EVALUATION OF THE GLADUE COURT
OLD CITY HALL, TORONTO

Report prepared for Aboriginal Legal Services

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2016

Acknowledgements

I am grateful to Justice Rebecca Shamai, Ontario Court of Justice, and Jonathan Rudin, Program Director, Aboriginal Legal Services, for their support in connection with this project.

Emma Gill-Alderson, a political science graduate student at the University of Toronto did an excellent job compiling and analyzing data contained in court files. Emma also spent many hours in Gladue Court taking detailed notes on the proceedings and assisted with interviews of court officials. Danielle Sinclair, a Ryerson University social work student provided valuable assistance by analyzing information in client files at Aboriginal Legal Services. Juan James at Old City Hall and Colette McCombs at Aboriginal Legal Services kindly provided access to files.

I want to thank the professionals who took the time to support the project through interviews or by providing information in other ways. Judges, defence counsel, duty counsel, Crown attorneys and others involved in the court system took the time to be interviewed, as did Community Council volunteers, court workers, case workers, aftercare workers and managers at Aboriginal Legal Services.

Finally, I would like to acknowledge with sincere thanks the individuals caught up in the justice system who agreed to be interviewed and who provided thoughtful comments that enriched our understanding of the issues.

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Executive Summary

Gladue Court first convened in October, 2001 at the Old City Hall courthouse in Toronto. The court was established to ensure the application of certain sections of the *Criminal Code* referring to the sentencing of Aboriginal people and to respond to significant social and justice-related issues facing Aboriginal people.

The Old City Hall Gladue Court aims to achieve the following:

- Directly address section 718.2(e) of the *Criminal Code* and the Gladue principles identified by the Supreme Court;
- Interpret bail provisions liberally so that pre-trial detention is not imposed unnecessarily and does not lead more directly to custodial sanctions;
- Encourage effective alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal persons in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

The research for the evaluation took place between September, 2015 and the end of March, 2016. The purposes of the evaluation are:

- to assess the extent to which the objectives of Gladue Court at Old City Hall are being achieved;
- to assess the extent to which the relevant section of the *Criminal Code* (s. 718.2(e)) is being realized;
- to identify and explain any unintended consequences resulting from court processes and related programs;
- to identify possible modifications to court processes and associated programs in order to increase objectives achievement, if warranted.

Evaluation methods include interviews with court officials and others involved with the Aboriginal criminal justice process at the OCH Gladue Court and at Aboriginal Legal Services (ALS), interviews with Aboriginal accused, file reviews at Old City Hall and ALS, review of federal and provincial statistics, and court observation.

The OCH Gladue Court takes a case management approach. An accused person (Aboriginal or non-Aboriginal) enters the system on the basis of one or more charges laid by police. She appears at Old City Hall on a promise to appear or is held for a bail hearing before a justice of

the peace or a Gladue Court judge. If the accused person is granted bail with conditions, she is given an appearance date and released. If bail is not granted, she is held in remand. As early in the process as possible the accused individual is given the opportunity to identify as Aboriginal. Various professionals are responsible for inquiring as to a person's Aboriginal identity, including the presiding justice of the peace, duty counsel, counsel, and the Aboriginal court worker assigned to Gladue Court. If the accused person identifies as Aboriginal, the court worker explains Gladue Court as an option. If bail is still an issue and the person chooses to have her case heard in Gladue Court, she engages with the court worker, her counsel and others to develop a plan of release (also known as a plan of care). She may also apply to the Toronto Bail Program, Gladue Supervision and work with the Gladue bail supervisor to develop a plan of supervision to apply while she is released on bail. At Gladue Court hearings, the Crown attorney can recommend the withdrawal or staying of charges and diversion or other resolution. The OCH Gladue Court is a plea and resolution court with diversion being a possible resolution.

In the period January to December, 2015 a total of 12,778 adult cases (Aboriginal and non-Aboriginal) were received at Old City Hall. We are aware of approximately 415 adult Aboriginal cases (3.2 percent of the total) received at Old City Hall in the same period. Between September 1, 2015 and March 31, 2016 (the 7-month evaluation period), 242 Aboriginal cases (approximately 653 individual charges) were received at Old City Hall. This represents approximately 94 Aboriginal persons who appeared in Gladue Court on a new set of charges during that time: 90 males and 4 females. Most individuals appearing in Gladue Court had more than one charge. The average number of informations per person was 2.6 and the average number of charges per person was 7 during the seven-month evaluation period.

Administration of justice offences continue to be the most common types of charges among Aboriginal accused persons at Old City Hall. The reasons for this are complex and further research is required to address the issue. Two possible explanations stand out. First, bail conditions might not be as fair, reasonable and culturally relevant to an individual's rehabilitation as we are told, including by Aboriginal people themselves. Similarly, probation conditions, particularly if assigned in a court other than Gladue Court, might be unreasonable in the circumstances. Second, it is important to bear in mind that Aboriginal people are generally more marginalized than non-Aboriginal people. This view, which is almost universally held by researchers, academics and advocates, is based on the recognition of a continuing legacy of colonialism and socio-economic deprivation that negatively affects Aboriginal people in cities as well as in remote and isolated communities. In turn, these realities are consistent with greater risk of becoming involved with the justice system and, at the same time, a feeling of alienation from the system. The immediate result of this combination of factors is often non-compliance

with the dictates of the justice system, regardless of whether bail conditions and court hearings are seen on the surface to be fair and reasonable. These are important questions that should be addressed in an in-depth way by first asking Aboriginal people themselves.

Case processing times are longer and more appearances are required in the OCH Gladue Court than in other Ontario and Toronto courts. All parties, including accused persons, agree that the extra time serves to ensure progress in the pre-diversionary period, thus increasing the likelihood of diversion or withdrawal of charges without diversion.

Diversion to the Community Council at ALS is seen as a culturally relevant approach to rehabilitation. It appears to have the effect of engaging individuals with their culture and decreasing re-offending. Diversion and the withdrawal of charges also remove the stigma and life problems associated with having a criminal record (among individuals who do not already have a record). The role of the ALS court workers and the Community Council are essential with respect to successful diversions.

Court configuration is not unlike that in other Old City Hall courtrooms. However, it is the professionals working in the court, the process and the principles on which Gladue Court is based that make it unique. That said, the court might consider the model employed at the Aboriginal Youth Court at 311 Jarvis Street. The youth court is configured as a modified 'circle' that is seen by all participants to be respectful of Aboriginal culture and less traumatizing for youth attending court. The opportunity for input from the youth and any person associated with the youth (e.g., family members, probation officers, social workers, the court worker and youth workers) is welcomed by those individuals and by the Crown attorney and defence counsel. The Aboriginal Youth Court model may not be entirely appropriate for adult Gladue Court, but its success could inform the convening of more sentencing circles in the OCH Gladue Court.

The OCH Gladue Court has achieved a significant degree of success in addressing the requirements of the *Criminal Code* and the direction implied in the Gladue principles laid out by the Supreme Court with respect to the sentencing of Aboriginal accused persons. It is clear that the OCH Gladue Court is dependent on the existence and good work of Aboriginal Legal Services with respect to the efforts of the Aboriginal court workers, case workers and the Community Council. Similarly, the restorative programs offered by ALS and other agencies (primarily Aboriginal) in the GTA are essential to the success of the OCH Gladue Court. The Toronto Bail Program, Gladue Supervision has offered an important means of achieving bail for accused persons and has thus contributed to the positive application of Gladue principles to bail and remand. The OCH Gladue Court successes have been demonstrated in several ways

and confirmed with reference to various information sources, including Aboriginal people engaged in the system.

In the view of the evaluator, the OCH Gladue Court is clearly meeting its five objectives. While some challenges and potential problems remain, the court has maintained flexibility and has adapted since its beginning. The OCH Gladue Court, together Aboriginal Legal Services and its Community Council and the Toronto Bail Program, Gladue Supervision, is providing a critically important service to Aboriginal individuals, their families and the larger Aboriginal community and should be seen as a model for the development of similar initiatives in Ontario and throughout Canada.

Recommendations are made with respect to several questions, none of them urgent and not all of them directed specifically at the Old City Hall Gladue Court:

- Personnel, particularly lawyers, appearing in other courts require further education to make them aware of Gladue principles and the existence of Gladue Courts, including the OCH Gladue Court. The opportunity for Aboriginal accused persons to identify as Aboriginal is not universally in place as it should to be consistent with the *Criminal Code* and the Gladue principles set out by the Supreme Court. The Ministry of the Attorney General, together with representatives of Gladue Courts, Aboriginal Legal Services and the Toronto Bail Program, Gladue Supervision should develop a plan of action regarding these issues.
- Consistency among court personnel and assurances that personnel have a solid understanding of Aboriginal issues, including Gladue principles, are essential for the effective operation of the OCH Gladue Court. The governments of Canada and Ontario should work together to ensure this is the case.
- There is a fundamental question that should be addressed by Gladue Court officials, defence counsel, Crown attorneys and representatives of Aboriginal Legal Services. The question is this: why are some Aboriginal accused persons not applying for bail and not entering a not-guilty plea when, in many cases, they should be doing both? The question is complex but warrants discussion, perhaps first at the OCH Gladue Court Operations Committee.
- Two sentencing circles have been convened successfully by OCH Gladue Court judges. There are potential benefits and challenges to the use of circles; however, if it seems appropriate and if all parties (including the victim) consent, more circles should be arranged. They should be convened on a case by case basis and their use assessed and modified as required.
- The Aboriginal Legal Services court workers and case workers perform essential roles in support of the OCH Gladue Court. It is therefore essential for the Ministry of the

Attorney General and Justice Canada to continue funding these programs on an ongoing basis.

- Several references to further research are made throughout this report. Comparative analysis between the OCH Gladue Court and other Gladue Courts and non-Gladue Courts will provide a more thorough understanding of Gladue processes. In-depth research into questions regarding the rates of bail and remand for Aboriginal persons is especially important. As well, investigation into reasons for individuals choosing not to apply for bail and to enter a guilty plea when they should probably do otherwise is also needed. In both cases, the extent of the problems must be addressed, in part, by asking Aboriginal people themselves.

Introduction

The Gladue Court first convened in October, 2001 at the Old City Hall courthouse in downtown Toronto.[1] The Court was established to ensure the application of 1996 amendments to the *Criminal Code* regarding the sentencing of Aboriginal offenders. In that regard the Court was cognizant of the Supreme Court's ruling in *Gladue*[2] that acknowledged the significant social and justice-related issues facing Aboriginal people, and that directed courts to adhere to section 718.2(e) of the *Criminal Code* with reference to the sentencing of adult Aboriginal offenders: "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." Gladue Court adheres to the statutory requirements of the *Criminal Code* through creative resolutions. Trials are held in other courtrooms at Old City Hall.

The judges who initiated Gladue Court also believed the justice system could play a role in the broader process of addressing the legacy and continuing reality of colonialism as it affects Aboriginal people. In this regard the Court anticipated the 2015 final report of the Truth and Reconciliation Commission and its calls for reconciliation between Canada and Indigenous peoples.

Diversion is an aspect of the overall process which, though not decided by a judge, was seen as contributing to the realization of Gladue principles by avoiding jail for Aboriginal persons. The Community Council, a restorative circle of Indigenous volunteers at Aboriginal Legal Services of Toronto (ALST),[3] would link Aboriginal individuals to culturally relevant services suited to their circumstances and needs. A case management approach was envisioned which, with the help of ALST and other agencies, would enable individual clients to prepare for the possibility of diversion or other resolution. The preparatory steps and the actual diversion process would connect the client to the Aboriginal community in Toronto or elsewhere, as appropriate.

The components of the Gladue Court process, as well as diversion, are addressed later in this report. However, a brief outline is warranted here. As noted, Gladue Court takes a case management approach. An accused person (Aboriginal or non-Aboriginal) enters the court system on the basis of one or more charges laid by police. At that point s/he can be directed on one of two paths.

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[1] The Gladue Court is also known as the Aboriginal Persons Court.

