

EVALUATION OF THE
ABORIGINAL LEGAL SERVICES OF TORONTO
GLADUE CASEWORKER PROGRAM

YEAR ONE
OCTOBER 2004-SEPTEMBER 2005

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1.0 INTRODUCTION

In the fall of 2004, Campbell Research Associates was contracted by Aboriginal Legal Services of Toronto (ALST) to evaluate their recently established Gladue Caseworker Program over a three-year period to September 2007. At the outset of this study, in June 2005, an evaluation plan was drawn up and submitted to ALST and the program funder, Legal Aid Ontario (LAO). The plan outlined the evaluation issues, data, data sources and methodology to be carried out over the period from March 2005 to September 2007. It was based on the *Gladue Caseworker Expansion Pilot Project Proposal* submitted by ALST to Legal Aid Ontario and interviews carried out with Gladue court judges, Gladue court crown attorneys (provincial and federal), Gladue court defence counsel, defence counsel in non-Gladue/regular court, the Gladue program manager at ALST and the Gladue caseworkers.

This report presents the findings of interviews undertaken from November 2005 to January 2006 with 25 respondents, including judges, Crowns, defence/duty counsel, courtworkers and the ALST program director and Gladue caseworkers, as well as information obtained from caseworkers' daily logs, client records and relevant program documents. Because of the small number of Gladue cases proceeding through courts outside of Old City Hall in the period from October 2004 to September 2005 (the time covered by this interim report) and, as a result, the few respondents who could comment on the functioning of the caseworker program in these settings, no overall conclusions have been drawn about the program. Rather the following sections detail the views of respondents and their experience to date.

1.1 Description of the Gladue Caseworker Program

The Supreme Court of Canada decision in *R v. Gladue* (1999) indicated how section 718.2(e) of the Criminal Code of Canada is to be applied to the sentencing of Aboriginal offenders, not only those living in traditional Aboriginal communities or on reserves but also all Aboriginal people across the country wherever they lived. This section, part of the comprehensive sentencing amendments made to the Code in 1996, states:

718.2 A court that imposes a sentence shall also take into account the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The Gladue decision pointed to the need to provide judges with information regarding the background factors leading to a specific offender coming before the court as well as placing these factors in the context of the systemic discrimination Aboriginal people have faced in Canada. In addition, the sentencing judge requires concrete suggestions for a sentence that will address the reasons why the individual engaged in criminal activity and thereby provide alternatives to incarceration.

Subsequent to this decision ALST and a number of Toronto judges in the courts at Old City Hall discussed plans for a dedicated Gladue Court. In October 2001 the Gladue (Aboriginal Persons) Court began operations two afternoons a week in Courtroom 126 at Old City Hall.

The judges who sit in this court, the Crown Attorneys and the duty counsel have all had specific educational sessions, provided by ALST, on the issues facing Aboriginal people in the city. A training session was also provided for defence and duty counsel, though not well attended by defence. ALST created a resource guide outlining Aboriginal-specific programs and services in the city. This guide was distributed to all the judges in the city as well as Crown Attorneys and duty counsel. The Gladue Court, as well as College Park, 311 Jarvis, 1000 Finch, 2201 Finch and Scarborough courts, have the benefit of Aboriginal courtworkers (employees of ALST) who attend court on a regular basis. There is daily coverage at OCH, College Park and 311 Jarvis but Scarborough, 1000 Finch and 2201 Finch are all served by one courtworker. Aboriginal courtworkers assist Aboriginal accused persons to find counsel, prepare release plans for bail or sentencing purposes, provide referrals to services, explain the court process to accused persons and their families and carry out other related activities.

It was also felt that one of the prerequisites for the formation of the Gladue Court was a specific person whose role it would be to write Gladue reports. ALST created a new position of Gladue (Aboriginal Persons) Court caseworker (currently funded by the Ministry of the Attorney General). The caseworker attends Gladue Court when it sits and, on the request of the judge, defence counsel or the Crown, prepares written Gladue reports for Aboriginal offenders.

Reports provide the court with a comprehensive picture of both the life circumstances of the Aboriginal person and of the options available to the court in sentencing. In order to compile this information the caseworker interviews the client, family members and other people who know the client. In addition, research and interviews may have to be held with individuals who can put the circumstances of the individual's home community into context. Finally, the report must also provide precise details of sentencing options.

In 2004, ALST submitted a proposal to Legal Aid Ontario to obtain funding for two additional Gladue caseworker positions to enable the provisions of s.718.2(e) to be applied to Aboriginal offenders not proceeding through Old City Hall Courts (there are six other courts in Toronto where Aboriginal people usually appear: College Park, Scarborough, 1000 Finch, 2201 Finch, Superior Court at 361 University and 311 Jarvis Youth Court; as noted above ALST has Aboriginal courtworkers available in these courts - daily in College Park, OCH and 311 Jarvis and one courtworker to serve Scarborough, 1000 Finch and 2201 Finch; 361 University is not covered). The plan was to hire one caseworker for the Toronto courts other than Old City Hall and one caseworker for Central Ontario (including Barrie, Hamilton and Brantford) as a pilot to assess how Gladue might be implemented and affect the regular courts.

The Gladue caseworker attends these courts when it is known beforehand that a Gladue report will be ordered. In some cases, particularly in Hamilton and Brantford, reports are ordered when a caseworker is not in attendance. If present, the caseworker can gather all relevant documents, i.e. synopsis, CPIC, etc., quickly and also has an opportunity to canvass, either with defence counsel or the Crown directly, what the Crown's position in the matter is. While there, the Gladue caseworker is able to meet with the offender and discuss with him or her just what the Gladue caseworker's role is, how long the process will take and what to expect during the process.

The ALST Program Director, a lawyer and law instructor, oversees the Gladue Caseworker Program and directly supervises the caseworkers. This includes reviewing every Gladue report before it is submitted to the court, assessing the implications of the Crown's position as to sentence and declining cases which are clearly inappropriate. ALST also provides funds to

assist offenders obtain treatment and/or to purchase tickets so they can get to treatment facilities.

