

Access to Justice for Indigenous Persons Being Sentenced in Ontario
An Approach to Wicked Problems

by

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Abstract

In 1996, Parliament passed s.718.2(e) of the criminal code of Canada, and in doing so, recognized the injustices experienced by Indigenous populations at the hands of our criminal justice system. Nearly 26 years later, and Indigenous overrepresentation in custody across Canada is still rising. This pattern of injustice raises the question, what is stopping Indigenous persons from accessing justice? By exploring the field of access to justice, and defining access to justice as containing procedural, substantive and symbolic elements, this thesis applied a unique approach to measuring access to justice based on the leading ideas and approaches of access to justice research. By focusing on the experiences of defence counsel who work within the Gladue framework of sentencing and applying an expansive conception of access to justice to guide the inquiry, this thesis attempts to shed light on the barriers to accessing justice that are faced by Indigenous persons being sentenced.

Keywords: *Gladue*, Access to Justice, Ontario, Defence Counsel, Gladue Reports

Dedication

In memory of my Father, Paul Carlson (1951-2021)

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Introduction

The imposition of a colonial justice system on Indigenous people in Canada is one of many examples of settler violence which have resulted in systemic discrimination across the institutions of this country. One commonly referenced metric which demonstrates this is the representation (or, more accurately, the over-representation) of Indigenous peoples in custody. As per the 2016 census, Indigenous persons comprise 4.9% of the population (up 42.5% since 2006).¹ In 2019/2020, they represented 30.04% of individuals in Federal sentenced custody, up from 12% in 1995/1996.² Moreover, Indigenous representation in remand custody in the provinces and territories has grown from 18% in 2000-2001 to 30.68% in 2019-2020.³ These stark levels of over-representation prompted multi-faceted efforts at legal reform, perhaps most notably by Parliament's introduction of s.718.2(e) as part of the 1996 Criminal Code Amendments.⁴ S. 718.2(e) directs sentencing judges to consider all other available sanctions, other than imprisonment, which are reasonable in the offender's circumstances, "with particular attention to the circumstances of Aboriginal offenders."⁵ Through the subsequent interpretation and application of s.718.2(e) in *R v Gladue*,⁶ the "Gladue Framework"⁷ as we know it today was developed. Unfortunately, these efforts have failed to remedy the over-incarceration of Indigenous people in federal, provincial, and territorial custody.

The inability of the justice system to address the overrepresentation of Indigenous persons in custody for 25 years is an overwhelming problem. There are several potential explanations for this problem, as it has its roots inside and outside the criminal justice system. It is both an act of colonial aggression and a symptom of the colonial legacy of Canada, and a symptom and a cause of the economic inequalities perpetuated in Canada. It is also rooted in how our criminal law

¹ Ministry of Indigenous Services, "Annual Report to Parliament 2020", November 2020, online:<<https://www.sac-isc.gc.ca/eng/1602010609492/1602010631711>>.

² Officer of the Correctional Investigator, "Indigenous People in Federal Custody Surpasses 30%," (2020), online:<https://www.oci-bec.gc.ca/cnt/comm/press/press20200121-eng.aspx?fbclid=IwAR2ydTrkNb2BZOwmcrug3DE034X27uAzRAgH-tSPyPWNck5-53cT_k4cr78>;

Roberts, Julian V & Andrew A Reid, "Aboriginal Incarceration in Canada Since 1978" (2017) 59:3 Canadian Journal of Criminology and Criminal Justice 313, (Roberts & Reid 2017) at 321.

³ Ibid (Roberts & Reid 2017), at 319;. Statistics Canada, "Adult Custody Admissions to Correctional Services By Indigenous Identity," (20210, online:< <https://www150.statcan.gc.ca/t1/tb11/en/cv.action?pid=3510001601>>.

⁴ Daubney, David & Gordon Parry, "2. An Overview of Bill C-41 (The Sentencing Reform Act)" in David P Cole & Julian Roberts, eds, Making Sense of Sentencing (University of Toronto Press, 1999) 31, at 32-45.

⁵ Criminal Code (R.S.C., 1985, c. C-46) at s.718.2(e).

⁶ R. v. Gladue, 1999 CarswellBC 778, 1999 CarswellBC 779, [1999] 1 S.C.R. 688 (Gladue).

⁷ As discussed in *R. v. Wells*, *Gladue* does not operate as a single legal test but as a legal framework with a distinct methodology which centres the experiences of Indigenous persons. See, *R. v. WELLS* [2000] 1 S.C.R. (Wells) at para 38.

accounts for the unique circumstances of Indigenous peoples and their conceptions of the world - what the Cree refer to as '*Miyupimaatisiun*' or 'living well.'⁸ Parliament, and later the Supreme Court of Canada addressed the problematic ways that our criminal law accounted for the experiences of Indigenous peoples through s.718.2(e) of the Criminal code⁹ and its subsequent interpretation by the Supreme Court of Canada in the leading cases of *R. v. Gladue*¹⁰ and *R. v. Ipeelee*.¹¹

However, the changes envisioned by the legislature and the Supreme Court of Canada ultimately succeed or fail based on the daily operations of the criminal justice system. The interactions that occur between defence counsel, their clients, and service providers when a client's Gladue information is collected and presented to a sentencing court contribute to the problematic patterns of over-representation. The systemic injustices imposed on Indigenous people through our criminal justice system contradict the ideals of justice engrained in our constitution. It demonstrates that Canada is not a "just society."¹² These facts raise a difficult question, what is stopping those who interact with our justice system, from accessing justice? This thesis takes a look at the Gladue framework, viewing its problems and deficiencies as problems of accessing justice. As such, this thesis will present the procedural, substantive, and symbolic elements of accessing justice within the Gladue framework. It will then attempt to describe some of the barriers to accessing justice that manifest in the experiences of defence counsel; barriers which, when compounded over time, ultimately contribute to this chronic deficiency of accessible justice.

Overview of Research Question

This thesis is led by the following research question: "Do defence counsel representing Indigenous clients in Ontario identify barriers in access to the resources required to sufficiently present the Gladue factors for these clients?" Sixteen interviews were conducted with defence counsel, with interviewees recruited through a mixed methodology of convenience sampling and snowball sampling. Though the number of interviewees is not representative of all defence counsel who have worked with Indigenous clients at sentencing, the interviews provide insights into the

⁸ Adelson, N. Health beliefs and the politics of Cree well-being. (1998) 2(1) Health 5-22 at 10.

⁹ Supra note 5 at s.718.2(e).

¹⁰ Supra note 6.

¹¹ *R. v. Ipeelee*, 2012 SCC 13, 2012 CarswellOnt 4375.

¹² CBC, "CBC Digital Archives: Pierre Trudeau: "Canada must be a just society,"" (December 1967) online:<<https://www.cbc.ca/archives/entry/pierre-trudeau-canada-must-be-a-just-society>>.

experiences defence counsel have with the Gladue framework and indicate the existence of systemic issues in access to Gladue services and thus to justice, in the province.

This thesis will begin by discussing the Gladue framework. Chapter one will present the legal aspects of the Gladue framework, how Gladue information is presented to a relevant court, how the procurement of Gladue reports in Ontario works and the role of the Crown, defence counsel and the judiciary in meeting the Gladue requirements. Chapter two will present a working theory of access to justice based on the work of Roderick A. MacDonald¹³ and demonstrate how it applies to the Gladue framework as well as how the results of the interviews can be understood through an access to justice lens. Following this, chapter three will describe the research methodologies. Chapter four will present the findings from the 16 interviews and outline the potential barriers to presenting the Gladue factors before a court identified by defence counsel in Ontario. This section will describe these barriers and contextualize them. Finally, chapter five will conclude the thesis with a discussion on the future of the Gladue framework and what can be done to address barriers to accessing justice.

¹³ MacDonald, Roderick, “Access to Justice in Canada Today: Scope Scale and Ambitions” in *Access to Justice for a New Century – The Way Forward* (Toronto: LSUC, 2005).

Chapter 1: The Gladue Framework

Introduction: Obviously, There's a Problem Here

Part XXIII of the *Criminal Code of Canada* was enacted in 1996 and set out the sentencing law of Canada as we know it today. This new way forward involved introducing new alternatives to incarceration¹⁴ (such as conditional sentences)¹⁵ and enumerated the principles that a sentencing court must consider when imposing a sentence,¹⁶ including s.718.2(e), which draws “*particular attention to the circumstances of Aboriginal offenders.*”¹⁷ Parliament recognized the problem of Indigenous overrepresentation in custody through several influential reports such as the Aboriginal Justice Inquiry of Manitoba (1988)¹⁹ and the Royal Commission on Aboriginal people (1996)²⁰ and a body of emerging academic knowledge²² and attempted to remedy the problem with an explicitly remedial amendment package in 1996. The Minister of Justice at the time, Allan Rock, articulated that the purpose behind s.718.2(e) was to address the disproportionate representation

¹⁴ Quigley, Tim, “Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?” (1999) 42 *Criminal Law Quarterly* 33 at 131.

¹⁵ *Ibid* at 133; *Supra* note 4 at 32-45.

¹⁶ *Supra* note 5 at s.718.2.

¹⁷ *Supra* note 5 at s.718.2(e). *Emphasis added.*

¹⁸ Accounting for the unique circumstances of Indigenous accused was not wholly new to the judiciary, with the consideration of different approaches to questions of justice being recognized as early as 1966. As discussed in Ralston, Benjamin A, *The Gladue Principles; A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre: University of Saskatchewan, 2021); early precedents which accounted for Indigenous peoples unique circumstances can be found in decisions dating back as far as 1966, in *R. v. Itsi*, 1966 NWT Terr Ct, at 402.

¹⁹ Ralston, Benjamin A, *The Gladue Principles; A Guide to the Jurisprudence* (Saskatoon: Indigenous Law Centre: University of Saskatchewan, 2021), (Ralston 2021) at page 33.

²⁰ Canada, ed, *Bridging the cultural divide: a report on Aboriginal people and criminal justice in Canada* (Ottawa, Ont: The Commission, 1996).

²¹ Other such reports include the Royal Commission on the Donald Marshall, Jr., Prosecution (Province of Nova Scotia, 1989); The Public Inquiry into the Administration of Justice, “The Aboriginal Justice Inquiry of Manitoba” (1991) online: <<http://www.ajic.mb.ca/>>; Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta, “Justice on Trial,” (Alberta, 1991); Commission on Systemic Racism in the Ontario Criminal Justice System, “Report of the Commission on Systemic Racism in the Ontario Criminal Justice System,” (Ontario, 1995); *Supra* note 20, (RCAP, 1996); The Honourable Justice David H. Wright Commissioner, “Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild,” (Saskatchewan, 2004); The Honourable Sidney B. Linden Commissioner, “The Ipperwash Inquiry Volume 1,” (Ontario, 2007); The Honourable Frank Iacobucci, “First Nations Representation on Ontario Juries,” (Ontario, 2013); Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Legacy, The Final Report of the Truth and Reconciliation Commission of Canada*, vol 5 (Montreal & Kingston: McGill-Queen’s University Press, 2015); Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Ottawa: 2019).

²² Quigley, Tim, “Some Issues in Sentencing of Aboriginal Offenders,” in Gosse, Richard et al, “Continuing Poundmaker and Riel’s Quest : Presentations Made at a Conference on Aboriginal Peoples and Justice,”(UBC,1994); Quigley, Tim, “Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?” (1999) 42 *Criminal Law Quarterly* 33; See also, Brian R. Pfeifferle, “Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration ” (2008) 32:2 *Man LJ* 113, at page 113; Rudin, Jonathan, “Aboriginal Over-representation and R. v. Gladue: Where We Were, Where We Are and Where We Might Be Going” (2008) 29, 687-690; Roberts, Julian V & Andrew A Reid, “Aboriginal Incarceration in Canada Since 1978” (2017) 59:3 *Canadian Journal of Criminology and Criminal Justice* 313, at 314.

of Indigenous people in custody.²³ Rock stated before the Standing Committee on Justice and Legal Affairs that, “[T]he reason we referred specifically there to aboriginal persons is that they are sadly overrepresented in the prison populations of Canada... .*Obviously, there’s a problem here*” (Emphasis added).²⁴ Minister Rock stated that alternatives to incarceration and programming in Indigenous communities could remedy this problem.²⁵ The direction from Parliament to sentencing courts through s.718.2(e)²⁶ and the introduction of new, non-custodial sentencing options²⁷ gave courts the direction and the means to take remedial steps to address Indigenous over-representation²⁸ and reduce the overreliance on incarceration more broadly.²⁹

The remedial intent to s.718.2(e) was central to the Supreme Court of Canada’s subsequent decision in *R. v. Gladue*.³⁰ The Supreme Court of Canada further expanded on this framework in the *Wells*³¹ and *Ipeelee* decisions.³² As articulated³³ by the Supreme Court of Canada in *Wells*, *Gladue* does not operate as a single legal test but as a legal framework with a distinct methodology that centres the experiences of Indigenous persons.³³

As prescribed by the Supreme Court of Canada, the *Gladue* framework requires a sentencing judge to consider two sets of Gladue information³⁴, including specifically “[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts” and “types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”³⁵ These factors are to be considered by a sentencing judge anytime an Indigenous

²³ Supra note 19 (Ralston 2021) at page 55.

²⁴ Ibid (Ralston 2021) at page 55-56.

²⁵ Ibid (Ralston 2021) at page 55-56.

²⁶ Supra note 6 (*Gladue*) at para 33; See also, Roach, Kent & Jonathan Rudin, “*Gladue*: The judicial and political reception of a promising decision” (2000) 42:3 *Canadian Journal of Criminology* 355–388 (Roach & Rudin 2000), at 358; Vasey, Adam, “Rethinking the Sentencing of Aboriginal Offenders: The Social Value of s.718.2(e)” 27, at 74.

²⁷ Supra note 6 at para 40; *R. v. Sharma*, 2020 ONCA 478, 2020 CarswellOnt 10511 (*Sharma*) at para 34; *R v Proulx*, 2000 SCC 5, 2000 CarswellMan 32, 2000 SCC (Proulx), at 16-18.

²⁸ Supra note 27 (*Sharma*) at paras 30-37.

²⁹ Supra note 6 (*Gladue*) at para 30; Supra note 11 (*Ipeelee*) at paras 59-64; Hasan, Nader, “*R. v. Ipeelee*; *R. v. Ladue*: Revisiting Aboriginal Sentencing Principles Thirteen Years After *R. v. Gladue*” (2012) 33:3 *For the Defence Magazine - The Criminal Lawyer’s Association Newsletter* 8; Supra note 7 (*Wells*), at para 37. Supra note 26 (Roach & Rudin, 2000) at 358.

³⁰ Supra note 6 (*Gladue*).

³¹ Supra note 7 (*Wells*).

³² Supra note 11 (*Ipeelee*).

³³ Supra note 19 (Ralston 2021) at page 106.

³⁴ Supra note 11 (*Ipeelee*) at para 59.

³⁵ Supra note 6 (*Gladue*) at para 66, Supra note 7 (*Wells*) at para 38, Supra note 11 (*Ipeelee*) at para 82.

person's liberty is at stake,³⁶ regardless of the offence.³⁷ Consequently, it is an error of law to fail to raise any substantive consideration of the *Gladue* factors when an Indigenous person is before the court.³⁸ What follows is an overview of the specific components of the Gladue information, the tools used to present Gladue information, the current administration of Gladue servicing in Ontario, and the roles of counsel and the court in applying the Gladue framework.

The Components of Gladue Information

The Unique systemic or Background factors

“The unique systemic or background factors which may have played a part in bringing the particular offender before the courts”³⁹ are key to the individualized and holistic analysis of an Indigenous offender's life circumstances required by s.718.2(e).⁴⁰ These circumstances may reveal to the court life circumstances that impact an Indigenous person's moral culpability.⁴¹ The Court stated that s.718.2(e) does not require a causal connection between these background factors and the offence in question,⁴² as the interconnections between the offenders' circumstances and the offence itself are too complex for such a direct link to be found.⁴³ The “fundamental purpose” of s.718.2(e) is to treat Indigenous offenders fairly by acknowledging their unique circumstances,⁴⁴ centring restorative justice initiatives⁴⁵ while providing the necessary context to allow for proportional sentences.⁴⁶ Reassessing the principles of sentencing and adequately engaging with the unique circumstances of an individual offender furthers this fundamental purpose of sentencing.⁴⁷

³⁶ *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534; *United States v Leonard*, 2012 ONCA 622 affirmed in *R v Anderson*, 2014 SCC 41. As such Gladue applies in bail (see *R. v. E.B.*, 2020 ONSC 4383) and extradition proceedings (see *United States of America v. Leonard* 2012 ONCA 622, 2012 CarswellOnt 11578).

³⁷ *Supra* note 11 (Ipeelee) at para 85.

³⁸ Rudin, Jonathan, “Aboriginal Over-representation and *R. v. Gladue*: Where We Were, Where We Are and Where We Might Be Going” (2008) 29, at 706-707.

³⁹ *Supra* note 6 (Gladue) at para 66.

⁴⁰ Hebert, Alexandra, “Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice” (2017) 149 *Queens Law Journal* 27, (Hebert, 2017) at page 153. *Supra* note 6 (Gladue) at paras 81, and 83.

⁴¹ *Supra* note 11 (Ipeelee) at paras 73, 81-82, *Supra* note 40 (Hebert, 2017) at page 156.

⁴² *Supra* note 11 (Ipeelee) at paras 80-85.

⁴³ *Ibid.*

⁴⁴ *Supra* note 6 (Gladue) at 87.

⁴⁵ *Supra* note 40 (Herbert 2017) at page 153; *Supra* note 6 (Gladue) at paras 81, and 83.

⁴⁶ *Ibid.*, see also *Supra* note 19 (Ralston, 2021) at page 111. Proportionality of sentence is the fundamental purpose of sentencing. See Criminal Code (R.S.C., 1985, c. C-46) at s.718.1.

⁴⁷ *Supra* note 19 (Ralston, 2021) at page 119.

These unique circumstances are the broad, systemic, socio-economic factors that translate into an offender's facially neutral, individualized circumstances. Both types of factors play a role in systemic discrimination.⁴⁸ They are “intertwined and interdependent factors,”⁴⁹ that include the direct and intergenerational harms of Residential schools;⁵⁰ impacts of child apprehension and ‘adoption out’ of Indigenous children to non-Indigenous families;⁵¹ loss of collective and individual autonomy through government actions;⁵² community isolation;⁵³ cyclical abuse and violence;⁵⁴ addiction issues;⁵⁵ Fetal Alcohol Spectrum Disorder;⁵⁶ and the loss of identity, culture and language which has occurred due to the impacts of cultural genocide.⁵⁷ In addition, the shared experiences of the community are crucial,⁵⁸ as each community has its unique history and experiences of colonialism,⁵⁹ which translate into specific aspects of an offender's life. For example, in *R. v. Dantimo*, the court discussed the impacts of unresolved land claims on Mr. Dantimo’s community (the Wikwemikong Unceded Indian Reserve) and how this act of dispossession has economically harmed the residents of this community.⁶⁰

The Supreme Court of Canada in *Gladue* recognized that the unique circumstances of Indigenous offenders might be compounded by the ineffectiveness of incarceration in the rehabilitation of Indigenous offenders.⁶¹ Sentencing judges, by virtue of their duties, play a role in reducing both crime and systemic discrimination faced by Indigenous offenders.⁶² Due to this, the

⁴⁸ Ibid at page 157; Supra note 6 (*Gladue*) at paras 67-69; Supra note 11 (*Ipeelee*) at para 67.

⁴⁹ Ibid (*Ralston*, 2021) at page 157.

⁵⁰ See for example: *R v Jourdain*, 2016 ONSC 7890 at paras 18, 54, 56 [*Jourdain*]; *R v Ireland*, 2021 ONCJ 159 at para 17; *R v Leis*, 2021 ONCJ 86 at para 24; *R v Bruzas*, 2021 ONCJ 372 at para 40.

⁵¹ *Brown v Canada (Attorney General)*, 2013 ONSC 5637 at paras 1, 3.

⁵² Supra note 19 (*Ralston*, 2021) at page 168; *R v Morrisseau*, 2017 ONCJ 307 at paras 34-39 [*Morrisseau*]; *R v Cardinal*, 2018 ONCJ 253 at para 23;

⁵³ See for example: *R v Masakayash*, 2015 ONCJ 655 at paras 9, 21, 23-24; *R v Wesley*, 2016 ONSC 408 at paras 62-63 [*Wesley*].

⁵⁴ See for example *R. v. Ladue*, 2011 BCCA 101 14 at para 7; *R v Kennedy-Money*, 2016 ONSC 7051 at 12, 43; *R v Jourdain*, 2016 ONSC 7890 at para 36; *R v Potvin*, 2017 ONCJ 429 at paras 21-23, 33.

⁵⁵ See for example: *R v Peters*, 2010 ONCA 30 at paras 7-8; *R v Altiman*, 2019 ONCA 511 at paras 110-112, 133-134; *R v Keewasin*, 2019 ONSC 3516 at para 48.

⁵⁶ See for example: *R v Killiktee*, 2017 ONCJ 966 at para 22, *R v MG*, 2017 ABCA 163 at para 5; *R v McDonald*, 2018 BCPC 244 at para 85; *R v Blackplume*, 2019 ABPC 273 at para 62; *R v JP*, 2020 SKCA 52 at paras 43-45 [JP]; *R v Paquette*, 2020 ABPC 173 at paras 148-149; *R v Head*, 2020 ABPC 211 at paras 59-63.

⁵⁷ Supra note 19 (*Ralston*, 2021) at page 191, See for example: *R v Kreko*, 2016 ONCA 367 at para 24; *R v Solomon*, 2015 CanLII 92840 (Ont Sup Ct) at 5.

⁵⁸ Supra note 19 (*Ralston*, 2021) at page 156; Maurutto, Paula & Kelly Hannah-Moffat, “Aboriginal Knowledges in Specialized Courts: Emerging Practices in Gladue Courts” (2016) 31:03 Can j law soc 451–471, at 456.

⁵⁹ Supra note 19 (*Ralston*, 2021) at page 159.

⁶⁰ *R. v. Dantimo*, 2009, CarswellOnt 802, at paras 22-42.

⁶¹ Supra note 6 (*Gladue*) at 68.

⁶² Supra note 19 (*Ralston*, 2021) at page 117.

consideration of ‘unique background and circumstances’ provides context for determination of whether ‘alternatives to incarceration’ are appropriate.⁶³

Appropriate Sentencing Procedures and Sanctions

The Supreme Court of Canada has described the second category of Gladue factors as “the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”⁶⁴ This assessment requires an exploration of any culturally relevant or community-specific sentencing options that might be available to the person being sentenced.⁶⁵ These submissions are included to aid the judge in creating more effective, individualized sentences by connecting the factors of the individual offender before them and the sentencing procedures and sanctions available to the sentencing court.⁶⁶

In *Gladue*, the Supreme Court of Canada stated that sentencing judges should guide their inquiry by asking questions such as “For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?”⁶⁷ The Supreme Court of Canada directed judges to inquire into the impact of crime on the community and the constellation of factors that brought the offender before them.⁶⁸ Considering an offender’s unique circumstances in sentencing requires a holistic and flexible approach,⁶⁹ as different sentencing procedures and sanctions may be appropriate for the offender because of their particular heritage.⁷⁰⁷¹ Sentencing judges must consider urban networks of support and programming as all Indigenous persons benefit from the Gladue framework regardless of the place of residence.⁷²

When crafting a sentence, the sentencing judge must acknowledge that restorative justice initiatives may impose a greater burden on offenders.⁷³ These burdens originate from the recognition of seemingly neutral systemic factors such as employment, education level, and familial conditions which can conceal an “extremely strong bias in the sentencing process.”⁷⁴ In

⁶³ Supra note 6 (*Gladue*) at para 71.

⁶⁴ *Ibid* at para 93.

⁶⁵ Supra note 19 (Ralston, 2021) at page 196.

⁶⁶ Supra note 11 (Ipeelee) at para 74.

⁶⁷ Supra note 6 (*Gladue*) at para 80.

⁶⁸ *Ibid* at para 80.

⁶⁹ Supra note 19 (Ralston, 2021) at page 87, *Sura* note 6 (*Gladue*) at para 81.

⁷⁰ *Ibid* (*Gladue*) at para 66.

⁷¹ Supra note 19 (Ralston, 2021) at page 125.

⁷² Supra note 6 (*Gladue*) at para 92.

⁷³ Supra note 19 (Ralston, 2021) at page 83.

⁷⁴ Supra note 11 (Ipeelee) at para 67.

sentencing or bail hearings, these factors may rule out alternatives to incarceration for who are unemployed, poorly educated or economically disadvantaged.⁷⁵ These same factors may also contribute to onerous release conditions conducive to breaches resulting in incarceration, more frequent guilty pleas, and cycles of recidivism.⁷⁶

Community-based sanctions (conditional sentences) were highlighted as a key tool in achieving the goals of restorative justice.⁷⁷ Though mainstream conceptions of restorative justice and their conflation with Indigenous perspectives of justice are subject to their own complex debates,⁷⁸ the emphasis on creating space for alternative approaches to justice may encourage decolonization of the justice system.⁷⁹ By creating space for an Indigenous community's solutions to questions of justice in western courts, a degree of respect for the conceptions of justice held by Indigenous groups can be expressed and incorporated into a predominantly Anglo-Saxon-dominated space.⁸⁰ Though in practice community admissions outnumber remand and sentenced custodial admissions, there is no conclusive data on the incorporation or role of Indigenous led responses to justice in the court process.⁸¹ The supports required for community-based sentences to be feasible are often negligently funded.⁸²

Some specific examples of culturally appropriate sentencing procedures and sanctions utilized include Justice Committees,⁸³ sentencing and healing circles,⁸⁴ Family Group

⁷⁵ Ibid at 67.

