin has examined what Gladue principles can be incorporated at bail hearings for Indigenous accused¹⁵⁷. Some recommendations she makes include examining the factors and practices that disproportionately affect Indigenous peoples and contribute to their over-incarceration, including the tendency to over-charge Indigenous persons in policing, the over-reliance on sureties, and the use of overly stringent forms of release¹⁵⁸.

What could be considered for communication protocol when a delay in the production of a report occurs?

It is inevitable that delays in producing reports will occur. Accordingly, necessary measures need to be put in place. There are options that are informed by the practices in other similar areas, but it is difficult to determine the optimal practice until the future state is established. It still needs to be determined what an appropriate amount of time would be to advise when a delay occurs. In Nova Scotia, the court requires one week before sentencing and the Gladue coordinator requires the report two weeks before sentencing¹⁵⁹.

In BC, the FPSC must send a letter to the court if there will be a delay in producing a Forensic Psychiatric/Psychiatric Assessment. That letter will explain the reasons for the delay and the next steps required for the assessment to be produced to the court.

An appropriate recommendation cannot be made at this time for what a proper amount of notice of delay should be, though it is essential for the success of the new Gladue system in BC that

¹⁵⁶ Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System. (2018). *Government of Canada*. <https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p3.html>

¹⁵⁷ Rogin, Jillian Anne, "The Application of Gladue to Bail: Problems, Challenges, and Potential" (2014). LLM Theses. 14 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1013&context=llm>; Rogin, Jillian, "Gladue and Bail: The pre-trial sentencing of Aboriginal People in Canada". <https://cbr.cba.org/index.php/cbr/article/view/4411/4403>.

¹⁵⁸ Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System. (2018). *Government of Canada*. <https://www.justice.gc.ca/eng/rp-pr/jr/gladue/p3.html>.

¹⁵⁹ Email with Nova Scotian Indigenous Courtworker. RE: Gladue Processes in Nova Scotia and at MLSN. March 2, 2020

delays are addressed through communication to the parties and the court. A working group that includes Gladue writers, GIA, PSB, and CSB would be able to develop a delay protocol.

How should writers be supported when being connected with a client in need of a Gladue report?

A community liaison at the IJCs can assist in connecting a client with a writer, particularly if a client is difficult to locate. IJCs throughout the province will likely have individuals well connected to the community, who can contact the client and assist with the preparation of the report by educating the client about the value of Gladue report, the process required to produce it, and the necessity for their cooperation.

Gladue Implementation Agency legal technological support.

GIA needs to be provided with the appropriate technology, particularly given the important role it plays in efficiently transferring information between the GIA headquarters, IJCs, and writers. Different platforms can be explored, but a mobile application could be a useful tool. Katie Sykes, a professor at the Thompson Rivers University Faculty of Law, specializes in legal technology and modernizing the justice system. She could be a useful resource in this area. The technology will need to meet security and privacy standards. MAG also has employees who have worked on technologically sophisticated tools for the justice system, including for the Civil Resolution Tribunal.

Who should be responsible for reviewing and editing Gladue reports when they are completed by the Gladue writer?

In Nova Scotia and the Yukon, the reports are edited by a single central Gladue coordinator, but those jurisdictions have fewer reports than BC¹⁶⁰. In Ontario, the ALS head office has two staff who edit reports, but it also has other qualified staff who can edit documents when necessary¹⁶¹. The CNG have “super writers” who are DJCS employees that provide support and quality assurance. They review and provide comments and support for other writers¹⁶².

Without additional qualified staff, the responsibility for reviewing and editing reports in BC would likely fall on the Gladue coordinator. Due to the expected volume, that would likely overwhelm the coordinator and lead to delays in having the reports provided to the court. Additional editors at GIA headquarters will likely be required to ensure the quality of the reports and they could also take on other responsibilities such as creating GIB plans. Another option for monitoring quality would be to have the writer return the report to the IJC, which could have their own editor.

What needs to be included in the new forms that will be developed with this process?

Two new forms must be created to implement these recommendations. One form will be filled out by the courthouse registry and will serve a similar purpose as the ADM 854 – “Pre-sentence

¹⁶⁰ October 18, 2019 – Phone meetings with CYFN

¹⁶¹ Notes from Meeting with Jonathan Rudin. October 15, 2019

¹⁶² Meeting Notes – Don Nicholls, DJCS, CNG – March 3, 2020

Report and Psychological/Psychiatric Assessment” form. This form must provide information about the offender, how to contact them, the type of report ordered, Crown and defence counsel contact information, when the report is due in court, and any remarks made by the judge and recorded by the clerk.

A second form will need to be created for Crown counsel to provide information to GIA. This form can be similar to the “Court Ordered Assessment Referral” form that Crown counsel distributes to FPSC for a Forensic Psychiatric/Psychological Assessment. The new Crown counsel Gladue form will need to provide similar information as well as a list of documents that must be provided to GIA by Crown counsel such as police reports, witness statements, previous Gladue documents on file, and corrections history. When developing this form, Gladue writers and GIA should be consulted so that they can confirm what information needs to be collected.

At what points might privacy assessments and/or information sharing agreements be needed?

As examined in the stakeholder engagement section of this Master’s project, the constant involvement of the MAG privacy officer is fundamental to implementing the recommendations. It is strongly advised to include privacy considerations throughout the implementation of this program rather than assess the privacy impact once the project implementation is nearing completion. Privacy assessments and information sharing agreements may be required for establishing an automated Gladue ordering system and the level of service delivery because these are areas where a client’s private information is shared with GIA, IJCs, and the writers. To develop an automated ordering system, information must be gathered from current justice systems in BC, such as JUSTIN and CORNET. It is not expected that GIA or Gladue writers would need access to these sources but they would receive information from stakeholders who already have access to them. This information would be distributed by forms to GIA, IJCs, and then to Gladue writers.

Other jurisdictions in Canada have confidentiality agreements that are signed by clients as well as Gladue writers. It is also a practice in some jurisdictions that all information on the client is destroyed once the Gladue report is completed. Adopting these practices should be explored with the MAG privacy officer. What should also be explored is whether clients and writers should be required to sign an agreement for each report or whether it is possible for all privacy considerations for writers to be covered under a single agreement covering them for all reports they produce. Additionally, consent from the client will be required to have the Gladue report written. Obtaining verbal consent or written consent from a client are options that could be examined.

While it is not intended that personal information will be stored on the Gladue database, contributors and those accessing the recommended Gladue database will need to be subject to privacy and information sharing agreements. The database should be financed by the government but directed by GIA.

Phasing in a regional service delivery model

There is still uncertainty as to some of the roles and workload that GIA will have in the new Gladue program. This also extends to the IJCs, which will grow in numbers throughout the province in the following years. Once the roles of GIA and the IJCs have been established, a plan to phase in the new ordering system will need to be determined. As the IJCs are set up over time, a plan must be made to ensure service delivery still meets the needs of Indigenous people.

What happens when a Gladue writer is required to provide oral delivery of a report?

As part of the contract between government and GIA, a component of the services offered by Gladue writers includes having the Gladue report/letter delivered orally.

The oral delivery of Gladue principles would proceed the same way a letter and a full report are ordered. When the order is made, there would be an option in the CCD for the report or letter to be delivered orally in court. Through the various forms that result from the order, the writer would be advised of this request and would prepare accordingly. The oral delivery of a report may be appealing to counsel and the judge when they are only seeking an update on a client who has previously been the subject of Gladue documentation.

What should be the value for Gladue reports, letters, bail plans? What if only a portion of the document is completed?

Criteria for valuing the work for each Gladue documentation should be determined even if they are not fully completed. In Nova Scotia, the payment model requires that in some circumstances the writer must be paid for portions of work performed on a report that, although not fully completed, is sufficient to be submitted to the court for use in sentencing. In BC, writers should be paid for portions of the report they complete, however, that value will need to be determined. Other values that will need to be determined include the payment for Gladue letters, GIB plans, updates, and oral delivery of a report. Determining these values should be done in consultation with GIA and the writers who can speak to the amount of time and effort required for each form of documentation.

How can Indigeneity be identified early?

Determining the smart practice for identifying indigeneity earlier in the justice system will be easier once GIA and the IJCs have a more established business plan and a better understanding of what resources they will have available. Having an Indigenous staff member at courthouses across the province, would help identify indigenous people early on in the criminal process. This is a smart practice that has been observed in Nova Scotia although Nova Scotia does have a smaller population than BC, which makes identifying Indigenous people easier.

If GIA and the IJCs do not have the capacity for a similar resource, then educating defence counsel on the new resources available to Indigenous clients would be required. It should be explained to defence counsel that it is in their interest to identify whether their client is Indigenous early in the justice system so that they can access these resources to help their client.

11. FUTURE RESEARCH AND CONCLUSION

Future Research: Gladue in British Columbia

Gladue principles should be expanded to parole hearings. Consultation with the Federal government would be required as parole hearings fall under Federal jurisdiction. This is an area where Indigeneity would be important because of the over-incarceration of Indigenous offenders serving sentences in federal correctional centres. Developing parole release conditions that are culturally informed could assist in improving a client's transition out of incarceration.