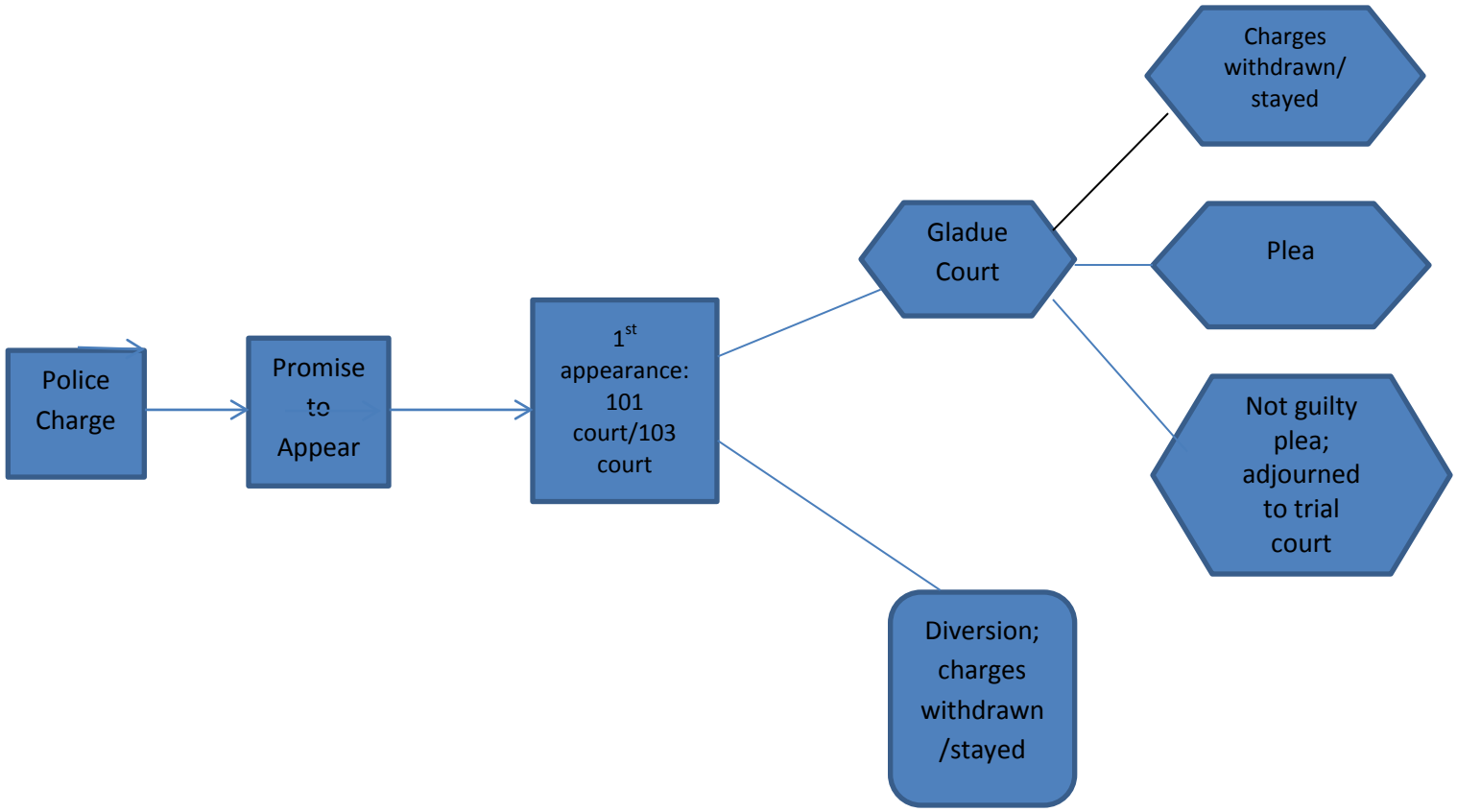
2 *R. v. Gladue*, [1999] 1 S.C.R. 688. Subsequent rulings, including Ipeelee (*R. v. Ipeelee*, [2012] S.C.J. No. 13), confirmed the court's directions in *Gladue*.

[3] Now known as Aboriginal Legal Services (ALS).

If she is released following charges on a promise to appear, she is given a hearing date and first appears in 101 court or 103 court (not in Gladue Court) (Figure 1).[4] If she identifies as Aboriginal, she will be informed of her option to appear in Gladue Court. If she chooses that route (rarely does an individual choose otherwise), she will then be directed to appear in Gladue Court. Alternatively, she may be diverted without a hearing and her charges stayed or withdrawn. The Aboriginal court worker plays an important role at this stage of the process by liaising with the Crown attorney regarding a possible diversion. If the individual is not diverted and is directed to appear in Gladue Court, one or more hearings take place. Ultimately, the matter is decided in Gladue Court in one of three ways: charges can be withdrawn or stayed; a plea can be entered; or no resolution results in Gladue Court if a not guilty plea is to be entered and the matter is adjourned to trial court.

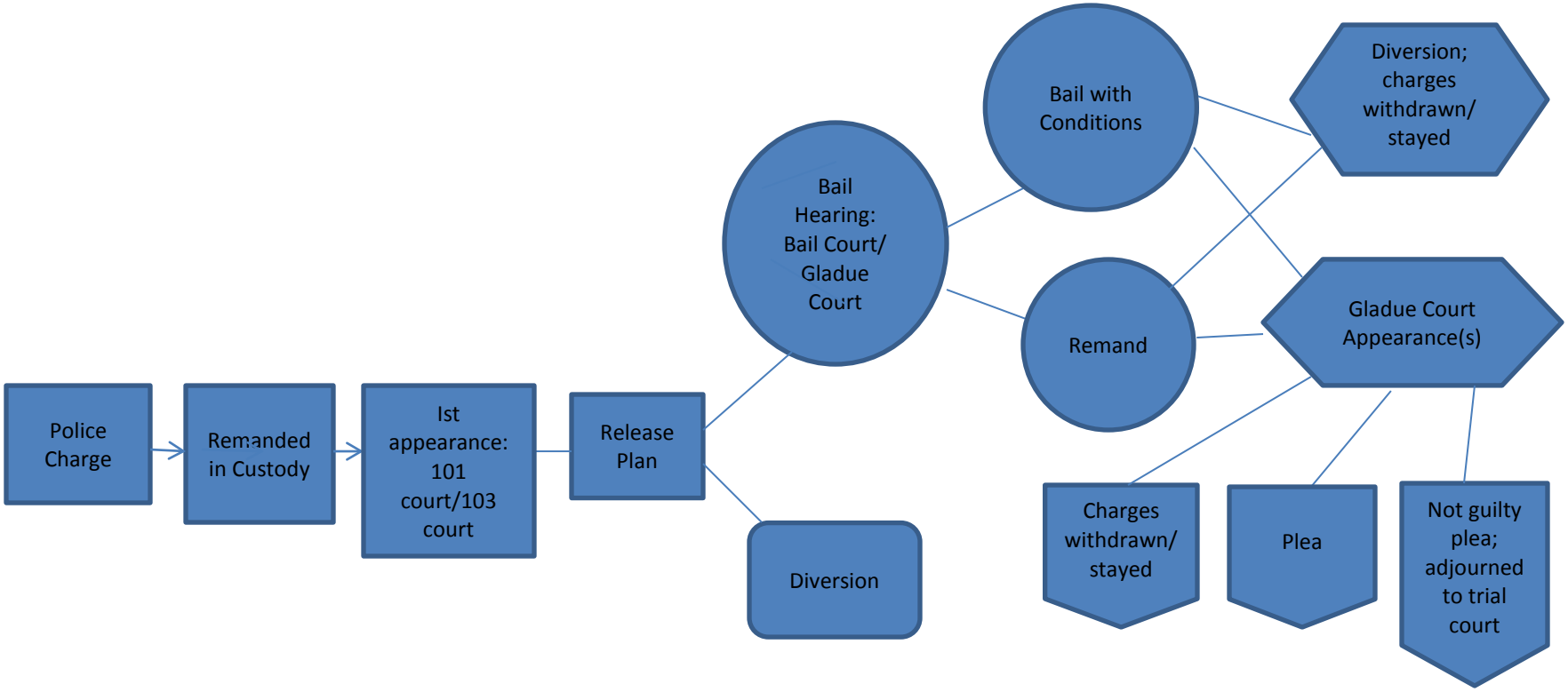
[4] Police can release individuals with a summons or a recognizance, in addition to a promise to appear. While the latter is the most common, there are other options under the *Criminal Code.*

Figure 1: Gladue Court Case Management – Released on a Promise to Appear



The second path through the court system after charges are laid involves the individual being remanded in custody (Figure 2). The accused person is held for a bail hearing and first appears in 101 court or 103 court. If he identifies as Aboriginal, the court worker will begin to develop a release plan (also known as a plan of care). At this point the individual could be diverted out of the court system or directed to Gladue Court for a bail hearing. However, depending on the timing of his charges and entry to custody, his bail hearing might take place in regular bail court. The related questions regarding remand, bail and timing present challenges and are addressed later in the report. In either case, if the individual has not already been diverted, he would normally be referred to the Toronto Bail Program, Gladue Supervision which is designed to cover bail when it would not normally be supported in the absence of a surety. If the individual is granted bail with conditions, he is given a Gladue Court appearance date and released. If bail is not granted, he is held in remand. Whether bail is granted or he is held in remand, diversion and the withdrawal or staying of charges is a possible outcome at this stage. If he appears in Gladue Court, the matter can be decided in three possible ways, as noted above: charges are withdrawn or stayed; a plea is entered; or the case is adjourned to trial court in the event of a not guilty plea.

Figure 2: Gladue Court Case Management – Remanded to Custody



As early in the process as possible the charged person is able to identify as Aboriginal. Various professionals are responsible for inquiring as to a person's Aboriginal identity, including duty counsel, counsel, and the Aboriginal court worker assigned to Gladue Court. If a person identifies as Aboriginal, the court worker explains Gladue Court as an option. If the accused chooses to have her case heard in Gladue Court, she engages with the court worker, her counsel or duty counsel and possibly representatives from other agencies to develop a release plan. A release plan is designed to recognize the circumstances of the individual and to meet that person's specific needs; for example, anger management or substance abuse counselling. It could include diversion to the Community Council at Aboriginal Legal Services. The Crown Attorney has the responsibility to approve diversion on the recommendation of counsel and the court worker, along with the withdrawal or staying of charges.

Gladue Court aims to re-model the traditional court process by incorporating Aboriginal understandings of justice and human relations. While care must be taken not to assume a "pan-Aboriginal" view of the world, it is fair to say that Aboriginal cultures in Canada are more oriented to addressing non-normative behaviour through reconciliation and positive transformation than is the mainstream system which continues to be based primarily on adversarial processes, punishment and deterrence. Gladue Court is an attempt to revise formal criminal court by incorporating Aboriginal values and approaches. Proulx (2005) refers to shifts in the formal system as a process of interlegality, in this case not changing Aboriginal approaches to justice but, rather, Euro-Canadian approaches. Clark refers to the same concept from the perspectives of both the Euro-Canadian justice system and the community-based Indigenous approach to justice as an intersection, although one that remains controlled by the dominant system (Clark, 2011).

Purpose of the Evaluation

The research for the evaluation of Gladue Court at Old City Hall took place between September, 2015 and March, 2016. The evaluation combines analyses of both processes and outcomes associated with the court. It examines the processes by which the court's objectives are being addressed and the outcomes of the court's work, mainly with reference to the achievement of objectives and unintended results. The research findings should assist court officials in planning and carrying out Gladue Court operations, and will provide information of use to agencies affiliated with the court. This refers primarily to Aboriginal Legal Services (ALS) and that agency's provision of court worker services, Gladue Reports, restorative counselling and rehabilitative programming. The findings should also be of interest to other court jurisdictions in Ontario and across Canada.

The purposes of the evaluation are:

- to assess the extent to which the objectives of Gladue Court at Old City Hall are being achieved;
- to assess the extent to which the relevant section of the *Criminal Code* (s. 718.2(e)) is being realized;
- to identify and explain any unintended consequences resulting from court processes and related programs;
- to identify possible modifications to court processes and associated programs in order to increase objectives achievement, if warranted.

This evaluation falls, to a certain extent, within the category of "realist evaluation." This approach to understanding social phenomena examines individuals' perceptions and results from a personal, experiential perspective. What does the experience of the court process mean for individual accused? This approach also considers the effects of the Gladue Court process on individuals and agencies who are involved as part of the system: judges, lawyers, court workers, case workers, aftercare workers, support groups and others. Most importantly, it gives voice to those who have had little opportunity to express their views before. Colonialism is not a legacy; it continues. As the Truth and Reconciliation Commission and other commissions of inquiry have told us repeatedly,[5] the negative social, economic, psychological and cultural impacts of colonialism affect all Indigenous people in Canada. While this is just one study of one court, it aims to give the voiceless a voice. In that spirit, the report contains quotes from Indigenous people who have been involved with the courts and were interviewed as part of the project.

Rationale for Gladue Court

The Problem of Overrepresentation

Indigenous people in Canada, whether status, non-status, Métis, or Inuit increasingly live in urban settings. According to Statistics Canada (2009a), 54 percent of Canada's Aboriginal population lived in an urban centre in 2006. Based on the 2006 census, Statistics Canada estimated the Indigenous population in the GTA to be approximately 32,000 individuals. However, according to estimates by agencies serving the GTA Indigenous population, the figure is closer to 70,000 (Toronto Aboriginal Research Project, 2011: 78). Thus, while many Aboriginal people continue to live in remote northern communities, the stereotype of

[5] For example, the Aboriginal Justice Inquiry of Manitoba, the Royal Commission on Aboriginal Peoples, the Commission on First Nations and Métis Peoples and Justice Reform, the First Nations Representation on Ontario Juries Inquiry, and the Ipperwash Inquiry.

Aboriginal people living predominately in isolation no longer holds true, a fact that has significant implications for policy development in all social arenas, including criminal justice. The existence of the Old City Hall Gladue Court in downtown Toronto is therefore an important development.