Training for the caseworkers is also carried out by ALST as there is currently no particular training program for those undertaking the writing of Gladue reports. The caseworkers' training involves education on issues of the law, on the Gladue decision and on theories of punishment and sentencing. In addition, information is provided on the types of programs and services available to Aboriginal offenders, how these services operate, how they can be accessed, waiting periods etc. New caseworkers spend time observing experienced ones in court. Finally, caseworkers practice the way in which reports are to be written and how to write them. No specific training materials have been produced aside from a collection of answers to a range of questions posed by the caseworkers. Training is an on-going process. Gladue Caseworkers attend relevant conferences or seminars and meet regularly with the supervisor for team meetings to share experiences, problem solve and work on the further development of the project together. All caseworkers have had some formal legal training and some had completed a law degree at the point at which they were hired (one has been doing his articles at ALST). However, caseworkers maintain that a law degree is not a necessary qualification for this position and its associated work.

The pilot Gladue Caseworker Program in the non-Gladue Courts was implemented in College Park in the fall of 2004, in Hamilton/Brantford (not including Barrie) in spring 2005 and in 1000 Finch court in January 2006. The program is fully funded by LAO over a period of three years as follows:

| | |
|---|------------------|
| Salaries (two Caseworkers @ \$40,000 per year each) | \$80,000 |
| Benefits | 11,200 |
| Supervision | 24,000 |
| Training | 1,500 |
| Mileage | 6,000 |
| Computers | 2,500 |
| Evaluation | 10,000 |
| Rent | 10,000 |
| Administration | <u>21,780</u> |
| Annual Total | \$166,980 |
| Three Year Total | \$500,940 |

1.2 Evaluation Issues

The program proposal describes the pilot project goal as being:

"To determine the effectiveness and impact of Gladue Caseworkers providing reports for Aboriginal offenders before sentencing judges in courts where no formal Gladue Court has been established".

Seven objectives have also been set out in the proposal:

- > Sentences for Aboriginal offenders will better conform to the principles set out in s. 718.2(e) of the Criminal Code and the decision of the Supreme Court in R v. Gladue;
- > Greater awareness of the Gladue decision in courts outside of Old City Hall;
- > Raised expectations from the bench that counsel will specifically advert to Gladue in their submissions;

- > More participation from Aboriginal service providers and First Nations in terms of assisting in the carrying out of sentences;
- > The development, in some communities, of Aboriginal alternative justice programs;
- > The development of Gladue Courts in some jurisdictions; and
- > Development of models to allow the Gladue Caseworker position to be put into place in other jurisdictions across the province.

There are five major areas that this evaluation addresses. These are outlined below.

- Project Implementation in non-Gladue Courts
 - publicity/notice/written information provided
 - preparation, training, education of justice personnel
 - resources available/provided
 - caseworker qualifications, training
 - implementation steps
- Gladue Project Operation
 - identifying candidates for Gladue
 - referral/request for Gladue report
 - roles of courtworkers, bail release program, probation, duty counsel
 - report preparation process
 - contents/format of reports
 - ALST contribution to offenders' sentence conditions
 - development of forms and operational guidelines
 - documents/information pamphlets produced and distributed
 - supervision
 - information meetings
 - attendance at conferences, seminars, workshops
- Gladue Process in Gladue and non-Gladue Courts
 - accused declines Gladue
 - time to sentencing
 - documents obtained
 - offender interviewed
 - discussions with personnel at court when request first made
 - who interviewed re offender
 - agencies contacted re recommendations
 - Gladue enabling/facilitating judges to follow legal requirements of s. 718.2(e)
 - positions taken by Crowns on sentencing
 - atmosphere, procedures, resources of Gladue/non-Gladue courts
 - relationship to bail
 - factors facilitating Gladue court process
 - factors impeding Gladue court process
- Results for Offenders
 - offenders' views of court process and treatment
 - offenders linked with resources to help them
 - sentence based on Gladue recommendations
 - changes in offenders' lives as result of Gladue
 - offenders connected to Aboriginal community

- Impact on Courts and the Justice Community
 - changes in dealing with Aboriginal cases in non-Gladue courts with/without Gladue process
 - perceptions of the Gladue program/court
 - effects on justice personnel.

As the above outline of the issues and areas addressed by this evaluation indicates, data is being collected from both the Gladue Court at OCH as well as the non-Gladue courts in other locations that are being served by Gladue caseworkers. At this point, the information from the interviews has been reported in the following sections according to the respondent category, i.e., judges, defence/duty counsel, Crowns and Aboriginal courtworkers. Although ultimately the Gladue court (OCH) and other court data will be analysed separately, there is not yet enough experience in the non-Gladue courts or an adequate number of respondents from these courts to present the information based on the two different court situations.

2.0 EVALUATION DATA SOURCES AND METHODOLOGIES

This report on the first year of the Gladue Caseworker Program collected data from a number of sources:

- ALST and Gladue program staff
- Individuals involved in the court process: judges, Crown attorneys, defence/duty counsel and Aboriginal courtworkers
- Program records and documents.

Aboriginal offenders who have experienced the Gladue process have not been interviewed at this stage of the evaluation.