Other areas of future research could be directed towards developing smart practices to building databases including the method of cataloguing Indigenous discrimination experiences.

Future research could also be directed towards monitoring the effectiveness of bail hearings for Indigenous populations and whether they are a diversionary tool for keeping Indigenous clients out of custody.

Conclusion

Inefficiency, uncertainty, and a lack of flexibility are problems with the current Gladue ordering system in BC. A lack of a clear formalized ordering system results in uncertainty surrounding Gladue reports - how they are ordered, who is involved in ordering reports, where they come from, and how many are written each year. It also means courts may not be receiving the necessary background information on Indigenous people.

Having a new system that addresses these issues requires implementing measures that establish a systematic process for ordering reports so that it is known who was involved in writing the Gladue report and that all efforts were made for the report to be produced as efficiently as possible. Increasing flexibility through the variation in formats that Gladue reports can be prepared (letters, oral delivery) and providing writers with the necessary supports ensures that reports can be prepared in a timely manner so Indigenous clients are better served by the criminal justice system.

This Master's project also explores how Gladue considerations can assist Indigenous accused at bail hearings by determining appropriate release conditions for a client through GIB plans. The funding of this new formalized Gladue system should be provided to GIA by government, but GIA must have the autonomy to decide how to deliver legal services to Indigenous populations because they are best suited to do so. This Master's project serves as a blueprint to guide a new model of delivery of Gladue services in BC that is aligned with the BCFNJS.

12. APPENDICIES

Appendix A – Current State of Gladue in BC.

Appendix B – Overview of the BCFNJS

Appendix C – Stakeholder Interview Questions.

Appendix D – Map of Legal Aid Gladue process.

Appendix E – Form ADM 854.

Appendix F – BC Mental Health and Substance Abuse – Court Ordered Assessment Referral.

Appendix G – Gladue report Request form.

Appendix H – Nova Scotia Collaborative Interview Form.

Appendix I – Confidentiality agreement signed by the report writer.

Appendix J – Recommendation 1: Ordering Gladue reports in Court

Appendix K – Recommendation 2: Level of Service Coordination for Ordering Gladue reports

Appendix L – Recommendation 3: Payment Reimbursement

Appendix M – Recommendation 4: Gladue at Bail

Appendix N – Recommendation 5: Gladue Letters

Appendix O – Recommendation 6: Technology Resources to Support Gladue Report Writers

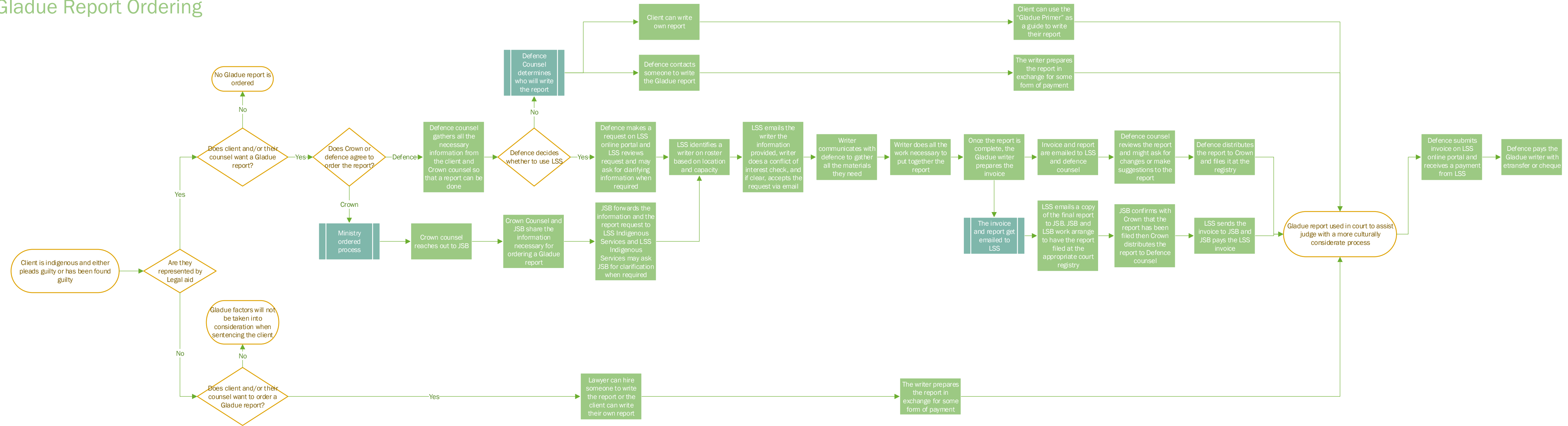
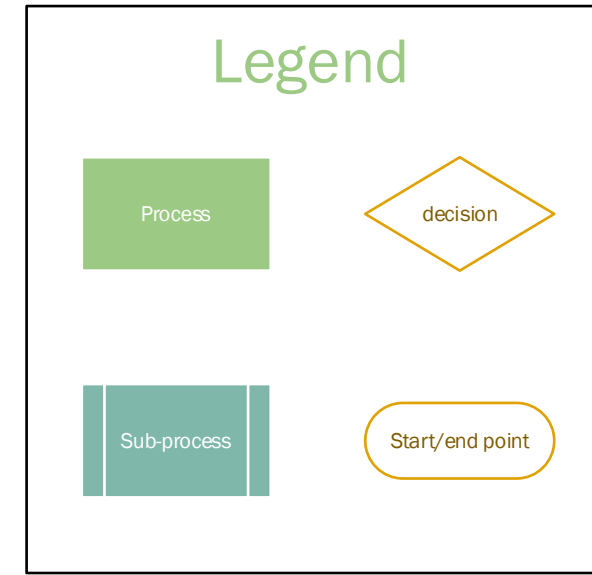
Appendix P – Map of the Future State of Gladue in BC.

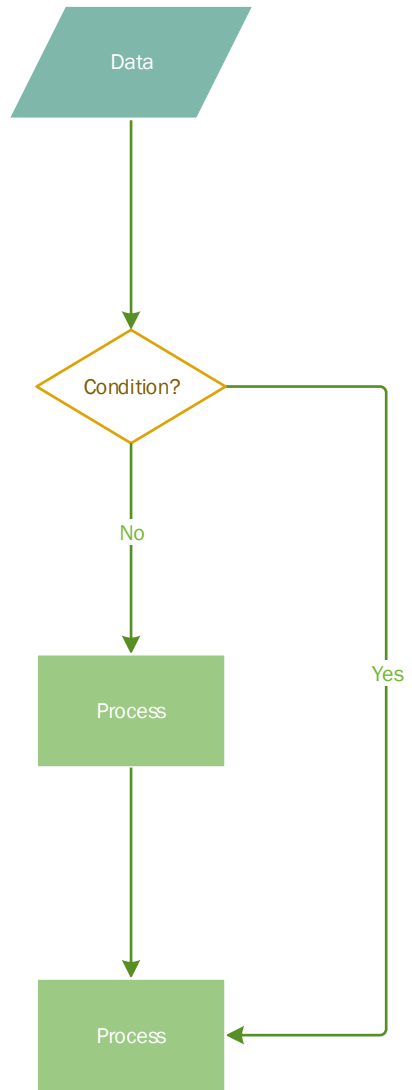
Appendix Q – Map of the BC bail process.

Appendix R – Map of the Gladue Informed Bail plan.

Appendix S – Working Group Members

Appendix A - Current State of Gladue Report Ordering





Appendix B – Overview of the BC First Nations Justice Strategy

Four Foundations of the BC First Nations Justice Strategy

- **Foundation 1:** A Strategy must adopt an integrative, holistic, and comprehensive approach that addresses all forms of interaction between First Nations and the justice system.
- **Foundation 2:** A Strategy must pursue two tracks of change at once: (1) Reform of the existing justice system; (2) Transformation through the rebuilding of Indigenous justice systems.
- **Foundation 3:** A Strategy must be proactive in creating conditions where First Nations people are no longer disproportionately interacting with, nor being impacted by, the justice system.
- **Foundation 4:** A Strategy must achieve a 180-degree shift from the current reality of First Nations people being overrepresented in all stages of interaction with the justice system, while at the same time being underrepresented as actors with roles and responsibilities within the system.

Four Pillars of the BC First Nations Justice Strategy

- 1) Core values,
- 2) Structures and Processes,
- 3) Roles, Responsibilities, and Capacities,
- 4) Laws and Policies.

Relevant Strategies and Lines of Action from the BCFNJS

Strategy 1: *Reflecting the core value of a presumption of diversion throughout the existing justice system*¹. A presumption of diversion means that at every opportunity, the least restrictive appropriate response to criminal conduct should be pursued. Both the principles articulated in Gladue, with regard to offenders, and the recognition of the harm to Indigenous women and girls as victims, must be addressed². This strategy explains that the justice system must have procedures in place that align with the presumption of diversion. This project explores the points within the criminal justice process where the presumption of diversion set out in Strategy 1 can be implemented in bail hearings, at sentencing, and posits having a short-form Gladue letter available in situations where a longer report may not be warranted at these points. Gladue letters are abbreviated forms of full Gladue reports. They can be written in a shorter time frame and are usually used in instances when a client faces a shorter jail sentence.