The failure of the criminal justice system for Aboriginal people is manifested in many ways, perhaps most notably in the extreme overrepresentation of Aboriginal individuals as incarcerated offenders. In 2014-15, Indigenous adults accounted for 25% of admissions to provincial/territorial correctional services, while representing less than 4% of the Canadian adult population. Custodial admissions for Indigenous adults amounted to 26% of the total and community admissions 24% in the provinces and territories. Admissions of Indigenous adults to sentenced custody in federal institutions in 2014-15 accounted for over 22% of the incarcerated population. Even more concerning is the fact that, according to Statistics Canada, "Indigenous females accounted for 38% of female admissions to provincial/territorial sentenced custody, while the comparable figure for Aboriginal males was 24%. In federal correctional services, Aboriginal females represented 31% while Aboriginal males accounted for 22% of admissions to sentenced custody" (Statistics Canada, 2016). Yet, again, Indigenous adults represent less than 4% of the total Canadian population.

With respect to other types of correctional supervision across Canada, Statistics Canada reported that in 2011-12, "Aboriginal adults accounted for 25% of admissions to remand and 21% of admissions to probation and conditional sentences." In Ontario in 2011-12, Indigenous people represented 2.0% of the adult Ontario population while representing 12% of provincial sentenced custody, 13% of remands, 9% of probation orders, and 15% of conditional sentences (Statistics Canada, 2014).[6]

Table 1 shows numbers provided by Statistics Canada of Aboriginal adult admissions to provincial correctional services – community admissions and custodial admissions – for the years 2010-11 to 2014-15. Community admissions include probation, conditional sentences and other community programs such as community service orders, provincial paroles, fine option programs, bail supervision, and restitution orders.

[6] Statistical data should be viewed with caution. It is difficult to ensure the accuracy of census counts of Aboriginal people, and even more difficult in terms of crime related data. Statistics Canada (2005) has acknowledged the challenges and Rudin has described the problem in detail (2007: 10-11). That said, Statistics Canada provides the best available data and the most useful for purposes of this report.

Table 1
Aboriginal Adult Admissions to Provincial and Territorial Correctional Services, 2010-11 to 2014-15

	2010-11	2011-12	2012-13	2013-14	2014-15
Community Admissions	152,562	147,486	127,124	124,850	119,487
Custodial Admissions	250,980	251,629	208,444	201,099	197,454

Sources: Statistics Canada, 2016, Cansim Tables 251-0026 and 251-0022.
http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2510026&&pattern=&stByVal=1&p1=1&p2=35&tabMode=dataTable&csid=
http://www5.statcan.gc.ca/cansim/a26?lang=eng&retrLang=eng&id=2510022&&pattern=&stByVal=1&p1=1&p2=35&tabMode=dataTable&csid=

According to the Statistics Canada data, both custodial admissions and community admissions in the provinces and territories decreased in number between 2010-11 and 2014-15. It is unclear if this is due to an increase in the number of charges being stayed or withdrawn or if there has been an increase in the number of diversions that is not reflected in the data. In any case, it is still important to recall that, as noted above, Indigenous adult custodial admissions and community admissions in the provinces and territories amounted to 26% and 24% of the total, respectively. On a comparative basis, then, the picture remains dire.

The overrepresentation of Indigenous people in the criminal justice system is clearly a serious problem. Nor is it improving significantly. In its 2014-15 Annual Report, the Office of the Correctional Investigator said this of Indigenous offenders and federal corrections:

> The intergenerational effects of Aboriginal social histories (i.e. residential schools experience; involvement in the child welfare, adoption and protection systems; dislocation and dispossession of Aboriginal people; poverty and poor living conditions on many native reserves; family or community history of suicide, substance abuse and/or victimization) continue to drive the disproportionate number of Aboriginal peoples caught up in Canada's criminal justice system. Unfortunately, and tragically, the number of Aboriginal people under federal sentence is expected to continue to rise due to the more youthful demographics of the Aboriginal population in Canada. The unique circumstances and social histories which give rise to disproportionate rates of offending and victimization among Aboriginal peoples need to be better integrated into interventions across the broader criminal justice spectrum (police, courts, corrections and parole).

While the Correctional Investigator addresses federal corrections, the same could be said of provincial and territorial jurisdictions and the challenges facing the provision of justice for

Indigenous people. Speaking of all jurisdictions, the Supreme Court in *R. v. Gladue* noted that overrepresentation data are both startling and an effective indication that relations between Aboriginal people and the justice system are seriously flawed. The Court stated, '[t]he figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system,"[7] a statement that was meant to resonate throughout governments and the justice system itself.

Section 718.2(e) and R. v. Gladue

The Government of Canada has attempted in the past to address the problem of overrepresentation in various ways, including amendments to the *Criminal Code* in 1996 (section 718.2(e)) and the subsequent inclusion of certain sections in the *Youth Criminal Justice Act* (sections 3, 38 and 50). These laws address the ways in which Aboriginal offenders, both adult and youth, are to be considered by the courts in the sentencing process. As Rudin notes with respect to the *Criminal Code* amendments, the purpose "was not necessarily to reduce rates of offending in Canada, but rather to lessen the country's reliance on incarceration as a response to such behaviour" (Rudin, 2009: 448). The amendments to the *Criminal Code* and the *YCJA* essentially direct judges to consider all aspects of an Aboriginal offender's background and to hand down a sentence that does not involve jail time if possible and reasonable. The importance of Section 718.2(e) was confirmed in the Supreme Court's ruling in *R. v. Gladue*[8] and, subsequent to the establishment of the OCH Gladue Court, in *R. v. Ipeelee*[9] and by the Ontario Superior Court in *R. v. Bain*.[10]

Three principles identified by the federal government and confirmed by the Supreme Court in *Gladue* underlie the 1996 sentencing provisions. The first is that Aboriginal people have long been marginalized and continue to be marginalized through the legacy of colonialism. Marginalization in the form of endemic poverty, poor health care, unacceptably low housing standards, fewer educational opportunities, fewer employment opportunities, and widespread experiences with control and assimilation (residential schools, for example) was acknowledged by federal law makers as contributing to higher rates of crime, especially violent crime, among Aboriginal people in many Aboriginal communities and cities. This view was confirmed in the final report of the Royal Commission on Aboriginal Peoples. The second principle on which the legislation is based is the recognition that Aboriginal people suffer systemic discrimination within the criminal justice system itself, including by police and courts. Third, the legislation

[7] *R. v. Gladue*, footnote 1, at para. 64.
[8] *R. v. Gladue*, [1999] 1 S.C.R. 688.
[9] *R. v. Ipeelee*, [2012] S.C.J. No. 13.
[10] *R. v. Bain*, Ontario Superior Court of Justice, February 18, 2004, unreported.

implicitly acknowledges that culturally relevant alternatives to incarceration in the form of rehabilitative programs based on restorative justice models are generally more effective than incarceration for the individual offender, the community, and public safety.

Judge M.E. Turpel-Lafond characterized *Gladue* in the following way:

> The *Gladue* decision is an important watershed in Canadian criminal law. The interpretation of s 718.2(e) of the *Criminal Code* by the Supreme Court of Canada clarified that this provision is remedial in nature and not merely a codification of existing law and practice. In so construing the provision, the court clearly endorsed the notion of restorative justice and sentencing regime which is to pay fidelity to "healing" as a normative value. (1999, 35)

It was in recognition of the need to act on the amendments to the *Criminal Code* as they pertained to Aboriginal offenders and the need to apply the principles laid out by the Supreme Court in *Gladue* that Gladue Court was established at Old City Hall. However, the intent was not simply for court officials to bear in mind the provisions and principles during the court process; rather – and significantly – the aim of the court was to actively engage with section 718.2(e) and with Gladue principles. This level of engagement made the Old City Hall Gladue Court unique in Canada at the time of its inception.

Objectives of the Old City Hall Gladue Court

The Old City Hall Gladue Court is a sentencing and bail hearing court where guilt must be admitted before a case can proceed. Objectives were first set out by the initiating judges (see Knazan, 2009) and subsequently revised over the life of the court. The objectives of the court are as follows:

- Directly address section 718.2(e) of the *Criminal Code* and the Gladue principles identified by the Supreme Court;
- Interpret bail provisions liberally so that pre-trial detention is not imposed unnecessarily and does not lead more directly to custodial sanctions;
- Encourage effective alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal persons in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

Indicators of Objectives Achievement

Achievement of the court's five objectives is assessed on the basis of specific indicators. The indicators identified for assessing objectives achievement vary in terms of the extent to which they are quantifiable or are qualitative/descriptive in nature. In either case, they are useful in understanding the processes and outcomes of Old City Hall (OCH) Gladue Court. Discussion of the objectives and their concomitant indicators follows:

Objective: Directly address section 718.2(e) of the Criminal Code and the Gladue principles identified by the Supreme Court.

Section 718.2(e) is general in scope: "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." This directive is open to interpretation. For example, how is a court to assess "the circumstances" of a particular Indigenous offender? How does the court acquire the information required to assess an individual offender's circumstances?[11] Who makes the assessment and what is the process? How is a court to judge the reasonableness of an available sanction? Are reasonable alternatives to incarceration available in the first place? As Rudin has said, "[w]hile *Gladue* very clearly set out the problems around Aboriginal overrepresentation it did not do much to set out solutions" (2009: 453).

The Supreme Court's 2012 ruling in *Ipeelee*[12] has clarified the questions somewhat but perhaps not entirely. Justice Melvyn Green, who presides at the Old City Hall Gladue Court, wrote about the ongoing problem of Aboriginal overrepresentation and the challenge of implementing restorative justice models:

> The questions I characterize as "vexing" are not directly addressed, let alone answered, in *R. v. Ipeelee*, the Supreme Court's very recent effort to "determine the principles governing the sentencing of Aboriginal offenders, including the proper interpretation and application of [the] Court's judgment in [*R. v.*] *Gladue*." However, the strength of the majority's language in *Ipeelee* (Rothstein J., alone, dissenting) affirms the robust nature of the Gladue principles and their universal application in sentencing hearings. (2012)

[11] Rudin raises the same question with respect to the *Gladue* ruling. As he points out, the Supreme Court in *Gladue* said that "judges needed more information about the particular Aboriginal offenders before the court and the sentencing options that existed for that offender. But what was not at all clear was how this information was going to be provided to the court" (2009: 454).

[12] *R. v. Ipeelee*, 2012 SCC 13.

In *Ipeelee* it was made clear (i) it is not necessary for an accused Indigenous person to prove a direct causal link between his/her personal circumstances and the crime at hand; (ii) Gladue principles do apply in serious and violent offences; and (iii) lower court judges have a duty to apply section 718.2(e). I believe the points made in *Ipeelee* in 2012 were already in practice at the OCH Gladue Court prior to the case being heard by the Supreme Court but that the ruling has given needed direction to other courts across the country.

Keeping in mind the broad scope of the *Criminal Code* provision and the questions of interpretation noted above, several indicators were identified for the purpose of assessing the level of achievement of the first objective. This was done after initial discussions with professionals working in the criminal justice system, as well as a review of relevant court rulings and academic literature. The indicators for the achievement of the court's first objective are as follows:

- Opportunities for charged individuals to register their Aboriginal heritage with the court.
- Awareness by judges and counsel of Gladue principles and the significance of individuals registering their Aboriginal heritage with the court.
- The frequency with which charged persons connect with an Aboriginal court worker prior to first appearance.
- The extent to which the Aboriginal court worker is able to identify the circumstances and needs of an Aboriginal person prior to a first hearing, and to develop a release plan[13] for that person.
- The opportunities for the Aboriginal court worker to inform the court regarding a charged person's situation with regard to program involvement and progress in other positive activities prior to a decision regarding resolution.
- The extent to which Aboriginal persons' cases are resolved without a custodial sentence.

Objective: Interpret bail provisions liberally so that remand is not imposed unnecessarily and does not lead more directly to custodial sanctions.

- The ability of the supervisor with the Toronto Bail Program, Gladue Supervision to meet with clients and to acquire the information needed to make a decision regarding bail.
- The frequency with which charged individuals are granted bail when they otherwise would not have been in the absence of a surety.
- Rates of remand in the OCH Gladue Court compared to remand rates in other courts (Indigenous and non-Indigenous).
- Rates at which persons granted bail under the Toronto Bail Program, Gladue Supervision receive custodial sentences compared to the rates in other courts (Indigenous and non-Indigenous).

[13] Also known as a plan of care.

Objective: Encourage effective alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process.

a) Release Plan
   - The availability of resources upon which the court worker, duty counsel, counsel and the Toronto Bail Program, Gladue Supervision draw to design an appropriate release plan for the client.[14]
   - The extent to which the Aboriginal court worker and colleagues are able to design individualized release plans appropriate to the needs and circumstances of individual clients.
   - The extent to which the Aboriginal court worker and colleagues are able to engage a client in programs which connect the client with his/her Indigenous culture.
   - The extent to which the Crown considers the program efforts of individuals in making a decision regarding diversion.
   - The extent to which individuals are diverted.

b) Diversion
   - The availability of resources upon which the Community Council at Aboriginal Legal Services and the Manager of the Community Council Program draw to design an appropriate program for the client.
   - The extent to which the Community Council and the Manager are able to identify individualized programs appropriate to the needs and circumstances of individual clients.
   - The extent to which clients complete the programs set out by the Community Council.

Objective: *Encourage the development of resolution plans which will engage Aboriginal persons in their own rehabilitation.*

- The extent to which the Aboriginal court worker and colleagues are able to identify individualized program plans appropriate to the needs and circumstances of individual clients.
- The extent of engagement of individual clients in their plans.
- The rate of completion of program plans by clients.

Objective: Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

- The number of Aboriginal community agencies involved in providing programming for clients.