2.1 Respondents Interviewed for Year 1 Report

The table below outlines the categories and numbers of individuals who were interviewed for this report.

| RESPONDENT CATEGORY | NUMBER | LOCATION | METHODOLOGY |
|-------------------------|-----------------------|---|---|
| ALST program supervisor | 1 | ALST | face-to-face interview |
| Gladue caseworkers | 3 current 2 former | ALST | Group interview |
| Judges | 7 | Gladue Court – 4 Brantford – 2 Other Toronto courts - 1 | Telephone interview – 6 self-completed questionnaire - 1 |
| Crown attorneys | 3 | Gladue Court – 3 (provincial – 2, federal – 1) | Telephone interview – 3 |
| Defence counsel | 5 | Gladue Court – 3 Hamilton – 1 Brantford – 1 | Telephone interview – 3 self-completed questionnaire – 2 |
| Duty counsel | 1 | OCH | Telephone interview |
| Bail program | 1 | OCH | Telephone interview |
| Aboriginal courtworkers | 2 | Hamilton – 1 Fort Erie/Cayuga – 1 | Telephone interviews |
| TOTAL | 25 | | |

Sections 3.0, 5.0 and 6.0 of this report detail the evaluation findings based on these interviews which were carried out from October 2005 to January 2006.

2.2 Program Records and Documents

ALST provided the consultants with:

- the program proposal
- quarterly and annual reports to LAO
- training materials
- samples of Gladue reports.

Where relevant, information from these sources has been integrated into the following sections of this report.

2.3 Data Bases Developed for the Evaluation

The consultants designed two data bases in a spreadsheet format to capture on an ongoing basis the daily activities and time required of the caseworkers and the specifics regarding characteristics of the individual clients and their cases. Gladue caseworkers provided information on these data bases for 34 clients and a total of 262 working days from April to September 31, 2005 (the end of the first funding year). This information has been summarized in sections 3.0 and 4.0 of this report.

3.0 GLADUE CASEWORKER PROGRAM OPERATION

This section outlines the information collected from interviews and the caseworker daily activity data base as it pertains to the operation of the Gladue Caseworker Program.

Gladue Caseworker Program Management Activities and Time

The ALST Program Director estimates that supervising the Gladue Caseworker Program requires approximately 40-50 hours per month. The Program Director is in the office three days per week and is always available to the caseworkers. The activities carried out by the Program Director in relation to this program include:

- outreach work
- meetings with justice personnel, maybe one to two times a month
- speaking to justice groups to educate them about Gladue and promote the program
- reviewing reports: reviews all several times after revisions
- weekly staff meetings – review referrals for appropriateness
- individual meetings regarding specific cases
- responding to questions
- “troubleshooting”
- liaising with the funder
- administration, managing the budget and approving expenditures.

Gladue Caseworkers’ Activities and Time

The caseworkers’ tasks and time allocation is presented below based on their daily log reports.

| TASK | AVERAGE TIME PER DAY (based on 262 days reported by 3 caseworkers) | PERCENTAGE OF DAILY TIME (slight differences in totals are due to rounding) |
|---|---|--|
| Court Time – Total: | 1.24 hrs. | 17.3% |
| Travel to and from court | .13 hrs. | 1.8% |
| Time spent in court | 1.11 hrs. | 15.4% |
| Office Time – Total: | 5.54 hrs. | 77.1% |
| Report research and preparation | 2.67 hrs. | 37.1% |
| Administration | .52 hrs. | 7.2% |
| Consulting with supervisor/team meetings | .19 hrs. | 2.6% |
| Other in-office tasks | 2.16 hrs. | 30.0% |
| Out of Office Time – Total: | .41 hrs. | 5.7% |
| Travel for meetings/interviews | .13 hrs. | 1.8% |
| Meetings with Gladue clients | .10 hrs. | 1.4% |
| Meetings with justice personnel | .06 hrs. | .8% |
| Conferences/workshops/seminars | .12 hrs. | 1.7% |
| Total Daily Hours | 7.19 | 100% |

As the table indicates, the greatest proportion of caseworker time is devoted to the research and writing required to produce the Gladue reports (37.1%). Over three-quarters of their time (77.1%) is spent in the office either preparing reports or carrying out related tasks. Travelling to court and being in court occupies close to one-fifth of the caseworkers’ time (17.3%). Other out-

of-office time for meetings and interviews accounts for a relatively small proportion of their total hours (5.7%).

Other ALST Contributions to the Gladue Caseworker Program

ALST contributions to the program in addition to caseworkers and management are:

- applications to treatment centres;
- purchase of bus tickets and putting individuals on the bus (recently hired a 'follow-up' worker);
- appearance in court as an intervenor on some cases.

Gladue Reports

The Gladue reports themselves contain the following information:

- offender's name;
- names of the defence counsel and the judge;
- sentencing date;
- a synopsis of the offence;
- past record of the offender;
- individual's personal circumstances;
- contacts made with the offender's family;
- options for services consistent with proposed sentence;
- plan for services to meet offender's needs;
- putting the offender's situation into the Aboriginal context by describing the systemic issues affecting Aboriginal people, e.g., history of adoption or foster home, impact of residential schools on the offender or offender's family, homelessness, factors leading to a separation from Aboriginal traditions;
- any applications to and arrangements made with residential treatment facilities;
- recommendations for sentence taking into consideration the Crown's submission.

The steps taken to prepare the Gladue reports include:

- at least one, and usually more than one, one-two hour interview, in person and/or by telephone as required, is carried out with the offender;
- with permission of the offender, family members are contacted for information; sometimes the offender prefers not to have this done but caseworkers deem it important to corroborate the offender's statements;
- treatment services are contacted and arrangements are made for the offender to receive these;
- obtaining information from the Crown Attorney involved regarding their initial sentencing position;
- the proposed treatment plan and sentencing recommendations are discussed with the offender; the offender needs to understand and agree to these.

Caseworkers report that they average approximately one referral a week and that it takes about 30 days to prepare a report. The reports are provided to all parties, i.e., judge, Crown, defence, the day prior to the sentencing date. Caseworkers indicated that preparing two reports a month is the practical limit .

The number of days from referral of the offender for a Gladue report to the actual sentencing date is described in the table below.

| NUMBER OF DAYS | NUMBER OF CASES (34) |
|----------------|----------------------|
| 20 or fewer | 5 |
| 21-30 | 2 |
| 31-40 | 4 |
| 41-50 | 5 |
| 51-60 | 3 |
| 61-70 | 4 |
| 71-80 | 4 |
| 81-90 | 1 |
| 91-100 | 2 |
| 115 | 1 |
| 198 | 1 |
| Unknown | 2 |

As most reports require approximately 30 days to prepare, it appears that 80 per cent have had sufficient time for this to be done while 15 per cent have had to be researched and written in less than 20 days.