Strategy 4: *Expand and invest in a comprehensive network of Indigenous Justice Centres*³. The BCFNJS looks to grow a network of fifteen Indigenous Justice Centres (IJC) across BC over the next five years. IJC's will play a pivotal role in delivering individualized services to First

¹ BC First Nations Justice Strategy. February 2020. P. 25.

² BC First Nations Justice Strategy. February 2020. P. 26.

³ BC First Nations Justice Strategy. February 2020. P. 31.

Nations people, including Gladue programming. This Master's project examines options that contemplate having IJCs involved in offering resources and support for production of Gladue reports that reflect the diversity of Indigenous communities in BC.

Strategy 6: Implement a comprehensive Gladue strategy supported by a dedicated First Nations controlled Gladue implementation agency⁴. This strategy identifies the need to create a formalized Gladue reporting process. A major component included in this strategy is the creation of an agency that will deliver and facilitate legal services to Indigenous communities. It will be called the Gladue Implementation Agency (GIA). This Master's project outlines the key contacts and required action that needs to be taken for this portion of the strategy to become a reality. For example, the recommendations made in this Master's project (e.g. the automated court ordering infrastructure, the Gladue database) will largely influence what roles and responsibilities the GIA will have. Consequently, the timely completion of this report is paramount as other areas of the BCFNJS are reliant on this report.

Strategy 15: Support First Nations community-based justice programming, with the goal that within five years every First Nations community that seeks it, has a long-term community justice programming plan and has begun offering expanded programming⁵. Strategy 15 is closely tied with the previously mentioned strategies because of its focus on community-based justice programs receiving sustainable funds. It is important that the judiciary, practicing lawyers, and all other stakeholders in the Gladue program in BC are familiar with the new practices for Gladue reports. This Master's project identifies key contacts with stakeholders and outlines options for funding future Gladue services. Constant communication and incorporation of feedback with stakeholders is paramount for the success of this project.

⁴ BC First Nations Justice Strategy. February 2020. P. 33-34.

⁵ BC First Nations Justice Strategy. February 2020. P. 41.

Appendix C – Stakeholder Interview Questions

Recommendations for a Formalized Gladue Report Ordering System in British Columbia

Expert Interview Questions

*Semi formal interview structure *not all these questions will apply to every interviewed person.
Additionally, the answers provided may spark follow up questions that can not be anticipated.*

Can you explain the current process of ordering Gladue reports from when an indigenous person is arrested until they are on parole?

What do you think are processes or operations that make the Gladue program in your province effective?

What are some challenges that the Gladue program in your province experiences?

How are Gladue writers paid?

What resources do you offer Gladue writers?

Who funds the Gladue reports?

What forms do you use to collect information from indigenous offenders?

What confidentiality checks are used?

How is information exchanged between those involved in the creation of a Gladue report?

What technology is used in ordering a Gladue report?

Who is entitled to a Gladue report?

What sort of privacy impact assessments and sharing agreements have been put in place for the current system in your jurisdiction?

CONFIDENTIAL

CONFIDENTIAL

Pre-sentence Report and Psychological / Psychiatric Assessment

Canada: Province of British Columbia

COURT REGISTRY
REGISTRY ADDRESS

Date: _____

Court File No(s): _____

Offender's Name: _____ D.O.B.: _____

Address (if different from RCC): _____

Place of Custody: _____ Phone Number: _____

TO: Corrections Branch - Probation Services

Address: _____

The Provincial / Supreme Court ordered the following report:

Purpose of Report:

- Ordered Pre-Sentence Report (PSR)
- Ordered Technical Suitability Report (TSR)
- Ordered PSR with Psychological/Psychiatric Assessment
- Requested Psychological/Psychiatric Assessment without a court order

Type of Report:

- Full
- Foc sed (See Remarks for details)
- Oral
- Update

TO: Forensic Psychiatric Services – Outpatient Assessment

Address: _____

The Provincial / Supreme Court requested/ordered an assessment report from Forensic Psychiatric Services.

Date Report Required: (two days before sentencing hearing) _____

Court Date: _____

Crown Counsel: _____

Defence Counsel: _____

- See attached copies of:
- Information(s)
 - Indictment(s)
 - Record of Proceedings (do not attach blank pages)

Remarks:

--

Clerk of the Court

Registry Use Only:

Extension for Report(s) – Sentencing Hearing Adjournment Date: _____ Time: _____

Pre-sentence Report / Psychological / Psychiatric Assessment

COURT ORDERED ASSESSMENT REFERRAL*

FORENSIC PSYCHIATRIC SERVICES COMMISSION

Please complete all applicable fields

*This form is not intended for Community Corrections referrals

I. PERSONAL INFORMATION

Name: _____ <small>(Last) (First) (Middle)</small>			Mailing Address (with postal code) _____		
Aliases: _____				Phone: _____ Cell/Alt: _____	
<input type="checkbox"/> M <input type="checkbox"/> F <input type="checkbox"/> Other:	Marital Status: _____	Language: _____ <input type="checkbox"/> Interpreter Required <input type="checkbox"/> Hearing Impaired	Date of Birth: (yyyy/mm/dd) _____	FPS #: _____ CS #: _____	

ALERTS: *i.e. carries weapons, issues with other ethnicities, gender concerns, medical concerns, bed bugs, etc.*

II. LEGAL STATUS INFORMATION

Court Location: _____	Next Court Date: _____	Stage of Court Proceedings: _____
Court File Number(s): _____	Current Charges / Convictions: _____	Sections of CC: _____
<input type="checkbox"/> Supreme Court <input type="checkbox"/> Provincial Court	Crown Counsel: _____ Defence Counsel: _____	Ph: _____ Ph: _____
Court Assessment Due Date: _____		

III. REFERRAL FOR *(please select only one)*

<input type="checkbox"/> Fitness – 672.11 CCC (Form 48 Required) OR ¹	<input type="checkbox"/> Ordered: PRE-SENTENCE REPORT with Forensic Psychiatric / Psychological Assessment 721(4) and 723(3) CCC
<input type="checkbox"/> NCRMD – 672.11 CCC (Form 48 Required) ¹ <i>if Fitness Assessment Ordered, NCRMD Assessment cannot be ordered concurrently</i>	OR
<input type="checkbox"/> Overnight Assessment – 516 CCC (Lower Mainland only)	<input type="checkbox"/> Requested: PRE-SENTENCE REPORT Forensic Psychiatric/ Psychological Assessment

IV. ASSESSMENT LOCATION

<input type="checkbox"/> In Custody <input type="checkbox"/> Forensic Psychiatric Hospital 70 Colony Farm Rd, Port Coquitlam V3C 5X9 604.524.7700 / Admitting: 604.524.7716 604.523.7896 (fax) <input type="checkbox"/> Correctional Facility: _____	<input type="checkbox"/> Out of Custody – Regional Forensic Clinics <input type="checkbox"/> Kamloops 5-1315 Summit Dr, Kamloops, V2C 5R9 f: 250.377.2688 p: 250.377.2660 <input type="checkbox"/> Nanaimo 101-190 Wallace St, Nanaimo, V9R 5B1 f: 250.739.5001 p: 250.739.5000 <input type="checkbox"/> Prince George 2 nd Fl, 1584-7 Ave, Prince George, V2L 3P4 f: 250.561.8075 p: 250.561.8060 <input type="checkbox"/> Surrey 10022 King George Blvd, Surrey, V3T 2W4 f: 604.529.3333 p: 604.529.3300 <input type="checkbox"/> Vancouver 300-307 W. Broadway, Vancouver, V5Y 1P8 f: 604.529.3386 p: 604.529.3350 <input type="checkbox"/> Victoria 2840 Nanaimo St, Victoria, V8T 4W9 f: 250.213.4532 p: 250.213.4500 <input type="checkbox"/> Client has been instructed to contact Community Corrections for further instructions on Assessment process / contacting FPSC for appointment
---	---

V. REASON FOR REFERRAL

PLEASE SPECIFY REASONS FOR REFERRAL TO ENSURE A TIMELY ASSESSMENT.

If the referral is for a psychological/psychiatric PSR, please be as specific as possible when outlining the issues the Court would like to have considered.

What is the essential referral question?