[14] Potential resources include Aboriginal Legal Services (ALS), the Centre for Addictions and Mental Health (CAMH), agencies presenting housing alternatives, and others.

- The extent to which the Crown considers program efforts of individuals in making a decision regarding diversion.

Information linked to the indicators listed above contributed to findings and conclusions regarding the court's achievement of its objectives. This is the "outcomes" component of the evaluation. The "process" component examines the methods by which the court attempts to achieve its objectives. The process component will also contain observations on related factors, including case processing time.

Methodology

The evaluation research included several approaches to collecting relevant information, analyzing that information, and drawing conclusions. Data collection methods included the following:

- Interviews
  - court professionals associated with Old City Hall Gladue Court (members of the judiciary, Crown attorneys, defence counsel, duty counsel)
  - Community Council members
  - ALS staff, including court workers, case workers, aftercare workers and managers
  - Gladue Bail Supervisor
  - accused individuals held in cells awaiting hearings (18 individuals interviewed for a total of 21 interviews)
  - individuals diverted to the Community Council at ALS (7 in total; see below)
- Analysis of court data

  Data were collected and analyzed for three periods, as indicated below. Analysis of data for each of the three periods appears in the report. The time periods were selected, first, to provide a longer picture (October, 2013 to December, 2015); second, to enable comparisons between our data and other available data, primarily Ontario Court of Statistics data (January, 2015 to December, 2015); and, third, to cover the specific period of the evaluation (September, 2015 to March, 2016).
  - October, 2013 to December, 2015: We accessed the ICON database at the OCH courthouse and randomly selected informations relating to Aboriginal persons for this period. The sample included 169 informations (460 total charges) pertaining to 66 individuals (5 females, 61 males). Those 66 individuals represented 7 percent of the

individuals appearing in Gladue Court in that time period.[15] This data period allowed a longer term picture of types of charges, bail, remand and dispositions.

- January, 2015 to December, 2015: This is the period covered by the *Criminal Court Offence Based Statistics* provided by the Ontario Court of Justice for Ontario and for Toronto courts, including Old City Hall. We looked at Aboriginal cases at Old City Hall for comparative purposes. During this period, 12,778 criminal cases (Aboriginal and non-Aboriginal) arrived at Old City Hall. Of that number, approximately 415 cases were Aboriginal, representing about 3.2 percent of the total.
- September, 2015 to March, 2016 (the evaluation period): We identified 242 Aboriginal cases linked to 94 people arriving at Old City Hall during this period. The average number of informations per person was 2.6. The average number of charges per person was 7.

o Review of 49 randomly selected ALS files (4 females, 45 males)
o Reference to statistics from the Ontario Court of Justice and the Canadian Centre for Justice Statistics (Statistics Canada)
o Court observation over a period of six months (Gladue Court convenes Wednesdays and Fridays).

The presentation of data throughout the report is done as consistently as possible with the definition of a "case" provided by the Ontario Court of Justice in the presentation of its annual statistics: a case "refers to all charges on an information for each single accused."

Individuals being held in cells at Old City Hall were approached by the researcher and, if agreeable, were interviewed prior to their hearing. In three cases, the same individual was interviewed prior to each of two hearings. Eighteen individuals were interviewed in the cells for a total of 21 interviews. A snowball sampling technique was used to identify and contact clients who had been diverted to the Community Council and who might be willing to be interviewed. The identification of clients depended largely on the assistance of ALS personnel. The sample was not random as clients were often difficult to contact or perhaps unwilling to participate in the study. Respondent bias was therefore possible; however, the fact that not all respondents were entirely positive about their experience suggests a reasonably accurate picture was obtained. Many respondents had suggestions for improvement (typically not major) which, in themselves, should be of value to Gladue Court and ALS.

[15] The original sample size was 90 individuals (10 percent of individuals appearing in Gladue Court from October 1, 2013 to December 31, 2015); however, informations were missing from court records in several cases and, due to time constraints, alternative informations were not identified.

All interviews were semi-structured and open-ended. This allowed coverage of the information essential to answering the evaluation questions and provided respondents the opportunity to expand on their answers and observations. All detained and client respondents were requested to read and sign a consent form prior to being interviewed. Each respondent was assured that s/he was under no obligation to participate and that information derived from the interview would be held in confidence by the principal researcher.

Limitations to the Research

It was challenging to find individuals who were willing to be interviewed after completing their diversion to the Community Council and meeting their program commitments. This was mainly due to the fact that once a person had completed his/her diversion, that person would return to regular life and would not necessarily be easy to contact or meet. Most respondents were clients who were attending a Council meeting and were interviewed at that time. In two cases, clients who had completed their ALS programs returned to the ALS office to visit and were interviewed then. Other clients who were interviewed were in the process of attending ALS programs after diversion.

A second limitation concerned the availability and completeness of files at the Old City Hall courthouse. Informations were frequently missing and those that were selected often provided inconsistent or incomplete information. The researchers did their best to extract relevant data.

Third, the two provincial Crown Attorneys working regularly in Gladue Court were not given permission by their management to be interviewed for purposes of the evaluation. In the end, the Assistant Crown Attorney who manages the Gladue Court Crowns was interviewed. Discussion with the Gladue Court Crowns would have provided more detailed information on the day-to-day operation of the court.

Finally, time constraints prevented the evaluation extending to other courts – both Gladue courts such as College park and non-Gladue courts – for comparative purposes. Widening the research would both strengthen the findings and suggest possible directions for change in other courts.

The Bigger Picture:
Adult Criminal Cases in Ontario, Toronto and at Old City Hall

Table 2 indicates the number and percentages of adult criminal cases received by offence group in Ontario, Toronto and at Old City Hall for the period January to December, 2015. The most prevalent category across Ontario involved administration of justice cases at 27.3 percent of all adult cases in Ontario. This was followed closely by crimes against the person at 26.3 percent of total Ontario cases. The third most common category of offences in Ontario was property crimes at 22.6 percent of total cases. Cases received in Toronto differed significantly from Ontario. In Toronto, the most prevalent category was crimes against the person at 35.1 of total Toronto cases. This was followed by property crimes at 24.8 percent, and administration of justice offences at 20.7 percent. Cases received at Old City Hall matched Toronto in terms of order of prevalence. Crimes against the person represented 24.5 percent of total cases received, followed by property crimes at 22.8 percent and administration of justice offences at 18.7 percent.

Table 2
Adult Criminal Cases Received, Ontario, Toronto and Old City Hall by Offence Group, January 2015 to December 2015

Offence Group	**Cases Received**			**% of all cases received**		
	Ontario	Toronto	Old City Hall	Ontario	Toronto	Old City Hall
Crimes Against the Person	57,092	13,984	3,135	26.3	35.1	24.5
Property	49,149	9,903	2,915	22.6	24.8	22.8
Administration of Justice	59,213	8,249	2,394	27.3	20.7	18.7
Other Criminal Code	10,232	1,996	681	4.7	5.0	5.3
Criminal Code Traffic	17,799	1,803	572	8.2	4.5	4.4
Federal Statute	23,175	3,856	3,081	10.6	9.6	24.1
Total Cases	216,660	39,791	12,778	100%	100%	100%

Case: refers to all charges on an information for each single accused.
Cases received: all cases received by a court location, adjusted for transfers to or from another court location.
Percentage totals add up to 100% before the frequencies are rounded to one decimal place.
Source: Ontario Court of Justice, *Offence Based Statistics*
http://www.ontariocourts.ca/ocj/files/stats/crim/2015/2015-Q4-Offence-Based-Criminal.pdf

It is worth noting that the percentages of cases received at Old City Hall match fairly closely the percentages in Ontario and Toronto, with the exception of Toronto's significantly higher percentage of cases involving crimes against the person (Toronto 35.1%, Ontario 26.3%, OCH 24.5%). A real difference at Old City Hall occurs with respect to federal statute cases. Old City Hall received 24.1 of its total cases in 2015 in the form of federal statute offences, while the rates in Ontario and Toronto were 10.6 percent 9.6 percent, respectively. (All drug offences in

Toronto arrive at Old City Hall and are not divided among the other provincial courts in the city, thus slightly skewing the relative rates of federal statute offences.)

Caseload at Gladue Court, Old City Hall

It is difficult to say what proportion of individuals appearing In Ontario courts are Aboriginal; however, it is reasonable to assume not all Aboriginal accused in Ontario or Toronto identify or have the opportunity to identify as Aboriginal. At Old City Hall the situation is different because of the existence of Gladue Court and the procedures in place that enable and encourage Aboriginal persons to identify as such.

In the period January to December, 2015 (the period specified in Table 2 based on Ontario Court of Justice statistics) a total of 12,778 adult cases[16] (Aboriginal and non-Aboriginal) were received at Old City Hall. We are aware of approximately 415 adult Aboriginal cases (3.2 percent of the total) received at Old City Hall in the same period.[17]

Between September 1, 2015 and March 31, 2016 (the 7-month evaluation period), 242 Aboriginal cases (approximately 653 individual charges) were received at Old City Hall. This represents approximately 94 Aboriginal persons who appeared in Gladue Court on a new set of charges during that time: 90 males and 4 females. Most individuals appearing in Gladue Court had more than one charge. The average number of informations per person was 2.6 and the average number of charges per person was 7.0 during the seven-month evaluation period.

In many cases, new charges were incurred while an original charge or set of charges was being processed. During the period October, 2013 to December, 2015, 20 percent of the sample of 66 individuals re-offended once before resolution of their matter. Those who re-offended twice represented 18 percent of the sample, and reoffending occurred more than twice before resolution in 12 percent of the sample.

[16] Case refers to all charges on an information for each single accused.

[17] Ontario Court of Justice statistics are available for the period January to December, 2015. While the evaluation period ran from September, 2015 to March, 2016, Old City Hall files were consulted to get an approximate picture of the number of cases received during the period January to December, 2015.

Gladue Court at Old City Hall: Process and Outcomes

Aboriginal Identity and Related Information

Aboriginal identity is a basic requirement for a case to be heard in Gladue Court. Accused persons are provided the opportunity to identify as Aboriginal in various ways. Duty counsel or the individual's own lawyer normally poses the question at the first meeting prior to appearing in court. Justices of the peace at Old City Hall are also aware of the need to recognize Aboriginal identity. If an accused person identifies as Aboriginal, counsel will refer the person to the Aboriginal court worker.[18] Service providers familiar with an accused individual will also alert a court official or the Aboriginal court worker to the fact a particular person is Aboriginal. Based on prior experience, court workers themselves are often familiar with individuals who are awaiting their first hearing. When a person is being held in custody at Old City Hall, the court worker meets with the person while s/he is held in the cells. Court workers also check the names of individuals held in the cells each day and can often tell if a person is Aboriginal by his or her name. Whether the court worker is advised of a person's Aboriginal identity by counsel or learns of it herself, she meets the person in the cells prior to the first hearing. She explains to the accused person the option to appear in Gladue Court and the potential benefits for an Aboriginal person.

In cases when the accused person is not being held in custody but arrives at Old City Hall on a promise to appear, it is especially important for counsel to ask about Aboriginal identity and to inform the court worker accordingly. The court worker frequently meets a client in the court worker's office at Old City Hall or in the hallway outside the dedicated courtroom either prior to the court being called into session or when the court is already in session.

The court worker plays an essential role in providing the opportunity for individuals to identify as Aboriginal prior to their first hearing. Similarly, it is important for the court worker and duty counsel to be aware of a client's Aboriginal identity prior to appearing for a bail hearing. If a client identifies as Aboriginal, the court worker seeks further information, including information regarding the following factors: personal background and current lifestyle; current living arrangements; whether s/he is status Indian, non-status, Metis or Inuit; the Band, reserve or

[18] One ALS court worker is assigned to Old City hall. However, she is supported when necessary by other ALS court workers who have responsibilities at other courts, including College Park. A new court worker was hired by ALS after the evaluation period (funded by the Ministry of the Attorney General) and will work at different courts as needed.

community with which s/he is affiliated; [19] who in the client's family is Aboriginal; work or school attendance; and other relevant information. The intake questions are important because they provide the court worker with an understanding of the client's circumstances and needs, thus enabling the court worker to advise the court and to make appropriate referrals to agencies and programs as part of a release plan.

Court workers and Aboriginal bail supervisors receive disclosure, a recent development that enhances their ability to understand the charged person through the lens of the offence and to design appropriate and effective release and supervision plans. As always, of course, disclosure is provided with the agreement of the Crown attorney and, while it is generally provided in Gladue Court, if a bail hearing is held in another court, Crowns are not as likely to agree.

> *Q: Do you think it's important for the court to know you're Aboriginal?*
>
> *A: Oh, yeah, for sure. I was in other courts and it's like they really don't care but I think I'm the way I am because of all the stuff I went through as a Native person. They should know about that. In this court they take you seriously. The judge talks to you and the Native courtworker helps a lot. They try to make a plan for you. Not in other courts, though.* – a man in cells who had appeared in Gladue Court previously

An Aboriginal person might choose not to appear in Gladue Court. This occurs very infrequently but has happened when a person is co-accused with a non-Aboriginal person and chooses to appear in another court with the other accused. This choice is typically made on the recommendation of counsel. In other cases, an individual may not be aware that he is, in fact, Aboriginal. Again, this occurs infrequently but has happened when the accused person has had no exposure to his/her community or culture. In very rare instances, a person might choose not to identify as Aboriginal simply on the basis of a personal identity choice.