Comparison of Pre-Sentence Reports with Gladue Reports

Pre-sentence reports (PSR) are prepared by probation officers at the request of the court and contain information about the offence and the offender that may be helpful to the court in determining sentence. They are usually based on information obtained from the offender’s record, the arresting officers and other sources who may have had an association with the offender.

According to Gladue caseworkers, the Gladue reports differ from pre-sentence reports in several ways:

- PSRs are much briefer without the extent of detail about the offender’s background that the Gladue report provides;
- there is little, if any, mention of the historical and contemporary socio-economic context and circumstances of Aboriginal people.

All judges interviewed see the Gladue reports as being distinct and different from PSRs in several respects:

- they provide information about systemic discrimination in the life of the offender; substance abuse, family disruption and the cultural base may be shown in the Gladue report in ways that are not always relevant to a PSR;
- Gladue reports are prepared by Aboriginal caseworkers who are more familiar with the offender’s situation, the range of available treatment resources and the court process;
- More time is taken in preparing Gladue reports;
- The Gladue reports are more sensitive to the individual’s situation and able to identify significant problems;
- They take a more holistic approach than PSRs;
- With PSRs it is often not clear whether the offender is in agreement with the information and suggestions; the Gladue report proposes a very structured plan which the offender has reviewed and agrees to;

- The plan of treatment included in the Gladue report identifies the resources available to the offender and has contacted these services to confirm acceptance and timelines.

However, a couple of points were also raised by judges regarding the information in the Gladue reports in comparison with PSRs:

- The information is largely similar between them, sometimes seem like duplicated effort;
- Gladue reports are based to a great extent only on self-report by the offenders whereas PSRs use more sources to confirm the information provided.

Three of the four Crowns interviewed commented that the Gladue reports are similar to PSRs although they also said that Gladue reports are different from PSRs in some ways:

- Gladue reports provide much more detail about the offender – the caseworkers are very proactive in seeking information;
- They are more focused on the offender, not on the offence and its circumstances;
- They provide a treatment plan;
- They give more historical background and family/community context regarding the offender's situation.

All defence/duty counsel feel that the PSRs differ from the Gladue reports in a number of ways:

- Gladue reports are relevant to the factors that Gladue targets;
- They are more detailed and zero in on the issues relevant to Aboriginal needs and solutions;
- PSRs do not take into account the person's Aboriginal background;
- Gladue reports ensure that the individual does not needlessly get jail time;
- Specific treatment programs are outlined in the Gladue reports;
- They are more comprehensive than PSRs;
- The recommendations are appropriate to the particular circumstances of the individual;
- The offender is consulted and agrees to the recommendations;
- They recognize the difference between Aboriginal and non-Aboriginal offenders and recommend traditional healing approaches.

The Gladue Process

According to the caseworkers identification of candidates for Gladue usually occurs at the point at which the accused enters his/her plea. In the non-Gladue courts these candidates are often identified to the caseworker by the courtworker (where there is one) and the accused's defence counsel or duty counsel. Judges have also made requests to the courtworker when there is no caseworker in court (as they usually attend the non-Gladue courts for sentencing) and the courtworker contacts the ALST program manager with the referral. In the Gladue Court most often defence/duty counsel brings cases to the caseworker's attention.

Based on the interviews carried out:

- Three (of four) Crowns indicated that they had proposed offenders for Gladue either by speaking to defence or contacting ALST program manager directly;
- All six defence/duty counsel have proposed offenders for Gladue either by asking the court, referring the case to ALST or speaking directly to the caseworker in court (Gladue court in OCH); in all instances the Gladue caseworker contacted defence to discuss the case;
- Courtworkers often identify candidates but so do some lawyers who are aware of the process and have received training (e.g., in Hamilton where ALST did training).

The application of the Gladue process has been challenged in some instances:

- Four (of seven) judges and two (of four) crowns indicated that they have seen challenges to the application of the Gladue process: by the Crown based on the need to establish certainty of the offender's Aboriginal identity – in these cases, usually the courtworker or another Aboriginal service provider in Gladue court carried out additional discussions with the offender to reach a determination; generally, the court accepts the individual's own declaration of being Aboriginal;
- Only one of the six defence/duty counsel has seen a challenge to the application for Gladue by the judge: this judge did "not believe that it's a factor in serious and violent offences".

According to the courtworkers not enough judges are aware of Gladue and it needs to be applied more broadly. There is also the issue of defence wanting to see a report for offenders for whom only a short (e.g., two months) sentence is being proposed. The courtworkers' understanding is that Gladue reports should be prepared for individuals not in custody for whom a sentence submission of at least four months' incarceration is put forward,

Sometimes the option of Gladue is declined by the offender.

Gladue caseworkers described:

- one case where the offender wanted penitentiary time to obtain services available in that setting;
- a few times the offender declined because he/she preferred to be sentenced immediately and "get it over with" rather than risk a longer period before sentencing, especially if in custody, and then the addition of time likely to be required for carrying out the conditions recommended by the Gladue report (if accepted by the judge).

Four (of seven) judges have seen an accused decline to have a Gladue report prepared for their sentencing:

- most often due to the time lapse involved (i.e., sentencing is postponed to allow for the production of the report) but sometimes it appears to be related to the individual's reluctance to either participate in the process (as a result of discomfort with the criminal justice system) or have detailed information about their background provided to the court.