VI. DOCUMENTS REQUIRED:

	<u>Enclosed</u>	<u>Not Available</u>
1. Court Order	<input type="checkbox"/>	<input type="checkbox"/>
2. Report to Crown Counsel, Police Reports, Witness/Accused Statements, Information, Record of Proceedings	<input type="checkbox"/>	<input type="checkbox"/>
3. Available collateral information including Probation Pre-Sentence Reports, social history, etc.	<input type="checkbox"/>	<input type="checkbox"/>
4. Corrections history / CPIC summary	<input type="checkbox"/>	<input type="checkbox"/>
5. Previous medical / psychiatric reports or assessments	<input type="checkbox"/>	<input type="checkbox"/>
6. CORNET Order Details Report	<input type="checkbox"/>	<input type="checkbox"/>
7. Agreed Statement of Facts <i>(required if assessing for NCRMD)</i>	<input type="checkbox"/>	<input type="checkbox"/>

VII. REFERRAL SOURCE

Name:	Service/Agency Name:
Position:	Phone Number:
Address:	
Referral Source Signature	Date of Referral

FOR FORENSIC OFFICE USE ONLY (do not write in this space)

Assigned:	Date:
Action taken:	
Remarks:	

Appendix G - Nova Scotia Gladue Report Request Form



Attention: Shannon Googoo
 803 Willow Street
 Truro, NS B2N 6N5
 Tel: 902-895-1141 Fax: 902-897-0604 Email: sgoogoo@mlsn.ca

Sentencing Circle and / or Gladue Request Form
 For Mi'kmaq and Aboriginal People

The Provincial Court of Nova Scotia
 On the _____ day of _____

Here by request a
 Sentencing Circle Gladue Report

For the following charges _____
 For the following individual _____

D.O.B: ____ / ____ / ____ Client Address: _____

Phone: (902) _____ - _____
ALT #: (902) _____ - _____

Attending Defence: _____
 Phone: (902) _____ - _____
 Fax: (902) _____ - _____

Attending Crown: _____
 Phone: (902) _____ - _____
 Fax: (902) _____ - _____

Judge: _____ Court Administrator: _____
 Phone: (902) _____ - _____
 Fax: (902) _____ - _____

Court Location: _____ Sentencing Date: _____
 Required documentation to be included with this referral:

Attached	
Full disclosure:	<input type="checkbox"/> yes <input type="checkbox"/> no, if no date expected _____
A full criminal history report:	<input type="checkbox"/> yes <input type="checkbox"/> no, if no date expected _____
Pre-Sentence Report:	<input type="checkbox"/> yes <input type="checkbox"/> no, if no date expected _____
Other assessments as ordered by the courts:	<input type="checkbox"/> yes <input type="checkbox"/> no, if no date expected _____ <input type="checkbox"/> not applicable

In 1999, the Supreme Court of Canada released The Gladue decision

- Helps judges decide what action to take when sentencing
- The judge's sentence may not always mean going to jail for the crime committed
- Helps judges and other people in the justice system understand 718.2 (e) of the Criminal Code

“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 circumstance should be considered for all offenders, with particular attention to the circumstance of Aboriginal Offenders.”

WHAT FACTORS WILL HELP THE JUDGE MAKE A DECISION?

In order to make a good decision you will need to tell the judge some things about your life or the life of someone close to you that you might not like to talk about, but will help you with their case and could help them in not getting in trouble again by knowing more about their story. This is what is meant by restoring balance.

ABOUT YOU

Name:	Age:
Aboriginal Ancestry:	Date of Birth:
Community:	

Have the client or yourself experienced overt (intentional & obvious) or covert (disguised & subtle) racism?

Has your family or community?

Has the client experienced premature or tragic deaths?

Has the client had issues with mental health? What do you remember most about these times?

Explain any distrust of the police.

What are your experiences with domestic violence? Think about the client, family & community.

Cultural Traditions: Sweats, smudging, hunting, fishing, arts/crafts, etc.

Have the clients parents/grandparents, family members attended residential schools?

How do you believe this has affected the client and the community?

To your knowledge, has the client suffered emotional, mental, physical, verbal, sexual or spiritual abuse?

Have their family members?

Your Education: grade level, location, challenges of racism, other challenges including disabilities & goals

Employment history: Where have you worked and for how long? Have you had problems with racism? Welfare?

Think back to the first time the client started getting into trouble, what happened?

Why do you think they have been involved with the Criminal Justice System?

Do you feel that a community based program would benefit the client? How so?

Your experiences are not limited to what you have personally experiences. This section should include things that your immediate and extended family & the community as a whole have experienced.

These experiences can include

- Substance abuse
- Poverty
- Overt or Covert Racism
- Family or Community Disintegration
- Domestic Violence
- Abuse: sexual, emotional, verbal, mental, physical or spiritual
- Unemployment, low income, lack of employment opportunity
- Isolation
- Lack of education opportunities
- Loss of Identity, culture or ancestral knowledge
- Involvement with Family & Childrens services

- Involvement in Criminal Activities
- Socio-Economic conditions
- Lack of housing

“A person’s life does not begin with their birth. It is shaped by the lives of those who have come before them.”

Appendix J – Recommendation 1: ORDERING GLADUE REPORTS IN COURT

Gap(s) being addressed: This recommendation addresses the slow, inconsistent, and inefficient processes under the current Gladue report ordering procedure. This recommendation also addresses the absence of Indigenous oversight in the current ordering regime. Further, this recommendation fosters improvements for concerns of conflicts of interest, privacy, and confidentiality that exist under the current ordering regime.

Option 1 (recommended) – *An automated ordering system for Gladue reports modeled after the BC Forensic Psychological/Psychiatric Assessment ordering system.*

Description

To have Gladue documentation ordered, Crown or defence counsel may request of the judge that a Gladue report be ordered to inform an appropriate sentence for the Indigenous client. Crown and defence counsel share the onus to identify whether the individual before the court is Indigenous. Crown and defence counsel may both advocate for or against a Gladue report being ordered. If the judge determines a report would assist with sentencing considerations, a report is ordered.

Upon the order being made, the court clerk records it in the CCD¹. The software on the CCD notifies the courthouse registry via the JUSTIN inbox that a report has been ordered. The courthouse registry completes a form as they would when a Forensic Psychological/Psychiatric Assessment has been ordered. This form can be modelled after ADM 854². The courthouse registry sends the form to Crown counsel and GIA, and then places the form in the court file. Upon receipt of this form, Crown counsel completes a form modelled and adapted from the “Court Ordered Assessment Referral”³ form and sends it to GIA along with all the specified documents. Once GIA has both forms and all the documents, the request for the Gladue report is provided to the appropriate IJC, which forwards the documents to a Gladue writer, who writes the report.

Once the Gladue report is complete, the writer sends the report to GIA to review the report prior to sharing it with defence counsel, Crown counsel, and the courthouse registry for distribution to the judge. Once the sentence has been imposed, the Gladue report is stored in the client’s file with the courthouse registry. GIA stores a copy for their own record. The general overview of this proposed system can be seen in Appendix I - *Map of the Future State of Gladue in BC*.

Required resources and necessary procedures

- Courthouse registry form (Similar to ADM 854).

¹ Whether a Gladue letter or a full Gladue report

² Appendix D – Form ADM 854. The form used by the courthouse registry to order a forensic psychiatric assessment. Changes can be made to this form to reflect what is needed to order Gladue documentation.

³ Appendix E – Court Ordered Assessment Referral. This form is sent from Crown counsel to BC mental health that provides information about the accused who requires a psychological evaluation. This form could serve as a template for a Gladue specific order form.

- A Crown counsel information distribution form⁴ (Similar to “Court Ordered Assessment Referral” form)⁵. GIA will need to be involved with developing this form as well.
- Privacy Impact Assessment for the sharing of information between CSB, PSB, and GIA.
- Develop a working group with CSB, PSB, JSB, and GIA.

Pros

- Gladue reports will be ordered consistently because every report will be ordered through the court rather than having Legal Aid BC reports, private reports, or government reports.
- The technological efficiencies as part of this recommendation will result in more timely ordering procedures.
- Removes the responsibility of ordering a report from defence counsel or the client.
- Reduces the amount of time defence or client must put towards having a report produced.
- Minimal cost to develop an automated system.
- Reports can be tracked more consistently.
- The new ordering procedure ensures that all Gladue reports are ordered to GIA, the Indigenous led organization that will manage the Gladue program in BC.

Cons

- Will require educating stakeholders of the new process.
- Requires the development of new resources, forms, and agreements amongst PSB, CSB, JSB and GIA.

Key Contacts

Person/Position/Agency	Role in implementation
CSB	CSB plays a significant role in implementing automated court systems. The CCD and its interface will need to be altered to accommodate the new requirements under this system. The courthouse registry and court clerks will need to be trained on the new procedures required by this new ordering process. CSB has staff whose job is to create, amend, and manage court and administrative forms. They will be involved in creating the new forms.
Judiciary	With any changes made to the court system, the judiciary will need to be consulted.
PSB	PSB will be involved with gathering and distributing information to GIA. They will also be able to advise what information they are able to provide on the Crown counsel form that will be provided to GIA to forward to the writer. Crown counsel will also be involved in the

⁴ This is the form that will serve the purpose that Court Ordered Assessment Referral provides for forensic psychiatric assessments.

