

EVALUATION OF THE  
ABORIGINAL LEGAL SERVICES OF TORONTO  
GLADUE CASEWORKER PROGRAM

YEAR THREE  
OCTOBER 2006-SEPTEMBER 2007

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## 1.0 INTRODUCTION

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

This report presents a comparison of dedicated Gladue courts and non-dedicated Gladue courts hearing Gladue reports based on interviews undertaken from September to November 2007 with judges, Crowns and defence/duty counsel, the ALST program director and Gladue caseworkers as well as information obtained from caseworkers' daily logs, client records and relevant program documents that cover the third year of the Gladue Caseworker Program from October 2006 to September 2007.

### 1.1 Description of the Gladue Caseworker Program

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

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

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

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

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

In the first year, the judges who sit in this court, the Crown Attorneys and the duty counsel had specific education sessions, provided by ALST, on the issues facing Aboriginal people in the city. Training sessions were also provided for defence though the session for defence counsel was not well attended. ALST created a resource guide outlining Aboriginal-specific programs

and services in the city. This guide was distributed to all the judges in the city as well as Crown Attorneys and duty counsel and is updated annually.

The Gladue Court, as well as College Park, 311 Jarvis, 1000 Finch, 2201 Finch and Scarborough courts, has the benefit of Aboriginal courtworkers (employees of ALST) who attend court on a regular basis. There is daily coverage at OCH, College Park and 311 Jarvis but Scarborough, 1000 Finch and 2201 Finch are all served by one courtworker. Aboriginal courtworkers assist Aboriginal accused persons to find counsel, prepare release plans for bail or sentencing purposes, provide referrals to services, explain the court process to accused persons and their families and carry out other related activities.

It was felt that one of the prerequisites for the formation of the Gladue Court was a specific person whose role it would be to write Gladue reports. ALST created a new position of Gladue (Aboriginal Persons) Court caseworker for the Old City Hall court (this position is funded by the Ministry of the Attorney General). Gladue caseworkers had previously attended Gladue courts when they were sitting. However, it was decided in the third year of the program that being present in court required a significant amount of their time that, given the demand for Gladue reports, would be better used in the research and writing necessary to prepare them. Since early 2007, a Gladue Liaison worker attends Gladue Court when it sits and transmits requests for Gladue reports to the Gladue caseworkers who prepare the reports.

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

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

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

The ALST Program Director, a lawyer and instructor in the Law and Society Program at York University, oversees the Gladue Caseworker Program and directly supervises the caseworkers. This includes reviewing every Gladue report before it is submitted to the court, assessing the

implications of the Crown's position as to sentence and declining cases which are clearly inappropriate. ALST also provides funds to assist offenders obtain treatment and/or to purchase tickets so they can get to treatment facilities.

Training for the caseworkers is carried out by ALST as there is currently no particular training program for those undertaking the writing of Gladue reports. The caseworkers' training involves education on issues of the law, on the Gladue decision and on theories of punishment and sentencing. In addition, information is provided on the types of programs and services available to Aboriginal offenders, how these services operate, how they can be accessed, waiting periods etc. New caseworkers spend time observing experienced ones in court. Finally, caseworkers practice the way in which reports are to be written and how to write them. No specific training materials have been produced aside from a collection of answers to a range of questions posed by the caseworkers. Training is an on-going process. Gladue caseworkers attend relevant conferences or seminars and meet regularly with the supervisor for team meetings to share experiences, problem solve and work on the further development of the project together.

In the first year all caseworkers had had some formal legal training and some had completed a law degree at the point at which they were hired (one had been doing his articles at ALST). However, those caseworkers maintained that a law degree is not a necessary qualification for this position and its associated work. There was a complete turnover of caseworkers with three new hires in 2005-2006. Two do not have law degrees but have qualifications and experience in journalism and social service. The third has a law degree as well as experience as an Aboriginal courtworker. In the third year another change in staffing took place with one of the caseworkers taking on another position at ALST and a former caseworker (now a lawyer) taking over until September 2007. At this point, three Gladue caseworkers are carrying the program – two in Toronto and another in Brantford.

## 1.2 Expansion of the Gladue Caseworker Program in Years Two and Three

The pilot Gladue Caseworker Program in the non-Gladue Courts was implemented in Toronto courts (other than Old City Hall) and in Hamilton/Brantford in the fall of 2004. In late fall 2005 the ALST program director met with the regional judge and other members of the judiciary to plan the implementation of a Gladue court at 1000 Finch. This Gladue court began operation at the end of January 2006 and takes Aboriginal cases from 2201 Finch. Between January and March 2006 discussions were held with the judiciary about establishing a Gladue court at College Park. This court began hearing cases in early June 2006. Currently, a Gladue court operates at OCH all day Tuesdays and Fridays, at 1000 Finch on Mondays for a half-day and at College Park on Thursdays. The caseworkers also handle Gladue reports requested by other Toronto courts.