Three (of four) Crowns have seen an accused decline

- for similar reasons as described above – time lapse probably being most important; one Crown reduced the sentence submission knowing that offender was eligible for Gladue;

Two of six defence/duty counsel have had accused decline the Gladue process:

- neither of these two respondents was able to explain why the individual declined though they speculated that the time required to obtain sentence and the person not being ready to offer the required information may have been factors;
- the outcomes were varied: one case went to trial and was 'lost'; defence withdrew from another case as they could not get proper instruction from their client; in the third case, the judge was able to convince the accused to accept the Gladue process.

All courtworkers reported that they have never seen any accused decline a Gladue process.

Program Issues

A number of issues related to the Gladue caseworker program operation were identified by the caseworkers and program director.

- ▶ Do not always know when a report has been ordered – a procedure has subsequently been established for this; standard forms have been developed for the intake process; these are either supplied to referral sources or completed by ALST based on the information provided by the referral source;

- ▶ Is the request for a report appropriate? Criteria for the acceptance of a request for a Gladue report need to be established. Often caseworkers and ALST get requests for reports that are not appropriate due to a non-custodial sentence being submitted by the Crown or the remand time served amounts to the sentence time being proposed. The caseworker can refuse a request for a report though all referrals are reviewed at weekly staff meetings. No formal guidelines have been prepared yet though this is planned. The criteria that would be helpful include: the nature of the charges, the minimum sentence attached to the charges, any mandatory sentence requirements and time spent in remand custody.
- ▶ The caseworker appears in the non-Gladue courts only on the day set for sentence. However, there can be several postponements. The result is that the caseworker travels to and spends time in court unnecessarily.
- ▶ If the caseworker is not able to be in a non-Gladue court to respond to potential questions regarding the Gladue report, then who is responsible for requesting an adjournment that would enable the report to be prepared?
- ▶ In OCH Gladue Court the consistent presence of a Gladue caseworker who has acquired a law degree results in this individual being asked by the judge (or other party) to carry out some of the duties of a courtworker or duty counsel when those persons are not present. There is a need to clarify the role of the caseworker when in court and whether it is necessary for them to be attending court when most of their time is spent sitting. It is important for the court and justice personnel to understand the caseworker's role.
- ▶ Identification of Gladue candidate where Aboriginal identity is in question – judges and caseworkers generally accept the statement of the offender. Some respondents raised whether there should be a standard process for assessing identification although ALST is not prepared to carry out any determinations of whether or not a person is Aboriginal..

4.0 PROFILE OF GLADUE CASES

The two sections below present a profile of the characteristics of offenders for whom Gladue reports have been prepared and an outline of the types of cases associated with these offenders. ALST estimated that approximately 50 Gladue reports had been prepared for OCH Gladue court and other courts from October 2004 to October 2005. Caseworkers were able to document a total of 34 cases on the data base prepared by the evaluators. Turnover in the caseworkers, revisions of the data base format and training of the caseworkers in the use of the data base resulted in some cases not being captured during this time period.

4.1 Client Profile

The following table outlines a profile of the offenders for whom Gladue reports were prepared between October 2004 and the end of September 2005.

| CHARACTERISTIC | NUMBER OF CLIENTS (Total clients = 34) |
|------------------------------------|---|
| Age at Referral: | |
| 17-19 years | 5 |
| 20-25 years | 5 |
| 26-30 years | 8 |
| 31-35 years | 4 |
| 36-40 years | 8 |
| 41-45 years | 2 |
| Over 45 years | 2 |
| Young Offenders: | 3 |
| Gender: | |
| Male | 28 |
| Female | 5 |
| Transgendered | 1 |
| Prior Mental Health Issues: | |
| Yes | 17 |
| No | 15 |
| Unknown | 2 |
| Fostered/Adopted: | |
| Yes | 15 |
| No | 17 |
| Unknown | 2 |
| Childhood Physical Abuse: | |
| Yes | 19 |
| No | 9 |
| Unknown | 6 |
| Childhood Sexual Abuse: | |
| Yes | 7 |
| No | 20 |
| Unknown | 7 |

| CHARACTERISTIC | NUMBER OF CLIENTS (Total clients = 34) |
|---|---|
| Residential School – Family: | |
| Yes | 13 |
| No | 14 |
| Unknown | 7 |
| Residential School – Offender: | |
| Yes | 3 |
| No | 23 |
| Unknown | 8 |
| Involved with Aboriginal Culture/ Community: | |
| Yes | 30 |
| No | 4 |
| Unknown | 0 |

Although these offenders ranged in age from 17 to 51 years, over half of them are under 31 years. Another third are between 31 and 40. The great majority are male. Approximately half have had prior mental health issues and the same proportion have had a history of being fostered or adopted. Almost two-thirds had experienced physical abuse in childhood while a minority had a background of sexual abuse. The experience of residential school characterizes the families of just over one-third of the offenders though very few had themselves experienced this – not surprising given the relatively young age of most. Close to all of these individuals have some involvement with their Aboriginal culture and community.

4.2 Profile of Court Cases

The table below outlines a number of characteristics of the cases and Gladue referrals of the 34 individuals for whom information was provided.

| CHARACTERISTIC | NUMBER OF CLIENTS (Total clients = 34) |
|---|---|
| Referred by: | |
| Judge | 9 |
| Defence | 24 |
| Courtworker | 1 |
| History of being Referred to Mental Health Court : | |
| No | 26 |
| Unknown | 8 |
| Pre-sentence Custody on Gladue Charges: | |
| Yes | 24 |
| No | 10 |

| CHARACTERISTIC | NUMBER OF CLIENTS (Total clients = 34) |
|--|---|
| Days in Custody Prior to Sentencing: | |
| 7 or fewer | 3 |
| 60 | 2 |
| 61- 90 | 3 |
| 91-120 | 4 |
| 121-150 | 5 |
| 151-180 | 2 |
| 226 | 1 |
| 335 | 1 |
| Unknown | 13 |
| PSR Report Submitted: | |
| Yes | 10 |
| No | 24 |
| Unknown | 0 |
| Sentence Consistent with Recommendations: | |
| Completely | 21 |
| Mostly | 4 |
| To some extent | 1 |
| Not at all | 4 |
| Unknown | 3 |
| Client didn't appear | 1 |

Three-quarters of the Gladue referrals came from defence/duty counsel. One-third had been granted bail while two-thirds had been remanded to custody on the charges for which they were to be sentenced under Gladue. The range of custody time varies from less than seven days to 335 days. One-quarter had spent 90 or fewer days in custody, another quarter between 90 and 150 days and

In addition to the Gladue report, a PSR was submitted for just under one-third of these offenders. In the majority of cases (i.e., two-thirds) the recommendations contained in the Gladue report were "completely" accepted as the basis for sentence. For another four cases the sentence was "mostly" consistent with the Gladue recommendations. In four cases none of the sentencing conditions of the Gladue report were acted upon.