It is also possible that counsel who are unfamiliar with Gladue Court or the provisions of the *Criminal Code* regarding Aboriginal persons will not make appropriate inquiries of a charged individual. This appears to have happened infrequently as almost all private bar counsel appearing at the Old City Hall Gladue Court do so regularly and are familiar with the importance

[19] Many clients appearing in Gladue Court do not have a band or reserve affiliation either because they are non-status, Métis or Inuit, or because they have lived all their lives in a city, in this case usually the GTA.

of the identity question.[20] That said, providing the opportunity for individuals to identify as Aboriginal is largely dependent on court professionals. It is therefore essential that court professionals – justices of the peace, duty counsel and private bar counsel – are knowledgeable regarding Aboriginal issues and build the identity question into their initial interactions with clients.

> *Q: How did you hear about the Aboriginal court at Old City Hall?*
>
> *A: Well, I was charged at the liquor store close to here so I guess that's why I'm here. But that lady – the lawyer who sees you when you come in [duty counsel] – she could tell I'm Native and she told me I could come to the Native court. Also another lady – the courtworker, I think – she talked to me too. They told me this is a special court for Native people and it might be good for me to be there. So I said yes. I think it's a good thing. But they need to advertise it more. I don't know but maybe if I was charged somewhere else maybe I could still come here. I was in other courts outside of Toronto but nobody told me about this special Native court so they need to, like, get the word out more. It's good.* – a man in cells prior to his first appearance in Gladue Court

On the basis of interviews and court observation, it is fair to say officials associated with the OCH Gladue Court, including judges, justices of the peace, Crowns and counsel who appear regularly, are knowledgeable about the Aboriginal provisions in the *Criminal Code*, Gladue principles, and the historical and current realities facing Aboriginal people. Ontario Legal Aid lawyers are obliged to take special training and are then granted membership on a Gladue panel, which is a requirement for work in Gladue Court. This arrangement appears to serve the court and clients well; however, panel lawyers occasionally give a designation to a non-panel lawyer. This is not necessarily problematic but has had some negative repercussions due to the lawyer's lack of familiarity with Gladue principles and options for diversion. Judges receive training on Gladue principles and concomitant legislation and are committed to understanding the circumstances and meeting the needs of Aboriginal people. In that light, and with the involvement of the Aboriginal court worker, Aboriginal individuals are consistently provided the opportunity to identify as Aboriginal early in the court process at Old City Hall. The opportunity

[20] Private bar counsel appearing in the OCH Gladue Court were without exception acting on a legal aid certificate.

to identify as Aboriginal may not be as clear at other courts. Further research is needed to address that question.

In addition to the OCH Gladue Court, there are Gladue Courts in Toronto at College Park, 1000 Finch and Scarborough. Aboriginal people at 2201 Finch have their charges traversed to 1000 Finch. Two respondents who had not previously been heard in a Gladue Court in Toronto but in court outside the GTA expressed the view that the court should be advertised more widely. However, it appears the OCH Gladue Court, together with the other GTA Gladue Courts, have been operating long enough that the Aboriginal population of Toronto is aware of their existence and mandate. That said, it remains a potential problem if charged individuals have their first appearance in a GTA court or in a court beyond the GTA where court officials, particularly defence counsel, are not aware of Gladue Courts or are not willing to traverse their clients to a Gladue Court. If counsel and other court officials in non-Gladue courts are so inclined and if the charged person is not aware of the option to self-identify, that person might fall through the cracks. The question remains as to what, if anything, should be done to make Aboriginal people and others aware of the importance of Aboriginal identification in court jurisdictions other than the GTA.

The question of Aboriginal identity and background is being handled with sensitivity and in ways that provide an opportunity for accused individuals to make a statement. We found that people who attended the OCH Gladue Court saw value in claiming their Aboriginal identity and would tell their friends to do the same. Benefits in terms of process and restorative opportunities associated with Gladue Court and ALS made it worth identifying as Aboriginal even if that had not originally been intended.

Gladue Reports and the Submission of Personal Information to the Court

Aboriginal Legal Services provides Gladue Reports to the court upon request, usually at the request of defence counsel, although judges and Crown attorneys can also ask for a report. Gladue Reports typically take six weeks to prepare and can take as long as three months. We were told repeatedly that they are much more comprehensive and more useful than a normal pre-sentence report because the ALS case workers who prepare the reports undertake detailed research on the individual's personal background. Case workers interview the client's family members and community members who know the person in different capacities; for example, former teachers and community leaders.[21]

[21] Aboriginal Legal Services provides Gladue Reports on request to 21 courts in southern, central and eastern Ontario, as well as to courts in Toronto.

According to Aboriginal Legal Services,

> Gladue Reports will only be prepared following a guilty plea or a finding of guilt. ALS will not prepare a Gladue Report in anticipation of a guilty plea. Gladue Reports are generally only done where the crown is seeking a custodial sentence of at least 90 days for an out-of-custody client or three additional months for a client who is in-custody…. Absent special circumstances, ALS will not do a Gladue Report for a client who will remain in custody on other charges that are unrelated to the Gladue Report.[22]

Interviews with counsel and ALS files indicate that Gladue Reports are requested frequently in cases meeting the criteria just noted. As many clients have appeared in Gladue Court on repeated occasions, once a Gladue Report has been written it can be referenced again. This is helpful for counsel's submission, but is also practical in view of the limited capacity of ALS to produce new reports.[23]

A related question is whether personal details about an accused individual's background should be raised in court. Information of this type would be consistent with Section 718.2(e) of the *Criminal Code*, insofar as judges require knowledge of an Aboriginal person's background in order to give proper consideration to disposition. As a member of the defence bar told us, the problem is that individuals often do not want the painful details of their life raised in a public forum. Moreover, many accused persons suffer the direct or intergenerational effects of past trauma – most notably residential schooling – and would find open discussion of their problems difficult to endure. In light of this reality, defence counsel who are familiar with Gladue Court and the challenges facing individuals who appear there usually refer in general terms to past trauma when making their submissions and refer the judge to specific pages in the Gladue Report (of which the judge will have a copy). This approach, while providing judges with the kind of information presumably indicated in Section 718.2(e) and in *Gladue*, offers some protection from additional trauma to particularly vulnerable people in court. Other lawyers, however, continue to raise difficult personal details in court, which is a problem in view of the common presence of other accused and students in the gallery.

Bail and Remand

When the adult Gladue Court was established at Old City Hall in 2001, it was reasoned that Gladue principles should apply to bail applications just as they should in sentencing.

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[22] Aboriginal Legal Services. http://www.aboriginallegal.ca/gladue-request-form.html

[23] ALS currently has three full-time case workers preparing Gladue Reports for 22 court jurisdictions.

Remanding Aboriginal individuals without attempting to find reasonable alternatives would contradict the intent of Section 718.2(e) and the Gladue principles initiated by the Supreme Court (Knazan, 2009). Justice Knazan (2009) has also expressed concern that a decision to deny bail may have a negative effect with respect to sentencing as a guilty person might be inherently more likely to be given a jail term in the absence of bail than might otherwise be the case.

As noted above, during the period October 1, 2013 to December 31, 2015, 169 informations were sampled for 66 randomly selected individuals appearing in Gladue Court at Old City Hall. Table 3 shows bail was granted in 106 (62.7%) of the selected cases in that period and not granted in 63 (37.2%) of the selected cases. We were unable to determine with certainty in cases when bail was not granted whether no application was made or an application was made but denied. Inconsistent court records and time constraints limited investigation into this question. However, based on anecdotal evidence, we estimate that approximately half the selected cases without bail were the result of the accused person not making a bail application. (See the section "Bail Application and Plea Decisions," below.)

Table 3: Bail, Sentencing and Jail Time in OCH Gladue Court, October, 2013 – December, 2015 (n= 169 sampled cases)

	Sampled cases	Resolved by sentencing	Jail
Bail granted	106 (62.7%)	91	25 (27.4%)
Bail not granted	63 (37.2%)	57	23 (40.3%)

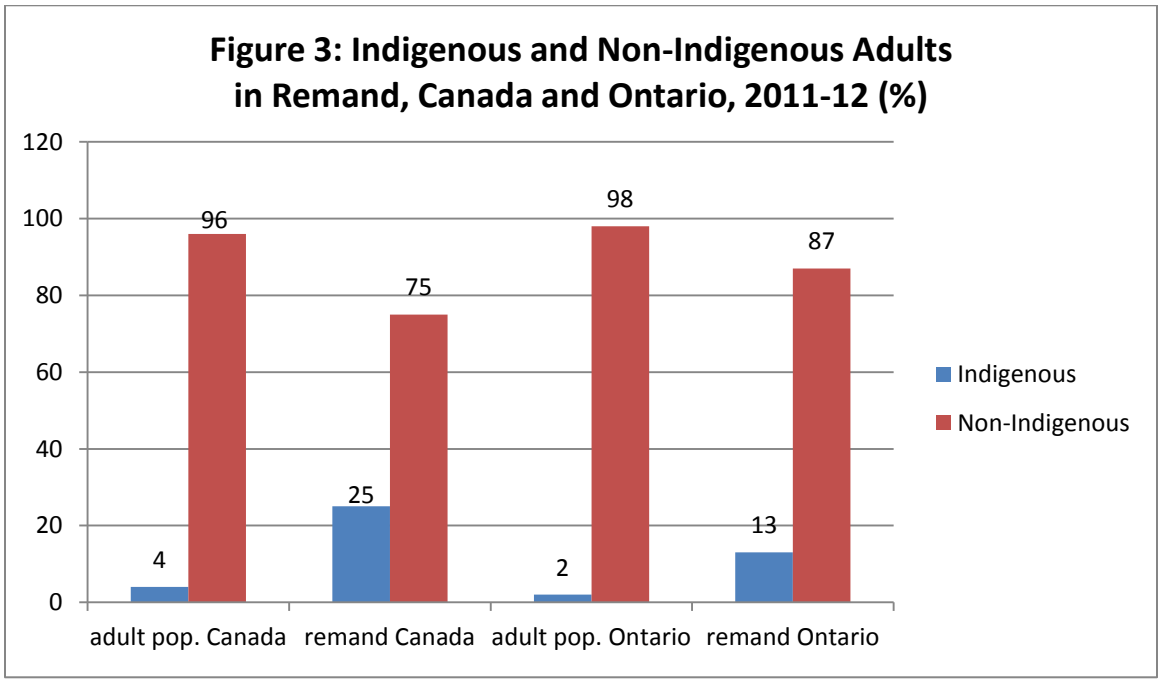
Source: Old City Hall court case files.

Of the cases resolved by sentencing, 91 cases had had bail granted, while 57 were without bail having been granted (total 148). Twenty-five of the 91 individuals who were granted bail were sentenced to jail time (27.4%). Twenty-three of the 57 individuals who did not receive bail were sentenced to jail time (40.3%). There appears to be a significant difference in terms of bail/no bail with respect to a custodial sentence, thus supporting Justice Knazan's argument.

This is an important question that requires more in-depth research. Is there a judicial and Crown predisposition to sentencing to custody individuals who have been denied bail? Are individuals who have been denied bail more likely to plead guilty on the assumption they will get jail time – but less jail time – at sentencing? If so, what are the implications for the offender? How does Gladue Court compare with other courts in this regard?

Of the 66 individuals included in the sample between October, 2013 and December, 2015, 24 were remanded to custody, while 42 were released. We did not collect data on the remand rates among non-Aboriginal people who appeared at Old City Hall; however, future research

should do this for comparative purposes. As Figure 3 shows, pre-trial detention is extremely common for Aboriginal people relative to the overall size of the Aboriginal population. While Aboriginal adults represent less than four percent of the total adult population of Canada, they comprise 25 percent of all pre-trial detentions. The Ontario figure for Aboriginal remands is somewhat lower at 13 percent. However, the Aboriginal population of Ontario is approximately 2 percent, compared to 4 percent nationally. The Ontario figures are therefore consistent with the national figures. Nationally and in Ontario, remand rates for Aboriginal women are even higher than for Aboriginal men.



Source: Statistics Canada. *Admissions to adult correctional services in Canada, 2011/2012*. http://www.statcan.gc.ca/pub/85-002-x/2014001/article/11918-eng.htm#a5
Statistics Canada. 2012.*Table 051-0001 - Estimates of population, by age group and sex for July 1, Canada, provinces and territories, annual (persons unless otherwise noted),* CANSIM (database).

Questions concerning bail and pre-trial detention for Aboriginal people in Canada are clearly serious. However, little research has been done on the reasons for the extremely high rates of bail denial and remand, or on the impacts of these realities. The work that has been done has shown that denial of bail has negative impacts on the individual and his/her family in terms of psychological stress and loss of opportunity. Further, as noted previously, individuals who are denied bail are more likely to receive jail time at sentencing. The reasons for the inequities are as yet mostly speculative (and not mutually exclusive). One theory is that police tend to use detention at a relatively high rate for Aboriginal people (Linden, 2007; Rogin, 2014). Another is that a certain ambiguity exists with respect to the use of pre-trial detention in cases involving administration of justice charges, particularly failure to comply with conditions and failure to

appear. In light of this ambiguity, judges who do not preside in a Gladue Court might be using pre-trial detention in these cases, again especially for Aboriginal people. A third theory is that in certain parts of the country alternative programming is either not culturally relevant or entirely non-existent, leaving judges with little choice but to remand a charged person and, in many cases, impose a custodial sentence when probation or another sentencing option would be more appropriate (Clark and Landau, 2012).