Due to the workload of the caseworkers as well as to the relative infrequency of Gladue reports being dealt with during the actual court process, a decision was made in the third year not to have the caseworkers attend court unless sentencing with a Gladue report is scheduled. Formerly, caseworkers had spent considerable time sitting in court without having a specific function to perform. Caseworkers have occasionally been called to testify regarding their report. However, in the longest-functioning Gladue courts (i.e., Old City Hall and College Park) caseworkers, when required to answer questions, have been able to speak from the body of the court.

In the 2006-2007 fiscal year the position of Gladue aftercare worker was created with funding from Miziwe Biik and continued in 2007-08 with funding obtained from the Ontario Ministry of Attorney General. This individual assists the offender in carrying out the conditions of the Gladue sentence by facilitating the offender's contacts with required services and making the necessary arrangements for obtaining the service according to the sentence handed down. Legal Aid Ontario will be providing funding for a second aftercare worker beginning in April 2008. In April 2006 the position of Gladue liaison worker was created, funded by Miziwe Biik Aboriginal Training and Employment. The purpose of this position is to act as liaison between the Gladue courts and the ALST Gladue team. This includes: attending the Toronto Gladue courts, preparing all documentation for the reports ordered and assist the Gladue caseworkers as required in developing the reports as well as assisting or filling in for the caseworkers on busy days, illness absences and vacations. There have been two individuals in the Gladue liaison position, both with university degrees, and one has since become a Gladue caseworker.

Although the judiciary has been very supportive of the program expansion, the key constraint has been arranging for court time in the busy Toronto courts to dedicate to a Gladue court. The support of the senior regional judges, other members of the judiciary and many justice personnel involved with the courts has been a major facilitating factor in the establishment of additional Gladue courts.

A number of information and public legal education sessions were carried out by the ALST program director over the past year:

- Meetings with duty counsel and other support staff at Brampton Courts and duty counsel at 1000 Finch;
- Meeting with Ontario Parole and Earned Remission Board regarding Gladue and parole;
- Meeting with Local Administrative Judge at 311 Jarvis Youth Court;
- Meeting with bail program at College Park;
- Training of Crown Attorneys with respect to Gladue;
- Training session with judges at OCH and CP focusing on Aboriginal identity and the use of the eagle feather;
- Program Director participated in a meeting to review the province's Aboriginal Justice Strategy;
- Program Director served on the planning committee for two one-day MAG-sponsored conferences on Gladue in Sudbury and Thunder Bay;
- Program Director attended community meeting in Vancouver to discuss the Toronto Gladue court and other models for inclusion of Gladue;
- Two groups from B.C. (Courtworkers and Vancouver Aboriginal Caucus) as well as from Mushkegowek Tribal Council visited ALST and Gladue Courts;
- Meeting with researchers on issues relating to clients with dual diagnoses (mental health and addictions);
- Program Director made presentations to Justice Committee of the House of Commons on Bill C-9 – to restrict access to conditional sentences and Bill C-10 – to increase minimum sentences.

ALST has also been involved in interventions in court cases related to issues regarding the application of s.718.2(e) and Gladue:

- ALST's Legal Clinic presented its arguments in *Hill v. Hamilton Wentworth Police* at the Supreme Court of Canada. While the case was a civil case and focused on the tort of negligent investigation, ALST's intervention addressed, among other things, the weight the court should place on the Gladue decision in determining the nature of the tort in Canada (factum has been posted on the ALST website litigation page).

- ALST's Clinic was retained by Mark Kakekagamick to appeal the sentence he received in R v. Kakekagamick (the Court of Appeal judgement on the Gladue page of the website). The Ontario Court of Appeal found that Gladue had not been properly applied. However, the Superior Court of Canada refused the leave to appeal request.
- ALST's Clinic was retained by Warren Parenteau to appeal his sentence from the Ontario Court of Justice in Dryden. No consideration of Gladue had taken place in his sentencing. Again, the Court of Appeal required a Gladue report and, based on that, reduced the sentence to time served.
- ALST's Clinic also took an appeal to the Ontario Court of Appeal for Lee Wilde that was successful. He too received a "time served" sentence.

ALST has entered into an agreement with the Mnjikaning First Nation in the Barrie area where its Biidabaan Program prepares Gladue reports for its members who are before the courts. The Gladue Program provided training to the Biidabaan staff person and supervises the writing of the reports in the same manner as with other Gladue reports.

The ALST website has been regularly updated with the materials produced by ALST in relation to cases involving Aboriginal people (e.g., factum argued on the base of intervenor status before the Supreme Court of Canada in R. BWP, subsequent decision, five Gladue cases at the Ontario Court of Appeal, four Gladue sentencing decisions at the Ontario Superior Court, 18 decisions at the Ontario Court of Justice and one at Youth Court) as well as articles, case comments and the two evaluations carried out in 2004-05 and 2005-06.