5.0 RESULTS OF THE GLADUE PROGRAM

Format and Structure of the Gladue Reports are Appropriate and Helpful

All of the respondents interviewed at this stage of the evaluation were asked whether the format and structure of the Gladue reports they had received were appropriate and helpful for the purpose of sentencing.

All seven judges responded that the reports are appropriate and helpful for the following reasons:

- They provide information about links the defendant has with the community;
- They provide information about where help for the individual may be obtained in the Aboriginal community in Toronto; this information is related to the remedial aspects of the Gladue decision;
- They provide much detail regarding the offender's background;
- They discuss the context of the individual's situation in terms of Aboriginal heritage and the impacts on the offender (e.g., of residential school, foster home, adoption, etc.);
- They provide a treatment plan with concrete arrangements and assists in assessing the individual's likelihood of rehabilitation;
- They are the only element in the justice system that enables judges to take systemic racism into account;
- A good report will provide information regarding whether systemic discrimination has been a factor, e.g., in terms of substance abuse and family issues, not only the specific circumstances of the particular individual's background.

Three of the four Crowns interviewed see the Gladue reports as being appropriate and helpful:

- They provide information regarding and insight to the offender's history, problems and barriers faced;
- They detail the treatment and supports needed by the offender and offer a plan for receiving them.

The fourth Crown commented that the Gladue reports are not helpful because they contain primarily the same information as a PSR and most of the reports present similar information that applies to any Aboriginal offender, not specifically to the individual before the court.

All defence/duty counsel consider the format and structure of the reports to be helpful and appropriate:

- There is an intensive assessment of the history of the offender – his/her background and the social context of this;
- Services available to and needed by the offender are clearly outlined in a treatment plan;
- Caseworkers who prepare the reports are more attuned to non-custodial options;
- Reports provide the judge with a picture of the individual's culture, family background and specific problems that need to be addressed.

Courtworkers commented that:

- More in-depth background on the individual is provided, where they are at, what they have been doing, where they came from, residential school, all of the background information that is relevant;
- Gladue reports have been prepared by an Aboriginal person who knows what to ask.

Gladue Reports Enable the Court to Follow the Requirements of Section 718.2(e)

Respondents were questioned to what extent the Gladue reports enable the court to follow the requirements of section 718.2(e) of the *Criminal Code of Canada*, the key purpose of preparing these reports and providing them to the court for the sentencing of the offender.

Five judges indicated that the reports enable them to follow the Criminal Code requirement “a lot”:

- There is detailed information about the offender;
- They include information about resources for the specific individual so that it is easier to impose a sentence based on these;
- Special attention is given to the particular individual by a person specifically trained for this task;
- Gladue enables judges to inquire regarding the individual's Aboriginal heritage and exhaust other sanctions before considering a jail term;
- They present valuable, pertinent and relevant information.

Another two judges responded that they do this to “some” extent, saying that:

- The reports plug the individual into required services and the Aboriginal community;
- Most individuals have not had a Gladue report prepared.

One Crown feels that the Gladue reports have enabled the court to follow the legal requirements of section 718.2(e) “a lot”, for essentially the same reasons as cited above, while two Crowns think that the reports do this “very little” (one could not comment). Their reasons for not seeing the reports as very useful in this regard are:

- In the Gladue court there is already a native courtworker and an Aboriginal bailworker so the caseworker is not really necessary; the reports only lengthen the process and are not needed except for very heavy cases;
- The reports don't make a big difference because Aboriginal heritage is already taken into consideration – the real problem for these offenders is related to a background of poverty associated with alcohol and violence.

According to most defence/duty counsel (five out of six) the Gladue reports enable the court to apply section 718.2(e) “a lot” while the remaining one said “some” in the following ways:

- Some – they provide specific information regarding the background of the offender;
- A lot – courts rely on the report and therefore take comfort in making their decision;
- A lot - they make the court familiar with the specific issues involved and with the needs of the offender; these are taken into account in the sentencing;
- A lot - they draw attention to the systemic factors involved and their effects on the individual offender;
- A lot - a treatment program is provided, often including traditional Aboriginal approaches;
- A lot - the offender has been consulted and agrees to the plan for treatment.

Courtworkers are divided in their view with one saying “a lot” and two saying “some”:

- Report goes in depth, goes to the whole of s.718.2(e);
- More so with the right judge and Crown who are up to date; the roaming Crowns don't seem to know as much.

Gladue Report Recommendations are a Sound Basis for Sentence

With respect to whether the Gladue report recommendations are a sound basis for sentence all judges responded 'yes':

- They outline a treatment plan and arrange for it to be carried out;
- Recommendations have been reasonable;
- The report authors understand the bench and recommendations are carefully tailored; the caseworker is present to respond to questions;
- The treatment plan is very specific and is culturally appropriate;
- The recommendations are built on the point of view of the offender; however, it is not always appropriate to recommend a community disposition;
- They connect the offender with the Aboriginal community and services.

Gladue Reports Result in Changes to the Crown's Submission on Sentence

The effects of the Gladue reports on sentence were described by the caseworkers:

- reports are usually accepted by the court without any additions being required;
- sometimes the reports are endorsed by the Crown and often result in the Crown proposing a reduced sentence from that originally requested;
- however, probably about 60 per cent of the time Crowns maintain their original submission.