Reasons for high rates of bail denial and remand for Aboriginal people have not been thoroughly researched in Canada or Ontario. We did not examine the role of police in terms of Aboriginal detention. But we are aware that judges associated with Gladue Court and justices of the peace at Old City Hall are conscious of the importance of bail and the avoidance of remand in all types of cases, including those involving administration of justice offences. As well, Toronto is more fortunate than many parts of Canada in that culturally relevant programs are readily available for Aboriginal people. This is thanks to agencies such as Aboriginal Legal Services, Native Child and Family Services, and Council Fire, among others.

On the other hand, problems continue with respect to short-term remand at Old City Hall. Despite the good efforts of judges, justice of the peace, court workers, bail supervisors and others, 24 of our sample of 66 individuals (36%) were remanded to custody. There are a number of reasons for this, although more in-depth research is needed. First, Gladue Court meets only twice per week: Wednesday and Friday. If an individual is charged on a Friday night, the next possible opportunity for a bail hearing before a judge in Gladue Court is the following Wednesday. The charged person can choose to wait for that hearing while in custody or he can choose a bail hearing in regular bail court. There is a concern among several respondents associated with Gladue Court that some justices of the peace in regular bail court are not as aware of Gladue principles and may not be as sensitive to Aboriginal issues as Gladue Court judges with the ultimate result of bail being denied and the charged person in remand at least until the first available Gladue Court day. Second, there appears to be a problem in terms of some defence counsel not showing up at Gladue Court until mid-afternoon (court convenes at 10:00 am). This prevents the court from conducting all the required bail hearings on that day, resulting in continued remand for some people. Third, a surety often lives outside Toronto and cannot be at Old City Hall soon enough to participate in the bail approval process, thus leading to further remand. If there is no surety, the Toronto Bail Program, Gladue Supervision becomes involved, a process which tends to take more time. Thus, while Gladue Court is well intentioned with respect to bail and the avoidance of remand, systemic factors can have unintended, negative consequences.

A major factor in the relative success of the bail process in Gladue Court is the existence of the Toronto Bail Program, Gladue Supervision. This program, which started at approximately the same time as the OCH Gladue Court, is part of the larger Toronto Bail Program. The Aboriginal program aims to support bail release for individuals who would not normally be granted bail for lack of a surety or some other reason. In light of the marginalized status of most Aboriginal people passing through Old City Hall, it is unlikely an individual would have a surety who would be acceptable to the court. If a person meets certain fairly strict criteria, they can be supported by the program and are more likely to be granted bail than would otherwise be the case.[24]

> *Q: Why do you think you got bail?*
>
> *A: It was the bail program for Aboriginal people. The lawyer told me about it and we talked with a lady in the program [the Gladue Bail Supervisor]. There were other times when I was in other courts and I didn't get bail but I did this time. I think I'm an okay person. I've got some issues but I don't want to make trouble so getting bail was a pretty good thing for me.* – a woman on bail awaiting her hearing

A plan of supervision is developed at intake and the bail supervisor makes referrals to agencies that would be appropriate to address the circumstances and needs of the individual. In this regard the bail supervisor must work closely with the Aboriginal court worker who is responsible for designing a release plan. The bail program is also staffed by a mental health worker who is responsible for designing a plan with appropriate services and conditions for clients with serious mental health issues. The Crown attorney on the case is responsible for accepting the proposed Gladue bail plan. The conditions of bail are incorporated in a contract to be signed by the client and typically the client reports every week, although reporting may be more frequent if ordered by the presiding judge. If a client has met her bail conditions, the supervisor can write a 'performance letter' indicating the successful completion of the bail program. This letter can be provided to the Crown to be used in decisions regarding diversion and the withdrawal or staying of charges.

[24] Bail support would not be given through the program if, in the previous four years, the accused person had been guilty of one of the following offences: failure to appear or attend court; failure to comply with a recognizance or probation; unlawfully at large; parole violation; escape custody.

The Toronto Bail Program, Gladue Supervision is essential in realizing the intent of Section 718.2(e) and Gladue principles. While we were not able to get precise figures regarding the number of individuals who applied to the program and were granted bail, the overall figures noted above show that 62.7 percent of our sampled cases received bail. It is also important to say that plans of supervision address the particular requirements of Aboriginal people in that the contacts and referrals made are primarily to Aboriginal agencies. Our only word of caution is that the Gladue bail supervisor and the Aboriginal court worker must continue working together closely in order to develop the bail supervision contract and the plan of release as effectively as possible and without contradiction or duplication.

Bail for Aboriginal individuals at Old City Hall typically includes the following conditions, shown as a percentage of the individual clients who received a particular condition: to reside at a reported address (25.7%); not to attend a certain address (22.8%); no weapons (20.8%); attend treatment (19.8%); no contact with a certain person (16.9%); report to an officer of the court (14.1%); attend court (13.8%); sign release forms (so that treatment progress can be monitored (13.2%); follow the Aboriginal plan of care (13.0%); no unlawful drugs (8.4%).[25] Bail conditions are amended at the request of counsel. The two most common reasons for amendments were a change in residence location (e.g., moving to the residence of another family member), or the need to be present in a previously restricted area for purposes of attendance at school, work or a rehabilitative program. Court observation also suggests that the court is sensitive to the efforts of individuals who are working not only to meet their bail obligations but also to improve their lives in other ways. For example, if a person has achieved success in programming and has made other positive efforts, the court appears willing to acknowledge that fact and to offer encouragement by altering bail conditions so they are less restrictive.

Flexibility with regard to the granting of bail is seen by the Gladue Court judiciary as key in adhering to the intent of Section 718.2(e) and Gladue principles. The plans of release drafted by the court worker and her colleagues and the bail supervision plan designed by the Gladue bail supervisor are designed to address the circumstances and meet the needs of each individual while also ensuring cultural relevance. Like the individual diversion programming developed by the Community Council (described below), the plan of release is flexible in terms of its rehabilitative components. For example, Aboriginal culture is considered ideal but if an individual identifies strongly as Christian, the release plan can accommodate that reality by connecting the client with a church based program. Interviews with Aboriginal people confirm the bail process at Old City Hall is generally fair and reasonable. Interviews with defence counsel confirm that culturally relevant release plans do, in fact, make bail and diversion an easier decision for the court.

[25] Percentages refer to the sample for the period October, 2013 to December, 2015.

This is not necessarily the case at other courts. An interview question concerning the fairness of bail conditions was asked of Aboriginal people who had previously had their cases heard at another court. The responses were almost universally clear that the OCH Gladue Court acts in their best interests with respect to bail, while other courts do not necessarily do that. The release plans designed by the court worker and the bail supervision plans designed by the bail supervisor are highly regarded by respondents, in part because the client has a role in designing the plans and because they "make sense."

> *Q: Were the bail conditions you got okay for you? Did they make sense and could you stick with them?*
>
> *A (1): Yeah, they were okay. Better than at other courts where they tell you you can't do almost everything. One of my conditions is to get help with my drinking and that and they [the courtworker] got me connected with a program. It works pretty good. Also they told me that I can't go to the liquor store and I guess that's good … but it's hard. I want to stick with it, though. –* a man on bail awaiting his hearing
>
> *A (2): Well, it wasn't totally good because they told me I couldn't go near a certain place because the victim would be there. But that's where all my friends hang out and where I get support. So I don't know. Maybe my lawyer can get the judge to change my conditions. I won't hurt anybody or anything … I don't want to go through this again. –* a man on bail awaiting his hearing

While bail conditions are generally seen as fair, reasonable and culturally relevant, the question arises as to why rates of failure to comply with conditions and failure to appear are as high as they are. This question is addressed in the following section of the report.

Administration of Justice Offences

Failure to comply with bail or probation conditions and failure to appear in court are especially serious issues for Aboriginal people, as has been documented in numerous commissions of inquiry and academic studies. As Table 4 shows, during the period January to December, 2015 (the period covered by statistics available from the Ontario Court of Justice), administration of justice cases as a percentage of Aboriginal cases received at Old City Hall was higher than the

rates in Toronto and in all Old City Hall courts: 27.7 percent of OCH Aboriginal cases, compared to 20.7 percent of Toronto cases and 18.7 percent of OCH cases. Among Aboriginal people appearing at Old City Hall, administration of justice cases ranked first in terms of volume, while in Toronto and at OCH courts these cases ranked third after crimes against the person and property offences. Property offences ranked relatively high among Aboriginal cases at Old City Hall compared to Toronto and OCH courts (25.3% compared to 24.8% and 22.8%), while the rate of crimes against the person was comparatively low among OCH Aboriginal cases (23.4% compared to 35.1% and 24.5%). These comparisons indicate the relative significance of administrative offences among Aboriginal people. According to our review of sampled informations at Old City Hall, administrative offences among Aboriginal individuals most typically involve failure to comply with bail or probation conditions and failure to attend court.

Table 4
Adult Criminal Cases Received, Toronto, Old City Hall and OCH Aboriginal by Offence Group, January 2015 to December 2015

Offence Group	**Cases Received**			**% of All Cases Received**		
	Toronto	Old City Hall	OCH Aboriginal	Toronto	Old City Hall	OCH Aboriginal
Crimes Against the Person	13,984	3,135	98	35.1	24.5	23.4
Property	9,903	2,915	104	24.8	22.8	25.3
Administration of Justice	8,249	2,394	115	20.7	18.7	27.7
Other Criminal Code	1,996	681	14	5.0	5.3	3.3
Criminal Code Traffic	1,803	572	8	4.5	4.4	1.9
Federal Statute	3,856	3,081	76	9.6	24.1	18.4
Total Cases	39,791	12,778	415	100%	100%	100%

Case: refers to all charges on an information for each single accused.
Cases received: all cases received by a court location, adjusted for transfers to or from another court location.
Percentage totals add up to 100% before the frequencies are rounded to one decimal place.
Source: Old City Hall court files/informations; Ontario Court of Justice, *Offence Based Statistics* *http://www.ontariocourts.ca/ocj/files/stats/crim/2015/2015-Q4-Offence-Based-Criminal.pdf*

While the rates of administrative offences among Aboriginal individuals are higher than among non-Aboriginal individuals, judges in Gladue Court tend not to apply sanctions in the form of either remand or bail denial or revocation to the extent that might be seen in other jurisdictions.

We observed that judges in Gladue Court are flexible with regard to a person missing a court date. Bench warrants with discretion are preferred to a regular warrant. It is accepted that people often face challenges in terms of attending appointments, whether the appointments

be at court or an agency such as CAMH. The reasons for non-attendance are many; for example, other commitments such as work, inability to travel to Old City Hall, illness, sleep deprivation (sometimes associated with mental health), or simple forgetfulness. That said, the ALS court workers and the Gladue Bail Program supervisors make sincere efforts to remain in communication with their clients and provide reminders to show up for court. Defence counsel appear to be effective in explaining to the court why an individual might have missed a court date. Again, judges tend to be understanding and willing to give clients further opportunities to attend.

We found that the OCH Gladue Court adheres to the principles initiated in the *Criminal Code* and with the *Gladue* ruling with respect to Aboriginal people by granting bail whenever possible and reasonable, including when cases involve administrative charges. We also found that bail conditions are generally appropriate to the circumstances and needs of individuals and that bail conditions are most often linked to culturally relevant programs. Bail conditions are amended to reflect practical realities or the good efforts by a client.

In terms of disposition of administration of justice offences, we found that charges stayed for diversion and charges withdrawn were common. For example, our sample (October, 2013 to December, 2015) included 50 charges involving a failure to comply with bail conditions and 112 charges involving failure to comply with a probation order. As Table 5 indicates, charges were withdrawn in 41.9% of failure to comply bail charges and in 44.6% of failure to comply probation charges. Charges were stayed for diversion in 16.7% and 16.9% of charges for failure to comply bail and failure to comply probation, respectively. Jail time was handed down for 12.1% and 12.5% of these charges. We did not analyze comparable data for non-Aboriginal persons or for Aboriginal persons in other court jurisdictions; however, anecdotal information and the high percentages of charges withdrawn and charges stayed for diversion would suggest the OCH Gladue Court is committed to avoiding custodial sentences for administration of justice offences.

Table 5
Disposition by Charge: Failure to Comply Bail and Failure to Comply Probation, OCH Gladue Court, October, 2013 to December, 2015 (7 percent of cases sampled)

	Failure to Comply Bail	Failure to Comply Probation
Withdrawn	41.9%	44.6%
Ongoing matter	24.2%	20.5%
Stayed for diversion	16.7%	16.9%
Jail time	12.1%	12.5%
Suspended sentence	5.1%	3.5%
Other	0%	2.0%
Total	100%	100%

Source: Old City Hall court records.