### 1.3 Funding of the Gladue Caseworker Program

The program was fully funded by LAO over the three-year period as follows:

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

### 1.4 Evaluation Issues

The program proposal describes the pilot project goal as being:

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

Seven objectives have also been set out in the proposal:

- > Sentences for Aboriginal offenders will better conform to the principles set out in s. 718.2(e) of the Criminal Code and the decision of the Supreme Court in R v. Gladue;
- > Greater awareness of the Gladue decision in courts outside of Old City Hall;
- > Raised expectations from the bench that counsel will specifically advert to Gladue in their submissions;
- > More participation from Aboriginal service providers and First Nations in terms of assisting in the carrying out of sentences;
- > The development, in some communities, of Aboriginal alternative justice programs;
- > The development of Gladue Courts in some jurisdictions; and
- > Development of models to allow the Gladue Caseworker position to be put into place in other jurisdictions across the province.

Over the three-year period from April 2004 to September 2007 the evaluation examined a number of areas related to the implementation, operation and results of the Gladue Caseworker Program:

- project implementation in non-Gladue courts
- Gladue project operation
- Gladue process in Gladue and non-Gladue courts
- results for offenders
- impact on courts and the justice community

In years one and two data was collected from the Gladue courts at OCH, College Park and 1000 Finch in Toronto as well as the non-Gladue court in Brantford. The following sections of this report present the findings for the most recent operational year, i.e., year three, 2006-07, in which a comparison between a dedicated Gladue court and a non-dedicated Gladue court was carried out.

## 2.0 EVALUATION DATA SOURCES AND METHODOLOGIES

In year three it was decided to focus on examining the process in a dedicated Gladue court (i.e., College Park) and a non-dedicated court (i.e., Brantford) in which Gladue reports were used in sentencing. Issues of interest were how these two different courts operated and the implications that their operations had for Aboriginal persons. This report on the third year of the Gladue Caseworker Program collected data from a number of sources:

- ALST and Gladue program staff
  - Individuals involved in the court process in two courts – a dedicated Gladue court, i.e., College Park, and a non-Gladue court in which Gladue reports are submitted on request, i.e., Brantford; these individuals include: judges, Crown attorneys and defence/duty counsel;
  - Program records and documents:
    - quarterly reports to LAO
    - materials produced
    - samples of Gladue reports
  - Data bases developed in spreadsheet format for the evaluation at the outset in 2004:
    - a caseworker log: to capture on an ongoing basis the daily activities and time required of the caseworkers;
    - client record: to document characteristics of the individual clients as well as of their cases;
- In the third year of the program (October 2006-September 2007) Gladue caseworkers provided information on these data bases for 37 clients and a total of 292 working days.
- Observations of court proceedings in the two courts:
    - The consultants attended College Park and Brantford courts on three days in each location. Systematic observations were carried out guided by an “observation checklist”. Although the days were selected on the basis of the expectation that a sentencing using a Gladue report would take place, this did not always happen as sentencing was sometimes put over to another date for a variety of reasons.

### 3.0 GLADUE CASEWORKER PROGRAM OPERATION

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

#### **Gladue Caseworker Program Management Activities and Time**

As in the first year, the ALST program director estimates that supervising the Gladue Caseworker Program requires approximately 40-50 hours per month (over half of the time that the director is present at ALST). The program director is in the office four days per week (and often five) and is always available to the caseworkers, by cell phone or e-mail if not in the office. Caseworkers reported that they were always able to obtain very fast response from the program director when needed. The activities carried out by the program director in relation to this program include:

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

#### **Gladue Caseworkers’ Activities and Time**

Based on their daily log reports, the caseworkers’ tasks and time allocation in the past three years is presented below.

TASK	AVERAGE TIME PER DAY YEAR 1 (based on 262 days reported by 3 caseworkers)	PERCENTAGE OF DAILY TIME YEAR 1 (slight differences in totals are due to rounding)	AVERAGE TIME PER DAY YEAR 2 (based on 439 days reported by 4 caseworkers)	PERCENTAGE OF DAILY TIME YEAR 2 (slight differences in totals are due to rounding)	AVERAGE TIME PER DAY YEAR 3 (based on 292 days reported by 3 caseworkers)	PERCENTAGE OF DAILY TIME YEAR 3 (slight differences in totals are due to rounding)
<b>Court Time – Total:</b>	<b>1.24 hrs.</b>	<b>17.3%</b>	<b>2.0 hrs.</b>	<b>28.4%</b>	<b>1.95 hrs.</b>	<b>27.5%</b>
Travel to and from court	.13 hrs.	1.8%	.36 hrs.	5.1%	.18 hrs.	2.5%
Time spent in court	1.11 hrs.	15.4%	1.64 hrs.	23.4%	1.77 hrs.	25.0%
<b>Office Time – Total:</b>	<b>5.54 hrs.</b>	<b>77.1%</b>	<b>4.73 hrs.</b>	<b>67.1%</b>	<b>4.5 hrs.</b>	<b>63.5%</b>
Report research and preparation	2.67 hrs.	37.1%	3.03 hrs.	43.0%	2.92 hrs.	41.2%
Administration	.52 hrs.	7.2%	.84 hrs.	11.9%	.87 hrs.	12.3%
Consulting with supervisor/team meetings	.19 hrs.	2.6%	.22 hrs.	3.1%	.07 hrs.	1.0%
Other in-office tasks	2.16 hrs.	30.0%	.64 hrs.	9.1%	.64 hrs.	9.0%
<b>Out of Office Time – Total:</b>	<b>.41 hrs.</b>	<b>5.7%</b>	<b>.33 hrs.</b>	<b>4.7%</b>	<b>.64 hrs.</b>	<b>9.0%</b>
Travel for meetings/interviews	.13 hrs.	1.8%	not tracked in year 2	not tracked in year 2	not tracked in year 3	not tracked in year 3
Meetings with Gladue clients	.10 hrs.	1.4%				
Meetings with justice personnel	.06 hrs.	.8%				
Conferences/workshops/seminars	.12 hrs.	1.7%				
<b>Total Daily Hours</b>	<b>7.19 HRS</b>	<b>100%</b>	<b>7.05 HRS</b>	<b>100%</b>	<b>7.09 HRS</b>	<b>100%</b>