⁷⁶ Aboriginal Justice Division, "Barriers to accessing Justice: Legal Representation of Indigenous People Within Ontario," (Ministry of the Attorney General, 2016) at page 2.

⁷⁷ Supra note 6 (Gladue) at paras 40, 46.

⁷⁸ Chartrand, Larry N et al, A report on the relationship between restorative justice and Indigenous legal traditions in Canada, by Larry N Chartrand et al, Open WorldCat (Ottawa: Department of Justice Canada, 2016).

⁷⁹ Elizabeth Adjin-Tetey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19:1 Can J Women & L 179, at 182.

⁸⁰ CBA National, "Fifteen Years after Gladue, What Progress?", (15 April 2014) online:< <https://nationalmagazine.ca/en-ca/articles/law/in-depth/2014/fifteen-years-after-gladue-what-progress>>, at pg 3.

⁸¹ As per statistics Canada, in 2020/2021, in all provinces and territories, 94,174 individuals were admitted into the community and 89,642 were admitted into remand and 35,562 were admitted into sentenced custody. Statistics Canada, "Adult Admissions to correctional services," (2022) online:< <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=3510001401>>.

⁸² Dickson, Jane & Michelle Stewart, "Risk, rights and deservedness: Navigating the tensions of Gladue, Fetal Alcohol Spectrum Disorder and settler colonialism in Canadian courts" (2021) Behav Sci Law bsl.2536.) at page 12.

⁸³ Research and statistics Division, Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canadas' Criminal Justice System, by Research and statistics Division (Statistics Canada, 2017), at page 45-46; See for example: R c Diamond, 2006 QCCQ 2252 at para 22 [Diamond]; R c Amitook, 2006 QCCQ 2705 at paras 38, 55, 85, 127 [Amitook]; R v Arcand, 2010 ABCA 363 at para 263 [Arcand]; R v Lazore, 2015 ONSC 1090 at para 12.

⁸⁴ Ibid, (Stats Canada, 2017) at pages 46-47; See for example: R v Francis-Simms, 2017 ONCJ 402 at para 2; R v McGill, 2016 ONCJ 138 at para 6; R v Paulson, 2020 ONCJ 86 at para 2; R v RS, 2021 ONSC 2263 at para 194.

Conferencing,⁸⁵ Elder Panels and Participation,⁸⁶ Specialized Sentencing courts,⁸⁷ Community Service Orders,⁸⁸ and Indigenous programming provided in correctional institutions or communities.⁸⁹ In applying these alternatives to incarceration, a sentencing judge must be mindful of balancing the relevant objectives of sentencing. The principle of proportionality requires that a sentence does not elevate any singular objective over another, including restorative justice in the context of Indigenous offenders.⁹⁰ The Supreme Court of Canada in *Gladue*, *Wells* and *Ipeelee* have discussed the importance of centring restorative justice while also abiding by the principle of proportionality,⁹¹ as the sentencing judge must keep in mind the principles of separation, denunciation, and deterrence,⁹²

How is the *Gladue* Information Presented?

R. v. Gladue also discussed how s.718.2(e) is to be considered in the daily functioning of Canadian courts⁹³, stating that Gladue information is required but its presentation to the court may vary.⁹⁴ If the information provided to the sentencing court is insufficient, sentencing judges must seek further information,⁹⁵ which can be submitted via pre-sentence report, oral submissions, or testimony. After the Gladue decision, specialized pre-sentence reports named “Gladue Reports” emerged⁹⁶ and quickly became the preferred manner of communicating Gladue information in Ontario and across Canada. The Supreme Court of Canada recognized their widespread use in *Ipeelee*, where their use was referred to as the “current practice” to obtain case-specific information.⁹⁷ However, this characterization created an assumption that Gladue reports are accessible to most offenders⁹⁸, which is not currently the case. There is strong evidence to indicate

⁸⁵ See for example, *R. v. M.* (M. 2001 CarswellOnt 2538, 46 C.R. (5th) 173, 50 W.C.B. (2d) 412, 85 C.R.R. (2d) 45 at para 5; *Family & Children’s Services of St. Thomas & Elgin v AC*, 2013 ONCJ 453 at para 139; *Children’s Aid Society of Toronto v AG*, 2015 ONCJ 331 at paras 101-104.

⁸⁶ See for example: *R v Vickers*, 2021 ONSC 3895 at para 53; *R v Leigh*, 2018 ONCJ 776 at para 76 [Leigh]; *R v Trudeau*, 2021 ONCJ 243 at para 79.

⁸⁷ See for example: *R v E (K)*, 2015 ONCJ 68 at para 43; *R v Armitage*, 2015 ONCJ 64 at para 3; *R v George*, 2012 ONCJ 756 at para 12.

⁸⁸ See for example: *R v Colton*, 2021 ONCJ 249 at para 43; *R v RS*, 2021 ONSC 2263 at para 247; *R v McCook*, 2015 BCPC 1 at para 182; *R v Luke*, 2019 ONCJ 514 at paras 59, 69.

⁸⁹ *Supra* note 19 (Ralston, 2021) at page 228.

⁹⁰ *Ibid* at page 112.

⁹¹ *Supra* note 40 (Hebert, 2017) at page 153; *Supra* note 6 (*Gladue*) at paras 81, and 83; *Supra* note 7 (*Wells*).

⁹² *Supra* note 19 (Ralston, 2021) at page 86.

⁹³ *Supra* note 6 (*Gladue*) at para 83.

⁹⁴ *Ibid* at para 83.

⁹⁵ *Supra* note 6 (*Gladue*) at para 84.

⁹⁶ *Supra* note 11 at para 60.

⁹⁷ *Supra* note 19 (Ralston, 2021) at page 234, *Supra* note 11 (*Ipeelee*) at para 60.

⁹⁸ *Ibid* (*Ipeelee*) at 60.

that in Ontario, most Indigenous offenders have their Gladue information presented to the court through oral submissions by counsel. Regardless of the form the Gladue information takes, the Supreme Court of Canada has stressed that this information must be presented to the sentencing courts in a comprehensive and timely manner to allow the judge to fulfill their duties under s.718.2(e).⁹⁹

Under s.718.2(e), Indigenous offenders are entitled to the consideration of this information, not a particular form of submission.¹⁰⁰ It has been suggested in the literature that s.718.2(e) of the *Criminal Code* demands that *Gladue* reports be made available to all Indigenous offenders.¹⁰¹ However, the Supreme Court of Canada left this ambiguous, and lower courts have stated the importance of determining the value of Gladue submissions based on substance rather than form.¹⁰² An appeals court in Ontario has held that the judiciary does not have the power to order a report.¹⁰³ This sets Ontario apart from Saskatchewan and Alberta which appear to be the only jurisdictions nationally where the power of a court to order a report is recognized.¹⁰⁴ As there are no national standards for how Gladue information is to be presented in Canada beyond the demands of the Supreme Court of Canada, the form and quality of Gladue reports, pre-sentence reports with Gladue content and submissions by counsel will vary from jurisdiction to jurisdiction.¹⁰⁵ It is important to note that Ontario does not primarily rely on pre-sentence reports with Gladue information. Instead, if a report is being procured, it will commonly be a Gladue report. Given this, this thesis will focus attention on Gladue reports.

A Gladue report is a specialized pre-sentence report tailored to the specific circumstances of Indigenous offenders¹⁰⁶ and were first piloted in Ontario by Aboriginal Legal Services of Toronto (now known as Aboriginal Legal Services (ALS)).¹⁰⁷ Gladue reports aim to contextualize the behaviour of an Indigenous person by informing the court of intergenerational experiences that have shaped their life.¹⁰⁸ Preparation of a report typically involves interviews with the client and

⁹⁹ Supra note 19 (Ralston, 2021) at page 116, 234; Supra note 11 (Ipeelee) at para 60.

¹⁰⁰ Ibid (Ralston, 2021) at page 236.

¹⁰¹ Supra note 40 (Hebert, 2017) at page 156.

¹⁰² Supra note 19 (Ralston) at page 235; *R. v. Corbiere*, 2012 ONSC 2405 at para 23. This view was reiterated in *R. v. Lawson*, 2012 BCCA 508 at para 36.

¹⁰³ *R. v. Parent*, 2021 ONSC 3701, 2021 CarswellOnt 7667, (Parent) at para 72-75, 116.

¹⁰⁴ See *R v Mattson* 2014 ABCA 178; *R. v. Sand*, 2019 SKQB 18.

¹⁰⁵ Ibid (Ralston, 2021) at page 236; See also, *R. v. Gamble*, 2019 SKQB 327 at paras 44-52.

¹⁰⁶ Supra note 19 (Ralston, 2021) at page 234, Supra note 11 (Ipeelee) at para 60.

¹⁰⁷ Ibid (Ralston, 2021) at page 243.

¹⁰⁸ Hannah-Moffat, Kelly & Paula Maurutto, “Re-contextualizing pre-sentence reports: Risk and race” (2010) 12:3 *Punishment & Society* 262–286, (Hannah-Moffat, 2010) at page 273.

their family members and draws on documentary records such as the criminal record, charge sheet and synopsis, as well as resources informing of relevant community and cultural histories.¹⁰⁹ Gladue reports authors are independent of the criminal justice system and are often Indigenous themselves, making them generally¹¹⁰ better situated to develop rapport with Indigenous persons.¹¹¹ Research has found that judges, defence counsel and Crown attorneys find Gladue reports helpful and that clients with a Gladue report are more likely to get a non-custodial sentence.¹¹² However, there is no consensus on the impact of Gladue reports on sentencing.¹¹³ Legal Aid Ontario has supported the use of Gladue reports stating that they are “an essential client-facing service” and effective in reducing the number of Indigenous persons in sentenced custody.¹¹⁴

Despite their benefits, and unlike standard PSRs,¹¹⁵ there is no statutory basis for a court to order a Gladue report. Instead, service providers have the discretion to create their own policies regarding to whom they provide reports. As it appears sentencing courts cannot formally order a report from a service provider, the administrative work required to procure a report or materials required for Gladue submissions falls on the offender’s counsel.¹¹⁶

Gladue reports have had several common problems identified with their procurement. Some issues are that reports verge on advocacy,¹¹⁷ the interviewers employ leading questions, “cut and paste” style writing and the variability in writing and procurement;¹¹⁸ the consistency of reports,¹¹⁹ failing to use fully verified information,¹²⁰ that the sentencing options recommended are not realistic,¹²¹ that reports could do a better job at connecting the specific Gladue factors to the offending conduct;¹²² and the timeliness of report procurement.¹²³

¹⁰⁹ Ibid at page 244.

¹¹⁰ Though generally this is accurate, there are still nuanced and case specific reasons for offenders to be hesitant or to outright refuse to engage with the Gladue writer.

¹¹¹ Supra note 19 (Ralston, 2021) at page 245.

¹¹² Gladue Report Disbursement: Final Evaluation Report, Zotero (Legal Services Society of BC, 2013), at 25.

¹¹³ Ibid at 32; LaBoucane-Benson, Patti, “Evaluation of the Alberta Gladue Pre-Sentence Report Program” 126, at 25.

¹¹⁴ Supra note 19 (Ralston, 2021) at page 246; Supra note 108.

¹¹⁵ “‘Relationships First, Business Later’: Aboriginal Justice Strategy consultation report: Part 1” 115, at page 11.

¹¹⁶ Pre-Sentence reports may be ordered through s.721 of the Criminal code.

¹¹⁷ Supra note 19 (Ralston, 2021) at page 243-244.

¹¹⁸ Supra note 19 (Ralston, 2019) at page 246; Supra note 112, at page 50.

¹¹⁹ Ibid (Ralston, 2019) at page 246; Supra note 113 (LaBoucane-Benson, 2019), at 21, 26.

¹²⁰ Supra note 112 at 47.

¹²¹ Ibid at 49.

¹²² Ibid at 51; Supra 113 (LaBoucane-Benson, 2019) at 21, 26.

¹²³ Ibid (LaBoucane-Benson Patti, 2019) at 21, 26.

¹²⁴ Ibid at 51.

The Administration and Funding of the Gladue Framework in Ontario

Publicly funded service providers procure Gladue reports in Ontario. Unlike jurisdictions like Alberta and Québec, where a central administrative body receives and fulfills requests for Gladue reports, no central organization procures, administers, or funds all Gladue reports in Ontario. As such, there are a plethora of organizations and funding sources for Gladue reports. This thesis will focus on Legal Aid Funded Gladue report programs and Legal Aid Ontario's Gladue policies. Though a more thorough review of Gladue servicing in Ontario may be beneficial, it is outside this project's scope.

In Ontario, Legal Aid Ontario provides approximately 1.5 million dollars to three organizations, Aboriginal Legal Services, Nishnawbe-Aski Legal Services Corporation and Grand Council Treaty #3.¹²⁴ The largest of these organizations, Aboriginal Legal Services, requires a client to have been found guilty of an offence and be facing a custodial sentence of at least ninety days. Service providers, such as Aboriginal Legal Services, state that a Gladue report will take 6-8 weeks to complete.¹²⁵ Legal Aid Ontario impacts the quality of Gladue and legal services that Indigenous persons can access in the way they compensate defence counsel for their work. Legal Aid Ontario operates a certificate system which pays lawyers for representing clients who cannot afford legal representation. Lawyers are compensated based on Legal Aid Ontario's Billing and Tariff Guide through which lawyers are paid either through a tariff payment or an hourly rate. Both types of payment are closely associated with particular legal tasks, for example, a tariff payment will be provided to lawyers who complete a bail hearing.

Legal Aid Ontario's tariff system compensates lawyers for the work they do to fulfill their Gladue obligations. As of 2014, the Gladue tariff was \$413.44 and was paid automatically when a client self-identified as Indigenous. The value of the tariff was increased to \$455.81 in 2016, equivocal to approximately 3 hours of work based on the hourly rates prescribed by Legal Aid Ontario. However, as of July 6th, 2019, Gladue block authorizations are only available where a publicly funded Gladue report is used, and the value of the tariff was reduced to \$273.49.¹²⁶ This

¹²⁴ Supra note 114 at page 10.

¹²⁵ Aboriginal Legal Services states that they take 6-8 weeks to procure (Aboriginal Legal Services, "Gladue," (2022) online:< <https://aboriginallegal.ca/courts/gladue>>.) NAN Legal services states that it takes 6 weeks to procure a report (Nishnawbe-Aski Legal Services Corporation, "Gladue," online:< <https://nanlegal.on.ca/gladue/>>), other organizations offer less specific timelines such as Tungasuvvingat Inuit in Ottawa who states reports may take a few weeks or a few months (Tungasuvvingat Inuit, "TI Gladue Client Factsheet," (2020) online:< <https://tiontario.ca/wp-content/uploads/2020/11/TI-Gladue-Client-Factsheet-English.pdf>>), where many such as ONWA and the London Friendship Centre do not provide timelines.

¹²⁶ Legal Aid Ontario, "TARIFF AND BILLING HANDBOOK" 210, at page 32.

amendment means that LAO will only compensate defence counsel for the time spent preparing Gladue submissions for their clients if they can get an LAO-funded Gladue report. As a result of this policy, unless Aboriginal Legal Services, Nishnawbe-Aski Legal Services Corporation or Grand Council Treaty #3 provides a report for their client, defence counsel, who have to put in the additional work to prepare Gladue submissions, will not be paid for this work.

The Role of Defence Counsel

Defence counsel has the duty to advance their client's best interests in the adversarial process. In most circumstances, providing the court with individualized Gladue information will advance the client's self-interest.¹²⁷ This often means that, where a Gladue report is not available from an LAO-funded Gladue service provider, the procurement of a Gladue report from a non-LAO-funded Gladue service provider or the gathering of Gladue information about their client, falls on defence counsel.¹²⁸ Defence counsel may utilize various sources and methodologies when procuring and presenting their Gladue submissions, and generally, submissions will be accepted by the court unless the factual assertions made are disputed, then they will need to be presented through a form of admissible evidence.¹²⁹ The quality of submissions prepared by defence counsel becomes particularly crucial in the *Gladue* analysis, given the frequency in which Gladue reports are inaccessible, as discussed in chapter four. Despite this, sentencing judges have cautioned against the reliance on submissions from counsel as a substitute for a Gladue report.¹³⁰ In chapter four, the experiences of defence counsel in producing and providing these submissions provide some insight into why these concerns may arise.

The Role of the Judiciary

Though judges have a limited capacity to address systemic problems through sentencing, the Supreme Court of Canada has held that they can remedy problems such as over-incarceration fully accounting for the circumstances of the Indigenous offenders before them and embracing alternatives to incarceration at sentencing, where appropriate.¹³¹ The Supreme Court of Canada in *Ipeelee* held that sentencing judges must reorient their approach to sentencing to account for principles of restorative justice and community justice initiatives that are culturally relevant to

¹²⁷ Supra note 19 (Ralston, 2021) at page 267.

¹²⁸ Ibid (Ralston, 2019) at page 268.

¹²⁹ Ibid Principles at pages 236-237.

¹³⁰ Ibid at page 238; See also, R v Rich, 2020 CanLII 32237 (NL Prov Ct) at para 7.

¹³¹ Supra note 19 (Ralston, 2021) at pages 77-79; Supra note 11 (Ipeelee) at para 66.

Indigenous offenders.¹³² Though counsel often plays a leading role in bringing forward the Gladue factors to the court, the judge alone is constitutionally obliged to craft a proportionate sentence for an Indigenous person that accounts for the Gladue factors.¹³³ As such, if the court fails to gather sufficiently detailed information regarding the offender's background or the availability and practicality of culturally appropriate sanctions before proceeding, the court's decision may be open to appellant scrutiny.¹³⁴ Sentencing judges are directed to identify the shortcomings in the information before them and call for further *viva voce* evidence as needed.¹³⁵ Despite broadly outlining the Gladue framework, the Supreme Court of Canada has largely left lower courts with the duty to determine how the Gladue factors specifically impact the facts of a particular sentencing decision.¹³⁶

Indigenous persons have a right to waive the Gladue obligations if they do not wish to have these circumstances presented. Their counsel will present this waiver to the court, which will be accepted as long as the waiver is expressed clearly on the record and is made with full knowledge of the right that is being surrendered. It falls on the judge to ensure that this bar is met and is not the result of negligent counsel.¹³⁷ Other appellate courts have also held that the duty to apply s.718.2(e) persists even when the accused waives the preparation of a Gladue report.¹³⁸ There has been judicial debate regarding whether judges should seek out a particular substantive standard of Gladue information or a particular form of Gladue information. These questions have not received a great deal of attention to date. When joint submissions are considered by a court sentencing an indigenous offender, the court must ensure the Gladue factors were adequately considered and that the sentence reflects the Gladue factors¹³⁹ or the decision could be subject to appellate review.¹⁴⁰ When Gladue information is provided through standard presentence reports, courts also must ensure that the PSR and the actuarial risk assessments inherent to PSR are effective for Indigenous persons and do not perpetuate systemic discrimination.¹⁴¹

¹³² Ibid (Ralston, 2021) at pages 76-77; Ibid (Ipeelee) at paras 59-64.

¹³³ Ibid (Ralston, 2021) at page 247, *R. v. Andersson*, 2014 SCC 41 at para 24.

¹³⁴ Ibid (Ralston, 2021) at page 253.

¹³⁵ Ibid at page 253.

¹³⁶ Ibid at page 154.

¹³⁷ Ibid at page 259.

¹³⁸ Ibid at page 260.

¹³⁹ Ibid at page 283.

¹⁴⁰ Ibid at page 293.

¹⁴¹ Ibid at page 141, see *Ewert v. Canada*, 2018 SCC 30.

The Role Of the Crown

The Crown's paramount function in the criminal justice process is a quasi-judicial role, in that the Crown must assist the court in the furtherance of justice instead of simply striving for a conviction.¹⁴² The Crown has a duty to ensure that the justice system operates fairly for the victims of crime and must do whatever is reasonable to assist the judge in avoiding error.¹⁴³ However, the Crown is not constitutionally required to consider the Aboriginal status of an accused when determining their sentencing position.¹⁴⁴ Crown action in bringing forward charges and determining positions on sentencing may only be reviewed by appellate courts for abuse of process,¹⁴⁵ meaning the proportionality of a sentence entirely rests on the judge.¹⁴⁶ The Supreme Court of Canada held in *Anderson* that the *Gladue* principles are not free-standing constitutional principles meaning they are limited to the competing interests and perspectives of sentencing, while the court seeks a proportional sentence following the tenants of fundamental justice.¹⁴⁷

Conclusion on Gladue Framework

In summary, the Gladue framework has jurisprudentially developed over the past 23 years and has specific applications. However, the non-legal aspects of the framework present several potential barriers to accessing Gladue services and thus to furthering Gladue's remedial goals. What follows is a presentation of how this thesis conceives of access to justice and how the Gladue framework can be understood through a threefold conception of access to justice, including its procedural, substantive, and symbolic elements. It is in the context of this analysis that potential barriers to these elements are highlighted and discussed.

¹⁴² Ibid at page 263.

¹⁴³ Ibid at pages 263-264.

¹⁴⁴ Supra note 36 (Anderson) at para 1.

¹⁴⁵ Ibid at para 1-4.

¹⁴⁶ Supra note 19 (Ralston, 2021) at page 138 – 139; Ibid (Anderson) at para 21-28.

¹⁴⁷ Ibid (Anderson) at para 33.

Chapter 2: Access to Justice

Chapter one presented the Gladue framework. Chapter two will explore the literature on access to justice and present a three-dimensional conception of access to justice which shaped how I sought to provide unique insights into the research question, “Do defence counsel representing Indigenous clients in Ontario identify barriers in access to the resources required to sufficiently present the Gladue factors for these clients?” Here we will explore the dominant themes of access to justice research and present the procedural, substantive and symbolic components of access to justice.

A Review of Access to Justice

Access to justice is a difficult concept to define, as it is code for various “disparate issues,” which can be legal, political, procedural, substantive, or deeply symbolic.¹⁴⁸ It has been described as an “umbrella” concept which addresses unmet legal needs, legal assistance and the gap between the availability of and access to various legal instruments (such as lawyers, courts, legal procedures, community resources and pre-sentence reports).¹⁴⁹ Cappelletti and Garth, the authors of “Access to Justice: A World-Wide Survey,”¹⁵⁰ acknowledge that the concept is difficult to define, but focus on two basic purposes of a state-run legal system which allows for people to vindicate their rights and/or resolved their disputes. First, a justice system must be equally accessible to all; second, it must lead to results that are individually and socially just.¹⁵¹ The United Nations Development Programme describes access to justice broadly as the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards.¹⁵² MacDonald presents eight elements of what would characterize an accessible legal system: 1) Just results, 2) fair treatment, 3) reasonable cost, 4) reasonable speed, 5) understandable to users, 6) responsive to needs, 7) certain and 8) effective, adequately resourced and well organized.¹⁵³ None

¹⁴⁸ Hutchinson, Allan C., "Access to Civil Justice" (1990). Books. 289.

https://digitalcommons.osgoode.yorku.ca/faculty_books/289 at xii. - as discussed in Roderick, A. MacDonald, “Whose Access? Which Justice?” at 176.

¹⁴⁹ Bianchini, Katia, “Identifying the Stateless in Statelessness Determination Procedures and Immigration Detention in the United Kingdom” (2020) 32:3 *International Journal of Refugee Law* 440–471 at page 450. The term “Legal Instruments” describes “instruments” such as lawyers, courts, legal services, legal procedures and other instruments that have been created to obtain or contribute towards a legal outcome or objective. This term is discussed in more detail later in chapter two.

¹⁵⁰ M. Cappelletti & B. Garth, *Access to Justice: A Worldwide Survey* (Milan: Sijthof, 1978). This piece is popularly cited in the field, and is one of the earliest pieces defining the field of access to justice.

¹⁵¹ *Supra* note 149 (Bianchini) at page 451.

¹⁵² UNDP, *Programming for Justice: Access for All – A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (2005) 5.

¹⁵³ *Supra* note 13 (MacDonald), at page 23, see also *Supra* note 149 (Bianchini) at page 451.

of the above definitions speak to the types of outcomes sought or the institution engaged by justice seekers. As such, these conceptions provide a starting point, but further inquiries are required to discuss the experiences of a particular justice seeker.

The elements of an accessible justice system described by MacDonald help us explore in more tangible terms what accessible justice could look like in any given scenario, raising further questions, including ‘what is a “reasonable” pace for a judicial matter to be resolved?’ ‘Whose needs should the system be responsive to’, and ‘how do we address them?’ As Deborah Rhode asserts, these questions of access to justice cannot be answered in the abstract due to the scale of variables involved in such an endeavour.¹⁵⁴ Though some basic tenets of law are universal across the legal system in Canada (the rule of law, constitutional supremacy, due process), asking these questions in a specific legal context encourages researchers to explore the impact of policies and practices on justice seekers. This thesis focuses on the specific legal context of Indigenous persons being sentenced in Ontario.

Different Waves of Access to Justice Thought

Access to Justice as a field has evolved since the 1960s. Since that time, the different waves of access to justice thought have been described in the literature by scholars such as Parker,¹⁵⁵ MacDonald,¹⁵⁶ and Cappelletti and Garth.¹⁵⁷ MacDonald’s work is the most recent, conceptualizing five waves of access to justice thought roughly corresponding to 5 different decades, the ’60s, ’70s, ’80s, ’90s and 2000’s.¹⁵⁸ Access to justice reform efforts in the ’60s were concerned with access to courts and lawyers, shifting to institutional redesign in the 70s, public legal education in the 80s, preventative law in the 90s and what MacDonald calls “proactive access to justice” in the 2000s.¹⁵⁹

¹⁵⁴ Rhode, Deborah L, *Access to justice* (Oxford ; New York: Oxford University Press, 2004) at page 6.