In praising the quality of the reports some judges pointed out that, to the best of their knowledge, the accuracy of Gladue reports has never been challenged.

Two of the four Crowns indicated that the Gladue reports have resulted in their changing their original positions on sentence in all or a few cases. The kind of information that has influenced their sentence recommendations are the plans for treatment where these are feasible and based on rehabilitation of the offender. In the cases in which they have not modified their sentence submission, Crowns explained that they felt their original submission was very lenient and had already taken into consideration the kinds of factors presented in the Gladue report.

Gladue Caseworker Program is Beneficial for Aboriginal Offenders

All interviewed judges agree that the Gladue caseworker program benefits offenders:

- The Crown is staying charges and there are more diversions to the ALST Aboriginal Community Council;
- Sentences are more lenient than would probably have been the case without Gladue;
- Offenders are receiving treatment services to a greater extent;
- Crowns are recommending bail more often;
- Sentences are based on a more holistic approach to the offender and his/her overall situation;
- Sentences are better able to meet the needs of the offender, many of whom have had a history of unsuccessful treatment;
- Provides unbiased information about the offender;
- Reports meet the need of paragraph 93 of the Gladue judgment;
- Appropriate plans for the offender are designed;
- Provides input from all parties (including courtworkers);
- The offenders' background and situation are put into the context of the history of the Aboriginal experience in Canada as well as of the Gladue decision;
- Offenders' ability to choose the Gladue court means they choose to be recognized in a positive way for an aspect of their background which is not always given a positive value.

Two Crowns responded that the Gladue caseworker program is beneficial for Aboriginal persons, one felt that it is both beneficial and not beneficial while one indicated that it is not beneficial. It is beneficial due to the information that reports provide to the court. On the other hand, it is not beneficial because it delays the sentencing and the court has already been carrying out the Gladue requirements anyway.

All defence/duty counsel see the Gladue caseworker program as being beneficial for Aboriginal offenders:

- The caseworkers are conscientious in preparing the reports;
- It operationalizes the process so that section 718.2(e) can be applied;
- The reports detail how the system has specifically affected the offenders;
- Reports provide a concrete treatment plan and recommendations regarding sentence;
- Reports include a lot of detail regarding the background of the offender;
- Reports give the sentencing judge a better outlook on the problems of Aboriginal people, systemic indifference, cultural values; provides a tool to fashion a sentence appropriately.
- Works for the lawyers too – can use the Gladue report to the advantage of the offender and use 718.2(e) to get the judge to see the case differently.

All courtworkers also reported that the program is beneficial:

- They show in-depth the individual's past and what is causing them to be before the court;
- Reports help with sentencing - judges have commented on how pleased they are and how it helps with sentencing;
- With the report in place and the worker there, there is a great difference; judges have started to become aware and order more reports, using the process more.

Gladue Caseworker Program is a Benefit to the Court Process

The seven judges interviewed feel that the program benefits the court process:

- Gladue court draws cases out of the regular courts thereby facilitating the work of the other courts;
- The reports assist with the determination of sentence and the time lapse involved is not much different than when a PSR has been requested.

With respect to whether the Gladue caseworker program is a benefit or hindrance to the court process, two Crowns see it as a benefit, one as both a benefit and a hindrance and one as a hindrance only. On the positive side, it is seen as essential for arriving at a fair sentence. However, negative comments were that it is both costly and creates delays in sentencing of up to three or four weeks.

Defence/duty counsel were unanimous in regarding the program as a benefit to the court process:

- Gladue reports provide more detail on the offender than a PSR so that the sentence is more appropriate;
- They enable the application of section 718.2(e);
- They help in the balancing of sentencing factors;
- They move the process along smoothly.

All courtworkers see a benefit to court process from the Gladue caseworker program:

- The reports speed up the whole process, including sentencing.

Effects of the Gladue Caseworker Program on the Court Process

The effects of the program on the court process were described by judges:

- Has the undesirable effect of slowing down the sentencing process;
- Provides better information for the determination of an appropriate sentence;
- Sentencing process is more efficiently carried out.

Defence/duty counsel indicated that the Gladue caseworker program has had a number of effects on the court process:

- Has lengthened the sentencing process;
- Judges have specific recommendations in front of them;
- Brings much more attention to the factors mentioned in the Gladue decision.

Courtworkers:

- helps the First Nation people to be understood better in the context of where they are;
- does create some paperwork - the report - paperwork does take time.

Effects of the Gladue Caseworker Program on Justice Personnel

According to judges the effects of the program on justice personnel (including judges, Crowns and defence) are:

- By-product is the education of justice personnel regarding historical circumstances of Aboriginal people;
- Provides some relief for duty counsel and defence work as they lack the time and resources to investigate and obtain information regarding offenders' backgrounds and services they may need;
- Demonstrates that there are different ways to carry out sentencing – does not have to be an adversarial approach;
- Reading the report requires more time for judges.

Crowns reported that the effects include:

- Is leading to an increased interest in adopting the application of Gladue;
- It provides more justification for alternative sentences;
- It gives defence, especially duty counsel, much more information for their case;
- The Gladue process applied to Aboriginal offenders makes it much more difficult to explain the outcomes to victims, especially Aboriginal victims, who often feel that their situation has not been fairly taken into account.

Defence/duty counsel described the effects of the program on justice personnel as:

- It makes it easier for the defence as there is an additional person to obtain information about the offender and develop a treatment plan;
- It facilitates the application of Gladue;
- Crowns are much more inclined to receive this input and accept the recommendations; they are more open to changing their sentencing submission;
- The Gladue court at OCH has definitely increased the awareness of Gladue among justice personnel;
- The sentencing judges have become more aware of Aboriginal values, history and issues in determining sentence.