As the table indicates, the greatest proportion of caseworker time in all three years has been devoted to the research and writing required to produce the Gladue reports. This increased somewhat in the second and third years due to increases in the number of reports (43.0% and 41.2% of caseworkers' time in years two and three respectively versus 37.1% in year 1). While over three-quarters of their time in year one (77.1%) was spent in the office either preparing reports or carrying out related tasks, in the two subsequent years this declined to approximately two-thirds of caseworker time (67.1% and 63.5%). Administration time has grown over the three years (7.2% in year 1, 11.9% in year two and 12.3% in year three). Travelling to court and being in court occupied over one-quarter of their time in years two and three (28.4% and 27.5%) whereas in year one these tasks consumed less than one-fifth of the caseworkers' overall time (17.3%) - sentencing does not always take place on the day originally scheduled. As in year 1, other out-of-office time for meetings and interviews has accounted for a relatively small proportion of their total hours, though this time doubled in year three compared with year two (5.7% in year 1, 4.7% in year two and 9.0% in year 3). In the last year, there have been more cases in which the offender has been remanded to facilities outside of Toronto, requiring the caseworker to travel to these locations in order to speak with the offender.

### **Gladue Reports**

The Gladue reports themselves contain the following information:

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

The steps taken to prepare the Gladue reports include:

- at least one, and usually more than one, one-two hour interview, in person and/or by telephone as required, is carried out with the offender;
- family members as well as other individuals involved with the offender are contacted for information;
- treatment services are contacted and arrangements are made for the offender to receive these;
- obtaining information from the Crown Attorney involved regarding their initial sentencing position;
- the proposed treatment plan and sentencing recommendations are discussed with the offender; the offender needs to understand and agree to these.

## **The Gladue Process**

According to the caseworkers, identification of candidates for Gladue usually occurs at the point at which the accused enters his/her plea. In the non-Gladue courts these candidates are often identified to the caseworker by the courtworker (where there is one) and the offender's defence counsel or duty counsel. Judges have also made requests to the courtworker when there is no caseworker in court (as they usually only attend the non-Gladue courts for sentencing) and the courtworker contacts the ALST program manager with the referral. In the Gladue courts both judges and defence counsel make requests for the preparation of a Gladue report. Judges do not usually question whether an offender is in fact an "Aboriginal" person and very seldom has there been a challenge to the offender's stated identity in this regard.

In year 3, the program created a "Gladue Report Request Form" for judges. This was circulated to the courts. Intended to assist in controlling the number of cases accepted for reports, and thus the program's workload, the form asks whether the client is in custody, for how long, the date for which the report is being requested and if a synopsis of offence and CPIC report is attached to the request form. The form further states that:

*"Aboriginal Legal Services of Toronto will only consider preparing a Gladue Report after the client has pled guilty or was found guilty after trial. A Gladue Report will only be prepared after we know the Crown's position on sentence.*

*If ALST has not agreed in advance to prepare a Gladue Report in this matter it cannot be assumed the report will be available on the date requested. ALST will endeavour to notify all parties as soon as possible if it is not possible to complete the report by the requested date."*

On a few occasions, offenders have declined having a Gladue report prepared. Most often this was because the offender wanted to shorten their custody as they were spending time in remand before sentence and did not want to wait for the Gladue report. In some instances, the offender was not willing to have family members contacted for the purpose of the report.

In the third year of the program, 100 Gladue reports were prepared. The caseworkers try to prepare reports within four-five weeks of referral. If the offender is not in custody, a request is made for additional time. In cases where the offender may be facing a sentence involving a substantial period of incarceration the program is very concerned to take as much time as needed to prepare a thorough and detailed Gladue report. The reports are provided to all parties, i.e., judge, Crown, defence, the day prior to the sentencing date.