¹⁵⁵ Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999) at 3132 (emphasis added).

¹⁵⁶ *Supra* note 13 (MacDonald).

¹⁵⁷ Cappelletti and Garth, *Access to Justice: A World Survey* (1978); *Access to Justice: Studies of Promising Institutions* (1978); *Access to Justice: Emerging Perspectives and Issues* (1979); and *Patterns in Conflict Management: Essays in the Ethnography of Law* (1979).

¹⁵⁸ *Supra* note 13 (MacDonald), at page 20.

¹⁵⁹ *Ibid* at 20-23.

Dominant Themes in Access to Justice Research

The justice system has been described as “a system of systems.”¹⁶⁰ Each system contains unique clients, policies, incentives, and bureaucracies. As MacDonald states, “Because reflection about access to justice originated in a critique of the civil litigation process, dispute resolution has been a dominant theme in most studies of the problem.”¹⁶¹ As a result, the materials reviewed below largely discuss the plight of “justice seekers”¹⁶² in the plurality of legal institutions which focus on dispute resolution, rather than specifically or narrowly in the space of criminal law. For example, former Chief Justice of the Supreme Court of Canada, Beverly McLachlin, conceptualized the problem in the dispute resolution space when she said, “we do not have adequate access to justice in Canada.”¹⁶³ The tendency to conceptualize access to justice in the civil law context is reflected in the relevant literature surrounding access to justice within academic literature,¹⁶⁴ government reports,¹⁶⁵ academic conferences¹⁶⁶ and large-scale research projects¹⁶⁷ being primarily concerned about the space of dispute resolution.¹⁶⁸

A common approach to access to justice research in the area of dispute resolution is to identify “unmet legal need[s].” This process works by identifying legal needs experienced by justice seekers and determining whether they can access legal instruments created to address those

¹⁶⁰ Canadian Bar Association, *Reaching Equal Justice Report: Equal Justice - Balancing the Scales*, by Canadian Bar Association, Open WorldCat (2013), at 48.

¹⁶¹ *Supra* note 13 (MacDonald) at page 105.

¹⁶² The term, “justice seeker,” is to be understood in the plain use of both words, an individual who is seeking justice. This definition does not limit the venue in which they are seeking justice or the type of justice they are seeking.

¹⁶³ When speaking in a panel discussion about the problem of civil access to justice for middle income earners. McLachlin, Forward in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).

¹⁶⁴ See for example: Sandefur, Rebecca L, “Access to What?” (2019) 148:1 *Daedalus* 49–55; Farrow, Trevor, “What is Access to Justice?” (2014) 51 *Osgoode Hall Law Journal* 33; *Supra* note 13 (MacDonald); Macdonald, Roderick A, “Theses on Access to Justice” (1992) 7:2 *Canadian Journal of Law and Society* 25.

¹⁶⁵ See for example: *Supra* note 160 (Canadian Bar Association); Sub-committee on Access to Justice of the Administration of Justice Committee, *Access to Justice: Report on Selected Reform Initiatives in Canada*, by Sub-committee on Access to Justice of the Administration of Justice Committee (Canadian Judicial Council, 2008); Farrow, Trevor C W et al, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report” (2016) SSRN Journal, online: <<https://www.ssrn.com/abstract=2795672>>;

¹⁶⁶ See for example: Bass, Julia, ed, *Access to justice for a new century: the way forward*; [proceedings of a conference held in Toronto, Ont., May 28, 2003] (S.l.: LSUC, 2005); *Expanding Horizons: Rethinking Access to Justice in Canada*, (Department of Justice Canada, 2000).

¹⁶⁷ See for example: Mauro Cappelletti, James Gordley & Earl Johnson, Jr, “*Toward Equal Justice: A Comparative Study of Legal Aid in Modern Societies* (1975); Farrow, Trevor C W et al, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report” (2016) SSRN Journal, online: <<https://www.ssrn.com/abstract=2795672>>; Coumarelos, Christine et al, *Justice made to measure: NSW legal needs survey in disadvantaged areas* (Sydney: Law and Justice Foundation of New South Wales, 2006).

¹⁶⁸ The term, “dispute resolution” is purposely broad, as it includes the full range of civil disputes.

needs. These studies typically utilize large-scale surveys of a variety of justice seekers.¹⁶⁹ As stated by Sandefur,

Often, the chasm between the vast number of people facing civil justice problems and the small number of people receiving lawyers' help is presented as a crisis of "unmet legal need." Yet embedded in this understanding is the key assumption that any problem with legal implications requires the involvement of a legally trained professional for a just, fair, or successful resolution. This diagnosis of the problem proceeds from a preference for a single specific solution: more legal services.¹⁷⁰

Sandefur identifies a key assumption present in some access to justice research. Often the question begs the answer. For example, when researchers seek to measure access justice by assessing how many justice seekers can secure a lawyer, they are assuming that access to justice is achieved simply through access to an attorney. As a result, the question also assumes the response. If access to justice is measured by the availability of a legal instrument, then the solution to solving access to justice is *more* legal instruments as opposed to *better* or *different* legal instruments. Bryant G. Garth discusses the same set of assumptions, stating that:

Classical access to justice research" was often "very myopic," and that it has led "lawyers and others "to think that" the only good solutions "to social problems" are "legal solutions," and encouraging practitioners, researchers, and opinion leaders to join in a chorus of "simplistic exhortations" about the importance of fulfilling "the unmet legal needs of . . . vague categories" of people, like the disadvantaged.¹⁷¹

A recent research project taking this approach was conducted by Farrow et al for the Canadian forum on civil justice.¹⁷² The researchers undertook a national survey of the everyday legal

¹⁶⁹ See Mathews, Julie & David Wiseman, Community Justice Help: Advancing Community-Based Access to Justice A discussion paper, by Julie Mathews & David Wiseman, Zotero (Community legal Education Ontario, 2020); Sandefur, Rebecca L, "Access to What?" (2019) 148:1 Daedalus 49–55; Sandefur, Rebecca L, ed, Access to justice, 1. ed ed, Sociology of crime, law and deviance 12 (Bingley: Emerald JAI, 2009).

¹⁷⁰ Sandefur, Rebecca L, "Access to What?" (2019) 148:1 Daedalus 49–55, at page 50.

¹⁷¹ Sandefur, Rebecca L, ed, Access to justice, 1. ed ed, Sociology of crime, law and deviance 12 (Bingley: Emerald JAI, 2009), citing Bryant G. Garth, in Sandefur, Rebecca L, ed, *Access to justice*, 1. ed ed, Sociology of crime, law and deviance 12 (Bingley: Emerald JAI, 2009) at page 258.

¹⁷² Similar research projects have been conducted under the supervision of Dr. Ab Currie see Currie, Ab, "Nudging the Paradigm Shift: Everyday Legal Problems in Canada" (2016) SSRN Journal, online: <<http://www.ssrn.com/abstract=2825507>>. For further

problems experienced by the Canadian public and included phone interviews with a random sample of over 3,000 Canadians aged 18 or older. The purpose of the study was to examine the public's experiences with the justice system, specifically, the kinds of problems faced, the methods respondents took to deal with them, and the costs associated with the problems and solutions.¹⁷³ The study found that within three years, 48.4% of the Canadian adult population would experience at least one everyday legal problem, the most frequent being consumer, debt and employment problems.¹⁷⁴ Respondents also reported the steps people take to deal with their problems, showing that only 7% of people seeking redress of their legal problems appeared before courts and tribunals and only 19% obtain legal advice from a legal professional. Out of the broad scope of legal problem types identified by respondents, "Criminal Charges" as a problem type were the least common problem faced by respondents, with only 0.4% of respondents selecting this response. Farrow's study does not offer any insight into criminal legal problems beyond the number of times respondents indicated that they faced these problems.

This study avoids the problematic assumption described by Sandefur, as it allowed applicants to describe how they resolved their disputes and what approaches they found meaningful¹⁷⁵, instead of simply accounting for how many did not have access to a specific legal instrument. Farrow et al. thus presents the legal problems faced by Canadians and the associated costs that correspond to them, opening up the dialogue to include factors beyond access to counsel or a specific form of dispute resolution. While valuable, this study is limited in its capacity to engage with the barriers faced by justice seekers when they attempt to access legal instruments. Beyond the brief acknowledgement that potential legal fees deterred them from taking action, no further discussion was included regarding why a respondent did not seek a legal resource to resolve the problem or why they sought a particular type of resource. The study takes a broad view of the legal needs faced by individuals and, generally, how many of those needs are met and unmet which, while helpful, does not engage with the particular bureaucratic, financial or regional barriers faced by justice seekers for each category of legal problems.

reading see: Canadian Bar Association, *Reaching Equal Justice Report: Equal Justice - Balancing the Scales*, by Canadian Bar Association, Open WorldCat (2013)

¹⁷³Farrow, Trevor C W et al, "Everyday Legal Problems and the Cost of Justice in Canada: Overview Report" (2016) SSRN Journal, online: <https://www.ssrn.com/abstract=2795672> at page 5-6.

¹⁷⁴ Ibid at page 5-7.

¹⁷⁵ Ibid at page 9-10.

Minimal academic discussion has concerned access to justice in the space of criminal law.¹⁷⁶ In their paper “Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives”, Hughes & Mossman (2001) provide a comprehensive, if now somewhat dated, review of access to justice in the administration of criminal law in Canada. When discussing the concept of legal “needs,” the authors state that this area of policy study seems to focus primarily, “or even exclusively, on ideas about needs for legal services in relation to matters that fall within the scope of civil law activity.”¹⁷⁷ They identify that in studies about “legal needs,” the legal needs of those within the criminal legal system are largely excluded.¹⁷⁸ They point out the lack of access to justice research that identifies the needs of all individuals who become involved in the criminal justice system, including offenders, victims, their families, communities and society at large.¹⁷⁹ This gap appears to still exist in the literature.

Hughes & Mossman state that we must move beyond the assumption held by policymakers that “needs in the criminal justice context are commensurate with categories of offences and the processes of criminal law and sentencing.”¹⁸⁰ An offender’s needs are not a list of criminal procedures and sentencing responses; the offence does not exclusively define their needs. For example, an offender found guilty of a drug offence does not require drug treatment because of the charge of possession; they require treatment because of their addiction. By acknowledging this assumption, it is easier to shift our understanding of access to justice beyond the narrow conception of access to justice that is concerned exclusively with access to legal representation and legal aid delivery. The assumption that access to lawyers, courts and specific legal procedures fulfills the needs of those involved in the criminal justice system falls short of the full breadth of possible needs. This assumption is similar to the those identified by Sandefur, which are embedded in some access to justice research.¹⁸¹ Hughes & Mossman state that future inquiry should be centred around both the legal and non-legal needs of all those involved in the system, including offenders, victims,

¹⁷⁶ See for example: Hughes, Patricia & Mary Jane Mossman, *Re-Thinking Access to Criminal Justice In Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives*, by Patricia Hughes & Mary Jane Mossman (Department of Justice Canada, 2001); Dehaghani, Roxanna & Daniel Newman, “Criminal legal aid and access to justice: an empirical account of a reduction in resilience” (2021) *International Journal of the Legal Profession* 1–20. For conversations which indirectly discuss criminal matters through conversations surrounding legal aid programs please see: *Supra* note 13 (MacDonald) at page 19-23; For a history of the right to representation for American criminal defendants see Rhode, Deborah L, *Access to justice* (Oxford ; New York: Oxford University Press, 2004) at 49-58; See the discussion regarding the scope of the Florence justice projects work in the late 70’s Galanter, Marc, “Access to Justice In a World of Expanding Social Capability” (2010) 37:1 *Fordham URB LJ* 15.

¹⁷⁷ *Supra* note 176 (Hughes & Mossman) at page 32.

¹⁷⁸ *Ibid* at page 32.

¹⁷⁹ *Ibid* at page 33.

¹⁸⁰ *Ibid* at page 33.

¹⁸¹ See footnote 183.

their families and communities, to centre reform efforts around an offender's practical and personal needs.¹⁸² Hughes & Mossman point out that by centring the needs of those participants in the criminal justice system, different questions emerge, such as how we account for and the relevance of "difference" in legal service provision.¹⁸³ Considering differences between offenders, their circumstances, and associated needs is crucial, especially when considering access to justice within the Gladue framework.

Finally, the researchers discuss the interactions between access to justice and the criminal justice system's goals. The nature of the criminal justice system creates surface-level differences in circumstances between the class of justice seekers being researched for this thesis (Indigenous persons being sentenced) and justice seekers in the dispute resolution space. A key difference is discussed by Mossman et al., stating that in the civil space, the victim of a wrongful act is in the driver's seat of the legal process, whereas in the criminal context, the state is in charge. A core goal to the criminal justice system is holding those who commit crimes accountable and punishing perpetrators on behalf of the victim. The state attempts to achieve this goal through legal actors, including the police, prosecutors and judges, who all have a role in responding to criminal acts.¹⁸⁴ As noted by Hughes and Mossman, this approach largely excludes victims¹⁸⁵ and forces the accused/offender to engage with a state-run institution of justice to achieve a particular outcome. Unlike individuals raising civil disputes, those being sentenced for a crime cannot choose which legal institution settles the matter or leave the legal matter unresolved. They must utilize what is available to them to act in their best interests. They are also largely dependent on other legal actors, including the Crown prosecutor, the capacity of their defence counsel, the availability of service providers and the judge, who ultimately decides their fate. However, through assistance from counsel, accused and offenders will often formulate ideal outcomes and expectations of how they will be treated, both legally (for instance, having their Charter rights maintained) and personally (being respected by the institution they encounter). As such, though they have no agency over the initiation of the proceedings, they are still justice seekers, actively attempting to access justice.

The approach to access to justice identified by Hughes and Mossman differ from the approach taken by this thesis. Hughes & Mossman's approach analyzes access to justice within the

¹⁸² Ibid at page 33.

¹⁸³ Ibid at page 33.

¹⁸⁴ Ibid at page 5-6.

¹⁸⁵ Ibid at page 5-6, 45.

criminal justice system by discussing the needs of all parties that engage in the criminal justice system, including offenders, victims and their respective communities. They then identify the emerging field of restorative justice as a tool that may respond to and balance those needs. This thesis focuses on the offender as the justice seeker and in the legal scenario central to this thesis, the desired outcomes and expectations of justice seekers are recognized and raised by their defence counsel throughout the legal proceeding. As defence counsel are acting on behalf of the justice seeker, the problems faced by defence counsel when representing their Indigenous clients and fulfilling their obligations defined under the Gladue framework can be understood as problems faced by Indigenous persons when attempting to access justice in the criminal law context and more specifically at sentencing.

In 2008, the Canadian Bar association released a report titled, “Reaching Equal Justice Report: An Invitation to Envision and Act”.¹⁸⁶ In this piece they described access to justice as a “Wicked Problem.” A wicked problem is not an evil problem, but “a complex policy problem that defies quick fixes and simple solutions.”¹⁸⁷ They outlined characteristics of “wicked” problems, stating that they are difficult to clearly define and are often interdependent or co-exist with other problems; their impacts go beyond the capacity of any one organization and there is disagreement about the best way to solve these problems. Lastly, part of the solution to wicked problems involves changing the behaviour of groups of people or all members of society.¹⁸⁸ Access to justice touches on numerous institutions, organizations and stakeholders. In the legal scenario central to this research project, Legal Aid Ontario, the practices and policies of the defence bar, Crown attorneys, the judiciary, Gladue service providers and the interests of the justice seeker are all interconnected and add degrees of complexities. There is no clear answer to how to increase the accessibility of justice for Indigenous persons. Systemic changes across several levels of government are required to adequately engage with the problem. It appears that access to justice broadly, and access to justice for Indigenous persons being sentenced in Ontario are “wicked” problems. Wicked problems require holistic, innovative, and flexible approaches to research and reform.¹⁸⁹ This thesis defines access to justice problems as “wicked” and as such, approaches

¹⁸⁶ Canadian Bar Association, Reaching Equal Justice Report: Equal Justice - Balancing the Scales, by Canadian Bar Association, Open WorldCat (2013).

¹⁸⁷ Ibid at page 126.

¹⁸⁸ Ibid at page 126.

¹⁸⁹ Ibid at page 127.

access to Gladue and justice broadly as inclusive of a range legal institution that impact Indigenous justice seekers.

Barriers

This thesis will use the analogy of “barriers” to identify problems in accessing justice faced by Indigenous justice seekers. Barriers can simply be understood as something that negatively impacts access to a legal instrument or a desired outcome. MacDonald states that “justice exists somewhere - in legal representation, in the court house – and that the goal is to identify and remove obstacles to accessing the institutions that are guarantors of that justice.”¹⁹⁰ Drawing on Doyle and Visano, Bianchini states that the “metaphor of barriers points to the underlying distinction between the availability of a service or right, and access to it.”¹⁹¹ Availability indicates that the service does exist, and access denotes whether a right or service is secured.¹⁹² Traditionally, the literature has focused on barriers to those services which exist, not gaps in servicing that need to be filled. For this thesis, the absence of a service which results in a need not being addressed by any existing legal instrument is a barrier to justice.

Barriers come in many forms: objective, physical, sociological/psychological, and subjective. So-called “objective” barriers have largely dominated the attention of researchers. Objective barriers are “those that are capable of measurement.”¹⁹³ These include costs, delays and the complexity of processes for obtaining redress.¹⁹⁴ Physical barriers prevent a justice seeker from physically accessing the institutions of law and justice, such as court houses, legal aid offices, registry offices and administrative agencies.¹⁹⁵ These physical barriers also include language and accessibility barriers.¹⁹⁶ As discussed by interviewees, in a COVID/post-COVID world, a justice

¹⁹⁰ Ibid at page 26-27.

¹⁹¹ Supra note 149 (Bianchini) at page 452.

¹⁹² Ibid at page 452. The distinction between “available” and “access” is important as sometimes the tools which are available, do not provide justice and present a barrier to accessing justice themselves. Instead of purely viewing justice and access to it, as accessing the tools which exist, this thesis includes such gaps as a barrier in of themselves.

¹⁹³ Ibid at 452. The assumption held in the wording of this barrier in the literature - that other forms of barriers, those not easily accessed through ledgers, calendars or aggregated lengths of time for specific legal motions, cannot be scientifically observed and objectively presented, or even quantified through surveys and other research means utilized by social-science researchers embodies the need to expand the knowledge base in access to justice research, as MacDonald calls for (Supra note 20 (MacDonald); and the needed “Revival of Access to Justice Research” discussed by Bryant G. Garth in Sandefur, Rebecca L, ed, Access to justice, 1. ed ed, Sociology of crime, law and deviance 12 (Bingley: Emerald JAI, 2009).

¹⁹⁴ Supra note 13 (MacDonald) at page 27. See also Supra note 197 (Bianchini) at page 452.

¹⁹⁵ Supra note 13 (MacDonald) at page 27.

¹⁹⁶ See: Mathews, Julie & David Wiseman, Community Justice Help: Advancing Community-Based Access to Justice A discussion paper, by Julie Mathews & David Wiseman, (Community legal Education Ontario, 2020).

seeker's capacity to access justice is not just limited by their ability to travel to an institution of justice; it is also impacted by their ability to access the technology required to attend online court hearings and meetings with counsel and service providers.¹⁹⁷ These new practices represent the modernization of the court. However, they also introduce new “physical” barriers to the justice system that need to be accounted for, such as poor internet infrastructure and a lack of available computers.

Subjective barriers, which largely originate in the perceptions of the justice seeker, are described as “even more imposing”¹⁹⁸ than objective or physical barriers. These barriers are a product of social exclusion. The justice system was built to meet the needs and expectations of predominantly “white, male, middle-aged, middle and upper class, English or French-speaking citizens” in Canada.¹⁹⁹ This system may exclude or even persecute those who fall outside of these groups unless they adopt and grow comfortable in a particular set of norms.²⁰⁰ Subjective barriers are also connected to sociological and psychological barriers. As discussed by MacDonald, these barriers originate from social marginalization, which can be tied to economic issues, health issues or more insidious forces such as discriminatory beliefs. MacDonald states that “access to justice is not discrete from other social issues.”²⁰¹ This means that social issues that negatively impact groups within a society work to exclude them from participation in those institutions. As stated by MacDonald, “For many people, it is exactly the characterization of a problem as a legal problem that is the most important barrier to access.”²⁰² The failure to address these exclusionary forces is itself a barrier to justice. Barriers are just as diverse and multifaceted as the legal systems they inhibit. The following section presents the working conception of access to justice used to analyze the interview data gathered for this thesis.

¹⁹⁷ MacDonald wrote on this issue in 2005, so It’s fair forgive him for not seeing access to Zoom Court as a pressing concern. During the COVID-19 pandemic the courts began mandating appearances occur over Zoom See, Superior Court of Justice, “Guidelines on Access to Hearings During the COVID-19 Pandemic” online:< <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/guidelines-hearings-access/>>.

¹⁹⁸ Supra note 13 (MacDonald) at page 28.

¹⁹⁹ Ibid at page 28.

²⁰⁰ Ibid at page 28.

²⁰¹ Ibid at page 27-28.

²⁰² Ibid at page 29.

Three-Dimensional Conception of Access to Justice

This thesis builds off the three-dimensional conception of access to justice presented by Roderick A. MacDonald in “Access to Justice in Canada Today: Scope Scale and Ambitions” in the book “Access to Justice for a New Century – The Way Forward.”²⁰³ MacDonald claims that access to justice contains procedural, substantive, and symbolic components. Each component of access to justice is associated with instruments of law and barriers that justice seekers may face when attempting to access particular legal instruments. By assessing whether and how each component of access to justice presents itself for justice seekers, researchers can identify whether there are barriers inhibiting justice seekers from accessing justice.

Procedural Access to Justice

MacDonald describes access to procedural justice as the ability to invoke and participate in the processes of justice. These processes normatively operate through social institutions that provide justice in areas ranging from civil proceedings to criminal justice.²⁰⁴ Alan Hutchinson conceptualizes “access” as the question, “is a legal service actually secured?”²⁰⁵ Access to procedural justice asks the binary question of whether an instrument is secured in a particular situation or not. As previously discussed, a predominant focus of access to justice scholarship internationally²⁰⁶ and in Canada²⁰⁷ has been on “unmet legal need[s],” or procedural access, in the civil legal space.²⁰⁸ This myopic focus often results in efforts to fill this gap with more pre-existing legal instruments²⁰⁹, as researchers determine the presence and intensity of any unmet legal need, which is then remedied through increasing access to pre-existing legal instruments.

Though this data is beneficial, it cannot be the only way access to justice is measured, as doing so reinforces the assumption that “justice” is met when a legal instrument is accessed. In our Canadian legal system, legal instruments (such as lawyers, courts, relevant laws and legal procedures) are created with a specific legal goal in mind.²¹⁰ These goals are identified through political and democratic processes, and, outside the system of law, legal instruments are seen as a

²⁰³ Ibid.

²⁰⁴ Ibid at 105.

²⁰⁵ Macdonald, Roderick A, “Theses on Access to Justice” (1992) 7:2 Canadian Journal of Law and Society 25, at page 26.

²⁰⁶ Supra note 149 at page 34.

²⁰⁷ Ibid at 34-58.

²⁰⁸ Ibid at 34.

²⁰⁹ Galanter, Marc, “ACCESS TO JUSTICE IN A WORLD OF EXPANDING SOCIAL CAPABILITY” (2010) 37:1 Fordham URB LJ 15, at 122.

²¹⁰ Summerst, Robert S, “Pragmatic Instrumentalism in Twentieth Century American Legal Thought-A Synthesis and Critique of our Dominant General Theory About Law and Its use” 66 89, at 863.

means to achieve these goals.²¹¹ There are two facets to the broad assumption that access to legal instruments equates to accessing justice. First, by focusing on unmet legal needs and access to pre-existing legal instruments, it is assumed that existing legal instruments effectively achieve the goals that motivate their creation. Consequentially, it is assumed that the only solution to problems of access to justice is increasing the presence of these instruments. Second, it is assumed that the goals that motivated the creation of these legal instruments reflect the needs and expectations of justice seekers, removing the opportunity for new perspectives and needs to be addressed.²¹² When discussing the focus of the “access to justice agenda,” Katia Bianchini states,

the supply side (courts and lawyers) of access to justice research continues to focus principally on procedures and complaint mechanisms, since projects currently being funded mainly address issues relevant to institutional players. In addition, empirical research in this area is more generally focused on the characteristics of an accessible dispute resolution system than those of an accessible justice system and is not concerned with investigating the quality of the outcomes that are produced.²¹³

MacDonald identifies an assumption in access to justice research. This assumption is that simply increasing the supply of legal instruments results in greater access to justice. When it is assumed that “more law” is equivocal to “more justice,” other components of accessing justice, such as the quality of legal instruments, go ignored. MacDonald argues that perceptions of access to justice in liberal democracies have shifted, requiring researchers to address this assumption in their work.²¹⁴

As Rhode states, the difficulties faced by justice seekers go beyond procedural access. Rhodes claims that questions which touch on those difficulties “are seldom acknowledged in bar discussions regarding access to justice.” Rhodes describes bar associations as the central institutions to research access to justice, which highlights the extent of the problem.²¹⁵ He claims that the view of the legal profession is primarily inspired by the theme of “more (legal services) is better”; hence their focus is on how to achieve more of those services.²¹⁶ This view largely neglects substantive questions of law such as “what does meaningful access to law imply? If, as is commonly assumed, meaningful access to the law also entails access to legal assistance, how much

²¹¹ *Ibid* at 863. For a more detailed discussion on Instrumentalist views of law please see Aeken, Koen Van, “Legal Instrumentalism Revisited” (2005) . *The theory and practice of legislation* 26.