A question raised in the previous section of the report is this: if bail conditions are considered fair and reasonable for Aboriginal people at Old City Hall, why are rates of administration of justice offences significantly higher than among non-Aboriginal people? This is a complex question that warrants more in-depth research than was undertaken for the evaluation. That said, there are two (perhaps more) possible explanations that may contribute in combination to the phenomenon. First, it is possible that bail conditions ordered for Aboriginal individuals are, in fact, not as fair and reasonable or as culturally appropriate for rehabilitation as respondents, including Aboriginal clients, tell us. While this explanation requires further investigation, it is not likely to be the sole answer, if it applies at all. Second, it is important to bear in mind that Aboriginal people are generally more marginalized than non-Aboriginal people. This view, which is almost universally held by researchers, academics and advocates, is based on the recognition of a continuing legacy of colonialism and socio-economic deprivation that negatively affects Aboriginal people in cities as well as in remote and isolated communities. In turn, these realities are consistent with greater risk of becoming involved with the justice system and, at the same time, a feeling of alienation from the system. The immediate result of this combination of factors is often non-compliance with the dictates of the justice system, regardless of whether bail conditions and court hearings are seen on the surface to be fair and reasonable. This is an important set of questions that should be addressed in an in-depth way by first asking Aboriginal people themselves.

Case Processing

Case processing times are longer and the number of appearances more numerous in the OCH Gladue Court than the provincial, Toronto and Old City Hall averages. Table 6 refers to the

average number of days to disposition[26] and the average number of appearances for cases disposed before a trial date in Ontario, Toronto, Old City Hall adult courts and the OCH Gladue Court for the period January to December, 2015. The averages broke down as follows: Ontario 104 days and 6.8 appearances; Toronto 112 days and 7.1 appearances; Old City Hall 99 days and 7.5 appearances. In the OCH Gladue Court for the same period (January to December, 2015), the average number of days to disposition was 153 and the average number of appearances was 9.6.

Table 6
Average Days to Disposition and Number of Appearances, Ontario, Toronto, OCH and Gladue Court, January to December, 2015

	Ontario	Toronto	OCH	OCH Gladue Court
Average days to disposition	104	112	99	153
Average appearances to disposition	6.8	7.1	7.5	9.6

Average number of days from when the first court appearance was scheduled to the date of the final court appearance in cases without bench warrants; appearances for cases disposed before a trial date.
Sources: Old City Hall court records; Ontario Court of Justice, Offence Based Statistics.

These comparisons are not unexpected and court officials, including counsel, and clients do not see the differences as a serious problem. Interview responses indicate all parties understand the importance of 'getting it right.' The court worker and bail supervisors take the time required to understand the circumstances and needs of each client and to set the best terms for release plans and bail supervision plans. These processes involve contacting and making referrals to agencies appropriate to the needs of the individual client. If a Gladue Report is requested, additional time is required to complete the process. Again, most people engaged in Gladue Court understand the overall benefits of the process and are not unhappy with the additional time and number of appearances required.

[26] Average number of days from when the first court appearance was scheduled to the date of the final court appearance in cases without bench warrants.

Q: Do you think your case was dealt with in a timely way?

A (1): Well, the timing was pretty good. Maybe not as fast as other courts where I was but it was okay. The thing is, in this court they take the time to talk to you, see what you need, and figure out a way to help you. Maybe it took a bit longer but I'm okay with that. They made arrangements for me and I got diverted. That was good too. – a man who had had his meeting with the Community Council and had completed his assigned programs

A (2): It was slow. I had to keep coming back because they kept adjourning my case. But I guess it's like that in other courts too, I don't know. The good thing is the lawyer and the courtworker were on my side and were there to help. I'd say that made up for the adjournments. – a woman awaiting her meeting with the Community Council

Courtroom Configuration

Gladue Court convenes in courtroom 116 at Old City Hall, a room similar to other courtrooms in the building. The presiding judge sits on the dais and other court officials (Crowns, defence counsel and others) are situated in the traditional courtroom configuration. This arrangement is significantly different from the Aboriginal Youth Court at 311 Jarvis Street initiated in 2012. A recent evaluation of the Aboriginal Youth Court described the proceedings this way:

> The judge presides … at a 'circle' comprising four tables arranged in a square [in the centre of the courtroom]. The Crown attorney is always present at the table, as are the Aboriginal court worker and either counsel or duty counsel. The judge encourages anyone involved with each youth in a supportive capacity to sit at the table. These individuals could include parents, guardians, siblings, case workers, CAS workers, probation officers, shelter supervisors, program facilitators, or close friends. The presiding judge offers everyone at the table the opportunity to speak about the case at hand. As well, the judge may question individuals participating in the circle and may invite others in the gallery, such as ALS youth workers, to provide information and views.

> The Aboriginal Youth Court is unique in that it provides a 'circle of care' within the courtroom itself. From the perspective of Aboriginal youth and their family members, the relative informality and inclusiveness of the AYC are among its most positive attributes. It is fair to say, for all the reasons regarding systemic discrimination noted by various commissions and the Supreme Court, Aboriginal people do not normally feel comfortable with the mainstream justice system. However, the responses provided in this evaluation clearly indicate individuals' original skepticism and, indeed, their fears of the system were allayed by the nature of the Aboriginal Youth Court and the professionals associated with it. The nature of the court provides youth with a sense of self-worth which, in turn, contributes to their rehabilitation. (Clark, 2016: 33-34)

This model appears to work well for the Aboriginal Youth Court. It is a model that should be considered for the OCH Gladue Court, although that court manages a significantly higher volume of cases and the time required to engage all the appropriate participants would be more than challenging on a regular basis.

Alternatively, sentencing circles held on an occasional basis could address the need to make the sentencing format more relevant to Aboriginal culture, while not over-burdening the court in terms of time availability. Judges at the OCH Gladue Court have recently held two sentencing circles which, by all accounts, were successful. This is a significant step in court proceedings. Sentencing circles hold their own challenges, as experience in other jurisdictions has shown, but they also hold real promise in terms of enhancing the interlegality (Proulx) or the intersectional make-up (Clark) between Indigenous and Euro-Canadian approaches to justice. Not all cases are necessarily appropriate for circles and there may be logistical challenges in convening them. It is fair to say circles 'take practice' to get right. However, based on the success of the first two circles held at the OCH Gladue Court, there appears to be potential for more.

Turning entirely to sentencing circles in the immediate future would not be practicable; however, in the immediate future individual judges may decide to convene circles occasionally on a case by case basis. In view of the inherent challenges in sentencing circles, the process should be iterative, monitored and altered as needed; 'the evolution of Gladue Court,' as one judge described it

> *It was all pretty good with the court worker and everything. I liked my lawyer too and the judge was good. But the courtroom was pretty bad. It's supposed to be a court for Aboriginal people but it's the same as any other court. I've heard about sitting in a circle – like the traditional Aboriginal way – but they don't do that. I think they should because it would make us feel less nervous and maybe we could speak up more. But at least they connect us to native programs and that helps a lot.* – a man diverted to the Community Council

Diversion

Diversions from Toronto Gladue Courts go primarily to the Community Council at Aboriginal Legal Services.[27] Approximately 133 adult diversions were made to the Community Council from Gladue Courts during the seven-month evaluation period. During the same period, approximately 95 diversions originated in the OCH Gladue Court. The Community Council is a restorative circle of Aboriginal volunteers, including Elders, who talk with the client about why the offence occurred, not about the offence itself. Unlike the probation system run by the Ontario government where program decisions are made by a probation officer, the Council is supportive of the client and sets a rehabilitative program in collaboration with him/her.[28]

The court worker at Old City Hall works closely with the client to identify the circumstances and needs of the individual and to set in motion the restorative process with the Community Council. The Council and the client reach a 'decision' which is a list of tasks to which the client agrees. This often includes attendance at the ALS anger management program, as well as activities at other agencies, as listed below. The programs suggested by the court worker and the Community Council are meant to be well suited to the individual. But, importantly, it is the client herself who decides on the program direction to follow. This appears to be important for individuals because it gives them agency in their own development and leads to a program direction that is more likely to elicit commitment and to result in success. Usually there is one meeting between a client and the Community Council for a set of charges. Occasionally the

[27] Diversions were also made to Native Child and Family Services, Council Fire, Anishnawbe Health and other agencies, although relatively few compared to diversions to the Community Council.
[28] Craig Proulx provides a thorough description of the Community Council in his book, *Reclaiming Aboriginal Justice, Identity, and Community* (2003).

Council will request a follow-up meeting, primarily for encouragement, support and assessing progress. As well, an ALS case worker (there are currently two case workers for adults) supports each client through their diversionary activities.

Several agencies provide programs to which Aboriginal clients are directed by the Community Council. Not all the agencies are strictly Aboriginal in their programming; however, Aboriginal clients claim to benefit from engagement in the programs. The prevalence of programs relevant to the needs of Aboriginal people means that Aboriginal people in Toronto (and the GTA) are fortunate relative to other parts of Canada. Agencies include the following:

- Aboriginal Legal Services
  - Harm reduction group
  - Housing location
  - Anger management
  - Life skills
  - Substance abuse counselling (recently ended)
- Council Fire
- Native Child and Family Services
- Anishnawbe Health
  - Offers sweat lodges, among other programs
- Miziwe Biik
  - Housing location
  - Education and training
  - Employment assistance.

In addition to engagement in structured programs, the Community Council often suggests other activities relevant to the needs of individual clients. Examples include:

- Explore volunteer activities in the Toronto Aboriginal community
- Request to the Toronto Police Service to have prints and photos sealed
- Get a driver's licence
- Prepare or update a resume
- Get a social insurance number
- Apply for jobs
- Begin an educational program or continue in a program already started.

In the interest of meeting the needs of individual clients, the court worker or the Community Council may recommend participation in a program outside the GTA. In one case, for example,

a man was urged to engage with the Native Friendship Centre in Halifax once he returned there to live with his mother.

> *For sure, I would tell people who I know about the Native court. The judge was pretty good but the best part was the other people who talked to me from when I was in the cells. I talked to the lawyer lady [duty counsel] and I think it was the lady courtworker. I think they really want to help. So I got diverted and I think it will be good for me. I hope so, anyway.* – a man awaiting his meeting with the Community Council

While case workers support individual clients during the diversion process, ALS sees it as important not to "police" clients while they are on their restorative path. Clients are told – and it is written into the agreement with the Community Council – that should the client be re-arrested, s/he will not be permitted to return to the Community Council until the previous diversion has been completed. After that has been achieved, the client can return on another diversion. Clients attending the Community Council are urged to contact their case worker for support if they have questions or are unsure of their path.

At least three positive results arise from diversion. First, individuals who are diverted and who have charges withdrawn do not leave the process with a criminal record (unless they have a prior record). The significance of this is obvious when speaking of disadvantaged people who need to make the most of every opportunity available to them in terms or work, housing, education, etc.

Second, adults diverted to the Community Council and subsequently to culturally and individually appropriate programming may continue to be more engaged with their culture than they had been before their involvement with Gladue Court and diversion. For example, we found that individuals occasionally continued to visit the ALS office simply to maintain their connections with other Indigenous people in a positive setting. We heard from former clients that the process had positive impacts on their lives and on their relationships with others. Regrettably, although not surprisingly, this was not as common among adult clients as it was among youth diverted from the Aboriginal Youth Court.

Third, we found that clients who had been through the Gladue Court-Community Council process were less likely to re-offend than Aboriginal adults in other jurisdictions. These findings are consistent with an evaluation of the ALST Community Council Program undertaken in 2000 (Campbell Research Associates, 2000).

> *The best thing about the [Gladue] court is they listen to you. It's like they care about the fact you're an Native person. I know I'm not exactly perfect but I deserve some respect too. And maybe that will help me get better. The other good thing is that they try to come up with a plan of things that you can do that will help you. Like, I need help with my drinking so if the people at the court can help me with that, it's pretty good.* – a woman in cells awaiting her second hearing in Gladue Court

In certain parts of Canada, re-offending rates are over 85 percent. During the evaluation period we saw a re-offending rate prior to resolution of cases of approximately 50 percent. Among individuals diverted from the OCH Gladue Court to the Community Council, the re-offending rate during the course of diversion programming was approximately 21 percent. To the extent we were able to review individual cases, the re-offending rate among clients whose cases had been heard at the OCH Gladue Court but who had had their charges withdrawn without being diverted was higher at 54 percent. Again, however, these rates are comparatively low in the larger context. Based on an analysis of the profiles of a sample of diverted clients (personal history, current living conditions, prior convictions) we saw that people with a more troubled past and present were more likely to re-offend during the diversion process. [29] However, the rate was not very much higher than that for diverted individuals who had a less troubled life: 24 percent compared to 21 percent.

We also saw that new charges incurred while clients were engaged in diversion programming tended to be less serious than their previous charges. While property offences remained at approximately the same level among those who re-offended, crimes against the person declined significantly. This may be a function of anger management programs (a common diversion program), engagement with one's Indigenous culture, and support from ALS workers.

[29] Unsurprisingly, individuals who had attended residential school, had been in foster care, and/or had substance abuse problems had a higher rate of re-offending during the course of diversion.

A reduction in re-offending is not a direct objective of the OCH Gladue Court. It is also important to acknowledge that Aboriginal people are at relatively high risk of being involved with the criminal justice system. Therefore, the assumption of major immediate and long term impacts with regard to re-offending is not realistic. However, the re-offending rates we saw during the evaluation period can be interpreted as a positive result of the Gladue Court-Community Council diversion approach.