⁵ A more detailed description of what the potential for the two required forms mentioned can be found in the Implementation section later in the report under the sub-heading, “What needs to be included in the new forms that will be developed with this process?”.

	in-court submissions for ordering a Gladue report as well as working to identify Indigenous clients.
GIA (Provincial Office)	GIA will need to be consulted to understand what the ordering procedure involves and what information will be distributed to them. This is information they need to know as they develop their organization's operating protocols.
Gladue writers	Gladue writers should be involved in developing information sharing, privacy agreements, and the policy that will guide the program.
Ministry Privacy Officer Ministry of Attorney General; Ministry Public Safety and Solicitor General	The MAG and PSSG Privacy Officer will determine the privacy assessments and sharing agreements that will need to be in place for the program to safely operate. JSB will work closely to gather information for the assessments and agreements that will need to be created.
Defence counsel	They will assist in identifying Indigenous clients and provide any available necessary contact information.

Option 2 – *Keep the same ordering process but transfer the program management from Legal Aid BC to GIA.*

Description

Continue with current state of Gladue report ordering in BC as shown in the Appendices A and B. One exception to the current state is the services that are provided by Legal Aid BC are transferred to the GIA.

Required resources and necessary procedures

- Scheduled meetings with key contacts (Legal Aid BC and GIA)

Pros

- Gladue writing and program coordination will be managed by an Indigenous-led organization.
- Less education to defence counsel, Crown counsel, judiciary, and support staff of procedural changes to ordering Gladue reports.

Cons

- Transferring the management of the program over to GIA does not solve the problems this project has identified, such as ensuring all Indigenous people have access to a Gladue report, developing a formal Gladue program for improved consistency of Gladue report content, and improving the timeliness for the preparation of reports.
- Current process in place is challenging to monitor the quality of each report and track who is involved in its development.

- There is a reliance on defence counsel to take the initiative in ordering reports. Changing the Gladue report provider would require educating defence that they are to refer to the GIA rather than Legal Aid BC.
- An absence of a formalized Gladue reporting process remains which does not align with *Strategy 6*, line of action D in the BCFNJS.
- No actionable steps to address the identified problems with Gladue reports currently being produced in BC such as timelier and clearer production.

Key contacts

Person/Position/Agency	Role in implementation
Legal Aid BC	Legal Aid BC will need to share their current policy and operating procedure to help inform GIA.
GIA	GIA will need to gather information and inquire about the current operations of Legal Aid BC and determine their own operating procedures.

Appendix K – Recommendation 2: LEVEL OF SERVICE COORDINATION FOR ORDERING GLADUE REPORTS (REGIONALLY FACILITATED/CENTRALLY FACILITATED)

Gap(s) being addressed: This recommendation addresses the slow, inconsistent, and inefficient processes under the current Gladue report ordering procedure. It can also help foster improvements for concerns of conflicts of interest, privacy, and confidentiality that exist under the current ordering regime.

Option 1 (recommended) – *Gladue documentation coordinated via regional Indigenous Justice Centres with document ordering overseen through the Gladue Implementation Agency.*

Description

When Gladue documentation is ordered by a judge, the courthouse registry notifies GIA through a form that indicates the type of Gladue documentation that has been ordered, where the order has come from, and preliminary information about the client. GIA files the order and waits for the Crown counsel “Gladue Information Order” form that provides more information about the client and their charges. Once they receive this material, they forward the courthouse registry form and the Crown counsel form and information to the appropriate regional IJC. GIA determines which IJC receives the form and materials. The IJC assigns and contacts the Gladue writer. Once the writer has completed the documentation, it is sent to GIA along with the invoice where it is reviewed by the coordinator. This option and how it fits into the future state of Gladue is displayed in *Appendix I - Map of the Future State of Gladue in BC.*

Required resources and necessary procedures

- Privacy Assessment and Information Sharing Agreement with GIA and IJCs
- Develop a working group with GIA and representatives of IJCs.

Pros:

- Having the regional IJCs deliver Gladue services to Indigenous communities would provide service on a deeper and more personalized level than GIA would be able to.
- Having up to 15 IJC’s to coordinate Gladue reports allows for ordered reports to disperse the workload across multiple offices rather than having GIA provide services to the entire province.
- The locations of the IJC’s and the services they provide for Gladue documentation would be easier for clients to access. It would also make connecting writers and clients easier.
- Involving the IJCs align with *Strategy 4* of the BCFNJS.

Cons:

- Implementation will not occur immediately because the BCFNJS indicates these regional offices will be set up over time. Therefore, some regions will experience a new system of ordering documentation that examines Gladue factors, while others will not. Because of this, regions will experience different models of delivery and solutions will need to be determined to address this.

Key Contacts

Person/Position/Agency	Role in implementation
------------------------	------------------------

GIA	GIA will need to incorporate this recommendation into their operational plan. They must consider how to transfer the necessary information from CSB to IJCs and how orders should be stored and tracked. Staffing of Gladue writers will need to be coordinated with IJCs.
Indigenous Justice Centres	Expectations will need to be determined regarding specific service delivery and staffing requirements at the IJCs to be able to support producing the reports.
Ministry Privacy Office Ministry of Attorney General; Ministry Public Safety and Solicitor General	The relationship between MAG, GIA, and IJCs will need to be clearly defined. This will help inform the information sharing agreements and privacy measures that will be required so the IJCs can provide this level of service.

Option 2 – *All reports are coordinated and delivered through a central Gladue Implementation Agency with no involvement of IJCs for regional delivery.*

Description

When the courthouse registry is notified that a report has been ordered, CSB staff fill out a standardized courthouse registry form that describes the order and forwards it to GIA and Crown counsel. GIA files the order and waits for Crown counsel to send their “Gladue Information Order” form and materials that provides more information about the client. Once this is received, GIA assigns and provides the Gladue writer with the forms and materials they have received so the writer can contact the client. When the report is complete, it along with an invoice for services rendered is returned to GIA where the report is reviewed and invoice paid. This option and how it fits into the future state of Gladue report ordering is displayed in *Appendix I - Map of the Future State of Gladue in BC*.

Required resources and necessary procedures

- Privacy Assessment and Information Sharing Agreement with MAG and GIA.

Pros:

- All reports coordinated out of a single location allowing for easier oversight of the produced reports.

Cons:

- Potential overload for GIA with the demand for Gladue reports without utilizing assistance from IJCs.
- Would not be as effective at delivering a service that accommodates the uniqueness of different Indigenous communities and clients across the province.
- Does not align with the BCFNJS to utilize the IJCs to support Indigenous communities across BC.

Key Contacts

Person/Position/Agency	Role in implementation
------------------------	------------------------

<p>Ministry Privacy Officer Ministry of Attorney General; Ministry Public Safety and Solicitor General</p>	<p>The relationship between the MAG and GIA needs to be clearly defined. This will inform the information sharing agreements and privacy measures that will be required to ensure GIA can safely provide this service.</p>
<p>GIA</p>	<p>GIA will need an operational plan for gathering the necessary information from the process participants, safely storing it, and distributing it to the appropriate Gladue writer.</p>

Appendix L – Recommendation 3: PAYMENT/REIMBURSEMENT FOR GLADUE WRITERS

Gap(s) being addressed: This recommendation addresses the inefficient payment scheme under the current Gladue ordering procedure.

Option 1 (recommended) – *Negotiate a contract that gives GIA the finances they need to produce Gladue documentation and allows them to determine how writers are paid.*

Description

JSB and GIA operate under a contract that outlines the responsibilities of GIA and the financial allotment they will receive for their services. MAG will provide an annual budget to be determined in consultation with GIA and GIA will determine how the money would best be allocated. GIA would provide annual reports on their expenses.

Required resources and necessary procedures

- A contract between MAG (JSB) and GIA, outlining the conditions, responsibilities, and financial obligations that GIA will be responsible for as well as the financial responsibility of MAG to support GIA.

Pros:

- Offers financial autonomy to GIA to allocate their budget as they determine would be most appropriate to deliver Gladue services.
- Requires less government action to reimburse for the work performed by writers for every report.
- Contract can encompass all the finances for GIA’s obligations under the future Gladue ordering system such as:
 - Value of the work completed by Gladue writers,
 - Value for work performed by writers for oral delivery of reports/letters,
 - Operational and administrative costs.
- Contract payment structures align with similar reimbursement schemes for like processes already established in BC, such as the FPSC and PSSG contract for Forensic Psychiatric/Psychological Assessments.

Cons:

- Initial negotiation and drafting of the contract will be resource consuming.
- Determining an initial budget will be difficult. There is an unknown demand for Gladue reports in BC. Therefore, funding will be based off estimates and it will take time to determine how much funding GIA will need to adequately execute the services expected from them.

Key Contacts

Person/Position/Agency	Role in implementation
JSB – legal counsel	JSB legal counsel and government procurement lawyers will lead the negotiations of the contract for JSB.
GIA – executives and legal counsel	Representing the operations and responsibilities of GIA.

JSB – Budget Manager; Manager of Finance	As the financier of GIA, JSB must identify constraints and opportunities for JSB and its funding relationship with GIA.
--	---

Option 2 – *The Gladue writer submits an invoice to GIA which pays the writer and recovers the payment from government.*

Description

When a Gladue writer completes their work, they fill out an invoice. The writer submits the invoice along with the report to GIA. The Gladue coordinator and assisting support workers at GIA will be responsible for reviewing the report and the invoice. If approved, the writer will be paid for their work. GIA will file and copy the invoice and send a copy to JSB. JSB will pay GIA for the value of the invoice as reimbursement for the payment already made to the writer. The invoice should also include a section where work-related expenses can be claimed, and the writer must provide proof of expenses.