²¹² *Supra* note 205 at 29.

²¹³ *Supra* note 149 (Bianchini) at page 451.

²¹⁴ *Supra* note 13 (MacDonald) at 19.

²¹⁵ Deborah L Rhode, "Access to Justice" (2001) 69:5 *Fordham L Rev* 1785, at 1787.

²¹⁶ *Ibid* at 1787.

is enough? For what, for whom, and from whom?”²¹⁷ Though Rhodes focuses on access to lawyers and courts, he demonstrates the need to look beyond procedural access to examine the limitations of legal instruments, for example, the potential benefits they render or the timeliness of their procurement. If a legal instrument has inherent limits, it is important to embrace this and create space for new instruments to be designed and implemented to fill in the gaps.

However, surface-level assessments of the prevalence of a legal service provide a pragmatic way of determining the level of coverage for a particular instrument, be it legal counsel or Gladue-related servicing. Procedural access to the instruments of the law is the first step for a justice seeker to access justice in Canada through a legal institution. Though a broad range of legal instruments will be accessed (courts, lawyers, sentencing resources), every legal instrument must be available to a justice seeker for that individual to benefit from it. Procedural assessments are complementary to substantive assessments of a legal instrument’s quality. Once a legal instrument has been proven to benefit justice seekers, research concentrating on procedural access to justice can identify the needs of justice seekers and bolster access to legal instruments.²¹⁸ However, it cannot and should not be assumed that more access to a legal instrument is good for justice seekers.

Barriers to Procedural Justice

Barriers to procedural justice vary depending on the legal instrument in question, with projects like the world justice project identifying objective barriers such as a lack of available courtrooms²¹⁹ and funding issues with legal aid programs which limit access to counsel as barriers to access justice through formal legal institutions.²²⁰ Qualifying criteria for legal aid and community services can be viewed as an objective barrier to justice as these may limit the procedural access to services required by those interacting with the criminal justice system.²²¹ As discussed previously, physical barriers may prevent individuals from accessing the physical and online spaces of law to attend their legal proceedings. These physical barriers are not just limited to formal court proceedings but also impact the ability of individuals to interact with service providers, including Gladue writers.

In the context of the Gladue framework, there are many procedural aspects of access to justice. First, the availability and capacity of any services which aid defence counsel in presenting the

²¹⁷ Ibid at 1787. Though this piece is not explicitly concerned with equality in the same direct manner that Rhode is in this piece, unequal access to Gladue services would indicate that not all individuals are able to access justice and would indicate the existence of a potential barrier to justice.

²¹⁸ A historically successful example of this has been Legal Aid systems.

²¹⁹ Neukom, William H, “The World Justice Project” (2009) 9:3 Leadership Manage Eng 129–130, at 10.

²²⁰ Supra note 186 at 39.

²²¹ Supra note 186 at 39.

Gladue factors to the court, sufficiently informing the sentencing process and impacting the outcomes achieved by justice seekers are key factors in access to justice. These services include Gladue reports, letters, and training resources that aid counsel in developing Gladue submissions; as these services are either present or not, their role in access to justice can be assessed through a simple binary.

Second, access to community resources (such as social workers, mental health supports, and drug treatment programming) enables the court to order non-custodial sentences where these are appropriate. These resources may also be available in specific custodial institutions. As this thesis will discuss in chapter four, the inability to access these scarce resources presents a barrier for clients attempting to access justice.

Finally, there are legal instruments in our criminal justice system which are not specific to Indigenous persons but impact the outcomes Indigenous persons experience. These are as fundamental as accessing lawyers, courts, and material resources required to participate in the processes of justice, including computers for “zoom court”²²² and transportation to in-person court. However, accessing any of these legal instruments and resources discussed does not ensure a client will access justice. To avoid this limiting assumption, two other components to access to justice as discussed by McDonald include the substantive and symbolic components.

When assessing the Gladue framework, a purely procedural view ignores the treatment of these legal instruments by the system at large. The complementary practice of focusing only on unmet legal needs and the assumption that justice is achieved through procedural access assumes the solution to the problem of barriers in the question.²²³ However, access to justice may be prevented by more than the inability to secure a legal service. For example, S.718.2(e) and the Gladue factors may be raised in sentencing, meeting the threshold of procedural access. However, they may be given little to no weight in determining the outcome compared to other sentencing principles, presenting a potential barrier to justice seekers. The barrier that causes this could be the opinions of Gladue held by legal decision-makers or the system prioritizing other principles at sentencing. These potential barriers to accessing justice can be explored through the substantive and symbolic dimensions of access to justice.

²²² During the COVID-19 pandemic, courts in Ontario began holding judicial proceedings over the video communication application “Zoom.”

²²³ Supra note 170 at page 49-50.

Substantive Access to Justice.

Substantive access to justice requires procedural access to justice. However, as previously discussed, it cannot be assumed that procedural access equates to substantive justice. For justice to be substantively accessible, rules and practices cannot be preordained to favour one party for reasons unrelated to the dispute. The rules and practices peripheral to the adjudicative process, such as rules of evidence, the procurement of crucial resources and policy decisions regarding who gets access to resources, cannot work to prevent just outcomes. The system must provide outcomes that address the needs identified by the legal regime, the expectations set for justice seekers by the law, and produce outcomes that are internally consistent with the goals of the system.²²⁴ The stated goals of the instruments being accessed must be reflected in the outcomes received by justice seekers. In the context of *Gladue*, the political goals of the legal instrument must be considered when inquiring whether justice has been accessed in a particular legal scenario. Drawing on the eight elements of an accessible justice system raised by MacDonald, relevant inquiries into substantive access to justice may include the following questions: Are the results of the system just? Does the system treat everyone fairly? Are the legal instruments utilized accessible within a reasonable timeframe? Is the system responsive to the needs of its users? Are its decisions certain? Is it effective, adequately resourced and well-organized?

It can be common for procedural and substantive justice to be conflated, whereby the beginning of the process of accessing justice is treated as the system's end goal.²²⁵ Procedural access to substantively unjust instruments can be normalized when masked under a narrowly procedural view of access in research and policy conversations. For example, in Ontario, Legal Aid Ontario maintains records regarding the number of applicants and recipients of legal aid certificates. However, as per the Auditor General of Ontario, despite the legislative authority to direct the law society of Ontario to perform quality assurance audits of lawyers, as of 2018, LAO has failed to do so beyond reactively referring lawyers to the law society after becoming aware of potential misconduct.²²⁶ As stated by Rhodes, “Poor lawyering for poor defendants compounds other inequities in the legal system and ultimately undermines its legitimacy. Without effective assistance of counsel, individuals who are unjustly accused or denied their constitutional rights are

²²⁴ *Supra* note 13 (MacDonald), at 105-106.

²²⁵ Deborah L. Rhode, *Whatever Happened to Access to Justice*, 42 *Loy. L.A. L. Rev.* 869 (2009), at 872.

²²⁶ Office of the Auditor General of Ontario, “2018 Annual Report: Legal Aid Ontario,” (2018) online: <https://www.auditor.on.ca/en/content/annualreports/arreports/en18/v1_305en18.pdf> at pages 254-255.

also without effective remedies.”²²⁷ “Poor lawyering” may have various origins beyond lawyers failing to do the required work. As will be discussed further in the findings of the thesis research, interviewees shared that the number of hours lawyers are paid to work on a file may impact the quality of representation they are able to provide to their clients. Regardless of the specific barrier that results in poor services, the outcome is poor or no access to justice. While a comprehensive review of the quality and effectiveness of Gladue reports is not within this project's scope, potential barriers to substantive justice were identified by interview Participants through their discussion of the quality of reports they receive, when they would order reports and the perceived impact of those reports.

There are numerous elements to account for when measuring substantive access to justice in the Gladue framework. These can be broadly categorized into the categories of ‘quality of services’, ‘outcomes’, and ‘procedural limitations’. There are numerous legal instruments to assess when discussing the quality of services these justice seekers access. These include the quality of the legal representation clients access; the quality of Gladue reports and letters accessed by clients; the quality of the production and delivery process associated with Gladue reports; the quality of the substance of the law and policies which impact justice seekers and the quality of servicing options available in the area of residence for the client. The limited focus of this thesis does not permit a review of the outcomes of all Indigenous persons being sentenced; however, it is clear in the increasing rates of over-representation that the outcomes experienced by Indigenous persons are not in line with the goals of Gladue and the reasonable expectations of justice seekers. Lastly, there are instances where a failure to procedurally access a resource, such as a translator, a computer device or access to services, may impact the quality of a specific service. For example, if a Gladue report writer is writing reports for a community member remotely, but that community member has poor/no access to the internet or phones, the writer may not be able to produce a high-quality report.

Barriers to Substantive Justice

There are numerous ways that barriers may impede access to substantive justice. Objective barriers may include insufficient funding resulting in service limitations, including personnel issues, lengthy timelines resulting in delays, and service providers' exclusionary policies and practices. There are also statutory barriers to non-custodial outcomes such as mandatory

²²⁷ Rhode, Deborah L, *Access to justice* (Oxford ; New York: Oxford University Press, 2004), at page 123.

minimums and how funding is distributed to legal professionals and clients. As discussed above, objective barriers may also be found in procedural barriers, which impact the capacity of a Gladue report, a defence attorney or a service provider to achieve its goals. Subjective barriers may include problems with the quality Gladue reports as reported by attorneys; non-custodial options or alternative approaches to sentencing not being adopted due to a lack of availability or the subjective views of legal decision-makers; racist views of Indigenous populations held by legal decision-makers that undermine the application of Gladue at sentencing; the client being rushed, dismissed or otherwise made to feel uncomfortable during the Gladue interview processes before sentencing, resulting in a poor quality of information being brought to the court. Sociological and Psychological barriers may include the trauma experienced by Indigenous clients being aggravated by poorly trained Gladue and legal service providers who fail to adopt a trauma-aware approach.

The aforementioned barriers frequently touch on a lack of resources for government-funded programs. As stated by Rhodes, when discussing the rationale for poor state investment in resources which benefit accused persons in the American context, “The reasons are obvious. Poor defendants are a singularly powerless and unpopular group.”²²⁸ Having enough resources to ensure equitable access to quality services is a consistent flaw across our criminal justice system and a barrier to justice faced by many justice seekers. However, as discussed in chapter four, problems associated with poorly funded services manifest in different ways depending on the legal scenario, and the Gladue framework is no exception.

MacDonald describes a broader perspective on access, discussing the importance of access to the institutions of law creation and administration.²²⁹ This view reinforces the importance of centring justice seekers in creating legal instruments through our democratic institutions.²³⁰ However, the role of participation in access to justice goes beyond our democratic methods of law and includes consultation with communities when developing other instruments of law, including Gladue services.

Symbolic Access to Justice

For an individual to access “symbolic” justice, they must be accorded respect and recognition by the system as a whole. Symbolic justice requires reciprocity between the expectations and desires of those seeking justice and the system which claims to provide justice. MacDonald states that the

²²⁸ Ibid at page 124.

²²⁹ Supra note 13 (MacDonald) at 85.

²³⁰ Ibid at 85-88.

most egregious examples of a lack of access to justice do not always have to be connected to legal rights being cast too narrowly, but instead these have to do “with recognition and respect.”²³¹ For example, Indigenous people before Gladue benefited from the same *Charter* rights as non-Indigenous persons. However, their unique circumstances were not recognized or respected in the sentencing law of Canada. Macdonald states that disparities in social power and the unwillingness to do much about them may result in social exclusion from mainstream institutions of law, including civil justice institutions.²³² MacDonald asks, “Do people respect the law, and do they have confidence in its outcomes?”²³³ It may become apparent that symbolic justice is not accessible if individuals disengage with the system as a whole, lose faith in its capacity or experience victimization by system actors failing to respect their unique circumstances.

MacDonald indicates that being responsive to the needs of users is a crucial component of an accessible justice system.²³⁴ However, this requirement requires more than recognizing a user's circumstances and corresponding needs in law. If the system reproduces injustices which harm its users, it is not respecting or recognizing the needs and experiences of those users. If a system does not treat users fairly, reproducing discriminatory outcomes, then it is not respecting their humanity. The users of a system must be centred when reform efforts are made to overcome barriers faced by justice seekers and change the legal instruments which reproduce these injustices.

Centring the users of a system in access to justice discourse can be difficult as the legal system is complex, difficult to understand, financially inaccessible and exists largely outside the day-to-day life of users. However, some recent access to justice research has centred on users and their experiences of justice. Farrow et al., in a study titled “What is Access to Justice?” approached people in selected public places and asked open-ended questions about what they thought terms such as “justice” and “access to justice” meant to them.²³⁵ The results of that study embody this symbolic component of access to justice. Farrow discussed their experiences in the field of access to justice (in the civil law context) and how policy discussions are often led and informed by insiders:

...the voices in the room have almost invariably been those of academics, lawyers, judges, government representatives, and the like. When voices of the public are heard, they are typically the voices of those who have been involved in the justice system-

²³¹ Ibid at 106.

²³² Ibid at 106-107.

²³³ Ibid at 106.

²³⁴ Ibid at 23-24.

²³⁵ Ibid at page 966.

current litigants or those who have previously used the system in some way. All of these people and groups are clearly important and will ultimately be part of an access to justice solution. However, over that period of time, I have increasingly heard myself saying: "If we ask regular people on the street what they feel and understand about justice and access to it, we might get a very different view."²³⁶

This thesis is part of what Farrow describes as an effort to “refocus the justice system, and reforms to it, so as to put the public squarely at the centre of those efforts.”²³⁷ The symbolic aspect of access to justice creates the space for researchers to understand “the direct needs of those who use the system, as opposed primarily to those who provide it.”²³⁸

The research project conducted for this thesis partially neglects the user's views by interviewing legal insiders to gather insights into how accessible justice is for users. Though Farrow's work is distinctly different from the study conducted for this thesis, the thesis research attempts to centre the priorities and needs of Indigenous justice seekers by identifying barriers they face by interviewing defence counsel representing them. While the thesis project would likely have generated different results had Indigenous justice seekers been included, this group represents a uniquely vulnerable population whose engagement as research subjects or participants requires careful and protracted preparation. That latter would require in-person, face to face research methodologies (such as interviews) that were not only impossible given the COVID-19 pandemic, but better-suited to the much longer timelines of a doctoral research project. As such, the views of those who work closely with Indigenous justice seekers form the focus of this thesis.

While future studies should centre the justice seekers more, the challenges that made this impossible in the current study are well-known impediments to such approaches generally. Accused persons and offenders are difficult to access as individuals generally do not advertise their involvement in potentially criminal behaviour. Justice workers with access to these individuals are also tasked with protecting their interests and confidentiality, making accessing clients through these professionals more challenging. Accused persons and offenders are also typically vulnerable persons, whether because of their socio-economic position in society or the fact that they are under scrutiny of law enforcement. These barriers need to be accounted for when crafting new

²³⁶ Farrow, Trevor, “What is Access to Justice?” (2014) 51 Osgoode Hall Law Journal 33 at page 959.

²³⁷ Ibid at page 961.

²³⁸ Ibid at page 961.

approaches to access to justice research but should not prevent researchers from attempting to centre the users of our justice system wherever possible.

When assessing symbolic access to justice, assumptions regarding what justice is must be avoided. For justice to be symbolically accessible, the different perspectives of justice seekers must be considered. The long-standing conceptions of justice held by legal institutions or their typically white, male, protestant actors, which have defined the norms of these institutions for decades, must not be held as universal truths. These conceptions of justice must be seen as only one of a range of understandings of justice across different cultures, communities and groups in society. It has long been recognized that Indigenous persons have a unique worldview, including their conceptions of conflict management and governance²³⁹ and histories and circumstances that carry a unique set of legal needs.²⁴⁰ In the context of Indigenous persons, breaking away from normative assumptions of “justice” takes on a new layer of complexity. It is not enough for legal instruments to be substantively just in the eyes of “academics, lawyers, judges, government representatives, and the like” (especially those outside of Indigenous communities)²⁴¹ as the goals which have motivated these instruments may actively harm a group of justice seekers. In the context of Indigenous persons, many aspects of our legal system contribute to the widespread injustices experienced by Indigenous peoples and their over-involvement with the criminal justice system in particular. To query and challenge those aspects and their outcomes, Indigenous nations, leaders, academics, lawyers, judges and justice seekers should be centred when researchers assess access to justice for Indigenous people. Parliament recognized these unique circumstances by passing s.718.2(e). Although the current Gladue framework explicitly acknowledges the unique background of Indigenous persons participating in the criminal justice system, it appears that the “respect” MacDonald describes is missing. A system that respects a minority group would not continue to perpetuate the systemic discrimination they experienced.

The scope of this thesis is that of the “Gladue framework,” not the criminal justice system as a whole. As such, it is outside the scope of this thesis to engage with Indigenous understandings of law, community safety or Indigenous governance. Also, the author of this thesis (a straight, cis white male of European heritage) is not in a position to speak on behalf of the diverse tapestry of

²³⁹ See: Borrows, Lindsay “Otter’s Journey through Indigenous Language and Law,” (Vancouver: UBC Press, 2018), Borrows, John, Freedom and Indigenous Constitutionalism (Toronto: University of Toronto Press, 2016).

²⁴⁰ See Barkaskas, Patricia & Sarah Hunt, “Access to Justice for Indigenous Adult Victims of Sexual Assault” 59 for a discussion of unique legal needs in the Australian context.

²⁴¹ *Supra* note 236 at page 959.

Indigenous communities within Canada, their needs, desires and traditional legal systems. What is relevant to this research is that in the criminal context, Indigenous persons are coerced by the state's power into participating in a legal system that claims to account for the circumstances of Indigenous persons from all communities and backgrounds. This accounting is largely done through the Gladue framework and the services/practices associated with it. This framework structures the thesis research project and the thesis itself, which focusses on the treatment of the Gladue factors as per s.718.2(e), and as a result, of Indigenous persons in the context of *R. v. Gladue*.

In the context of the Gladue framework, the symbolic dimension of access to justice includes how the needs of justice seekers are addressed, how their expectations and desires are actualized and how the system acknowledges their background and unique circumstances. For Indigenous persons to access symbolic justice, the system must acknowledge their needs, expectations, and experiences. Indigenous clients and their lawyers need access to services that assist in adequately presenting the client's unique background to the court and respecting their humanity by taking a trauma-informed approach. Their needs must not only be acknowledged but also respected through meaningful action in servicing and programming. The promise of Gladue to alleviate the systemic marginalization of Indigenous persons must also be considered when discussing the symbolic elements of access to justice. As stated by Stenning and Roberts,

In our view, those last nine words in paragraph 718.2(e), and the Supreme Court's efforts to interpret and apply them to the sentencing of Aboriginal offenders, can rightly be seen as offering little more than an empty promise to Aboriginal people and a bitter pill for sentencing judges who struggle to do the right thing, but become daily more aware of their powerlessness in the face of a situation far beyond their control.²⁴²

If the implementation of Gladue continues to fail to alleviate consistent rises in over-representation experienced by Indigenous persons, the expectation of justice set by Parliament and the courts will continue to be just an empty promise. The unique circumstances of Indigenous persons can be acknowledged through alternative sentencing practices such as sentencing circles, community-based justice and Indigenous Peoples courts (though the substantive quality of these legal

²⁴² Stenning, Philip & Julian V Roberts', "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" 33, at pages 166-167.

instruments is contested). Barriers that prevent users from accessing these services can limit symbolic access to justice.

Barriers to Symbolic Justice

Barriers to symbolic justice come in two forms, those that result from barriers to procedural/substantive justice and those subjective barriers that are present in legal decision-makers or the normative beliefs that infuse the criminal justice system as a whole. For example, the capacity of the Gladue framework to respond to and respect the circumstances of Indigenous offenders is impacted by the substantive barrier of mandatory minimum punishments, which effectively bar access to the restorative, alternative sentences embodied in the Gladue report. In that case, symbolic justice is also denied. Essentially, procedural and substantive justice is required to access symbolic justice.

Subjective barriers can also impede the ability of justice seekers to access justice when a pre-existing bias, held by a legal decision-maker or entrenched within the laws and practices of the system, works against the needs and world views of the justice seeker. First, suppose a legal decision-maker holds biased, paternalistic views regarding the capacity of Indigenous peoples or Indigenous approaches to a procedure like sentencing. As a result, this may limit the capacity of a justice seeker to access Gladue courts, sentencing circles and other programming. Second, if the system is prejudiced against certain approaches to criminal justice despite the needs of its users, this can be seen as a subjective barrier to symbolic justice. These can manifest from a variety of sources, whether it be through the allocations of resources, the prioritization of certain programs over others (for instance, prioritizing drug treatment court over other specialty courts such as Indigenous peoples court during the pandemic), or the codification of specific responses and priorities over those that reflect the needs of users, such as the use of mandatory minimum periods of incarceration.

Conclusions on Access to Justice

Access to justice research has a broad scope as it can potentially touch on every factor within every legal institution. Though access to justice research has been predominantly focused on the area of dispute resolution and questions of procedural access to pre-existing legal instruments, there appears to be a growing consensus in the field that access to justice must expand its scope of inquiry. This thesis utilizes a three-dimensional conception of access to justice that can be applied

to determine the accessibility of justice for any justice seeker in a particular legal scenario. This thesis argues that, as MacDonald purported, access to justice contains procedural, substantive, and symbolic elements. These three components allow this thesis to fully explore the origin and types of barriers that defence counsel identify in connecting their Indigenous clients with Gladue services. Chapter three will present the methodologies of this piece, and chapter four will present the findings from this research project.

Chapter 3: Methodologies

Research Question

As stated in the introduction, this thesis is led by the following research question: “Do defence counsel representing Indigenous clients in Ontario identify barriers in access to the resources required to sufficiently present the Gladue factors for these clients?” This research question contains several qualifying criteria, including geographic limitations, a perspective from a stakeholder within the Gladue framework, and a particular legal scenario where “justice” is attempting to be accessed. This thesis began with a general finding and a broad question.

When reviewing the literature on the overrepresentation of Indigenous persons in custody, it became apparent that Indigenous persons continue to experience discriminatory outcomes as the rates of Indigenous persons sentenced into custody in Canada continue to rise. The rate of Indigenous overrepresentation in custody has increased, despite the acknowledgment of this injustice and attempts to remedy it through the Gladue framework. This thesis approached the problem as one of accessing justice and barriers that may prevent Indigenous persons from accessing justice. When reviewing the literature on access to justice to determine a clear research methodology, it became apparent that access to justice as a school of thought is not commonly applied to the criminal justice sector. As explained in chapter two, elements of access to justice from other spaces of the law were considered when determining the scope of this research project and how it conceives of access to justice. This chapter identified procedural, substantive and symbolic elements of access to justice for Indigenous persons being sentenced in Ontario. To better answer the research question central to this thesis and apply the working conception of access to justice determined in chapter two, the scope of potential research needed to be narrowed. Two determinations were made to achieve this.

First, it was determined that in this legal scenario,²⁴³ accessing justice means accessing the resources which allow an offender, or more commonly their representative, to submit the Gladue factors to the court in accordance with s.718.2(e). These submissions distinguish the sentencing of Indigenous offenders from non-Indigenous offenders and direct courts to inform sentencing with information unique to Indigenous people, such as residential school attendance. The reason the

²⁴³ The term “legal scenario”, for this thesis will refer to a sentencing proceeding in the province of Ontario where an Indigenous person who has been found guilty of an offence in Ontario is being sentenced for that offence. This thesis will not differentiate between the offence the offender was convicted of, or any other factors of a particular case.

research question does not specify “Gladue reports”²⁴⁴ is that due to circumstantial evidence found in the literature, the results of the 16 interviews conducted, and the results of a recent study of judges’ experience with Gladue,²⁴⁵ there is little reason to assume that Gladue reports are the most common way for Gladue information to be communicated to the court. To solely measure access to reports ignores the problems faced by offenders when a report is unavailable and the unique barriers that defence counsel must overcome in these scenarios to present the Gladue factors properly.

Second, Defence counsel were determined to be the most appropriate professional to interview for this project. This determination was shaped by a number of factors, including ease of access to the Participant group and a belief that defence counsel are well-situated to speak to the questions of this study as they have privileged access to their client’s unique circumstances in a sentencing context and are often charged with procuring Gladue information for sentencing submissions. This perspective enables defence counsel to speak to the specific issues they and their clients face in this legal scenario.

Research Method

The research for this thesis was conducted between June and August of 2021, following ethics approval from the Carleton University Research Ethics Board on May 31st, 2021. The research included conversational interviews with defence counsel recruited using a “snowball” sampling method. By this method, each individual interviewed was asked to recommend further persons who may be interested and appropriate to interview. In total, 16 telephone interviews were conducted. Each interview was recorded using the secure app TapeACall and subsequently transcribed by the researcher. The interview questions are included in ‘Appendix A.’ In limited cases, interviews included discussion of unanticipated issues raised by interviewees, which created some inconsistency in the resulting interview data. If germane to the research project, these issues were added to the list of questions and raised with future interviewees. Due to the nature of these prompts, some crucial aspects of the Gladue framework were not raised by Participants until the

²⁴⁴ A Gladue report is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. See, *Supra* note 9 at para 60, and Benjamin A. Ralston, “The Gladue Principles: A Guide to the Jurisprudence,” (University of Saskatchewan: 2021) at page 234.