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

<b>NUMBER OF DAYS</b>	<b>NUMBER OF CASES (total=39)</b>
20 or fewer	4
21-30	3
31-40	1
41-50	7
51-60	7
61-70	1
71-80	2

NUMBER OF DAYS	NUMBER OF CASES (total=39)
81-90	2
91-100	2
101-120	4
Over 120	3
Unknown	1
Report Withdrawn	2

Of the 39 cases for which data was available, seven (approximately 18%) were sentenced in four weeks or less. Close to 40 per cent (i.e., 15 out of 39) were sentenced within 31 to 60 days of referral to the program and just over one-third (i.e., 14 out of 39) received their sentence more than 60 days after referral. The time lapse is not necessarily related to the time of delivery of the Gladue report but to a range of factors affecting the court process.

### **Program Issues**

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

- ▶ The program is receiving an increasing number of requests for Gladue reports from jurisdictions outside of Toronto and Brantford. These referrals, when accepted, are adding to the workload of the caseworkers, sometimes requiring travel on their part to the location of the request. In a few cases, where there is a major offence involved and a distant location, LAO has provided additional funds for the travel expenses of the caseworkers. However, this presents an additional time requirement of the caseworkers who are also responsible for the requests coming from Toronto and Brantford.
- ▶ The time necessary to prepare a Gladue report includes interviewing offenders who may be in remand at various facilities around Toronto and Brantford as well as contacting offenders' families and other key persons who have been involved with the offender. This process may take considerable time as it is often hard to reach these individuals. The program is reluctant to set a "cut-off" date for this as the main concern is to prepare a thorough report with all of the necessary information. An arbitrary cut-off date may mean excluding key persons who could supply significant information regarding the offender's background that might prove important to the offender's disposition.

## 4.0 PROFILE OF GLADUE CASES

The two sections below present a profile of the characteristics of offenders for whom Gladue reports have been prepared and an outline of the types of cases associated with these offenders. According to ALST, 100 Gladue reports were prepared from October 2006 to October 2007. In this third year, caseworkers were able to document a total of 37 cases on the data base prepared by the evaluators. Turnover in the caseworkers, training in the use of the data base, illness and time demands on the caseworkers resulted in some cases not being captured during this time period. It should be kept in mind that the client profile is based only on just over a third of the offenders for whom reports have been prepared and, as a result, is not representative of all of the Gladue cases.

### 4.1 Client Profile

The following table outlines a profile of the offenders for whom Gladue reports were prepared between October 2006 and the end of September 2007.

CHARACTERISTIC	NUMBER OF CLIENTS (Total clients = 37 )
<b>Age at Referral:</b>	
16 years	-
17-19 years	1
20-25 years	8
26-30 years	5
31-35 years	4
36-40 years	7
41-45 years	6
Over 45 years	6
Unknown	-
<b>Young Offenders:</b>	1
<b>Gender:</b>	
Male	28
Female	7
Unknown	2
<b>Prior Mental Health Issues:</b>	
Yes	4
No	28
Unknown	5
<b>Fostered/Adopted:</b>	
Yes	11
No	26
Unknown	-
<b>Childhood Physical Abuse:</b>	
Yes	16
No	20
Unknown	1

CHARACTERISTIC	NUMBER OF CLIENTS (Total clients = 37 )
<b>Childhood Sexual Abuse:</b>	
Yes	16
No	17
Unknown	4
<b>Residential School – Family:</b>	
Yes	11
No	21
Unknown	5
<b>Residential School – Offender:</b>	
Yes	1
No	35
Unknown	1
<b>Involved with Aboriginal Culture/ Community:</b>	
Yes	22
No	15
Unknown	-

Offenders for whom data was available range in age from 17 to 53 years though half were under 35 years. The great majority were male. Only a few had been diagnosed with prior mental health issues and just under a third had a history of being fostered or adopted. Almost half of the documented clients had experienced physical or sexual abuse in childhood. Among these 37 cases, close to one-third of the families of offenders are reported to have experienced residential school. However, only one offender had been in a residential school. More than half of the 37 individuals for whom information has been provided have some involvement with their Aboriginal culture and community.

## 4.2 Profile of Court Cases

The table below outlines a number of characteristics of the cases and Gladue referrals of the 37 individuals for whom information was provided.

CHARACTERISTIC	NUMBER OF CLIENTS (Total clients = 37 )
<b>Referred by:</b>	
Judge	16
Crown	1
Defence	19
Duty Counsel	1
Unknown	-
<b>History of being Referred to Mental Health Court :</b>	
No	37
Unknown	

CHARACTERISTIC	NUMBER OF CLIENTS (Total clients = 37)
<b>Pre-sentence Custody on Gladue Charges:</b>	
Yes	34
No	3
Unknown	-
<b>Days in Custody Prior to Sentencing:</b>	
0	3
<20	6
20-30	2
60	4
80-90	3
100-150	5
151-200	4
201-250	4
251-300	1
452	1
480	1
1185	1
Unknown	2
<b>PSR Report Submitted:</b>	
Yes	12
No	17
Unknown	8
<b>Sentence Consistent with Recommendations:</b>	
Completely	19
Mostly	8
To some extent	3
Not at all	4
Unknown	3

In the past year, approximately one-half of the documented requests for a Gladue report were made by judges and one-half by defence/duty counsel. This is in contrast to previous years in which the majority of documented requests came from defence/duty counsel. According to the program director there has been an increasing number of referrals for Gladue reports from judges.