Required resources and necessary procedures

- Administrative resource in GIA to manage the money used to pay writers.
- Secure line of communication to exchange payment information between the writers, GIA, and MAG.
- Invoice template for work done by Gladue writers.

Pros:

- Gladue writers may be paid back quickly after submitting their work.
- No budgetary concerns with paying writers.

Cons:

- GIA may have to wait a period of time to be reimbursed by JSB.
- Constant on-demand delivery of funds from JSB to GIA. This would be more time and resource consuming for JSB on a continuous basis.

Key Contacts

Person/Position/Agency	Role in implementation
GIA	GIA will need to have a business plan and resources in place to be able to pay and support Gladue writers for their work.
Gladue writers	The Gladue writers should be involved in the implementation of the payment scheme to establish a method of payment that works for them. They will also need to be consulted to develop a line of communication between GIA and the writers.
JSB – Budget Manager & Manager of Finance	As the funder of the reports, the financial division will need to be consulted to establish a line of secure communication for reimbursement of reports to GIA. They will also need to assist in managing and

	maintaining GIA's float for paying writers in instances where funds fluctuate.
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Appendix M – Recommendation 4: GLADUE AT BAIL

Gap(s) being addressed: This recommendation addresses the need for an expansion of Gladue factors being used in various capacities within the justice system, and specifically for bail hearings.

Option 1 (recommended) – Gladue Informed Bail (GIB) plans

Description

Strategy 1 of the BCFNJS emphasizes the importance of a presumption of diversion for Indigenous people in the justice system. Bail is a point in the justice system where the indigeneity of a client can be considered in a more formalized manner.

Bail practices have recently undergone some changes in Canada. Bill C-75 created s. 493.2 CCC, which states that special consideration must be given at bail to Aboriginal and vulnerable populations. When a client is arrested and appears in custody, their counsel can ask the judge to order a GIB plan to assist with securing the client's release on bail. A GIB plan would provide some information about the Indigeneity of the client, the factors that may help explain why the client is before the court, and the support and resources available to help satisfy the judge that the client can be released into the community on bail terms that address public safety and the client's requirement to attend court. The Gladue Submission Guide in BC already has information about applying Gladue principles at bail hearings and what needs to be included in a bail plan¹.

There are parameters around what can be included as part of a bail plan. According to s.518(1)(b) CCC, no one except for the client's defence counsel is permitted to ask the accused about the nature of the offence². However, under s.518(1)(a) CCC, the judge can inquire about the client. This is the legal basis for ordering a GIB plan.

When an order for a GIB plan is made, it will be recorded in CCD and the courthouse registry will be notified. The courthouse registry will complete a Gladue Information Order form³ identifying a GIB plan has been ordered. The form will be sent to GIA, which will identify a Gladue writer. The writer will contact the in-custody client and any other resources necessary to complete the GIB plan. When the GIB plan is completed, the Gladue writer will email it to the client's legal counsel, Crown counsel, and the courthouse registry prior to the client returning for their bail hearing.

This recommendation is depicted in Appendix J and Appendix K. Appendix J shows the current bail procedure in BC and indicates where new GIB plan considerations would take place. Appendix K shows the new steps and process that would be put in place with GIB plans.

Required resources and necessary procedures

¹ Gladue Submission Guide. *Legal Services Society*. (2017). <https://pubsdb.lss.bc.ca/pdfs/pubs/Gladue-Submission-Guide-eng.pdf> P. 4.

² Criminal Code of Canada. *Government of Canada*. <https://laws-lois.justice.gc.ca/eng/acts/C-46/section-518.html>

³ The form modelled after ADM 854.

- A database would be critical to improving the timeliness that a GIB plan can be produced⁴.
- Option added to CCD and subsequent forms that indicate a GIB plan has been ordered. An option for a GIB plan can be added to the Gladue order form that will be modelled after form ADM 854.
- GIA will need staff at their headquarters who can write GIB plans. Due to the need to try and secure the client’s release from custody as soon as possible with the assistance of a GIB plan, consideration will need to be given whether these should be done by GIA headquarter staff or IJC writers.

Pros:

- Indigenous clients will have their Gladue rights fully considered at their bail hearing.
- Automated and streamlined system of ordering Gladue documentation for bail.
- Adopting this recommendation aligns with *Strategy 1* of the BCFNJS of having a presumption of diversion for Indigenous clients.
- Having an automated ordering system allows for consistency with orders for GIB plans.

Cons:

- GIB plans will need to be put together within a few days for them to be of use to the client and the court. This might be difficult to do without the proper infrastructure and supports in place.
- If this system develops excessive backlog or is delayed, it will offer less value because the client will remain in custody longer.
- There is no knowledge or comparable practice to anticipate what the cost of a GIB plan would be.

Key Contacts

Person/Position/Agency	Role in implementation
CSB	CSB is responsible for supporting court operations. If a GIB plan is ordered in court, CSB staff are responsible for recording and communicating the order.
GIA	GIA would receive notification that a GIB plan has been ordered and would be responsible for producing it either by themselves or referral to an IJC.
Judiciary	Like any change in procedure to the court system, the judiciary must be consulted.
Community Indigenous programs	Consultation should occur with Indigenous communities regarding the support networks that could be available to clients should they be released from custody. For this, IJCs can assist with gathering contacts and information and establishing these relationships. Information about community Indigenous programs can be kept on the recommended database.

⁴ The value of this database and its application to this recommendation is discussed in the previous recommendation and in the Implementation of recommendations section.

Option 2 – Defence coordinates the GIB plan by contacting GIA

Description

Strategy 1 of the BCFNJS emphasizes the importance of a presumption of diversion for Indigenous people in the justice system. Bail is a point in the justice system where the indigeneity of a client can be considered in a more formalized manner.

Bail practices have recently undergone some changes in Canada. Bill C-75 created s. 493.2 CCC, which states that special consideration must be given at bail to Aboriginal and vulnerable populations. When a client is arrested and appears in custody, their counsel can arrange for the production of a GIB plan to assist with securing the client’s release on bail.

Defence counsel identifies their client as Indigenous and contacts GIA to seek assistance in putting together a GIB plan for their client, who is in custody. GIA will collect the contact information from defence counsel and connect with the client and other resources to produce the GIB plan. Once complete, the GIA writer will email it to defence counsel.

Required resources and necessary procedures

- Establish a line of contact between defence counsel and GIA for a GIB plan
- GIB Plan Information Intake form⁵
- GIA will need to do record keeping for GIB plans
- GIA will need staff at their headquarters who can write GIB plans. Due to the need to try and secure the client’s release from custody as soon as possible with the assistance of a GIB plan, these should likely be done by GIA headquarter staff rather than IJC writers although this may require further consideration and consultation.

Pros:

- Plans could be ordered quickly since the client’s defence counsel can immediately work with GIA to put together a GIB plan.
- Adopting this option aligns with *Strategy 1* of the BCFNJS of having a presumption of diversion for Indigenous clients.

Cons:

- Would require educating the criminal defence bar of new practices in place to help an Indigenous client obtain bail.
- There is no knowledge or comparable practice to anticipate the cost of a GIB plan.
- The initiation of a GIB plan and the responsibility to have it ordered are placed on defence counsel. There is no certainty that an Indigenous client will receive a GIB plan if defence counsel does not communicate with GIA to have a GIB plan put together.
- If a GIB plan cannot be produced in a timely manner, then it does little to serve the client.

Key Contacts

Person/Position/Agency	Role in implementation
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⁵ This is a form similar to Appendix G, which is used Nova Scotia to gather information about the client in an organized and efficient manner.

Defence Counsel	Defence counsel will need to be educated on the new resource available to them and their clients for bail.
GIA	GIA is the coordinator for having a client receive Gladue documentation. Under this option, they will be receiving the requests from defence counsel.

Appendix N – Recommendation 5: GLADUE LETTERS

Gap(s) being addressed: This recommendation addresses the timeliness that a report must be made and returned to court.

Option 1 (recommended) – *Letters would be ordered when the client faces a shorter jail sentence.*

Description

When Crown counsel seeks a jail sentence for an Indigenous accused that is less than a specific duration¹, a Gladue letter can be ordered rather than a lengthier and more comprehensive Gladue report. The judge would order the document they think would be the most appropriate given the potential sentence the client faces². The process to order a letter is identical to that of ordering a full Gladue report apart from the court clerk selecting a Gladue letter rather than a full report on CCD. Additional information and considerations about Gladue letters and their potential for use in BC can be found in the *Implementations* section in this Master’s project under the sub-heading, “When should a Gladue letter rather than a full report be ordered?”.

Required resources and necessary procedures

- Options added to both the CCD and the courthouse registry Gladue order form for a Gladue letter.