²⁴⁵ Dickson, J., & Smith, K. (2022). Exploring the Canadian judiciary’s experiences with and perceptions of Gladue. *Canadian Journal*, forthcoming at page 13.

end of data collection, meaning that all 16 lawyers were not asked about it. As such, these interviews explored potential barriers faced by Indigenous persons being sentenced in Ontario and the parameters of the interviews grew as interviews produced additional data informing new questions asked by later participants. Given the small sample size and the modest variation in the interview questions, the results are not statistically representative of the views of defence counsel representing Indigenous clients in Ontario.

Analysis

Once the interviews were completed, the transcribed interviews were imported into Nvivo. A code for each question was created to label responses to each question included in the original questionnaire; codes were also created for prompts outside of the questionnaire and/or other themes that defence counsel raised throughout the interviews. Each interview was then coded, linking the response to either a question, prompts or theme raised by counsel. The coded text was then reviewed, and the types of responses were grouped together for ease of analysis. Responses were aggregated by the available responses for closed questions. For open-ended questions, similar responses were grouped together and aggregated. This approach made it possible to aggregate responses and indicate consistency across responses. Third, groups of responses which indicated a barrier faced by counsel were analyzed to identify the barrier and identify their specific strength. Each of these was then analyzed and quotes that best summarized each group's responses were selected. If required, additional background research was conducted for each barrier identified to corroborate the finding. Finally, all barriers identified were categorized and explored through the access to justice framework presented in chapter 2. What follows is a description of the findings of this project and discussion of the barriers identified in the interviews.

Chapter Four: Results

The following chapter presents the findings from the interviews conducted. Findings will be categorized by theme and identified barriers will be presented for each theme.

Location, Practice and Availability of Gladue Services

Of the 16 interview participants, ten practiced in Ottawa and its surrounding regions, with one practicing in Ottawa and other eastern Ontario communities such as Kingston, Barrie and Brockville. Five participants practiced in Toronto, with three participants working outside Toronto in the Greater Toronto Area. One participant practiced in the “Central East” region, naming Muskoka, Parry Sound, Bracebridge and Orillia as communities where they work. All participants indicated that a portion of their criminal defence practice was Indigenous, with the lowest percentage estimated being 5% and the highest being 80%. All 16 participants stated that Gladue reports were available to be requested in their jurisdiction.

1. Determining Whether a Report will be Ordered or Not

Theme number one discusses how reports are produced and what factors impact whether a report will be accessed or not. Participants were asked who determines if a Gladue report would be procured for their client. 6/16 participants explicitly stated that the service provider determines who gets a report, with 2 of these participants stating that the service providers set the qualifying criteria for reports. 8/16 participants explicitly stated that defence counsel decided whether a report would be provided. These findings reflect the procedure for how Gladue reports are typically requested, with defence counsel requesting the report from the service provider on behalf of their clients. When asked, all participants did discuss the factors they would weigh when determining whether to order a report or not, indicating that the decision ultimately rests with the defence and the client they represent.

Role of Defence Counsel

Several participants made statements discussing how the current Gladue service model burdens defence counsel with many of the obligations under Gladue, including collecting and presenting Gladue information, filing the paperwork to ensure a Gladue report is procured and working with both the client and the service provider to ensure all required information is provided. There are also incidental considerations beyond the production and delivery of Gladue information, such as reviewing the Gladue information with the Indigenous client and ensuring the legal positions

presented by counsel are reflective of that information, as well as any delays which may occur due to the timing of report delivery.

Participants generally stated that they are the ones to request Gladue reports, and a large portion of the interviews were concerned with the factors they consider when ordering a Gladue report. Although judges can order Gladue reports in some jurisdictions, reports are typically requested in Ontario. Often, these requests come from defence counsel. While a court may make it clear that they require a report or Crown counsel may request a report in order to agree to a joint position (as stated by one participant), it appears that the actual task of ordering a Gladue report falls on defence counsel. Some of the latter indicated that:

To distinguish Gladue reports from the typical pre-sentence reports. I mean, the first is when you order a pre-sentence report in the normal course, the probation officers are assigned, and the report is done. For Gladue reports, you know, a lot of the work is put onto the defence counsel, sort of offloaded from the institution on to the individual.

I've never seen a Crown Attorney raise a Gladue principle

There's really nothing that needs to be done, except that I need to fill out a form with on the Aboriginal Legal Services website. So that's procedurally how I get it done. So I don't know what the what the rule is in other cases. I just know that here in Toronto, I just log on to their website, and it's me, the defence counsel, that asks for the reports... ..the Crown doesn't have any say in terms of whether my client orders Gladue report. So they have absolutely zero role in it except for taking the position [on sentencing].

We request it. But then, as defence counsel, it's our responsibility to write to ALS and request the reports. And then, based on the circumstances, ALS tells us whether or not they're able to do it. And whether or not they're - when they would be able to do it. And typically, if the sentence is more than, I think it's three months or more, then you'll get a full report; if the sentence is three months or more then you'll get a full report. And if not, then you'll get a letter.

Beyond procuring Gladue information, connecting clients to services and alternative approaches to sentencing appears to fall on defence counsel. One participant discussed a sentencing circle they helped organize, stating,

I've done one outside of Toronto, a sentencing circle, where it was kind of, where it was left to me to make all of the arrangements for the sentencing circle. So I communicated directly with Aboriginal Legal Services on an ongoing basis, and the Crown had no issue with it. It was just left to counsel, so I don't know. It was a lot of work...

Overall, it seems that the decision whether to order a report or not largely rests with defence counsel and as such, the work capacity and interests of defence counsel will shape whether a report is ordered. It also appears that these defence counsel, though legally not solely responsible for fulfilling the Gladue obligations, in practice are the sole providers of Gladue information to the court.

Crown Attorneys

Defence counsel discussed negotiating with the Crown to resolve a client's charges as a key component of their role in the criminal justice process. Successful negotiations can expedite the client's release from custody or the removal or loosening of their bail conditions. However, the position taken by the Crown at trial and sentencing heavily influences the outcomes of the legal proceedings. Participants discussed their capacity to negotiate with Crown attorneys and their experiences with how Crown attorneys account for the Gladue factors. Defence counsel generally stated that the approach to Gladue and the impact of the Gladue factors on Crowns' decisions and the alternatives they entertain varies from Crown to Crown. Interviewees stated,

So it depends on the particular Crown 'cause you have Crowns that are much more sensitive and aware to the issues that Indigenous people face. So it's, it's very Crown specific

I don't think all Crown Attorneys are as live to the issues. I don't think there's the same level of understanding. It's difficult because their lens is different than mine, right?... ..like, I've never seen a Crown Attorney raise a Gladue principal. Like I haven't seen them do that of their own volition.

Sadly, I think a lot depends on which Crown you have, as in there's a lot of good Crowns that will listen, will consider, will understand the big picture and be able to make decisions that are appropriate for each client, and there's other Crowns that there's no real discussions with. There's no real consideration. It's kind of just the standard practice. So I think there's a lot of really good Crowns. And I think there's a lot of Crowns that really could use help in these areas. Especially when we're talking about release conditions, some want conditions that are, I think are, inappropriate in the circumstances of the case.

Sometimes, depends on the Crowns. It depends... .I mean, generally yes, people are, if you raise the issue, they are receptive to it. Some are more receptive than others or take it more into account than others. Some are not familiar with the resources or procedures involved in terms of Gladue reports, sentencing circles, etc.

It depends on the Crown, and I think therein lies the problem with the exercise of discretion in an area where I am seeing historic systemic racism...to ask a broken system to fix itself through the use of unenforceable, unreviewable discretionary measures

I've been very successful in having courts agree with doing different options rather than jail. I, at least in my, in my jurisdictions, I have always taken the view that if you can give the courts something else other than jail for indigenous clients, they will try to do it. Sometimes there's, you know, it's a very violent offence of which, you know, there's not many other options.

Defence counsel also provided minimum responses on the impact of Gladue information on their negotiations with Crown counsel over their positions, pre-trial negotiations, plea bargains and ultimately, their positions on sentencing. Though these responses are limited, they present compelling reasons for further inquiry into how Gladue works – or fails to work – in Ontario and potentially reworking the Gladue servicing model in the province.

The whole flaw in the entire Gladue regime is that you're going to get your best results for Indigenous clients during the pre-trial negotiation, right? I mean, Crowns have just as much power as judges do. Crowns can agree to drop charges; judges can't do that. Crowns can agree to go jointly on non-custodial sentences, which (may) bind judges, but you need to get the Crown that information, and you're not going to get that information unless the guy pleads guilty. So when I got these reports, I've done it as a pre-trial negotiation tool. And that's when it's most effective. That's when you have a Crown attorney who's got twenty files to screen. They don't give a [REDACTED] who your client is or what his background is unless you give them the information that forces them to get a [REDACTED]. So if Gladue reports were prepared pre-plea, you'd see a lot of charges get diverted, you've seen a lot of charges get withdrawn, you'd see a lot of charges get dealt with expeditiously with the probation sentence or a conditional sentence without even worrying about going to court. So that's the whole flaw in the Gladue regime

I'm negotiating with the Crown for the position, as counsel, I already know, the background, right, like any good counsel is going to know that there is, you know, any sort of correlation between the reason why it applies before the court, and you know, any trauma or any learned behaviour, that you know, they work with, any counsel is already going to be able to share all of that with the Crown so that the Crown can take into consideration some of those unique circumstances that you would then ultimately find in a Gladue report, so if the Crown still wants jail, even after I've shared those

reports with them, the details with them, then it's even more important to get a Gladue report so that you can convey those same factors to the judge.

Someone should be, you know, really in touch with and in tune with the specific factors for this client that's before the court and really working with those people. You know, like as it develops with the Crown, you know, anyone who leaves it to the very end of a sentencing hearing isn't doing their client service because they're not raising those issues with the Crown beforehand in negotiation for the position. Now, sometimes you do it, sometimes, you know, my clients in for, you know, break and enter and, you know, possession of tools, Crowns screen it for 15 days, I would then likely just go into court and say, you know, it's an open position and I forward, you know, a fine or something instead of if my, if my client wants to plea, you know, and just go in open and, and not talk to the Crown. In other circumstances where you're having a Crown pre-trial first, and you're doing, you know, all of the steps through the process.

[I] put together a two-page synopsis in almost point form that I call the Gladue information sheet and the judge and, frankly, the Crown in that situation. I've done this on several occasions. But oftentimes, what happens is when the Crown gets the Gladue information sheet, their position sometimes changes. And we can then go forward on the joint position, but the courts will take that information into account. And so we may not have a Gladue report, per se, or Gladue letter, but I always make sure that the Gladue information is before the court.

It appears that defence counsel and their clients make the final decision as to whether a Gladue report will be ordered. The factors that impact this decision-making process will be discussed later in this section. It also appears that the timing associated with Gladue report production and delivery limit the capacity of defence counsel to inform the judicial process with the Gladue factors. It also appears that introducing the Gladue information of a client earlier in the criminal justice process impacts the outcomes achieved by that client. However, how frequently are defence counsel able to secure Gladue reports? Participants discussed their experiences with accessing Gladue reports, and these responses are discussed in the next section.

Securing Gladue Reports

When asked how frequently their clients were able to secure Gladue reports when one was requested, 14/16 participants were able to answer the question. Of these 14 participants, 10/14 indicated that they usually get reports when they order them, with a few exceptions. These include cases where their clients do not meet the Gladue service provider's criteria to complete a report, such as those cases where the ancestry of their client cannot be confirmed. As a general rule, it appears that counsel do not request reports where their clients do not clearly meet the criteria set by the Gladue services. Interviewees stated:

Yes, I would say in my experience, we always get a report. Although sometimes the report may say, like I have had instances where the report says, you know, we've met with the accused, we've looked and looked into their background and that they don't find any kind of tie to any indigenous ancestry. So sometimes, so I guess in that regard, it's not a fulsome report, but in my experience, at the very least, they'll say that they've explored it, and they'll give a reason why they can't provide a report

When one is requested, every time - I've never been turned down for one.

As well, four participants said that they get reports every time they order them with little elaboration. Interviewees also indicated that when a report is ordered but not provided, they will often get a Gladue letter, with one participant stating:

I might say I requested them ten time[s], and about half the time, it turns into what's called a Gladue letter rather than a Gladue report. But every time I've requested, I got like a document Gladue report or letter I've been able to get something.

Participants stated that they would only receive reports when the matter is more serious, partly due to Gladue service providers' policies. Interviewees stated:

You're generally getting the Gladue reports when there's a lot at stake for your clients. And it's beyond, you know, it's it, it seems more obvious that Council should not be getting that information on their own.

Well, only in situations where they're where they're facing a jail sentence of ninety days or more. So, It's only it's only those clients. So that just depends on the year and the clients I have. Some of them are looking at sentencing of 90 days or longer. Some of them aren't the ones that aren't getting one.

Most clients that come in through the justice system are very low-end, and I deal with everything from, you know, "theft unders" and just compliance to, you know, I've got two murder cases going on right now. So, I usually handle like a big variety of them... ..but most of them that come in are not looking at anything more than 60-90 days at the top end

There is a large body of responses by counsel stating that Gladue reports are rarely ordered. One interviewee stressed that securing a Gladue report is the exception to the norm that occurs only in specific circumstances, such as when the client will be participating in drug treatment programming before sentencing occurs. They stated:

My experience is it takes a couple of months, and the ones I'm remembering. I mean, there are times where it's not great, but on the other hand, let's say you're facing certain charges and you're doing counselling as up-front work for a certain result for a plea that time [delay incurred due to ordering a Gladue report] can be permissible because you'd be waiting to complete this work anyways. You know, if you're resolving a matter for a plea of guilt or a peace Bond or something like that often, the Crown attorney will want, you know, if we're dealing with someone with addictions issues, attendance at some sort of addictions program, and that sort of thing.

Another participant, stated that they don't frequently seek out Gladue reports, stating,

Well, I mean, the last fourteen months, being a bit of an exception, there's such a recidivism rate in my clientele that I haven't been using them for quite some time now. And the other thing is, I mean, I have a sexual assault trial coming up. And if there's a conviction there, I'll use a Gladue report, but I haven't had a super serious Indigenous charge, and, you know, sometimes the worst you'll get are assault causing bodily harm or assault with a weapon. And those are always - you can still work it out, you know, without the sky falling on an accused. So, generally, you're going to get a better result for the client even, even with that level of Jeopardy. And so you just end up not ordering them.

It appears that requests for Gladue reports are not often denied, but as one participant states, this may be reflective of the fact that reports are not ordered that frequently, rather than a reflection of an accessible service. The participant stated,

I think there's been two occasions where I've had a Gladue report; sort of, they've not been able to complete the Gladue report. But generally, when it's requested, it's because I know I'm not going to take the time to do those requests forms and go through all the information if I don't believe it's going to if I don't believe they're going to be able to do it. So, I'd say that, like there's been two times where I requested the report, and they haven't completed it. And I ended up going ahead and doing the sentencing. But the majority of times, I wouldn't request that publicly funded one because I know it won't help, there won't be enough time, or the client could get a better position if I just simply do the work now and get it completed.

As seen in the quote above, there are several different factors defence counsel weigh when determining whether to request a Gladue report. The criteria defence counsel use to make these legal decisions are considered in the next session. Overall, it appears that participants can access

Gladue reports in very limited circumstances but that services are accessible within those circumstances. However, potential barriers are still present.

Criteria

Interview participants were asked what criteria impacted whether their client would be able to access a Gladue report. The responses ranged from the criteria utilized by participants to determine whether they would request a report to the criteria utilized by service providers when determining who can receive their services. The most consistently discussed criteria weighed by defence counsel in their decision to order a report is “the length of custodial time the client is expected to serve, in relation to the length of time the resource will take to procure.” Beyond issues of timeliness and delay (discussed below), other criteria appeared to impact the decision whether to order a Gladue report/letter.

General Criteria

Participants outlined a series of criteria which may impact their decision whether to request a Gladue report. Though some of these criteria only have a marginal response rate associated with them, it is important to list them here to present the full scope of potential barriers faced by justice seekers accessing Gladue reports. To begin, Aboriginal Legal Services and several other service providers have criteria that clients must meet to receive a Gladue report. One policy is that offenders must be facing over 90 days in custody to qualify for Gladue services. Following this policy, 6/16 participants stated that their clients must be facing a minimum term of incarceration, with four stating it has to be over 90 days specifically. The policies put forward by service providers may further incorrect beliefs about Gladue, for example, that certain applications of Gladue are only relevant when the charges faced by a client are more “serious.” 4/16 participants stated that the seriousness of their client’s offence and possible sentence are factors they consider. One interviewee stated that “I would request one, obviously not in an extremely minor case,” and goes on to say that they would not,

Request one on a theft under if... ..the Crown and I are on the same page, but for the most part, if there’s any sort of sentencing hearing, and the sentencing hearing is contested... ..[I] would always request one, and I haven’t found it to be the case that judges will only order one or writers will only write one if it’s a more serious crime... ..but then like I said, I wouldn’t be requesting one on like, an extremely minor offence or an offence where it’s a very simple sentencing and that the Crown and I are asking for the same thing.

Another participant furthered this sentiment stating,

If it's a really serious case, where for a regular type of accused, you would have a pre-sentence report, then a Gladue report is the, uh, version you would have for an Indigenous client. So I determine that, and I determine it with the prosecutor, and if it's needed, it's ordered.

One participant stated that they would order a report anytime a client's liberty is at stake and defined the phrase "liberty at stake" with a very broad brush stating:

Liberty at stake doesn't always necessarily mean jail. It could be like in a Highway Traffic Act Offense, right? Somebody's Liberty might be at stake if they're presented with facing like restriction on driving. Like if they have anything that says like, you're going to lose your license for two years. I hope that's a Liberty state issue. Right? So sometimes that has to be factored in as well. So, counsel, so the bottom line is for counselling clients, they should be ordering it unless there are factors that would hurt the client to order it, and that usually is the length of time.

The end of their response, "unless there are factors that would hurt the client to order it," alludes to a series of factors raised by nearly all participants where defence counsel have to balance the possible negative and positive impacts of accessing Gladue. For example, 5/16 participants stated that the client's interests would impact the decision. This category includes whether the client can participate in the report production process and, considering the client's circumstances, it is advantageous to stay in custody or wait on release for a Gladue report. Unique legal factors such as a time-sensitive deals between Crown and defence counsel may impact the clients' interests. Defence counsel are alive to the fact that, given the current model of Gladue servicing, sometimes ordering a Gladue report will do more harm than good to their client. The most common example of defence counsel balancing the harms and benefits associated with ordering a Gladue report is the time a report takes to produce and deliver a report in relation to the expected length of time an offender will spend in custody. 12/16 of participants stated that this is a determinative factor in their decision whether to request a report for their client. These comments inform a larger conversation around the impacts of delay and the timing associated with Gladue report procurement in the province. As such, these comments will be discussed separately.

3/16 of participants stated that the usefulness of the report or the impact it would make on the ultimate sentence is a factor they consider in the constellation of other factors which impact their decision whether to order a Gladue report or not. One participant stated,

One of the factors, the main factors is what the range of sentence is, whether or not ... the Gladue report would have a meaningful impact on the sentence, the practicality of whether or not any delays in getting the Gladue report might result in an accused person spending time in custody awaiting, the disposition on sentence while they wait for that report to be done. And then I and then I guess whether or not the client wishes to participate in one.

One participant discussed how their view of how useful a Gladue report or the Gladue factors, in general, are for a client's circumstances would determine their approach to presenting their client's Gladue information.

All indigenous person's lives are, are more difficult as a result of the actions taken by the Canadian government. But often, when you're looking at sentencing, it's about the individual, right? So, like, if there aren't, if there aren't any personal factors that are assisted like, can I find a way to say this, without, you know, being so glib about something so tragic. But when you have someone who doesn't have as tragic of background, and it might be sufficient, just to explain that they're indigenous, right? Whereas if you have someone who went through abuse of this sort of thing, those are things you're going to want to let a judge know.

The statements by this lawyer reflect a larger trend in the responses by defence counsel, which is that the Gladue factors and resourcing related to its presentation are viewed as a tool for defence counsel to achieve their goals, not as a methodology of sentencing used to inform the judicial process with the history and circumstances of Indigenous persons in Canada. Another response that reflected this sentiment is as follows:

Why would I not order a Gladue report? One - because there's a prior one done. So that's one kind of like I've had circumstances where you have a Gladue report from before. And there's no real need to update it. And second, if it's not particularly germane, so I mean, like, It's not a small undertaking, but if there's not likely to be of assistance, let's say there's certain circumstances. I consider like if it's on a resolution track, that's good. You don't think you need a Gladue report, and the judge might ask for it, the judge might indicate, you know, if you're doing a plea that they'd be interested in if you could adjourn for a Gladue report to be completed, but, you know, if you have an accused, you have a very good resolution offer, let's say you're going to trial, it might not be something you want or need.

In an adversarial system, it is not surprising that legal instruments get treated by one side as a tool to benefit their legal goals. For example, one participant indicated that they would order a Gladue report only in scenarios where a case is contested. This response demonstrates that it is not always about the capacity of the report to aid the long-term healing and rehabilitation of the client, but rather the report's utility for one side to achieve an outcome within an adversarial system:

I suppose in a theft under, [if] the Crown was asking for a sentence that I wasn't asking for, I would still request one. So I guess I use that example because usually, the Crowns wouldn't be asking for a significant sentence, and usually, we'd be on the same page, so I think it comes down to more whether It's contested or not, meaning whether the Crown and I are asking for the same sentence and typically in kind of more minor offences It's easier to be on the same page as the Crown attorney often the person's record will also play into that cuz you could have someone with a hundred "theft unders" and then the Crown would be potentially asking for a more significant sentence. So, I guess it more depends on the sentence, which tends to kind of, you know, usually more serious offences. The more contested the sentence may be, but it usually depends more on what the Crown Attorney's asking for, in terms of sentence, if that makes sense.

3/16 of participants indicated that the capacity of the client to demonstrate their indigenous heritage is a factor they consider. One participant spoke of their experiences with clients whose ties to Indigenous heritage were tenuous and that this impacted how they approach ordering reports for Indigenous clients:

Yes, proof of Indigeneity, definitely, because I've had many experiences where clients have said I need a Gladue report, and I do, and then it turns out they, you know, It's rather suspect whether they're indigenous at all. Shall we say. And the problem with publicly funded Gladue reports only is that very thing, right? If you get the court order one, they obviously get a copy of whatever is produced, and if it turns out that somebody is, is making up their own indigenous Heritage or, you know, Many of the Gladue considerations don't apply to them at all. It can come back to haunt them, right? Like, I had a case last year where he very clearly had no indigenous Heritage at all, after months of investigation, and that obviously did not look good for him, come sentencing, so...

Another participant discussed how the amount of information a client can provide regarding their Indigenous heritage could be a barrier to a Gladue report being produced by service providers.

So, I've had it happen where a client didn't know if she had very, very little information, which is quite common, about their background, and Aboriginal Legal Services

endeavoured to find out more, but they were unsuccessful, and so that they drafted a Gladue letter rather than a report.

3/16 of participants stated that the presence of an older report would deter them from ordering a new report, as they can reuse the old report. 2/16 of participants stated that if their client has pled guilty or been found guilty will impact their decision to order a report, referencing the policy implemented by some service providers such as ALS, which require a finding of guilt to receive a Gladue report.

Timing / Delay

14 of the 15 interview participants asked about delay raised issues regarding the timeliness of report delivery and delays incurred in the process of report production and delivery. There are several components to delay and timing issues. These include the impact of the timeliness of report production on whether a report is ordered, report delivery outside the reported timelines by service providers, timelines impeding the legal rights of Indigenous persons, the harmful impacts of delay on the client when in or out of custody, problems which result in delays and delays in other Gladue related services such as Indigenous people's court. To begin this discussion, I will review how long participants stated Gladue services took to procure before presenting the impact of these timelines on the decisions made by defence counsel and their clients.

How long Does it take to procure Gladue Reports?

11/15 participants asked about timing and delays provided an approximation of how long they commonly wait to receive reports. The most common timeline provided was 6-8 weeks, with 4 participants presenting this timeline and another stating that timelines are extended when a client is out of custody. Aboriginal Legal Services, the province's largest Gladue service provider also states that reports take 6-8 weeks to procure. Four participants stated that reports will take longer than 6-8 weeks, varying from at least 8 weeks to several months. One participant stated,

My experience is it takes a couple of months, and the ones I'm remembering. I mean, there are times where it's not great, but on the other hand, let's say you're facing certain charges and you're doing counselling as up-front work for a certain result for a plea that time can be permissible because you'd be waiting to complete this work anyways. You know, if you're if you're resolving a matter for a plea of guilt or a peace Bond or something like that often, the Crown attorney will want you know, if we're dealing with someone with addictions issues, attendance at some sort of addictions program, and that sort of thing. Um, so that takes time anyway. So sometimes it's all right.