Close to all (34 out of 37) offenders had been remanded to custody on the charges for which they were to be sentenced under Gladue. The range of custody time varied from seven days to 1185 days (over three years – a case in which a dangerous offender application was being made). Just over half (17 out of 32) had spent over 100 days in custody.

In addition to the Gladue report, a PSR was submitted for one-third of these offenders (although in eight cases this is not known). Pre-sentence reports (PSRs) are prepared by probation officers at the request of the court and contain information about the offence and the offender that may be helpful to the court in determining sentence. They are usually based on information obtained from the offender's record, the arresting officers and other sources who may have had

an association with the offender. PSR's rarely include the offender's perspective regarding their background and situation.

In half of the cases the recommendations contained in the Gladue report were "completely" accepted as the basis for sentence. For another fifth the sentence was "mostly" consistent with the Gladue recommendations. In four cases none of the sentencing conditions of the Gladue report were acted upon. There are some offences which require a mandatory minimum sentence regardless of the circumstances pertaining to the offence or the background of the offender.

## 5.0 COMPARISON OF THE APPLICATION OF GLADUE IN A DEDICATED GLADUE COURT AND A NON-DEDICATED GLADUE COURT

The evaluators spent three days in Toronto's College Park court on days when it was constituted as a Gladue court and three days in Brantford court which has access to a Gladue caseworker but does not operate at any time specifically as a 'Gladue court'. The following are some of the observations made regarding the court processes and the application of the "Gladue" provisions of s.718.2(e) to sentencing of Aboriginal offenders.

The range of programs and individuals potentially available for Aboriginal accused as well as the usual justice personnel appearing in court were noted. These are outlined below for both courts on the days on which observations were made.

RESOURCES AVAILABLE IN COURT	COLLEGE PARK GLADUE COURT	BRANTFORD 'NON-GLADUE' COURT
Aboriginal Criminal Courtworker	Either in court for the entire day or in-and-out of the court room assisting accused	No criminal courtworker available (temporary while waiting for a new hire) – Gladue caseworker assisting or conferring with various accused in addition to those with reports due
Gladue Caseworker	Gladue caseworker did not attend court on these specific occasions as no sentencing requiring Gladue reports was scheduled	Attending court in anticipation of sentencing – however, on 2 of the 3 occasions, sentencing did not take place
Aboriginal Bail Supervisor	Made only very brief appearances, as needed	No Aboriginal Bail Program
LAO Duty Counsel	Present 100% of the time and was involved in at least 95% of the cases heard	Available in office next to court room – occasionally called in to speak to matters re non-represented accused
Crown Counsel (Provincial)	Always in attendance – same Crown on 2 out of the 3 days	Various ones in attendance though the same persons on all days (office is down the hall from the court room)
Crown Counsel (Federal)	Federal cases are heard only at Old City Hall	Attended twice
ALST after-care worker for Gladue cases	Not in attendance – presence is not required in court	Follow-up worker is located in Toronto

As the above table indicates, the Gladue worker in Toronto was not in court on the observed occasions as their attendance is only necessary when sentencing with a Gladue report is scheduled. The Gladue worker in Brantford attended upon the expectation that sentencing would take place. However, this did not always occur as sentencing was put over for various reasons. Due to the lack of a criminal courtworker in Brantford though, the Gladue caseworker assisted some Aboriginal persons with information regarding the court process relevant to their case. At this point, there is only one Gladue after-care worker who is located in Toronto. The

Brantford Gladue caseworker performs the follow-up work to assist individuals sentenced with a Gladue report in carrying out the conditions of their sentence, i.e., applications to treatment facilities, arrangements for transportation.

Based on the observations made, there are some differences between the two courts in the ways in which they operate with respect to the treatment of Aboriginal offenders. Several characteristics of the Gladue court process have been identified by Justice B. Knazan in a paper presented to the National Judicial Institute held in St. John's, Newfoundland and Labrador, in April 2005. These characteristics were used as the basis for noted observations in the College Park and Brantford courts as the table below describes.