Pros:

- Provides an option for Gladue documentation that can be written in a shorter amount of time for clients facing shorter jail sentences who may not otherwise have the benefit of a full Gladue report. This is an improvement on the current ordering process that only allows for Gladue reports.
 - Gladue letters have not been used in the past in BC. Clients facing shorter sentences have waived their Gladue right to a report due to the time it takes to write them. Gladue letters fill a gap that currently exists by making Gladue information available to the court for clients who face short jail sentences.
- Assists in ensuring Indigenous clients have Gladue principles considered at sentencing.

Cons:

- There may be an increase in the demand of Gladue documentation in BC as a result of adding the availability of Gladue letters. This will likely require increased funding for Gladue documents.
- The price for a Gladue letter will need to be determined.
- Hiring additional writers may be required to accommodate increased demand for Gladue documentation.

Key Contacts

¹ A “specific duration” will need to be determined. For reference, Quebec will recommend a Gladue letter when a client faces a sentence of four months or less while Ontario requires a Gladue letter for sentences that have a jail time of three months or less. The time in BC would need to be determined in consultation with the stakeholders.

² When determining when a letter should be used, there should be a concrete threshold for when a letter should be ordered rather than a full report. This is to avoid having the inappropriate documentation ordered. Information on this and guidance on how this threshold should be determined is described later in this report under the section titled, “Under what circumstances should a Gladue letter rather than a full report be used?”

Person/Position/Agency	Role in implementation
Judiciary	The judiciary must be consulted with any changes to court procedure. They will also help determine when it is appropriate to order a full report as compared to a letter ³ .
Gladue writers	Gladue writers will advise defence counsel, Crown counsel, and the judiciary about what a Gladue letter can provide.
CSB	CSB will need to relay the new information to the court clerks who are responsible for carrying out the ordering of the letter. CSB will also need to adjust their form accordingly to accommodate notification that a Gladue letter has been ordered.
Defence counsel and PSB	They will help determine when it is appropriate to order a full report as compared to a letter

Option 2 – Do not add Gladue letters for sentencing

Description

Gladue letters will not be an available option and full Gladue reports will continue to be used to assist a judge with sentencing Indigenous offenders.

Required resources and necessary procedures

- No additional resources or procedures required

Pros:

- There are no additional resources needed and no additional costs accumulated.

Cons:

- Some clients may not have their Gladue principles available to the court because the length of time it takes to produce a full report may be longer than the potential jail sentence.
- The problem of a lack of flexibility associated with the current ordering process is not addressed.

Key Contacts

No contacts required

³ The discussion of determining what instances require a Gladue letter compared to a full report is also a discussion that should occur with PSB and defense counsel.

Appendix O – Recommendation 6: TECHNOLOGICAL RESOURCES TO SUPPORT GLADUE REPORT WRITERS

Gap(s) being addressed: This recommendation addresses the need for a more systematic and technologically advanced support structure for producing Gladue reports. It also addresses the timeliness that a report must be made and returned to court.

Option 1 (recommended) – *Gladue database: provide Gladue writers with a resource to assist in writing all future documentation requiring Gladue consideration.*

Description

Modelled after the Saskatchewan Gladue Database and the Bugmy Evidence Project in Australia, a database in BC would provide a resource to writers to assist with writing Gladue documents quicker. This database would house the resources and supports writers need for research in a single location. This resource will provide reliable tools to help writers gather information such as community histories, local supports for Indigenous peoples, case-based evidence, and academic research. These resources will reduce the amount of time that writers require to conduct the necessary research to write a report. The database can be updated and expanded so that its value will grow over time. The database should be government funded with direction for its construction and maintenance provided by GIA. More information on the development of the database can be found in the *Implementations* section of this Master’s project under the sub-heading, “Who should be involved in the development and maintenance of the database should it be developed?”

Required resources and necessary procedures

- Website/database developer
- A human resource to update content and work with other contributors
- Privacy Assessment and Information Sharing Agreement

Pros:

- This resource would reduce the time it takes writers to research and write Gladue documentation. The database will be an important resource to support the growth of the Gladue program.
- Having a database to assist in creating Gladue documentation that is populated with fact-based information, evidence, and academic research, improves the independence, quality, and impartiality of Gladue documentation.
- A technologically sophisticated resource can be expanded over time and will become more valuable. It can also act as a single online hub for GIA staff and Gladue writers to prepare reports and communicate with one another.

Cons:

- A database will take time to develop.
- There would be both start up costs in building the database as well as operating costs for maintaining and continually adding content to it.
- As the database expands over time, there are considerations around privacy that cannot currently be predicted. When these instances occur, it is essential to involve the ministry privacy office.

Key Contacts

Person/Position/Agency	Role in implementation
Gladue writers	Gladue writers will be the primary users of the database. Gaining their insight into what the database should include for resources will make the database more valuable for them. Since writers are the primary users, they can also inform a layout so that it is user friendly for them.
Website developer	A website developer will advise on the possibilities and constraints for the database and its interface. They can also offer technical support.
Database contributors	Having contributors to the site besides the Gladue writers will assist in developing the database quicker. They will also ensure content is being contributed to the database and that the information is up to date. Some valuable content contributors could include the University of Victoria Faculty of Law Indigenous Law program (JID), Thompson Rivers University Faculty of Law, and Peter A. Allard School of Law at the UBC Indigenous Law Clinic. IJCs throughout the province have connections to specific Indigenous communities in BC and a strong understanding of their backgrounds. IJCs could be valuable contributors for gathering community histories.
GIA	GIA, being the lead coordinator of Gladue principles and documentation in the province, should be the gatekeeper and director of the database.
Ministry Privacy Officer Ministry of Attorney General; Ministry Public Safety and Solicitor General	Those who have access to the database will need to be determined, and for this reason privacy and access may need to be assessed. The MAG privacy officer's involvement will be required to assist with this.

Option 2 – Status quo: Writers use their own materials to write reports as they do now.

Description

While there is no practice in place that requires Gladue writers to keep a library of materials, some of the frequent Gladue report writers do. These resources save time for writers that may have otherwise been spent researching community or social backgrounds.

Required resources and necessary procedures

- None

Pros:

- Writers have been able to write adequate reports without a database.
- Zero cost option.

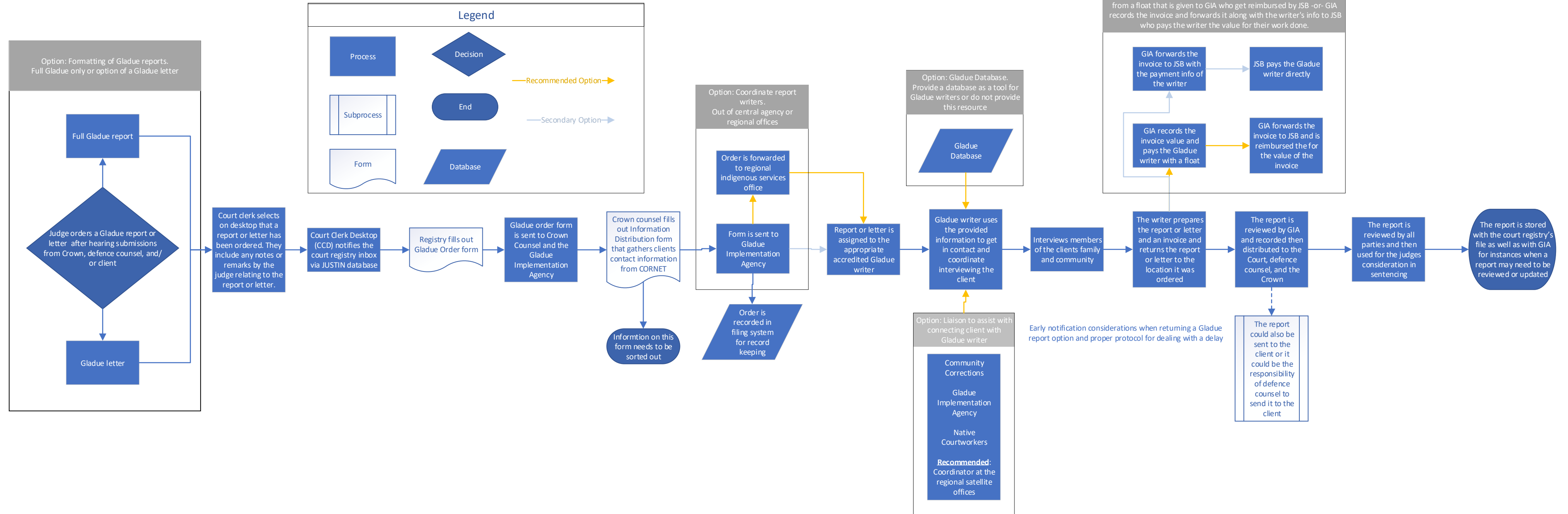
Cons:

- With the expected increase in demand and workload on writers resulting from the province's expansion of the Gladue program, not having additional supports for writers may be overwhelming, the quality of Gladue documentation could decrease, and reports will not be produced faster.