One participant stated that the 4-6 week timeline applies when clients are in custody, but that out of custody they stated it takes 8-12 weeks, a significant jump in procurement time. Lastly, two participants stated that it would take less than 6-8 weeks, stating a month and 4-6 weeks each. However, participants did indicate that delays occur which extend these more typical timelines and it is apparent that some participants viewed “delay” as the delays their clients incurred in the judicial process due to the timelines for Gladue reports. This understanding was best reflected in the following statement,

So, I mean, if we're looking at a Gladue report, and we're passing by one or two rent cycles, and that partly puts that person at risk of losing housing, which is significant. So, when you say when you ask, am I experiencing delays? Yes, but there the delays are the six-eight weeks. So those delays are the norm. And so it is a delay, but it's also normalized within the system, which is still a delay. And that's that, but there's no solution to it. So, just to be fair, like, they need time to do it. I mean, you can't do Gladue reports in a time that's less than that, and I understand... ..And we don't also want to leave these people out on bail if we know that we're going to set them up to fail. So really don't know what the solution is. You know, six, eight weeks is a short period of time for someone to write a 40-page essay. Right? I mean, it really is a really short period of time, especially when we have the jail interfering with our ability to interact with clients. It's normalized. But it's totally still delay, that means you factor it in.

Though the failure to define what the term “delay” meant in the interview process weakened the strength of the data related to delays, it did demonstrate that counsel, as discussed below, view the idea of seeking a Gladue report as a delay their client will incur and as a factor that has to be weighed against the overall benefits of a Gladue report. As well, the impact of both kinds of delay, (delays from the typical or advertised timelines and the delay that is incurred when a Gladue report or letter is sought) are important when discussing the capacity of Indigenous persons to access Justice in this scenario. Participants provided the following insight into delays from the typical timeline of service provision they expressed.

Delays a lot. 6 to 8 weeks is the time frame. It's, you're, you're hoping that it gets that, but then there's a that's a whole other can of worms, is with more systemic issues, and more systemic racism is that the jails don't give a ■■■ about your indigenous client or his Indigenous sentencing hearing, or his Gladue report. So, it's hard. It is to even get the Gladue writer to interview your client in custody that's hard enough as it is to get that appointment takes, you know, three or four weeks to get an appointment. Then create the report, which causes more delays. But of course, the jail who doesn't give a ■■■ will transfer your client to another jurisdiction without even considering remotely.

Your clients need to get that indigenous report done and be interviewed. [REDACTED] a case where the judge and I just ripped, ripped, the jail for transferring my client before he was interviewed, for Gladue

Yeah, there could definitely be times when it's longer than that. You know if an individual is I could take longer than if they're in custody and certainly during the pandemic, delays have extended the process um and you know made it a lengthier process to get reports, so you know, I['ve] definitely seen delays in excess of that but generally for someone in custody looking at a preparation time of two to three months.

Defence counsel were unable to provide any particular insights into issues internal to service providers which may impact service provision or cause delays. However, a few participants indicated that aspects of their clients circumstances may result in delays or be compounded by delays:

Many of my indigenous clients are of no fixed address, and so, just practically speaking, any delay, like a delay for two months, could mean that I lose contact with them, or the court loses contact with them, and that poses you know, they, they're facing potentially a fail to appear charge, fail to comply charge and, and that poses difficulties of its own. So that would be one I can think of.

When the report is finally done, and your client is there for sentencing, they may have relapsed or reoffended and then back in custody and then any benefit for that specific case of the Gladue report might have given is either offset or diminished in some way by their current situation.

Overall, defence counsel provided mixed messages about how long Gladue reports take to procure. This reflects that the defence counsel interviewed have had mixed experiences with the length of time it takes to produce and deliver Gladue reports. However, defence counsel consistently stated that the length of time Gladue reports take to produce is a factor they consistently consider when determining whether to order a report or not. As discussed below, this factor consistently presents as a barrier to accessing justice.

Timeliness for Report Delivery/Production deterring Clients from Ordering Gladue Reports at Sentencing

The most frequently cited issue deterring Indigenous people from seeking Gladue reports was the length of time Gladue services require to produce a report. Of the 15 participants asked about delay, 13/15 participants stated directly that the length of time necessary to procure a Gladue reports take to order limit the capacity of their clients to access them. One participant stated that a large part of their practice is “quick wrap-up stuff”, stating, “People get arrested every day and I

also don't want to go for bail. Just wrap it up. Like that's a big chunk of what I do as a lawyer." They also stated that in their experience the problems of timeliness don't only extend to Gladue reports but also the submissions made by counsel, stating,

People will certainly proceed to sentencing without the opportunity to prepare and make formal Gladue submissions. The Judge is still going to be made aware that applies. And you know, this person is Indigenous, but certainly, they'll waive the formal Gladue hearing, yeah, happens all the time.

Participants discussed Gladue reports and the length of time they take to produce.

Even in custody, Gladue reports generally in this area take, I don't know. Six to eight weeks. So I don't know, but often but sometimes, they don't want to wait for that length of time to get one... .. Obviously, if you're in a time served or approaching a Time served position, they don't want to sit in custody... .. They don't want to spend six to eight weeks more in a custody then I think I could probably get them. There are certainly times. When someone's facing a lengthy Federal sentence, they don't want to sit around in a provincial Institution for an extra two months. They just want to go off to the penitentiary and start serving their sentence and start doing their program. So, delay has all sorts of impacts. It's definitely a problem.

The biggest one [factor] is, if they're in custody, is if the timing makes sense as in, if their sentence is basically up and didn't have to wait, you know, a few weeks to get the Gladue report doesn't make sense to do a Gladue report and I'll explain that to them that, you know, to get a Gladue report means you'll stay in custody longer than you would if you didn't get a Gladue report... .. In my experience, it is usually timing. It's usually guys who maybe you're at time served, um, and you know they don't want to wait for [a] Gladue report to be prepared. They'd rather just, you know, be sentenced now and be able to get out.

The only reason a Gladue [report] wouldn't be done is kind of in the spirit of saving time. If everyone is on the same page, you know, they can take time to craft. So you know, if everyone's on the same page, there's not a contentious, in terms of sentence, it's not contentious then you know, there's no time for a Gladue report.

The primary criteria is the length of the sentence due to how long it takes to prepare a Gladue report. And the fact that preparation only begins after finding of guilt, you know, any sentence that's going to be, you know, less than three months of length or yeah, anytime it's going to be three months or less. Um, generally, there's just not enough time to prepare a Gladue sentence report

I mean, any person who knows they're going to get out that day is not going to stay in custody six weeks to eight weeks longer to get a report so that they would have got out without it. So, I mean, that's another problem with Gladue, is it takes so long, right? Takes six to eight weeks to get a report.

The limitation, though, is often timing, so if I have someone who has that time served, I am never going to ask for a report.

If you're looking at a position where you believe that person could be out of custody, now, you're not going to request the report because, you know, it's going to take four weeks.

I think it [the length of time Gladue reports take to produce and deliver] is, I mean, it's double-edged, it's, I see why such an amount of time needs to be taken on one hand because Gladue reports, part of why they're excellent. Excellent tools is that they're extremely comprehensive, and that requires time, unfortunately. It does potentially weed out clients who are not like deserving of one or qualify for one because they don't want to wait.

I don't know if I would call it [delay] a problem, it's a consideration and it can, it can deter from us ordering one for some of the reasons that, that, that I mentioned earlier. And I don't know if I can, if I can, if I have enough information to say that it should be taking less time or not... ..there are times and especially if someone is in custody and they're not looking at much more time or a sentence that it could be it could be a reason to not do it.

If you're going to order a Gladue report, then it's going to take time for that Gladue report, and then the person just sits in jail while you get that Gladue report. It's like a story on repeat. It just, it happens constantly.

The responses above indicate that participants frequently do not order Gladue reports due to the length of time they take to order in relation to the expected length of sentenced custody. Participants generally stated that they will not order reports where this would result in their clients spending additional time in custody and that spending additional time in custody runs counter to their clients' interests. When clients are in a time served position, it was frequently stated that a Gladue report would needlessly delay sentencing and the release of their client. The benefits clients would receive from a Gladue report are secondary to the benefits associated with getting a client out of custody at the earliest possible moment. As such, the focus of defence counsel is on getting their clients out of custody. One participant stated,

I need to get mitigating factors Infront of a judge and get someone who shouldn't be in custody out of jail. So even, you know, a day in delaying that process is a bad thing.

So, it impacts by keeping people in a cage who probably shouldn't be there, to begin with, right? ...If the result is a good result, and this is a results-oriented business, go in and get it. Get the person out of there. If it's an Indigenous person or otherwise, it's the same thing. It's you know you want to get the result that you think is just. And if I can do that without saying a lot of, that's me being a service to an Indigenous person. It may appear obvious that the primary focus of defence counsel is to get their client out of custody as quickly as possible. However, as discussed in chapter two, it is important to centre the practices of defence counsel and the interests of justice seekers when designing legal instruments. Currently, it appears that the current model of Gladue service provision does not sufficiently account for the interests of justice seekers and the practices of defence counsel. Instead of offering support services for defence counsel making timely submissions or offering more expedient, less time intensive services in these scenarios, or even beginning the process of producing and delivering Gladue reports earlier, Indigenous persons are put in a position where they must choose between the potential benefit of a Gladue report and being released from custody.

The focus for the majority of those interviewed is to get their clients out of custody as soon as possible. The issue is that where Gladue servicing results in their client spending more time in custody, the Gladue services work against the interests of their client and the practices of defence counsel. However, this lack of harmony between the operation of the criminal justice system and the policies and practices of Gladue service providers is not limited to in-custody clients. Participants stated that this issue is still germane when clients are out of custody, making it clear that timelines can still deter individuals from seeking out Gladue reports when they are out of custody. Participants stated:

In terms of delays, even if a person is out of custody, the delays in ordering a Gladue report might still deter from whether or not it's in their best interest because for, and unfortunately for the majority of my Indigenous clients, because of the situations they find themselves in, if they're for instance homeless, dealing with addiction issues or mental health issues or a combination of the three there's always the possibility of recidivism while they're awaiting sentence... ... where you have a client who seems to be engaged with resources and on the right track and you, kind of want to strike while the iron is hot. That person could present to a judge out of custody having done some positive work with, you know, counsellor, support working standing there with them saying you know, so and so has been meeting with me frequently and a judge then gets to reward that progress, you know, commend them and also have it reflected in the sentence they give. Sometimes you know, especially with recovery, that these things are, are peaks and valleys and putting the matter off for any significant period of time, even for a valid reason like a Gladue report, might mean that your clients, when the

report is finally done, and your client is there for sentencing, they may have relapsed or reoffended and then back in custody and then any benefit for that specific case of the Gladue report might have given is either offset or diminished in some way by their current situation.

So, if I have somebody who's at time served... ..And if that's the outcome that I'm expecting, then I would never asked him to go over for six, eight weeks. Not even if they gave him bail, because if I place my clients on bail I'm setting him up for potential failure, and I also refer to my client as male because most of my clients are male, so I don't mean to be gender specific, and that males are charged more often than females. So, and then I also, I also want to go back to that liberty at stake issue.

Obviously, it's different for every client, but when you're, when you're awaiting sentencing, obviously, it is a stressful period. So, whether you're in and out of or out of custody, sometimes people just want it done, and they don't want to wait.

One participant stated that in their experience Gladue reports take 8 weeks (56 days), which for a statistically significant number of clients is prohibitively long. However, this participant also stated that delays before sentencing do have some potential benefits:

So, I mean, sometimes delay before sentencing is good because the client has the opportunity to potentially engage in some rehabilitative activities in the community right. Um, perhaps they if they're dealing with their addiction issue. They may seek counselling or treatment to address that. They may engage in some domestic violence counselling, or you know, or whatever other programming. It also gives, if they can manage to kind of stay out of trouble. That always looks good. Right, you know, come back and say your honour that this person they've been on bail for this long. No new charges kind of thing, but it can certainly also work against them because they also have the opportunity to get more charges.

However, there are still severe potential draw backs to extending the length of time it takes to settle a matter. This participant also stated,

It also causes problems or can cause problems in scenarios. I'm thinking of where somebody has charges related to their spouse or their children. Because, of course, accused persons are almost always placed on, you know, no contact orders, but quite often the accused person and their partner, the complainant, you know, they want to reconcile, they're going to reconcile or, you know, they want to get back together, or they have kids and these conditions and waiting for the case to resolve while a Gladue report is prepared, for example, delays all of that. Meanwhile, client can't see their family. You know, spouses is stuck with the kids and wanting this person to come home. Perhaps even if they're not from Ottawa, they're not able to go back home while

they're awaiting sentencing, you know, and staying in the Shelter in the city where they've never been.

Another participant stated that any delays in the judicial process at this stage can be very detrimental to a client, stating,

If you're out of custody, you know, people say the harshest time for an individual, even if they're sentenced to a long time and in prison, is kind of the build-up and the lead-up, right? The unknown, not knowing what your sentence is going to be and the stress that comes with that. So it just kind of delays being sentenced, which is always a stressful time, but if you're on bail for those extra 8-12 weeks instead of just getting it done with and knowing what your final sentence is going to be. So even if you're out of custody, it does kind of contribute, I find, to kind of the stress, and that's inherent with the delay that these people face.

When discussing the timeliness of report production, in line with cycles of breach charges and releases one participant stated:

So you know, you're released, and then you're picked up for an alcohol breach or, you know, you you're, you're picked up your causing a disturbance, because for whatever reason, you're drunk and, you know, the police shouldn't be charging, but whatever. We can get into an over-policing over charging line if you want us to, but anyway, so then they're picked up and now it's a breach. So, you know, you get them released again. But and then it's kind of like this Vicious Circle until You know that person is so displaced, and you now are at a point where they breached too many times and can't get them out of jail and then they're going to sit. And if you're going to order a Gladue report, then it's going to take time for that Gladue report, and then the person just sits in jail while you get that Gladue report. It's, it's I don't know if it's like a story on repeat. It just, it happens. Constantly, it's depressing. To be honest with you.

One participant, when asked how frequently their clients are able to access Gladue reports, they shed light on how the current model of service provision is further delayed by the work put on defence counsel in order to access a Gladue report.

...the biggest hurdle that we face is the six to eight weeks that it takes to create a report. And so because of that, you know, oftentimes, you know, I have a lot of things that I need to do. Like, as counsel, I need to, you know, be able to bail first, obviously, but then I need to get disclosure, I need to look at that, I need to get instructions from my clients, I need to talk to the Crown. I mean, this takes weeks, sometimes to do, depending on when I get the disclosure. So, the problem is, is that if someone's looking at, you know, a 60 to 90-day sentence, the likelihood of them coming back before the court if it's a thorough and well thought out resolution, you know, the chance of them coming back and still having enough time, you know if they're still in custody to get a

report is very low. So, I'm sorry. I should have clarified before I even said that. I'm talking about somebody who doesn't get bail, so someone who's still in custody. So, if you're looking at 60-90 days, then you know, when by the time I get through that process, it's just, you know, weeks that takes me maybe three, four weeks to get to that. So, they're already served 30 days in, which is 45 days at summer, probably enhanced credit. So, you know, after 30 days in, they might be at 60 days. So, I would never ask for a Gladue report... And then also, by the time I get to that point, I don't want to drag it on while my clients [are] on bail for another few months, you know, because they're likely not going to make it for two months. So, you know, ordering the Gladue report is actually quite problematic because of the timing, because if I, if I want to leave somebody on bail for two months, I'm risking them coming back before the court on an administrative problem.

Another participant raised this issue stating,

When you order a pre-sentence report in the normal course, the probation officers are assigned, and the report is done. For Gladue reports, you know, a lot of the work is put onto the defence counsel, sort of offloaded from the institution on to the individual. You know, sometimes we have to find the appropriate author. If there's delays, we might have to look for other authors or experts. If you know the subject matter or the individual is from a different part of the country or a different Community, we might seek out some of the specialized knowledge, even just with the bureaucratic process that defence Counsel and the accused have to fill out forms back at them and take these various bureaucratic steps which, you know, that the court does for white offenders or non-Indigenous offenders. So, there's a number of, you know, systemic barriers that are put in place that above and beyond the time it takes... ..no one's going to order a report in their right thinking. If the Crown is asking for 30 days and you're making a time-served pitch, it would be. I would have some serious questions for a client who says no, no, I want to wait in custody. You would be released, perhaps on a very restrictive bail. Released into the community without social supports, basically, you know, the next two or three or four months to get a report when I'd be long done serving my sentence on the worst day. By the time that report is ready.

The impact of the current practices of service providers on the capacity of clients, both in custody and out of custody, to access justice will vary, as demonstrated in the responses of defence counsel and the variability of their client's unique legal circumstances. However, what is clear is that the impact of these timelines creates a series of barriers to accessing procedural, substantive and symbolic justice which clients must face.

2. How is the Gladue information Presented When a Gladue Report is Unavailable?

Theme two discusses how the Gladue information of a client is collected and presented in the absence of a Gladue report. As discussed, there are several barriers faced by defence attorneys (and by extension their clients) which prevent them from accessing Gladue reports at sentencing. Defence counsel were asked questions about how they collect and present the Gladue information at sentencing when Gladue reports are unavailable. What follows are the various statements made by counsel regarding how they submit Gladue information in the absence of a Gladue report and the various barriers that may appear in this scenario.

The means by which Gladue information is presented When a Gladue Report is Not Available

All 16 participants stated that they present their clients Gladue information to the court when a Gladue report is not provided. 9/16 participants stated that they typically present the Gladue information through oral submissions. 4/16 participants stated that they will present a written document, with one participant calling it a “Gladue information sheet.” One participant stated that they will present letters from family members and three participants stated that they will sometimes ask the court to call on their client to provide information to the court directly. 6/16 participants stated that they will work with local service providers, such as Odawa, their local friendship centre and other community services to help prepare their Gladue submissions.

Methodologies and sources of Gladue information

Participants discussed how they collect Gladue information and the sources they collected it from. Participants made the following statements regarding the collection of Gladue information.

So I mean, if you can't get one [a Gladue report], I mean it's still your, you know, Duty bound to get this information before the sentencing judge, right? [The] Judge has to consider Gladue in sentencing. So, if you're representing somebody where that applies, you know, you have to make sure that it all the relevant information gets before the judge, so it can come from the lawyer, right? You know you should know your client well and Spend time with them. So that, you know, if you can't get a Gladue report, to the best of your ability, you can kind of get that same information in front of the judge via oral submissions or written submissions on that on sentences.

Oftentimes Council are doing these checks with their clients about where they grew up, what their family history is and all of this. But it's not. It's not as effective as a Gladue report where you'll get the history of what happened in that particular village, town, area, dislocation injustices, residential schools, federal day schools, all of that right.

I provide the information solely. They have also had - kind of the judge on one occasion. Really talked to my client basically about his background and his Experiences. So there's been kind of a mix of how the information would get before The court... ... it's tough because I'm only relying upon what my clients tells me, which means I may be lacking and have to be pretty General in my Global impact regarding the harm generationally. It's done to him and the impact it's had on, you know, his tribe or where he's from. So I think it's tougher for myself to do it without the good enough knowledge base about the full breadth of impact [*sic*].

Using Case Law or end information from that I got from my client's family member. So, I usually try and get as comprehensive of a background from them as they possibly can and then turn to case law... ...I don't know if I feel confident. I think that I tried to learn as much as I can and present it in the proper way. I'm less confident without a report, but I think that I, I typically, again, I try to really spend time with my clients and learn about them and their backgrounds and so that I can present as comprehensive a picture as I can in a sensitive way. And I usually talk to them about that. I talked to them about how it might come across, how I'm going to present it, and I asked them if they're okay with that. So that's my practice. I don't know about other people, but I typically talk to my client if I don't have a report. Even if I do, I talked to them about how that might be presented in court, and cuz it can be very traumatic for them as well, and I'm presenting their life, and I want it to be as accurate and sensitive as they as it can.

I do [make their own Gladue information sheets], and not a lot of lawyers do, but even when I do it, and I do a good job, it still doesn't even come close to the quality and depth of information as a Gladue, a properly trained Gladue writer could provide. It's enough to move the needle for the Crown, but man, that needle could move way further if I had that report going into pre-trial negotiation.

So, the first one is, obviously, to fulfill the Gladue principles. And the Requirements for the court provide some sort of context. I would start with interviewing the client. Whenever possible, I like to call their parents, or you know, family members, if they feel comfortable with it, of course, I always ask for permission, I oftentimes will turn to the internet. And I will, you know, log on and see if they have a First Nations if their first nations, and I'm talking about Aboriginal right now, but they have their different nations had like, a wiki page, or like a website page, and I kind of just see what they're read about their specific community so that I can know a little bit about it. And then I also, because I deal with a lot of indigenous people, tend to know a lot of this social, social, social work and social justice kind of articles and stuff. So if they have fetal alcohol syndrome, then you know, I have resources, and usually specifically trained to that has some sort of, you know, guidance for the submissions that I want to make to the court, you know, how, to use fetal alcohol syndrome, as example, you know, how does that affect someone's ability to, to, you know, report to probation and stuff like that. So, essentially, I'm doing all of that work without a Gladue report, like I do that anyways. And then I would, I would already have basic knowledge, and then I get the Gladue report... ...save the exception is for sexual abuse, I find that it's not something

that's comfortable for my client to talk to me about it, particularly because I'm not a social worker. And so oftentimes, I, if I know that I'm going to be getting a Gladue report anyways, as the Gladue report writer, the experts, ask about those more specific and detailed, traumatic experiences as a child, I don't tend to know. I mean, they were suggested, but I will not know as many details as would be in the Gladue report.

So, I was told that there may be a Gladue course going to be offered and mandated. And I would happily take that course to assist my clients. That being said, I have a history specialist degree. So, I, prior to law, so I do, I am able to write history. I also am sort of just conveying information on behalf of my clients. So when I write Gladue, my Gladue information sheets, a lot of the time, I'm drawing on information directly from the client. And I'm not sort of going in and looking into the circumstances of like a Gladue report. We'll look at, you know, the First Nation and they'll provide some context into the First Nation. I have done that in terms of so, for instance, one of my clients, their grandparents went to Spanish residential school, and Spanish residential school being quite infamous. I pulled some specifics, and some information about Spanish, the residential school in Spanish, and I put those into my Gladue information letter. So I will do that. And I will pull on that sometimes, but, you know, preferably, it would be done in a Gladue report. I will do it because I want that information to be somewhat before the court. But I don't believe that there as that my Gladue information sheet, which is probably two pages point form is, is as good as a Gladue report.

It depends on the client. It depends on my relationship with the clients. I can say that some clients are a little more reluctant to get into private and personal and oftentimes. You know, difficult histories and so I in terms of approach, you know, if it's someone that I've been representing for some time and I've developed a rapport, I think it's easier for me to sit them down and ask them a few questions I start very generally and then, depending on how comfortable they are getting into more specifics. I can get into that. I make it clear that that, you know, will only share what they're comfortable sharing. And depending on again, how much impact I think it'll have on the overall determination of sentence. There's, there's perhaps a more. I, I'll go into further detail if I think this is information that'll have, um, that'll have a, a more important impact on them. Again, if it's a joint position, it, maybe it, maybe as, as simple. Perhaps simple is not the right word, but it might be as general as establishing what their connection to an indigenous Community is maybe in very broad Strokes, how marginalization has affected them for immediate family members and then that information can be given to the court to give a context to why this position was arrived at. And that is one of the factors that was being considered if it's if the Crown and I are apart in terms of sentence in a more substantial way than I think. In that situation, I may approach my clients to say, you know, if you're comfortable sharing more specific stories and a more specific history with the court. Then then, I think that'll go a longer way for the judge to better understand your specific situation. Supposed to just generally and then and then apply mitigating factors of Gladue, in a more, in a more meaningful way in sentencing.

Participants discussed the methodologies they used, with the above responses including interviewing the client, researching their community, talking to family members and draw from the knowledge they have previously collected from their client. Participants also indicated that the work they do requires unique training and being situated within the community. The conversations above also indicate an awareness of how to engage with their clients trauma. One participant discussed how they attempt to compensate for the lack of engagement by Crowns and the lack of available services. They stated,

Well, yeah, but the Crown never gets it right. The Crown never gets it. Unless you, as a conscientious and Good Counsel, get it to them, right? You have to get it to them, and I don't, you know, I can't fault the Crowns for generally not giving a shit, yet because that's not your business, it's not your job. But I can fault Counsel for not getting that information. But where counsel is hamstrung is that they can't get that information in the same depth and quality. As in a Gladue report, you can't get a Gladue report unless the person pleads guilty or is facing a jail sentence of 90 days or longer. So, what I do, what I do is either I get a privately funded if I can, or I do my damndest to get as much Gladue information as I can. And that basically involves me going out and doing the kind of work that Gladue Writers. Do, you know, contacting collateral sources contacting sources Back in their first nation, and you know, it's a lot of work. But when you get the Crown attorney that information, I find it generally. Yes, if the absolutely appreciate it and they use it effectively and to your client's best interest. There's rarely a situation where you have all that information pre-plea.

Training and Preparedness To do the Gladue Work

Participants discussed how confident they felt collecting and presenting their clients Gladue information and if they felt like they had sufficient resources to help them do this work sufficiently.

One participant stated that,

I feel ill-equipped, and sometimes it's like I'm going through a checklist with a client that I don't really know much and I don't have that solid relationship... ..I just feel it's hard because we're lawyers, we're not social workers, and we're not necessarily trained on how to get this very sensitive information and I don't want to be re-traumatizing somebody by asking those questions.

When they were asked how they feel ill-equipped to collect their clients Gladue information they stated,

Because I am a lawyer because I'm part of the colonial legal system, and I'm not. Up here, and not another member of the community. And I'm extracting this incredibly sensitive information, and I've been told I'm like, I've had, I was told early on in

Navigating IPC that I was, that the person felt traumatized when I was asking questions too. And that was a huge learning lesson for me and completely got me to change my perspective on what I was doing.