CHARACTERISTICS OF GLADUE COURT PROCESS	COLLEGE PARK GLADUE COURT	BRANTFORD NON GLADUE COURT
<ul style="list-style-type: none"> <li>▪ Court breaks often/sits late for courtworkers to arrange housing/ travel to implement bail orders/ treatment plans mandated by the court</li> </ul>	<p>Many short breaks to give defence time to discuss with clients or for the defence and crown to meet. The breaks were usually only ten minutes or so. No breaks were ordered specifically to arrange housing/travel, to implement bail orders/ treatment plans mandated by the court. On one day, two breaks were ordered to give guards time to get prisoners "up" from the cells.</p>	<p>Judge put non-Gladue matters first to give Aboriginal client time to appear (not present) – did not show up and matter had to be put over; a matter was 'stood down' to allow defence time to consult with client regarding course of action with respect to a Charter issue; another case was rescheduled to provide time for a Gladue report to be prepared (requested by defence);</p>
<ul style="list-style-type: none"> <li>▪ Court encourages accuracy in use of individual's name</li> </ul>	<p>Did not seem to be an issue as judges were careful to use correct names or to ask for correct pronunciation if not sure.</p>	<p>Did not arise as court personnel familiar with clients</p>
<ul style="list-style-type: none"> <li>▪ Court encourages accuracy in use of place names/geography</li> </ul>	<p>Not an issue in terms of the cases as most involved Toronto locations. There were some external place names used in terms of where the individual would go from treatment, or where "home" was located, but these were not problematic.</p>	<p>Not an issue – clients all from the Brantford area</p>
<ul style="list-style-type: none"> <li>▪ Court encourages accuracy in proper identification of different First Nations</li> </ul>	<p>Rarely came up in court. When it did it was usually in the context of a "home" First Nation or to where an individual might be returning.</p>	<p>Did not arise</p>
<ul style="list-style-type: none"> <li>▪ Indicates awareness of Gladue though not requesting report</li> </ul>	<p>All judges at least made a mention of Gladue, most in terms of processes or treatment options.</p>	<p>Judges very aware of Gladue and had received Gladue reports on previous occasions; judge also cognizant of the criteria for ordering a report (see "Requests Gladue report" below)</p>
<ul style="list-style-type: none"> <li>▪ Indicates awareness of Aboriginal service provider agencies</li> </ul>	<p>High awareness in the courtroom of Aboriginal service provider agencies. One case had a housing worker give testimony; another had a drug and alcohol worker present.</p>	<p>Generally familiar with types of services (judges, Crown and defence have operated in this court for considerable time)</p>
<ul style="list-style-type: none"> <li>▪ Requests Gladue report (who?)</li> </ul>	<p>No requests were made, although one Gladue report was specifically mentioned.</p>	<p>Two cases in which reports were requested by defence – in one case the judge declined to have a report</p>

CHARACTERISTICS OF GLADUE COURT PROCESS	COLLEGE PARK GLADUE COURT	BRANTFORD NON GLADUE COURT
		prepared as the outcome would be a non-custodial sentence
<ul style="list-style-type: none"> <li>▪ Assessment of 'comfort' level of court for Aboriginal accused</li> </ul>	High level of "comfort" as judges, Crowns and duty counsel took the time to get things right. Accused were given opportunities to speak on their own behalf. Judges were careful to ask accused if they understood what the charge(s) was/were, if they understood what was happening, or what the consequences of certain decisions might be. Judges also spoke directly to the accused and tended to be very polite. One judge permitted a man with mobility issues to sit while speaking.	"Comfort" level very high – clients given opportunities to speak, judges question accused directly, judges provide full explanation of the process and implications of discussions with defence and Crown; respect for accused was evident and court was flexible to accommodate needs of defence and accused; presence of Aboriginal legal counsel and paralegal worker

In both College Park and Brantford, standard court processes were in effect. However, judges displayed a willingness to slow things down, to speak directly to the accused, to ensure the accused understood what was going on and that certain decisions would result in specific actions. The judges and Crowns were respectful when speaking and, despite delays in cases (both on the day and in prior hearings), were willing to give time to defence to be adequately prepared.

After numerous attempts over a period of several weeks, one person was ultimately contacted at College Park Gladue court for an interview. Feedback was received from judges, Crowns and defence counsel in Brantford. The key points made by these individuals are:

- The Gladue reports are a valuable contribution to the sentencing decision and lead to more appropriate sentences. They need to be available to the court to carry the requirements of s.718.2(e).
- The Gladue reports are beneficial for Aboriginal offenders and produce better outcomes for them in court.
- The quality of the reports is high and provides much more detail than a PSR by including background information about the offender.
- There is a problem regarding the timeliness of submitting reports to the various parties. Receiving them the day prior to scheduled sentencing does not allow enough time to review them thoroughly.
- There is also an issue regarding the length of time required to complete the reports. In a few cases, it has been up to two months and, on a couple of occasions, adjournments were required.

All of the respondents recognized that the workload, in terms of the number of requests for Gladue reports, was exceeding the capacity of the one Gladue caseworker to prepare timely reports up to the standard now being met. Several suggestions were made to address this:

- Provide more Gladue caseworkers or an assistant for the existing worker;
- Develop a means of obtaining the benefits of a Gladue report without having a complete report prepared (expedited PSRs are available within three weeks);
- Have Gladue caseworkers, in addition to those attached to specific jurisdictions, who travel to other court jurisdictions as needed.