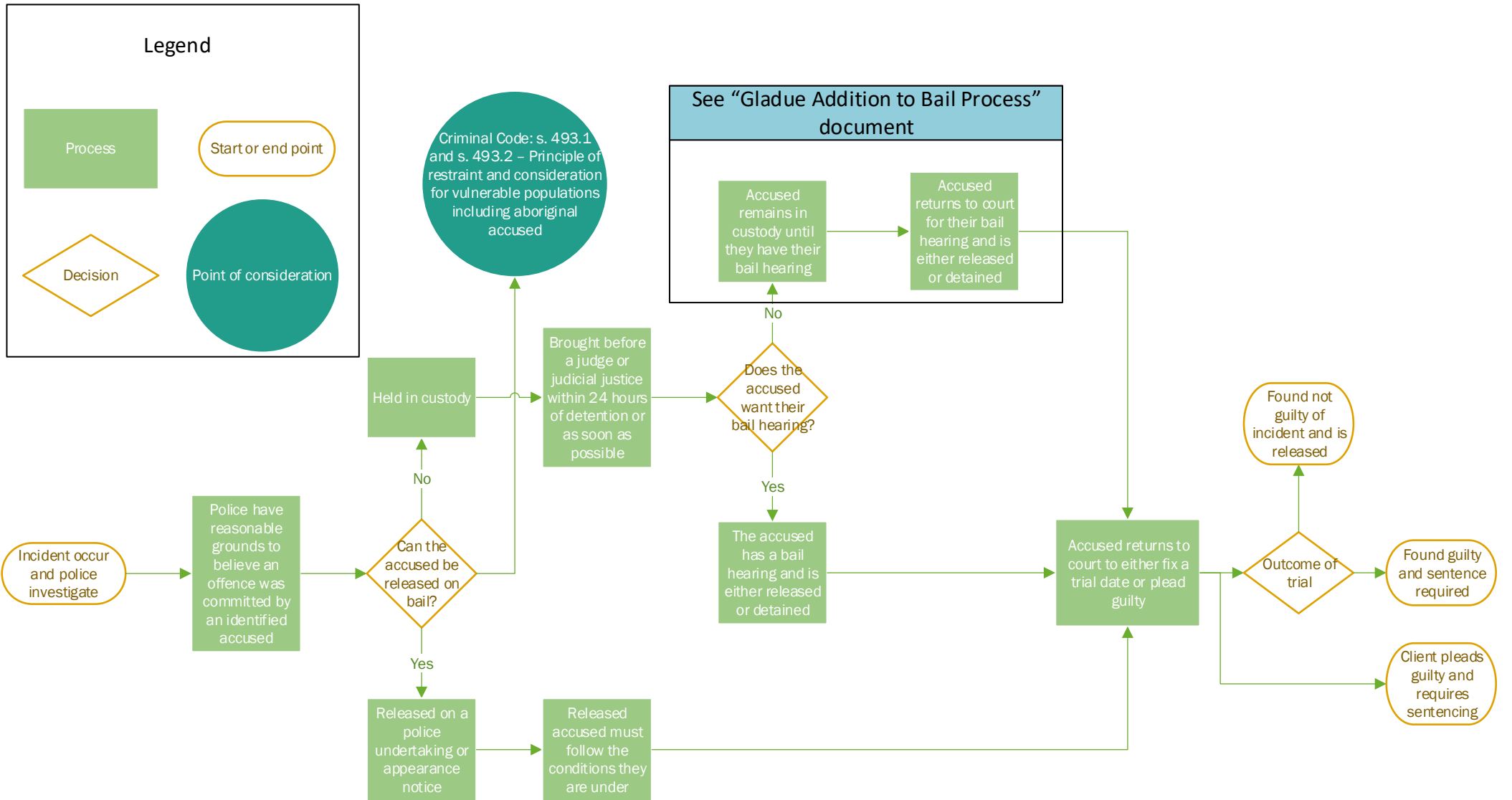
Key Contacts

No key contacts

Appendix P - Future Gladue Report Ordering System



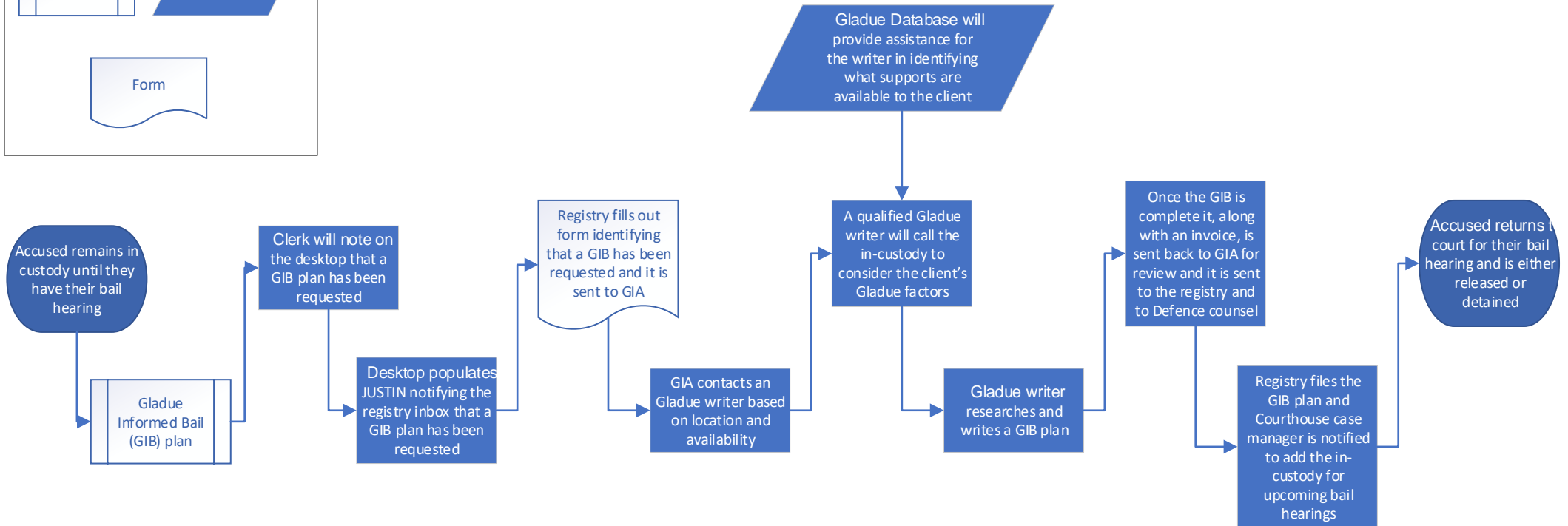
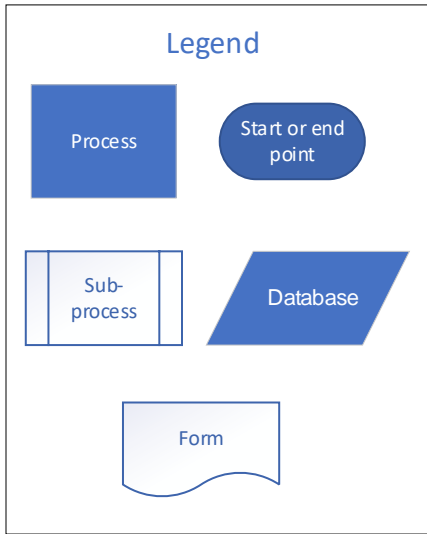
Appendix Q - Map of the BC Bail Process



Appendix R - Map of the Gladue Informed Bail plan

Notes:

- In order for this process to be utilized, it must produce a GIB quickly (ie. A week or less)
- The bail plans purpose is to demonstrate that the in-custody has a plan that will hold them accountable as well as not place the public in any unreasonable harm.
- The GIB plan cannot speak to the nature of offence the client is accused of
- The judiciary must be consulted to identify what is essential to be in a GIB plan



Appendix S – Working Group Members

Justice Services Branch (Project Lead):

Executive Director – Indigenous Justice Strategy

Senior Policy analyst

Legal Counsel

Budget Manager

Manager of Finance

Court Services Branch:

Senior Policy analyst

Prosecution Services Branch:

Deputy Director, Policy and Justice Issues

Crown counsel & Policy Division

Information Access & Privacy coordinator

Correction Services:

Policy and Program Analyst

Gladue Writers Society:

Chairperson of the Gladue Writers Society of BC

Ministry of Attorney General and Public Safety and Solicitor General:

Ministry of Attorney General Privacy Officer

Contacts external to government:

Indigenous legal program manager – Legal Aid BC

Senior Legal Officer - Provincial Court of BC

Executive Director & Senior Counsel – Supreme Court of BC

Executive Director - BC First Nations Justice Council

Member – Criminal Defence Advocacy Society

(Optional) Database contributors:

University of Victoria Faculty of Law – JID program

Allard School of Law at UBC – Indigenous Law Clinic

Thompson Rivers University Faculty of Law

Gladue Writers Society – Chairperson

GIA – Gladue Coordinator

IJC's – IJC managers