Other participants raised similar concerns, stating the following,

No, I would say no, I would say any knowledge I have, or kind of how I approach clients or discussions. It's all just me doing my own kind of research. I found, you know, leaving law school. I didn't have any preparation for that, you know, it's, it's kind of I've had to teach myself and learn as I go type thing. I don't think that lawyers are adequately prepared for that at all.

I do wish there were more. Resources and education for defence lawyers. Like I think the perception seems to be that we are, you know, we're known for our clients and for access to Justice and the whole bit. But I'm not sure we're all; we're in the position to know everything that we should, right? Like, I'm sure there's a lot of resources out there that I could refer, you know, my indigenous or otherwise clients to that, we just don't know of it. I think there needs to be more education for us to, you know, about reading *R. v. Gladue* in the latest court of appeal decision about it, there really needs to be more of an emphasis on, like, on the ground resources that we can turn to. And that our clients can turn to. Yeah, the question just seems to be that we know all of these things, and so you know we can prepare everything and educate the judge in the Crown about it, but that is not the case at all.

I'm used to dealing with the accused person and trying to understand their circumstances, right? So an indigenous accused person is an accused person, right? And there are things you do. Let's say you're going through sentence. You get a full personal background and try to understand everything there is to know about them, where they're from, what they've been through. You just sweep through that. Perhaps, sweep is not the right word, but carefully and methodically go through their past to see what you can find for mitigating factors. You know, if I encountered, perhaps an accused person was from a specific tribe who wanted to kind of explore that then, you know, I think I would have the resources, not that I've taken them up on it, but I think I could call Odawa or TI and kind of pursue that, as yet I haven't found. You know, I've had some Gladue reports that have been quite useful, but I haven't had a circumstance where I thought that that's something. You know, I should do recently, but that's kind of a hard question cuz once you have a Gladue report, you kind of have what you need, and I mean, the judges are quite live to the issues faced. By indigenous persons as a whole, I don't think it's necessarily in the past that I've had to differentiate between this tribe and that tribe. I will say, if you're doing submissions on sentence, you should know what tribe the offenders from or what indigenous group. I'm sorry. I'm not sure if that's the correct nomenclature.

You know, the publicly available information. Um, you know, it's easy to outline systemic issues and um, historic Injustices and to ask the court take notice of, you

know, intergenerational trauma caused by residential schools and, and other factors like that, um, it is very hard as a non-indigenous person myself to draw out from my client you know specific factors as of going to have to have those discussions that go beyond that make issues and um are more personal or specific to the offender. So, you know, I don't have the ability to do, to have the job of having this conversation.

The only reason why I still get the Gladue report is because they do a much better job at, you know, in speaking to the family members, they can actually access, like records and stuff from the communities and everything. And then also, that's what they're trained to do, they're trained to talk to the client, and develop, you know, kind of like the flow of the documents, trying to create a 40-page Gladue report for each one of my clients would be impossible for me.

Three readily apparent issues exist with defence counsel collecting and presenting Gladue information independently. First, no quality standards exist regarding the required level of detail or the methodology for appropriately collecting and presenting the Gladue information of a client. As such, beyond the capacity of the court to ask for more information or appeals courts to find a judge erred by not seeking more information, there is no remedial course for justice seekers and no oversight to ensure that Gladue information is collected and presented properly. Second, defence counsel, either as part of the Legal Aid Ontario's Gladue panel or through law school are not required to receive any training that would provide defence counsel with the skills required of a Gladue writer. This includes but is not limited to, the use of historical archives and datasets, trauma informed interviewing and the specific factors that Gladue writers are trained to ask clients about. As one participant, who is heavily involved in a local Indigenous peoples court in their jurisdiction stated, "we're lawyers, we're not social workers and we're not necessarily trained on how to get this very sensitive information and I don't want to be re-traumatizing somebody by asking those questions." Lastly, defence counsel appear to not be adequately compensated for the additional work associated with collecting and presenting the Gladue information. The last point has two components, both of which were raised by defence counsel. First, the degree to which the current Gladue servicing model puts the onus of Gladue on defence counsel and second the manner in which defence counsel are compensated for their Gladue related work, both of which will be discussed next.

Gladue Tariff

In the late stages of the interview process an interview participant raised their concerns with the Gladue tariff, the process by which Legal Aid Ontario compensates lawyers for the work they do

specifically related to presenting the Gladue information and generally fulfilling their obligations under s. 718.2(e) of the criminal code. The participant stated,

Also, in terms of resources, there's also a difficulty with if I don't request [a] publicly funded Gladue report, and legal aid doesn't pay for the additional Gladue hours. So what happens is I take more time and get paid less. So in terms of financial resources, they're not there... ..that circumstance will probably happen to me about 50% of the time. Like, I'm making Gladue submissions, but that doesn't necessarily mean that I'm rewriting a Gladue report or a new letter. Sometimes I have that already. Sort of if it's a repeat offender, I already have that information, so I can pull on it. But yeah, I would say, you know, 50% of the time I'm doing Gladue information for the court of which I haven't received a report, and therefore I don't get paid for it.

They further elaborated,

The tariff is that it has to be publicly funded. So it used to be that if you had an indigenous clients and Gladue would be put on the certificate, and there'd be an additional five hours without questioning why, and I don't know the rationale behind Legal Aid removing that. But I get the sense that it was, there were there are; unfortunately, certain people and certain lawyers who will say, Well, if I'm on the Gladue panel, and I get five extra hours to do a guilty plea, I'm going to grab the Aboriginal clients do the guilty plea, not worry about Gladue, and get paid the additional hours. Now, that is not to say that 98% of the lawyers out there are doing that. But they're, you know, I, I don't understand why they would change it from an additional five hours to only allowing it if there was a publicly funded report. And I think that has to come from somewhere. I think that the idea was, we don't want to just incentivize people to take on indigenous clients and them not providing a service. So you know, I think that there are, you know, the way that I would have to respond to that is I would have to do the extra work, and then submit a discretionary increase letter, and then say, I wrote out my own Gladue report and hope that they pay for it, which most of the time on a block fee certificate, you're not going to get, you'd have to do your hours, you have to do that. And so, ultimately, you do more work, and you get paid less in these circumstances.

This issue was specifically raised in the last interview. However, other participants raised issues regarding compensation, with another participant stating,

I believe I do more. I mean, I do tons and tons of pro bono work in the Indigenous community. I've been doing it for over a decade. So I work for free. But for those who don't work for free, the vast majority of their clients are getting paid by legal aid, right? And legal aid rates are so low, and lawyers are capped at so few hours, and they've actually removed legal aid, has removed The extra Gladue tariff that they used to pay us. So the financial incentive for lawyers to work harder is very low. So it's there's

systemic issues with that too. If you want to encourage lawyers to do that extra work, you need to pay them more and also not cut funding that used to encourage them to do it. Used to be, used to get paid an extra five hours from legal aid. If you did an Indigenous sentencing, they cut that two years ago.

Though the experiences of a broader selection of attorneys relating to the Gladue tariff could not be surveyed, when reviewing the policies as outlined in the Legal Aid Ontario billing and tariff handbook, obvious structural issues became readily apparent. First, the fact that lawyers were only paid for work related to Gladue submissions when a Legal Aid Ontario funded Gladue report was procured was confirmed. Second, it was confirmed that this changed in 2019 from the general block fee as described by the aforementioned participant. Thirdly, that the amount of block compensation was reduced from \$455.81 to \$273.49 in July of 2019.²⁴⁶

3. Quality of Gladue Servicing

The third theme of the results touches on the quality of Gladue servicing. Defence counsel were generally very deferential towards service providers when it came to the content of the reports they procured. Of the 13 participants who directly commented on the quality of Gladue reports they received, all 13 spoke positively of the quality of Gladue reports they have received. These responses include the following statements,

The reports that I have received in recent history and they were all done by Aboriginal Legal Services Toronto, I thought were expertly prepared really thorough, really good, really detailed background information about my client about their family included a good deal about my client's history of the people as a whole right there actually saying, you know, this person's from x place and here's their deal with their mother and father was like, oh, this is sort of a brief history of this particular group of indigenous peoples. And I thought the recommendations were specific to the accused person and quite appropriate in the circumstances. So actually, no, I thought they were really good.

I think they're highly useful. Especially if you have one that's well written where you're, you know, oftentimes Council are doing these check with their clients about where they grew up, what their family history is and all of this. But it's not as effective as a Gladue report where you'll get the history of what happened in that particular village, town, area, dislocation injustices, residential Schools, Federal day schools, all

²⁴⁶ Tariff and Billing Guide p. 2 – 9.

of that right where you get. I really think that the history providing that context in a multi-page report really adds value.

But where counsel is hamstrung is that they can't get that information in the same depth and quality. As in a Gladue report, you can't get a Gladue report unless the person pleads guilty or is facing a jail sentence of 90 days or longer. So, what I do, what I do is either I get a privately funded if I can, or I do my damndest to get as much Gladue information as I can. And that basically involves me going out and doing the kind of work that Gladue Writers do, you know, contacting collateral sources contacting sources back in their first nation, and you know, it's a lot of work. But when you get the Crown attorney that information, I find it generally. Yes, if the absolutely appreciate it and they use it effectively and to your client's best interest. There's rarely a situation where you have all that information pre-plea... ..but even when I do it (prepare Gladue submissions) and I do a good job, it still doesn't even come close to the quality and depth of information as a Gladue a properly trained Gladue writer could provide It's enough to. It's, it's, it's enough to move the needle for the Crown, but man, that needle could move way further if I had that report going into a pre-trial negotiation off.

The Gladue reports are incredibly culturally appropriate. I mean, they are, you know, primarily, almost exclusively geared towards indigenous programming or indigenous run programming. That being said, there are exceptions, like St. Mike homes, for example, which is not an indigenous program but does have a high percentage of indigenous people who came to me who participate in this. So not an indigenous program, but like I said, a high population. So I would say everything in the Gladue report was incredibly culturally appropriate.

Where it's available, I think the reports adequately mentioned the opportunities that people can take. I've never taken like. I've always found the Gladue reports to be well done and provide the courts with other options that they contain. I've, in fact, had the Gladue writer make submissions directly to the court, which is a rarity, but it made a profound difference. In the case that I did

As this project did not seek to gauge the quality of reports provided by specific service providers, counsel were asked to generally speak about their experiences with Gladue reports and then specifically the quality of the recommendations made for their clients. Several participants took this opportunity to discuss issues regarding the services available in their community.

I mean, there's collaborative Justice, which is non-criminal resolutions, and, you know, I'd like to see more of that. I'd like to see more non-criminal more diversion. I'd like to see in-custody treatment programs. Like serious ones, we don't really have the space at the Royal Ottawa for people with mental health issues to stay there if they're still in

custody at jail, right? So they have inpatient treatment programs, but it's costly, and it's limited for how many people from Ottawa, Carleton detention centre that are can actually be at the Royal Ottawa or other facilities for secure in-person treatment. And I think having some sort of Middle Ground would be really, really helpful. You know you deal with a lot of people who have mental health issues in general for criminally accused. But, you know, you deal with people who, let's say you have an indigenous person with both mental health issues, like post-traumatic stress from growing up in the environment they did and, and maybe some addictions issues. You'd be nice to have something aside from Ottawa Carleton Detention Center. But these facilities are expensive.

I'm not as familiar with the mechanisms for Gladue reports as I should be, but I have requested them before. I know that there is a, they're quite thorough, and they are really helpful often for offenders in my experience.

No, I think that they're, for the most part, good. It's like anything, right? Like some are better than others. I don't know if it's a community thing. I think the writer and the amount of information they can get obviously if they're able to interview more family members and it's always better and more helpful the report, and that can just be you know, not being able to track certain people down or get enough information from the client, but I don't know. I don't have any specific concerns with, you know, the recommendations are always good in terms of different programs that can be helpful in specific to them. So, I would just say it more comes down to how much information they can get from different family members often clients, um, you know, aren't able to put them in touch with as many people, or aren't in touch themselves with as many family members, which can make their report a bit more sparse in terms of this information and help about the person's background.

Not, not really. I mean, I find that the reports are, you know, pretty comprehensive as someone who has, you know, engaged with the issue with Gladue reports and read, you know, and engaged in in the background material, reconciliation commission and others sort of reports like that, you know, I find that the content generally pretty good. I mean, I haven't seen sort of independent analysis or anything, so there is probably another perspective, but not indigenous, upper-middle-class white man, but they seem to be pretty comprehensive. I certainly learned something or realized something new with each report. They are right in terms of, you know, the history or ongoing trauma or, you know, impacts of colonialism. Like there's something that I learned when I read reports, so they are informative.

Not particularly, I think my, Not the quality. I find them generally very good and helpful. The only thing is in terms of resources and potential wait lists. Factoring that in, that can be a problem but that's not really related to the effectiveness or the quality of the recommendations. That's just the nature of the world we live in, I guess.

One participant stated that they had concerns over the trauma awareness of Gladue writers, stating,

One sort of problem that I did identify not with the report itself but with the, I guess, the manner in which it was prepared, and I am thinking of a particular client. So, you know, when you get these reports, you know, the clients agreed and, you know, hopefully, is actually sort of prepared to do this. But they're going to meet with somebody, who's a total stranger, who's going to ask them for a lot of really detailed information about themselves. Much of which is traumatic, right? These people experienced terrible things, and they're having to recount them and relive these traumas. So, I think that for a client, the preparation of these reports can be Really upsetting and depending on the writer and what kind of training that person has, their needs to be like, sort of, an after-care counselling kind of component, I think to the preparation of these reports, and I'm thinking of a particular client who was sent into a total tailspin after this, had a relapse and stuff with new charges kind of thing. And she was like I was completely triggered by these questions and kind of having to relive all the worst moments of my life kind of thing. But I think that subsequent to that, about six months later. ALS did end up hiring somebody to do that, very specific thing and to meet with people kind of like after the report and you know to check in and see you know make sure they were okay so. That's good if that's still happening.

My only concern is that every single recommendation involves some program decided to Ottawa. There's nothing in Ottawa. So sure you found them a program, six-hour, eight-hour drive from Ottawa. Or there's recommendations on which penal institution will give them the best Gladue services, but judges have no control over where they go, and the jails don't care. So, It's not. The recommendations are; it's a lot of just lip-service, not through the fault of the recommender. They're simply doing their job. But the reality is that most of these places that are any good or not in Ottawa or the jails that have these programs. The judge has no control over where the offender goes.

The release plans, the items that they've recommended, are not as structured as the plan that I've put together because I know my clients and I've been working with them for years... .. And in terms of limitations for the report itself. Yeah, I mean, Just because they make the recommendation doesn't mean that my clients [are] on a waitlist or that they've made the application for them, they put on the release plans, you know, they recommend St Mike's homes, for example. Well, St. Mike's homes takes an application process. You know, they haven't actually made that application process. And so then it is really put into the hands of my clients, who oftentimes has maybe, you know, because of Fetal Alcohol Syndrome, because that's the best example. You know, cognitive disabilities, maybe they have learning disabilities, and they're unable to fill out an application, maybe they don't even have access to the internet or, you know, a printer to fill out the application. There are limitations in terms of the recommendations that are made, only because there's no bridge there to implement the recommendation. So the problem is that the courts expectation that, you know, because it's written down on a piece of paper, the client who's been, you know, empowered to follow through with these things need something more than that. And so that's why Gladue reports are better than any other form because they actually assign on the Gladue report, they'll assign a caseworker. And then that caseworker, after a Gladue report, will then help

them connect to those services. So they do have resources available, but they're not available to people who, you know, are released on bail, who just had to release plan? They don't assign a court worker or caseworker, sorry. They don't assign a caseworker unless a Gladue report is made.

Okay, so for the services, to follow up with that is very difficult because they can only offer what's available and only offer programming that is available. I predominantly work in Bracebridge. I also work in Parry Sound. You can look on [REDACTED] about the black hole that is Muskoka for indigenous services. We have nothing, literally nothing in this community for indigenous people.

One participant summarized these sentiments well when they stated, "I have a problem I guess with not so much recommendation, but with available solutions." Stating that,

We only have certain things that are available, so there's probation, there's jail, there's community service, there's part of probation, you know? So we have our justice system are sentencing regime is very rigid and limited, so there is only and we can't get out of that. You can't get out of that Paradigm. We can't get out of that context.

Sentiments like this raise considerations of access to symbolic justice, with the participant questioning whether the legal instruments themselves are reflective of the needs and world views of justice seekers.

Several participants also indicated that they view Gladue reports as a tool to help present their client's background and pay less attention or draw less value from the recommendations made in them.

Yes. Yes and no. I mean, I see Gladue report(s) frankly as more helpful just in terms of advising the court about a person's background and Trauma and family history and the like rather than the actual recommendations that are made in it. I mean, I see it more as a pre-sentence report. Specifically for indigenous people, rather than something that, you know, the recommendations carry a whole lot of weight... .. yeah. I'm just trying to think through if I've got concerns about that. I mean, if I'm being honest, I don't actually pay that much attention to the recommendations. I mean, they're generally pretty boilerplate as much as they are in pre-sentence reports. And so, I suppose in that sense, they could be more individualized, but then again, I mean the service providers are working with, you know, the programs that are available for them to suggest and that sort of stuff. So, their kind of their hands are tied, but I see Gladue reports as more helpful in the historical background than rather than the recommendations.

Recommendations. Well, there's more of a background nature to a Gladue report than a sort of recommendation although, sometimes you, you see that I've done circles, although they're, also, more rare now, and then that's been subsumed into the IPC. In terms of recommendations, I mean there's a comparison to pre-sentence report, and at the end of the pre-sentence reports which are prepared by probation officers is very often a suggestion for sentence, and that's actually not allowed by the legislation happens all the time. Happens routinely. But Gladue reports. I think it's mostly useful for the background, and I handle the range, right? Or the resolution of the case, I give the judge. In other words, I know what it's worth. You know, in IPC, there was a lot of complaints that it was taking too long. And that's a factor. And so that justice delayed is justice denied, and it was really being delayed in IPC. I don't know if it's still up, and it's it was a court. Believe it or not, that I had to avoid for some time because I'm like, I know who the judges are. I can get this done without going in there, and it's a bunch of things wrong with IPC. That's something that I've been saying. I'm not the only one saying it not coming up. I'm not saying it from an ideological point of view; I'm talking about getting what should be and getting a result for an Indigenous person that's just in the in their context. And that didn't always happen cuz it was taking too damn long.

There should be a lot more alternatives, right? I mean, I'm just trying to think of like Gladue assessments. The Gladue reports have seen don't necessarily opine on what an appropriate punishment is. Rather just indicate the whole person's history. And that's just incredibly useful for context and kind of understanding where someone's come from and the obstacles they faced.

I think it's more the background. It's being able to explain to a judge who the person is, why they're before the court. What are maybe some of the reasons that have brought them before this court. I think that's the most important thing to me when I even do, do a Gladue report or PSR. It's to explain to a judge why, well, what's gone wrong and what, what can we do to maybe help this?

Three participants stated that the recommendations in reports were “boilerplate.” Where three participants stated that Gladue reports often only resulted in lip service, with these participants stating,

I mean, there is always the sort of persistent problem of resources and recommendations and social supports to implement those recommendations. And you know, there always is the concern that you know, this is, you know, your lip service, especially as the sentences become more serious. I've seen lots of Judges shed a tear when talking about the Gladue reports and about trauma and my client's situation, and then, you know, this is a very serious offence and then, you know, give a sentence that one would have got even without a report without that all that information, uh, and I think that there could be some real damage done there to the individual. Just you know, who just bared their soul to a report author. So to see, you know, uh, a representative

of the state, a Judge sort of disregard or, you know, say things about the report in the situation but then, not actually do anything different at the end of the day, I think that that can be a discouraging experience and perhaps compound the harm.

I would say that my experience is that courts pay lip service to Gladue. In sentencing and in bail. So, like that, to me, is the bottom line in my experience... I'm constantly shocked at the over-representation of indigenous people in the criminal justice system and in incarcerated and in bail court in particular, and that's why I mean that's part of the reason why I feel like we were paying really paying lip-service to Gladue because I don't see a lot of difference in the way Indigenous People are sentenced, and I don't see a lot of difference in the way indigenous people are granted relief or in what conditions In the context of bail, I don't see I don't see any difference, you know, In IPC I don't see any difference in the sorts of sentences indigenous people are getting from the sort of sentences that are being proposed in the regular street.

The recommendations are, It's a lot of just lip-service, not, not through the fault of the recommender. They're simply doing their job. But the reality is that most of these places that are any good or not in Ottawa or the jails that have these programs. The judge has no control over where the offender goes.

Though it is outside the scope of this piece to provide a comprehensive review of available services in each community, gaps in servicing and the types of programs which aid in enabling Indigenous persons to access alternatives to incarceration and lower recidivism, it appears that servicing is not nearly as robust as it should be. The fact that participants indicated a common flaw with Gladue reports is the availability of servicing, a factor that actually has nothing to do with the Gladue reports themselves represents the depth of questions related to access to justice. Barriers to substantive justice have a multitude of origins and it appears that Indigenous persons face several barriers from several different sources just within the servicing and program segments of the criminal justice system. As well, it is interesting that defence counsel indicated both that the recommendations provided in Gladue reports have limited effectiveness concurrently with statements that Gladue reports are mostly good for their background elements. The statements made about the presentation of the background factors in Gladue reports is promising, however the effectiveness of this well-presented information appears to be heavily limited due to the availability of Gladue reports generally.

Adoption of Recommendations

Of the 16 total participants, 11 made statements regarding the tendency of the sentencing court to adopt the servicing recommendations and alternatives to incarceration provided in Gladue reports. Of these 11 participants, 6 stated that it depends on the judge, with one participant stating, that "It really really depends on what judge you have." Other participants discussed the fact that the severity of the offence will impact the capacity of the judge to adopt certain recommendations, participants stated,

Gladue principles, um, kind of don't go out the window entirely, but it just makes it so the sentence tends to be more kind of akin to a sentence a non-Indigenous offender would get.

Well, the problem is, with my practice, I have a lot of very serious matters, so typically... ..the judge's hands are sort of tied. You know, I always hear deterrence and denunciation has been the most important sentencing factors.

I think that is more the case for, for minor offences for offences, where, you know, the individual may have received a sentence in the community or a rehabilitative sentence. Anyway, without would certainly as offences become more serious or the consequences of become more serious. For example, with an impaired driving offence, you know, there, there is little to distinguish an impaired driving causing death offence from an impaired driving offence, or a, an assault with a weapon offence from a manslaughter. A lot of time, just your luck and happenstance are the only thing that distinguish those two offences, the sort of moral culpability behind the actors. Exactly the same, you know, whether you punish somebody or hit them with a piece of wood and they received no injuries, and you get charged with an assault with a weapon or, you know, they happen to hit their head when they fall to the ground and die, it's the exact same act that leads to completely different offences. And certainly, there is, uh, the consequences of the offence become more serious, there is a reluctance on the part of the court to engage in a more rehabilitative or holistic, or alternative type of sentence. I think that's where there are instances where we don't see sentencing options. Or restraint and Rehabilitation being fully embraced.

The survey population is very small and not representative of the research class. However, If the statements made by defence counsel regarding when recommendations, and alternatives to incarceration are applied are generally true, then the current Gladue servicing model has a major structural flaw. The alternatives to incarceration and beneficial services that these reports can work to make available for Indigenous offenders are more likely to be adopted in cases where the offence

is less severe, but Gladue reports are not available unless you're found guilty of a more serious offence.

4. Bail

The fourth theme of the findings touches on the implications of Gladue at bail. Though this research project initially began with little focus on bail and Gladue, interview participants quickly began discussing the importance of bail in the context of assessing Gladue service provision and the effectiveness of the overall Gladue framework. Though no questions were prepared to specifically discuss the implications of Gladue at bail, the following insights were drawn from the statements made by counsel.

Statements Regarding How Gladue is Communicated at Bail

Of the seven Defence counsel who made statements regarding bail all seven generally indicated that they relied predominantly on oral submissions to provide the Gladue information to the court. Participants made the following statements regarding how the Gladue information is communicated at bail.

(In their practice) we're dealing with people who don't have like super serious charges, so we would be wanting... ..bail is obviously very time-sensitive, and they're in custody. So you don't have time to put things over to wait for lengthy periods. For a Gladue report, because Gladue reports are so involved. So the other resources that we would use So, for example, if I were to want to call evidence of Gladue factors, I'd often use the Odawa bail supervision program. So there is like now it's (information redacted), but in the past, it's been other people like (Information redacted). So they would go down. And if they are taking the client on bail, they would interview the client, and I've had I've actually called we could call those people to testify as to Gladue factors. That may be the, that they're aware of that touch upon that client particular circumstances and we can call them as long as we get the client's consent to testify, as to those matters. The other way is simply having the clients themselves testify to the Gladue factors when they take the stand in a bail hearing.

So, it's if, if you have an indigenous accused, it just automatically forms part of your submissions on bail. Um, that's just a given, and some, you know, they're very detailed and sometimes they're not as detailed, but it's, it's highlighted to the judge at the very start of the hearing.

Yeah, I would go to (information redacted), but they, they have such volume in the rat race that is the bail system in Ottawa they don't really have the time to be doing those. As a regular thing in Barrie, it seems to be, you know, kind of baked into the bail process. I'd love to have those kind of reports in Ottawa for every, every client because

every single Indigenous person, to some extent or another, is a victim of some kind of, you know, systemic problem traceable to something specific, and it's like wow and justice of the Peace, a Judge who doesn't take that into account just isn't doing their job right.