The courtworkers who were interviewed pointed to several effects of the program on justice personnel:

- Judges who are aware of Gladue do take it into consideration and have respect for it;
- Justice personnel in the OCH Gladue court understand the role of the caseworker and courtworkers help them to get in touch with the Gladue caseworker;
- There is a huge interest in adopting a greater application of the process.

6.0 SUGGESTIONS FOR IMPROVEMENT AND CHANGES

Factors Facilitating the Application of Gladue

Program staff, judges, Crowns, defence/duty counsel and courtworkers were asked about the factors they feel are facilitating the application of the Gladue requirements under section 718.2(e). Their responses are detailed below.

ALST program director and caseworkers:

- necessary to have a native courtworker in place; problems arise where Gladue caseworker is not coordinated with a courtworker
- frequent communication with justice personnel, courtworkers and Aboriginal bailworkers
- buy-in by justice personnel
- program supervision and review of reports by an experienced lawyer – need to be able to see things from the judge’s perspective
- reports include a discussion of the affect of systemic issues (e.g., adoptions, foster home history, residential schools, homelessness) on offenders

Crowns:

- in OCH the bailworkers and courtworker provide options for the disposition of the offender with a clear plan; this facilitates consideration of a shorter sentence or release;
- the offender facing very serious charges.

Defence/duty counsel:

- the provision of more information about the offender;
- the court receives first-hand knowledge of the issues and concerns facing Aboriginal offenders;
- having a dedicated Gladue court at OCH – there should also be one at College Park;
- promoting awareness of Gladue and providing information and education about it has influenced the attitudes of the judges and Crowns;
- the commitment of the judges and Crowns in Gladue court at OCH;
- the recommendations made in the Gladue reports.

Courtworkers:

- judges, crowns and courtworkers who are informed in this area;
- lawyers who have received training from ALST and have the knowledge and know how to do and use the tip sheet;
- ALST and their efforts and workers;
- Aftercare workers, Gladue caseworkers all help the person go through each step of the process so that it functions smoothly; never is the accused without help and guidance - they get follow-up and help with each step of the process; the team is very supportive of one another and there is no hole where the client is left in limbo.

Factors Impeding the Application of Gladue

The same respondents were also questioned about the factors that seem to be impeding the application of Gladue. Again, these are described below.

ALST program director and caseworkers:

- no standardized procedure for referrals (wastes a lot of time);
- few criteria established for determination of appropriate cases.;

Crowns:

- the delay in obtaining the Gladue reports;
- the holding facilities in OCH are so far from the courtroom; bringing accused up from custody slows the entire process down;
- most of the defence bar are not aware of Gladue and the caseworker program.

Defence:

- selectivity in who gets a Gladue report when one has been ordered;
- the need for more Gladue caseworkers, especially to cover courts other than OCH;
- having only one dedicated Gladue court that operates just two days a week;
- the lack of information about Gladue on the part of many justice personnel and a lack of philosophical commitment to Gladue on their part;
- there is the possibility that, without enough Gladue caseworkers to meet the growing demand for reports, the caseworkers will be stretched too thinly and the reports will become less well prepared – this will undermine their use and the application of section 718.2(e).

Courtworkers:

- judges, Crowns and defence counsel who are not aware - need to get the word out;
- identification of being "Aboriginal" is based on self –identification - some people say that they are and they are not, others are and will not say so.

Overall, at the point of being interviewed, half of judges were not sure that they had received prior information about the Gladue court and caseworker program. Three of four Crowns and most defence indicated that they had not received such information.

Ways in Which the Gladue Caseworker Program can Better Assist the Court in Following the Requirements of Section 718.2(e)

A number of individuals interviewed provided suggestions for ways in which the Gladue caseworker program might better assist the court in following the requirements of section 718.2(e).

ALST program director and caseworkers:

- ▶ there is a need to educate judges, Crowns and defence counsel regarding Gladue and, particularly, the role of the caseworker.

Three judges:

- ▶ Increase the number of suggestions regarding plans for different potential dispositions;
- ▶ Restricting reports only to offenders for whom jail is being requested by the Crown overlooks dealing with first-time offenders;
- ▶ The real weakness is at the implementation stage; there is a need for somebody to “hold the hand” of the offender in order to get them into treatment and ensure that they actually carry it out;
- ▶ Collaborate to avoid duplication with PSRs.

Two Crowns:

- ▶ The caseworkers should act more like courtworkers and provide immediate assistance in the court;
- ▶ Caseworkers should have more discussion with the Crowns and develop a rapport with them.

Courtworkers:

- ▶ make more judges and crowns aware - need more education on the process.
- ▶ New judges need to be made aware, same for the Crowns - they all need awareness of the process;

Respondents' Suggestions Regarding the Gladue Reports

The following suggestions were offered with respect to the Gladue reports.

Judges' suggestions regarding the reports:

- ▶ sometimes becoming too much of a critique of government policy regarding the historical treatment of Aboriginal people;
- ▶ must be cautious about usurping the judges' role regarding sentence determination;
- ▶ provide more detail regarding the specific First Nation of the defendant and its particular circumstances; there are many First Nations in Ontario and they vary greatly across the province;
- ▶ build on previously produced pre-sentence reports, where available, in order to save time;
- ▶ if both a PSR and a Gladue report are prepared, the writers should confer to avoid duplication between the reports.

Crowns' suggestions regarding the reports:

- ▶ reduce the length of time that it requires to prepare the reports;
- ▶ include the views of the arresting officer or officer in charge;
- ▶ their tone and approach should not be that of an advocacy document that attempts to persuade the court regarding a specific sentence;
- ▶ they are not needed as the PSR provides the same information.

One respondent commented that the Gladue reports provide special treatment in the justice system for offenders who are Aboriginal, in that this identification is regarded as a factor that aggravates their criminal behaviour, but offers no balancing consideration when victims are also Aboriginal.

Only one defence counsel offered suggestions:

- ▶ reports should be no more than 10-12 pages.