> *I couldn't believe I got diverted. That never happened to me before in other courts. I didn't even know it was possible before I came here but they told me about it and they helped to make it work. I think it's a really good opportunity for me to get some help and turn myself around a bit. I'm looking forward to it.* – a man awaiting his meeting with the Community Council

Of the 66 individuals selected in our sample for the period October, 2013 to December, 2015, 25.4 percent of cases were stayed for diversion. Diversion is decided by the Crown attorney (provincial and federal jointly, as required) with important input from the court worker. Clients are given the opportunity to prove themselves while on bail in the hope of improving their chances for diversion. That process takes additional time, which is one of the factors contributing to longer than average case processing times in the OCH Gladue Court. However, the extra time is considered justified by court officials, by support agency staff (e.g., Aboriginal Legal Services), and generally by the clients themselves.

Bail Application and Plea Decisions

The consensus among individuals interviewed for this evaluation, including people caught up in the justice system, is that Gladue Court at Old City Hall is a positive step toward reconciling Canadian justice with Aboriginal realities. It might not be perfect but it is significantly better than mainstream criminal courts as far as Aboriginal people, Aboriginal service providers and the professionals who work in Gladue Court are concerned.

There is, however, a fundamental question that remains to be addressed. As one defence counsel put it, Gladue Court is great 'but it's a safe place for my clients to plead guilty.' But is a

guilty plea always valid? This is a question that casts doubt on the commonly accepted principle 'innocent until proven guilty.'

In my discussions with accused people involved in Gladue Court, this was a difficult topic. Once a person has made a decision about their admission of guilt, they are not likely to share their reasoning with an evaluator. I have seen this phenomenon many times in courts across the country over many years. A probable explanation is the vast extent of mistrust and cynicism held by Aboriginal people regarding the criminal justice system. Question: Why did you plead guilty? Answer: To get it over with. The assumption inherent in this response is that, regardless of the person's culpability, the system would find them guilty anyway, so why not get through it as soon as possible?

Another possible explanation is that the accused person is acting strategically. Are accused people pleading guilty at their first hearing – whether guilty or not – in order to be sentenced in Gladue Court where they stand a reasonable chance of diversion and direction to rehabilitative programs? Further, are they choosing not to apply for bail in the knowledge they could still be diverted, or, if sentenced to jail, their jail term would account for time served?

As Rudin points out, a concern 'is the tendency of many Aboriginal accused persons to plead guilty to their offences if they are denied bail' (2007: 2, 51-57). The reduction in custodial sentences in recent years has meant that many individuals who are held in remand and plead guilty 'are essentially receiving "time-served " sentences' (Rudin, 2007: 2).

Again, these are fundamental questions that should be discussed by professionals in the OCH Gladue Court and representatives of Aboriginal Legal Services. There is not likely an easy answer but addressing the issue may provide another example of 'the evolution of Gladue Court.'

Conclusions

This section of the report provides conclusions based on the analysis of available information. Recommendations reasonably arising from those conclusions follow. The conclusions address both process questions – how Gladue Court and related institutions operate to achieve the objectives of the court – and outcome questions – the success of the court in achieving its objectives. A series of indicators relating to objectives were identified earlier in the report. Again, the objectives of the OCH Gladue Court are as follows:

- Directly address section 718.2(e) of the *Criminal Code* and the Gladue principles identified by the Supreme Court;
- Interpret bail provisions liberally so that pre-trial detention is not imposed unnecessarily and does not lead more directly to custodial sanctions;
- Encourage effective alternatives to incarceration for Aboriginal offenders, developed through a culturally and individually appropriate process;
- Encourage the development of resolution plans which will engage Aboriginal persons in their own rehabilitation;
- Provide opportunities for Aboriginal community agencies to engage in the rehabilitation of Aboriginal persons.

The OCH Gladue Court was conceived and initiated primarily with a view to applying the specific components of the *Criminal Code* and Gladue principles identified in the first objective listed above. The four subsequent objectives, important in their own right, are essentially intended to achieve the primary objective. The following conclusions and recommendations are therefore framed in terms of the first objective while considering the significance of the subsequent objectives in terms of the first.

Aboriginal Identity

We found that Aboriginal individuals whose cases arrive at the OCH Gladue Court are provided reasonable opportunities to identify as Aboriginal. Justices of the peace and duty counsel are aware of the need to inquire about an individual's identity. Defence counsel who regularly appear Gladue Court are cognizant of Gladue principles and the importance of Aboriginal self-identification. The court worker checks the daily court docket and is usually present at bail hearings. If an Aboriginal person is being held in custody, the court worker speaks with that person to explain the option to appear in Gladue Court. It is possible but not likely, thanks to the efforts of the court worker and court officials, that the identity of an Aboriginal person would be missed at OCH. An Aboriginal person might choose not to appear in Gladue Court for personal reasons, although this appears to have occurred very rarely. The role of the Aboriginal court worker is essential with respect to identifying individuals as Aboriginal.

There is a concern that accused Aboriginal persons whose cases arrive at other GTA courts are not receiving the same opportunities to identify as Aboriginal. This may be due, in part, to the lack of awareness of Section 718.2(e) and the Supreme Court's Gladue principles by justices of the peace and counsel. Court workers, who would normally ensure the opportunity to identify as Aboriginal, do not work at every GTA court. More education and training are required for justice professionals working in non-Gladue courts.

Awareness of Gladue Principles by Court Officials

Court officials, including judges, Crowns, duty counsel and counsel appearing in the OCH Gladue Court are well aware of Gladue principles and the importance of accused persons identifying as Aboriginal. Moreover, they understand how Gladue Court differs from other courts in acknowledging the circumstances and meeting the needs of Aboriginal people. Justices of the peace at Old City Hall are generally aware of the need for Aboriginal individuals to identify as Aboriginal and that Gladue principles apply when making bail decisions and setting bail conditions.

Court observation suggests that counsel appearing in the OCH Gladue Court do not generally present an argument as to why a person should be managed in a particular way because of his/her Aboriginal background (the "Gladue argument") unless there is an especially relevant point with reference to the person's attempts to rehabilitate through engagement with Aboriginal cultural activities. In such cases the court worker contributes relevant information. We found that Gladue Court officials understand the background circumstances generally facing Aboriginal people and that those circumstances do not often require explanation by way of a Gladue argument. On the other hand, Gladue Reports pertaining specifically to the background of an individual are often requested and used by all parties, including judges. Consistency in court personnel is important with regard to understanding the context of Aboriginal offending. For example, the fact the Crown understands the issues and is familiar with the resources available for Aboriginal people provides assurance that Gladue principles will be applied and that the resources offered by ALS and other agencies serving Aboriginal people will be drawn upon.

Case Management and the Role of the Aboriginal Court Worker

As noted above, the court worker plays an essential role at Gladue Court. She is the bridge between the court and restorative alternatives for each accused person. She is key in identifying individuals as Aboriginal and explaining the Gladue Court option to them. She provides information regarding the circumstances and needs of individuals to the court and liaises with care givers and representatives of agencies with the capacity to assist Aboriginal people. Individuals whose hearings are at the OCH Gladue Court almost always connect with the court worker in a timely manner and with enough information exchange to assist both the accused person and the court. Each person's background, particularly as an Aboriginal person, is documented by the court worker and the information shared with the court as appropriate in order for the court to be able to apply Gladue principles in responding to the circumstances and needs of the individual. The court worker and the Gladue bail supervisor, together with others, develop release plans and bail supervision plans, and report to the court regarding each individual's progress with the plans. This information is significant in the Crown's decision to

divert. Similarly, the court worker provides information to the judge when requested at sentencing and advice to the Community Council with respect to appropriate diversion programs. The Aboriginal court worker plays an essential role with regard to case management and the successful operation of the OCH Gladue Court.

Alternatives to Incarceration

The OCH Gladue Court is effective in finding alternatives to pre-trial detention and sentenced custody. Moreover, with the involvement of Aboriginal Legal Services and other agencies, people are provided the opportunity to engage in culturally appropriate alternatives. Accused individuals have agency in determining their diversion plans through their interactions with the Aboriginal court worker and the Community Council.

The relationship between the OCH Gladue Court and Aboriginal Legal Services cannot be overstressed. The Aboriginal court workers and their colleagues, along with the Community Council, are essential in assessing the circumstances and meeting the needs of Aboriginal people in trouble with the law. In a three-year evaluation of the ALST caseworker program associated with the OCH Gladue Court (caseworkers write Gladue Reports), Jane Campbell said this of ALS personnel:

> … there is a high level of trust among team members that took time to build – the continuity of these team members in their positions has been important to this development of trust; this has influenced how the court operates and enables all parties to provide greatest assistance to Aboriginal offenders; having this network in court facilitates addressing the offender's needs. (2008: 21)

The same applies to the court worker and the Community Council members engaged with individuals through Gladue Court. Understanding of the issues facing Aboriginal people, dedication and continuity are essential and enable the successful transition from the court to restorative programming in diversion to the Community Council. Similarly, by my observations judges, Crowns, duty counsel and counsel appearing regularly in Gladue Court exhibit the same qualities of understanding, dedication and, very importantly, continuity in their work. They appear to effectively apply Gladue principles and address Aboriginal overrepresentation through creative resolutions.

The OCH Gladue Court has achieved a significant degree of success in addressing the requirements of the *Criminal Code* with respect to Aboriginal accused persons. It is clearly the case that Gladue Court is dependent on Aboriginal Legal Services for effective case management and to provide restorative options associated with the court. Similarly, the

restorative programs offered by ALS and other agencies (primarily Aboriginal) in the GTA are essential to the success of Gladue Court. This has been demonstrated in several ways and confirmed with reference to various information sources, including Aboriginal individuals engaged in the system.

In the view of the evaluator, the Gladue Court at Old City Hall is clearly meeting its five objectives. While some challenges and potential problems remain, the court has maintained flexibility and has adapted since its beginning. The OCH Gladue Court, together with Aboriginal Legal Services/Community Council, the Toronto Bail Program, Gladue Supervision and other agencies, is providing a critically important service to Aboriginal people, their families and the larger Aboriginal community and should be seen as a model for the development of similar initiatives in Ontario and throughout Canada.

Recommendations

1. Aboriginal people in other Toronto court jurisdictions may not be getting the opportunity to identify as Aboriginal. Further, it is possible that little or no special provision is made for those individuals who do identify. It is possible that many are "falling through the cracks." The OCH Gladue Court is operating at full capacity and cannot increase its intake. However, the problem could be addressed in a number of ways. First, the OCH Gladue Court could convene more than two days per week. The problem with this idea is that judges and other court staff do not have the time to dedicate to additional Gladue Court days. Second, additional dedicated Gladue Courts than already exist could be opened in the GTA and beyond. This would require logistical planning and intensive training of court officials on the *Criminal Code* requirements and Gladue principles. Third, additional outreach and education could be provided to judges, Crowns and defence counsel at other existing courts (not necessarily dedicated Gladue Courts) in order to provide opportunities for Aboriginal people to self-identify and to connect those people to culturally appropriate programming. Finally, the planned new courthouse should be designed in terms of structure and process to manage Aboriginal cases effectively and efficiently.

   It is essential for the criminal justice system to provide the opportunity for Aboriginal people to self-identify and to be treated in the manner intended by Section 718.2(e) of the *Criminal Code* and the Gladue principles set out by the Supreme Court. The Ministry of the Attorney General, together with representatives of Gladue Courts, Aboriginal Legal Services and the Toronto Bail Program, Gladue Supervision should develop a plan of action regarding these issues.

2. The OCH Gladue Court works well in large part thanks to the justice professionals who work there. It was expressed several times during the evaluation that a change in personnel (e.g., Crown attorneys) could change the dynamic overnight. The federal and provincial governments should ensure consistency among officials working at the OCH Gladue Court. As well, personnel must be carefully screened for their knowledge, experience and commitment to Aboriginal justice issues prior to being assigned to the court.

3. The question of accused individuals deciding to plead guilty and not to apply for bail when they should do otherwise is a fundamental question to be addressed in an informal setting by professionals associated with the court and representatives of Aboriginal Legal Services and the Community Council. The Gladue Court Operations Committee might be the best place to begin the discussion.

4. Additional sentencing circles should be considered for the OCH Gladue Court. There are potential benefits and challenges to the use of circles and the question requires careful consideration on a case by case basis. However, if it seems appropriate and if all parties (including the victim) consent, circles should be arranged. The use of sentencing circles should be assessed and modified as required.

5. The Aboriginal Legal Services court workers and case workers perform essential roles in support of the OCH Gladue Court. It is therefore essential for the Ministry of the Attorney General and Justice Canada to continue funding these programs on an ongoing basis.

6. Several references to further research have been made throughout this report. Comparative analysis between the OCH Gladue Court and other Gladue Courts and non-Gladue Courts will provide a more thorough understanding of Gladue processes. In-depth research into questions regarding the rates of bail denial and remand for Aboriginal persons is especially important. As well, investigation into reasons for individuals choosing not to apply for bail and to enter a guilty plea when they should probably do otherwise is also needed. In both cases, the extent of the problems must be addressed, in part, by asking Aboriginal people themselves.

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