## 6.0 CONCLUSION

This conclusion focuses on the results of the evaluation of the third year of the Gladue Caseworker Program as well as a number of key points arising from the evaluation of years one and two.

### Time Required to Prepare Gladue Reports

In both years two and three, some issues regarding the length of time it is taking for reports to be submitted have been raised. In the view of many respondents over the past two years, this is related, at least to some extent, to the resources available to the Gladue Caseworker Program which affects the capacity of the current number of caseworkers to meet the growing demand for Gladue reports.

### Evolutionary Model of the ALST Gladue Caseworker Program

The program in its current form has evolved from its original base of one caseworker in 2005 in the Toronto Old City Hall Gladue court to three caseworkers, an aftercare worker and a Gladue liaison worker. A funding proposal has been recently submitted for two new Gladue caseworkers for Sarnia/London and Kitchener/Waterloo/ Guelph and an aftercare worker for Brantford. The first Gladue court was established at Old City Hall in October 2001 after discussions with and support from a number of judges. These members of the judiciary were concerned to apply s.718.2(e) in the best possible way and the value of having a specifically-trained individual prepare reports with the kinds of information required to do this. As additional courts began to request "Gladue" reports, not only were more caseworkers needed but it also became clear that an aftercare worker could serve an important function in ensuring that arrangements would be made for the offender to carry out the court's sentence based on recommendations made in the Gladue report. The increasing workload of caseworkers was further eased by the creation of the position of Gladue liaison worker to generally assist the Gladue caseworkers as required (e.g., obtaining documents, paperwork) and fill in for caseworkers absent due to illness or vacation. This position expedites the preparation of the Gladue reports.

### Pre-Sentence Reports versus Gladue Reports

A few of the respondents interviewed for this evaluation questioned whether PSRs, which have always been and continue to be available to the judge for sentencing, could not serve the same function as the Gladue report and be prepared in less time. However, many more respondents recognized the distinctiveness and value of the Gladue report. The Gladue case decision, followed by Criminal Code s.718.2(e), indicated information requirements in addition to the type of information included in PSRs.

Gladue reports put the offender's issues into the context of the history and treatment of Aboriginal people in Canada in addition to presenting the particular background of the individual. According to s.718.2 (e) "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." The reports put an emphasis on seeking the least restrictive or non-custodial option for disposition of the offender and set out recommendations for sentence based on this. Based on these recommendations, a detailed plan for the offender

is developed along with the specific arrangements required to implement this plan. The offender's agreement to all elements of the plan is required before the Gladue report is submitted. All parties to the court are provided with the plan ahead of sentencing. The reports are subject to appeal, however, to date, none have been appealed.

Whereas Gladue reports include the offender's perspective and background, PSRs rarely include the "voice" of the offender. The PSRs are prepared by probation officers whose function is to monitor compliance with probation conditions, not to enable people to get into treatment, while Gladue reports provide a plan that will help the offender to deal with the problems that have led to the individual's involvement with the justice system. Probation officers and Gladue caseworkers are both mandated to serve the needs of the court for sentencing. However, benefits of Gladue reports, as expressed by justice personnel throughout the evaluation, indicate that the distinct situation of Aboriginal people, their history of contact with governments and the specific requirements of s.718.2(e) have been best provided by an Aboriginal organization and Aboriginal caseworkers.

### Comparison of Dedicated Gladue Courts and Courts with the Benefit of Gladue Reports

This evaluation of year three of the Gladue Caseworker Program compared two types of courts – a dedicated Gladue court in Toronto and a court in Brantford which has the services of a Gladue caseworker but does not sit as a Gladue court. The observation periods carried out by the consultants in both courts did not identify distinct differences between them with respect to the treatment of Aboriginal offenders. However, interviews with justice-related personnel in the two courts highlighted some characteristics of the Gladue court particularly:

- the Gladue court, unlike regular courts, deals with bails and pleas in the same courtroom and there is an Aboriginal Bail Program for Aboriginal accused;
- the emphasis is on assisting Aboriginal accused and offenders in ways that take into account their Aboriginal heritage;
- Gladue court has a team of resources that supports the Gladue process, i.e., Aboriginal Bail Program, Gladue caseworker, aftercare worker;
- 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.

In both of the courts observed it was clear that having judges, Crowns and defence who are aware of and concerned about the application of Gladue to sentencing Aboriginal offenders promotes attention to the unique cultural identity of Aboriginal individuals, their background and circumstances that have led them into contact with the law. According to the evaluation respondents in the past three years, Gladue reports provide a more complete view of the situation of the offender in the historical context of Aboriginal people and have been a benefit to the court in sentencing. Over the three-year evaluation period, data was provided for approximately 37 per cent of Gladue cases regarding the extent to which sentencing was consistent with the recommendations in the reports. Of these cases, sentencing was completely consistent with the recommendations in just over 60 per cent and mostly consistent in another 20 per cent. Overall, 80 per cent of the sentences of offenders having the benefit of a Gladue report closely or totally followed the plans set out in the Gladue reports.