The biggest one that's kind of on my head when I've been answering these questions instead of at the bail stage on, it's kind of you get Gladue reports at the sentencing, but we're told and the criminal code now it is said to talk about, you know, the impact of marginalized communities and minorities in bail. But we don't get these types of reports, so we don't get the information that one would formally get at a sentencing before a bail judge. Where a bail judge is just kind of more so reliant upon hearsay evidence and maybe their own experiences of what they know about Aboriginal offenders to make decisions when it comes to bail. And when, you know, Gladue principals should be throughout the system from arrest to bail to the matter to sentence. I think that's the one thing lacking. But the problem is, is what's the timely method? If someone wants a bail that day or a bail the next day, what's the method? And what's the possibility of getting that information properly before the court except potentially education for JPs and judges. I don't know if what the what the solution is

So, it's mostly oral submissions. However, I do; I also turned to Aboriginal Legal Services, they provide bail services. So, they'll meet with the client and provides a release plan essentially, so connecting them to culturally appropriate community supports.

No, Gladue reports and letters are not available at the bail stage. And that's because that's because Aboriginal Legal Services is the primary provider for the Gladue Reports here in Toronto. And so, because they are the primary provider for the report, they refused to provide reports, or letters without the finding of guilt being made first, except for under very few and exceptional circumstances, generally they say no unless it's a finding of guilty.

Defence counsel acknowledged several problems with presenting Gladue information at the bail phase. The bail phase presents unique challenges to defence counsel as bail proceedings are very expedient. First, it appears that the Gladue information is predominantly being collected and presented to the court by defence counsel. This presents specific challenges for defence counsel as discussed in the responses above. One participant spoke about these challenges,

Well, you know, it's very difficult, like I mean, they're either going to be forthcoming about it, or they're not in the context of bail or quick sentencing. It's one of those things where if I can't establish a rapport quickly and the person is not really quickly going to be able to talk about those things, then it's going to be really difficult in the context of my role [REDACTED] like we don't have a lot of time to spend with people, so unless you can, you're dealing with someone that's, for whatever reason, going to

be forthcoming about those things and be able to speak to them. We don't have the time to establish a rapport. Those things. So that is a major limitation that we have in our roles, and we just don't have the amount of time to be able to spend with someone to be able to establish a trust rapport and really tease out all these issues. You know, it's just, it's either going to be there, or it's not, you know, like, I that's the way it is. It's, it's not, and that's not any different than it's not any different than quote-unquote, normal or non-indigenous clients. Like, sometimes people are very forthcoming about, you know, issues and their drug addiction, for example, or their psychiatric diagnosis, but sometimes they're just not, and in the context of our role as duty counsel it. You know, you don't have, you don't have the time to be able to knock down sort of barriers. And with sharing these kinds of things. Which is it's unfortunate, but it what, it what it essentially means is that you know, we're stuck with what we're stuck with sometimes, as far as the amount of information that we can get.

Other participants stated that they worked with local service providers to facilitate the collection and presentation of Gladue information. The forms of presentation mentioned varies from oral submission to Gladue letters with one participant stating that they'll sometimes get the client to testify themselves. These forms of presentation all present unique challenges, but it appears the form of submission that requires the least amount of work from defence counsel and is the most trauma aware is the scenario described by one participant who worked with the Barrie Native Friendship centre.

Timeliness for Report Delivery/Production deterring Clients from Ordering Gladue Reports at Bail

Participants discussed that the same issues that occur at the sentencing phase occur at the bail phase. These issues are much more apparent as the bail phase occurs at a much faster pace than sentencing. For bail hearings, timing is everything and any delays incurred have potentially constitutional implications. Participants made several statements regarding why Gladue reports, and Gladue letters are not used at the bail phase.

Bail hearings happen so quickly, right, so you can get an indigenous person in the morning, and the bail (Crown) is taking an unreasonable position, and you don't have time to order a bail letter. It's only really for, you know, the indigenous person who has, you know, like this is there, you know, fourth time, you know, they're now they're breaches, they've got, you know, ten sets of outstanding charges now and they've been released every time, but they're not coming to court, and they're not getting their fingerprints repeatedly breaching or you know for that person who, you know, to get them out, would require filing case law, you know, maybe getting a bail letter.

Bail is obviously very time-sensitive, and they're in custody. So, you don't have time to put things over to wait for lengthy periods. For a Gladue report, because Gladue reports are so involved. So the other resources that we would use So, for example, if I were to want to call evidence of Gladue factors, I'd often use the Odawa bail supervision program. So there is like now it's [REDACTED]. So they would go down. And if they are taking the client on bail, they would interview the client, and I've had I've actually called we could call those people to testify as to Gladue factors. That may be the, that they're aware of that, touch upon that client particular circumstances and we can call them as long as we get the client's consent to testify, as to those matters. The other way is Simply Having the clients themselves testify to the Gladue factors when they take the stand in a bail hearing.

I would never take the time to get a Gladue report or a letter or a Gladue letter for a bail hearing. Because even though the Gladue letter is meant to be a shorter document and produced faster, I still would never have a person sitting in custody just for that reason.

Someone gets arrested. They want their bail hearing as soon as possible that makes sense. Then you want to have their bail hearing as soon as possible. So, you don't have time really to get all the information you need. You just have to have a really healthy dose of knowledge of the case law, and lawyers can do that on their own, and they should, but even if you had resources available for the bail stage, it's just bail hearings are supposed to happen quickly and they should. You really need to do a really thorough interview of your client before he or she has a bail hearing. And if you're lucky enough before Covid, that was possible, but during covid, it's a lot harder.

Overall, it appears that defence counsel interviewed provide Gladue submissions through a variety of sources with the majority being through oral submissions. Services, such as Gladue letters, being provided in a timely enough manner so as to not delay bail unreasonably is a key step moving forward to better the quality of Gladue submissions at bail, as there are limitations to what Gladue information counsel are able to produce and present in the best of times (As discussed previously in this section).

Breach Charges

Four participants raised the issue of breach charges, and how it impacts their Indigenous clients. The impact of breach charges as presented by these defence counsel presents supporting evidence for claims that Gladue services need to be introduced earlier in the criminal justice process (such as at bail) than it currently are. Of these four participants, three provided insightful statements on the interrelation of bail conditions, breach charges and cycles of incarceration, stating,

Breaches are common, and they're both very impactful.... ..can be very serious and damaging in terms of getting bail down the road. So if you have breaches on your record, it can be much more difficult to get bail and the more you have, the more difficult can be. So you're kind of seen as an individual who's not trusted on a release... ..And also the fact that you know, frankly breaches, they're usually tough to defend if the Crown's proceeding on it... ..So they will be more inclined to plead or they'll be inclined to plead... ..often they will plead guilty to those and then which is unfortunate because down the road, it can be a problem or they'll see it as well, plead to the breach and they'll withdraw the assault which at the time seems like a good idea, but it's actually would be better down the road to have an assault on your record, then a breach in terms of going for bail... ..All these conditions you know we need to actually really take a good look at that and make the least restrictive bail that is necessary to obviously protect the public and I still find day-to-day that's not happening you know justices of the peace are more inclined to just kind of kind of put all these conditions... ..it's like anything, it depends on the individual and you know, I and I don't really see Gladue factors being mentioned too much in terms of fashioning conditions, which they, of course, are supposed to be taken into consideration, even in fashioning conditions, which tends to kind of, you know, you just kind of put these General conditions on every offender instead of looking at the specific person,

Back to the beginning of the interview, we're talking about people in custody. Well, it starts at imposing too many conditions for bail and too many conditions on probation orders, which then leads to breach charges, which then leads to resolutions, including multiple pleas to breach charges, which then has a criminal record that is replete with breach charges and then at every bail hearing after that, we the inevitable. The inevitable submission that's made by the Crown or cross-examination if you choose to testify at his or her bail Hearing is, well, you promised on that day that you were going to listen, and you didn't, and that time you promise the judge you would listen, and you didn't, And it's just, it's become so roped and overused. But access to bail has been impacted by these administration of justice offences... ..But, ultimately yeah, people are, are pleading guilty to breaches and being incentivized to do so by avoiding jail. But the downside is then it stains their record and might lead to longer periods of incarceration later. If they ever come back in custody and need any bail.

Yeah, totally, that most of your clients. Sadly are addicted to substances or are suffering from trauma and mental health issues relating to historical trauma, and they're under strict bail conditions. They're often homeless. They also don't have Securities, they have very few Community Resources, so they are going to likely breach in that waiting period. So that's a massive like that is the biggest impediment disadvantage to the wait time... .. Massive impact. Massive because they very rarely have a defence to a breach. Whereas they often have a defence to their substantive charge, right? So if there are substantive substantial substantive original charge is domestic assault. They may have a defence to that, so there's no incentive to plead guilty when their substantive, original charge is public Mischief or cause disturbance, and it's just the bogus horse [REDACTED] Police charged for some intoxicated indigenous person protesting about being harassed. They have a defence to that, you know, we'll set trial

dates if it's the subject of an illegal search and seizure. They can defend that. But if you have a breach, there's rarely any defence to that, you're out past 10:00, and you can't be out past 10:00. You got no defence. You're drinking, and you shouldn't be drinking. You've got no defence. So as soon as that breach hits, you just said, all right, you're in for 30, 45 days. Anyway, so I might as well wrap up the substantive ones, so they're massive guilty plea drivers.

The statements made by defence counsel are not definitive or representative, however, the issues they raise are important when determining how to best impact the over representation of Indigenous persons in custody. If Indigenous persons are more likely to face breach charges, then this, alongside the interpretation of s.493.2(a) of the criminal code and the fact that Indigenous persons are more likely to be denied bail would provide a strong set of evidence to justify an overhaul of our bail system and how Gladue information is presented at bail. It appears for now, that Gladue submissions come from a variety of sources in an inconsistent manner, that defence counsel are the primarily collecting and presenting Gladue information themselves, with some counsel being able to utilize local bail workers to assist them and that issues with conditions being overly onerous and resulting in breach charges impact Indigenous persons.

Chapter 5: Discussion

The findings relayed in chapter four revealed 20 potential barriers to justice faced by Indigenous persons being sentenced in Ontario. These barriers take various forms but impede a justice seeker's capacity to access procedural, substantive and symbolic justice. What follows is the presentation of these 20 barriers, their categorization within the three-dimensional conception of access to justice as presented in chapter two, and potential action that can be taken to remedy these barriers. The barriers identified touch on similar issues, such as barriers 5 and 6 which discuss the impacts of timelines and barriers 16-19 which discuss bail. However, each unique barrier touches on different problems which create unique barriers and unique responses.

Determining Whether a Report will be Ordered or Not

Barrier One: The decision whether to order Gladue reports or not rests with defence counsel and is subject to their interests, capacity to work, and subjective beliefs on the application of Gladue (Subjective Barrier to Procedural and Substantive justice).

Drawing from the statements made by interviewees in section one of the findings, it can be identified that sometimes reports are not ordered due to the influence of legal decisions makers on their clients and the factors they consider when determining what to advise their clients to do. Respondents indicated that generally, their clients listen to them when they recommend a course of action with Gladue, with one respondent stating, "If I'm pressing an accused to do it, they usually do it." The fact that Gladue reports need to be ordered by a legal actor who is allowed to draw from a broad range of objective and subjective factors when advising their client whether they should order a Gladue report or not is a subjective barrier to accessing procedural justice and substantive justice. It may contribute to the inability of justice seekers to access an instrument of justice, consequently impacting the quality of justice they are accessing. As stated by one interviewee, unlike pre-sentence reports, the work associated with procuring Gladue reports is "put onto the defence counsel, sort of offloaded from the institution on to the individual." As reflected in the statements made by interviewees, the criteria defence counsel weigh when consulting with their client about ordering a Gladue report varies considerably. As defence counsel, in most instances, are responsible for the provision of a client's Gladue information (whether through a Gladue report or alternative mechanisms, such as oral submissions), the lack of standards and variability from counsel to counsel may add a great deal of complexity to the Gladue framework. The subjective nature of this barrier is difficult to quantify as each lawyer has their own experiences, legal

practices, biases and availability, which impact all aspects of the Gladue framework and the quality of justice accessed by a justice seeker.

Barrier Two: The use of Gladue “cut-off” policies which requires clients to be facing a minimum length of sentence (Objective barrier to procedural and substantive justice).

When interviewees discussed their ability to secure Gladue reports, it became readily apparent that the policies set by the most prominent Ontario Gladue service providers limit the number of individuals who can access those services. Two policies specifically presented as barriers. First and most significantly, the “Gladue Cut-off” policies limit access to those offenders facing over 90 days in custody. Second, clients must be found guilty of an offence to access Gladue reports. These policies appear to be well communicated, resulting in a low number of unsuccessful applications largely because a large percentage of potential Gladue report recipients anticipate their application for services will be denied and thus the application is not made. Barrier two touches on the impact of Gladue “cut-off” policies, and barrier three touches on the impact of service providers requiring a finding of guilt. Aboriginal Legal Services, the largest Gladue service provider in the province, utilizes a Gladue “cut-off” policy. As stated on the Gladue report/letter request form on Aboriginal Legal services’ website:

As per ALS policy, if the Crown is seeking more than 90 days custodial sentence, the request will be assigned to a Gladue Writer who will prepare a Gladue Report. Gladue Reports take approximately 6-8 weeks to complete. If the Crown is seeking 90 days or less custodial sentence or a conditional sentence of any length, the request will be assigned to a Gladue Caseworker, and a Gladue Letter will be completed. Gladue Letters take approximately 4-5 weeks to complete.²⁴⁷

Though there is no publicly available data on the scope of Gladue servicing at sentencing or bail, I was able to estimate the impact of this and similar Gladue cut-off policies by combining Statistics Canada data on the length of time sentenced persons spend in custody, the representation of Indigenous persons in custodial admissions, and the policy of Aboriginal Legal Services mentioned above.

²⁴⁷ Aboriginal Legal Services, “Gladue Request Form,” online:<
<https://forms.zohopublic.com/aboriginallegalservices/form/GladueRequest/formperma/6aylT3uzSLdB4ZsXx5flYp1FLCNsabJppVsiuWtkvWc>>.

These figures are estimations only, because there are limitations to the available data. However, this indirect evidence speaks to the capacity of Indigenous persons to access justice at sentencing. The dataset from Statistics Canada, which provides the number of persons released from custody, the type of custody and the length of time they spent in custody, does not delineate these people any further; meaning that these estimates reflect trends in the entire population of persons released from remand and sentenced custody within a fiscal year, as opposed to focusing on releases of Indigenous persons.²⁴⁸ However, as per Figure 1 (page 93), we do know that Indigenous people are believed to comprise between 10-17% of those in provincial custody in Ontario on any given day. It is thus reasonable to assume that 10-17% of those included in Statistics Canada's Ontario data are Indigenous; it is also important to note that the Indigenous numbers may be viewed as conservative, given that not all persons of Indigenous heritage entering the system in Ontario will self-identify and are thus not included in that 10-17%. As such, it would be inaccurate to say that the general patterns identified in the following tables are not representative of the experiences of Indigenous persons in the correctional system in Ontario. Although the admissions and release data cannot be harmonized, one informs the other.²⁴⁹

²⁴⁸ It is also important to note that this data set does not present the position of the Crown on sentence, nor does it inform of the ultimate sentence the offender received. Instead, it presents the real length of time each offender spent in remand or sentenced custody. As such, it is likely that some persons who spent less than 90 days in custody may have qualified for a Gladue report.

²⁴⁹ The available data do not permit definitive conclusions about the number of Indigenous people who would qualify for Gladue reports in Ontario. Rather, what the available data permits is contextualization of the servicing model utilized by LAO-funded Gladue services within the daily operations of the criminal justice system by revealing the general length of custody patterns.²⁴⁹ To calculate reliable statistics on eligibility for reports, researchers would need aggregated numbers on the positions of Crown Lawyers (including both contested and jointly held positions), the length of any custodial position sought and the length of days in remanded custody that would make up a "time served position" for a particular offender, as well as aggregated numbers reflecting the length of sentences ultimately ordered by the court, specifically custodial sentences. All this data would ideally also have corresponding racial identity and geography metrics to determine differences between groups and regions of Ontario. In the absence of this data, table 3 demonstrates the general distribution of sentences imposed on offenders by length and severity of sentence, to highlight where resources would be best allocated and estimate the current scope of coverage from the Gladue service models utilized within Ontario. The limitations of this estimation are as follows. 1: It does not include specific data on Indigenous persons. 2: It does not include persons who were sentenced to a non-custodial sentence and as such were not remanded into custody, this includes those who were released at a time served position and were not placed into "sentenced" custody. As such the total number of Indigenous persons may be higher. 3: The length of time persons spend in custody is often less than the Crown's position on sentencing, meaning a portion of those who spent less than 90 days in custody may have been facing more than 90 days in custody at sentencing.

Figure 1: Representation in Custody (Ontario)

Year		Remand	Sentenced	Total
2017 / 2018	Total Persons Admitted	43,646	20,729	69,190
	Indigenous Persons Admitted	5,889	2,224	8,456
	Percentage Indigenous	13.49%	10.73%	12.22%
2018 / 2019	Total Persons Admitted	41,131	18,905	64,818
	Indigenous Persons Admitted	5,670	1,998	8,056
	Percentage Indigenous	13.79%	10.57%	12.43%
2019 / 2020	Total Persons Admitted	42,629	17,822	79,944
	Indigenous Persons Admitted	6,632	2,256	11,159
	Percentage Indigenous	15.56%	12.66%	13.96%
2020 / 2021	Total Persons Admitted	30,331	9,020	54,087
	Indigenous Persons Admitted	5,207	1,549	9,020
	Percentage Indigenous	17.17%	17.17%	16.68%

Statistics Canada. Table 35-10-0016-01. Adult custody admissions to correctional services by Indigenous identity
As per the 2016 census, approximately 2.8% of the population of Ontario is Indigenous.

Figure 1 presents the representation of Indigenous persons admitted into custody by year from 2017/2018 to 2020/2021 and the form of custody into which they were admitted. These figures can be used to estimate the number and rate of representation of Indigenous persons in custody. For the purposes of estimation, the figures demonstrating the representation of Indigenous persons admitted into custody will be assumed to be the same as those demonstrating the representation of Indigenous persons released from custody. This methodology makes it possible to refine these estimations further. As demonstrated in figure 2, in 2018/2019,²⁵⁰ it can be estimated that 80.97% of all offenders released from custody were incarcerated for less than 90 days. The information in figure 2, when contextualized with the data in figure 1, demonstrates that in 2018/2019,²⁵¹ 11% or 1,998 of the 18,905 individuals admitted into sentenced custody in Ontario were Indigenous; 80.97% of 1,998 persons amounts to 1,617.78 Indigenous persons who would not qualify for Gladue reports provided by the largest Gladue services in Ontario given the 90-day Gladue cut-offs. This number is likely higher than the actual number of persons excluded due to the cut-off policies, as it is possible that more individuals face over 90 days of sentenced custody than the number of individuals who are sentenced for over 90 days (see footnote 249).

²⁵⁰ For the purposes of the following approximations, 2018/2019 has been selected as it is the most recent year, with the most complete data available.

²⁵¹ 2018/2019 was selected as it is the most recent year for which this data was provided. Ontario has not reported the number of people spending each period of time in custody since 2018/2019.

Figure 2: Estimation of Offenders Excluded (Ontario)

Calendar Year	Type of Release	Total: Less Than 90 Days	Percentage: Less Than 90 Days	Less Than 30 Days	Percentage: Less than 30 days
2016/2017	Remand	42,220	89.61%	34,702	73.65%
	Sentenced	15,628	83.36%	11,973	63.87%
2017/2018	Remand	39,000	88.89%	31,645	72.13%
	Sentenced	14,105	81.81%	10,684	61.97%
2018/2019	Remand	35,314	87.91%	28,078	69.89%
	Sentenced	12,680	80.97%	9,388	59.95%

Data is drawn from Statistics Canada. [Table 35-10-0024-01 Adult releases from correctional services by sex and aggregate time served](#)

Notwithstanding this possibility, this estimation demonstrates that Gladue “cut-off” policies present a procedural barrier to accessing Gladue reports for most Indigenous persons in Ontario. If this estimation is accurate, and less than 20% of those legally entitled to s.718.2(e) consideration (and due to this may seek a Gladue report) at sentencing can access one due to a policy limitation, it is hardly surprising that interviewees indicated that they rarely access Gladue reports for their clients. Furthermore, the purpose of these policies is not communicated by service providers, and in reflecting on the literature for this project, no evidence appeared that would justify this policy. Also, given that ALS, as the largest service provider and progenitor of cut-off policies, states that it takes between 42 and 56 days to procure a Gladue report, there appears to be no readily available rationale to explain why they would mandate an additional segment of offenders be excluded from accessing a Gladue report. Lastly, a review of the policies of a handful of service providers finds that Gladue “cut-off” policies are not universal outside the largest programs. For instance, the Barrie native friendship centre and the Ontario Native Women’s association do not exclude individuals based on the position of the Crown at sentencing and offer services at bail as well as sentencing.²⁵²

Barrier Three: The requirement that a client has been found guilty of an offence before the Gladue report production process begins and before servicing becomes available generally (Objective barrier to procedural justice).

²⁵² The policies of these service providers can be located on their websites, which are as follows, “Barrie Native Friendship Centre,” online:< <https://www.barrienfc.ca/>>; “Ontario Native Women’s Association,” online:< <https://www.onwa.ca/services>>.

As one interviewee pointed out, the timelines for report production and delivery begin very late in the criminal justice process for an offender,

A large part of preparing Gladue reports is collecting information on the individual and on their community. You know, this is what is time-consuming, having those conversations, and you know, if you have an individual who's waiting for trial, is found guilty, that only begins at the stage of the finding of guilt. There's some work that you couldn't do prior to that finding of guilt. For example, talking about, you know, remorse, acceptance of responsibility. You know you obviously would never tell your client to have those discussions before his trial before the Crown's proven their case. But there is a ton of work that can be done before that, and so I think it's sort of ridiculous that we begin preparing and looking at these cultural factors after a finding of guilt. You have individuals who are often stuck in your facilities for months and months, and I get to their trial, and there's no reason why we couldn't start that reintegration, start a Gladue report, start exploring these cultural factors, intergenerational trauma. You know?... . . . You want to have those discussions all ready for their trial month, and then if they're required, you know, there can still be valuable resources to help reintegrate them. And there can still be informed discussions that may be useful, and if they're connected, the report can go along to the next stage to talk about the specific findings of the Judge, a specific stock of the offender on those findings after a trial and, you know, we can have a report ready in days instead of months because all that front end work had been done. But we waste all that time.

Another interviewee discussed this issue in the context of bail, stating,

No, Gladue reports and letters are not available at the bail stage. And that's because Aboriginal Legal Services is the primary provider for the Gladue Reports here in Toronto. And so because they are the primary provider for the report, they refused to provide reports, or letters without the finding of guilt being made first, except for under very few and exceptional circumstances, generally they say no unless it's a finding of guilty.

It appears that the requirement for a finding of guilt before Gladue information is collected operates as an objective barrier to procedural justice for those facing less serious charges. For these justice seekers, the length of time required to complete a Gladue report, if started at the point of a finding of guilt, may extend past the point in which they would still be in custody. The policy also impacts access to substantive justice by preventing justice seekers from accessing legal instruments. Lastly, this policy appears to contribute toward barriers four, five and six, discussed below.

Barrier Four: The lack of Gladue servicing or Gladue information available pre-trial (Objective barrier to substantive justice).

As discussed in pages 56 – 60, some interviewees believe that Gladue information would influence the decisions made by Crown lawyers more if it was available earlier in the process, especially while they are crafting their positions on charges and sentences. Further research is required to confirm this and must of course include Crown lawyers. However, if this statement is treated as true, then the failure to provide Gladue services earlier in the judicial process presents an objective barrier to substantive justice by lessening the potential positive impact of the Gladue framework.

Barrier Five: The length of time Gladue reports nominally take to produce and the capacity of these timelines to extend both the length of time a client spends in custody and the length of time a client spends under supervision in the community (Objective barrier to substantive justice).

When the extensive statements made by counsel regarding the impact of Gladue report production timelines on their client’s capacity to access Gladue reports are assessed, a series of barriers to procedural, symbolic, and substantive justice appear. These two barriers, though similar in that they touch on the impact of timelines, they each touch on different problems which create unique barriers and unique responses. Barrier five touches on the impact of nominal timelines for Gladue report and letter production and delivery, while barrier number six touches on delays in these stated timelines.

The most significant deterrent to requesting a report cited by interviewees is the length of time reports take to procure in relation to the expected length of time a client would spend in custody. Defence counsel repeatedly stated that they often do not order Gladue reports because doing so would extend their client's time in custody. 13 interviewees explicitly stated that reports take too long to produce, making them for all practical purposes unavailable to their clients. The timelines associated with Gladue report production and delivery operate as an objective barrier to substantial justice as these timelines make it so reports may still be available but would result in less-than-optimal outcomes for justice seekers.

Drawing from tables 1 and 2, it is possible to estimate the number of individuals whose time in remand custody would extend beyond the length of time they would normally spend in remanded or sentenced custody. Focusing again on the policies of the province's largest Gladue service provider, ALS states that it takes 6-8 weeks for a report (42-56 days) and 4-5 weeks for a letter (28-35 days). For 2018/2019, 59.95% of persons in sentenced custody were there for less than 30 days. As a result, it can be approximated that over half of those individuals legally entitled

to s.718.2(e) consideration are completely excluded from both Gladue reports and Gladue letters as they would be out of custody by the time a Gladue report or letter is produced. This number is likely higher as there are a substantial number of persons whose sentence would fall into the aggregated category of 1-3 months.

When a similar analysis for those in remand custody is conducted, a similar outcome is observed, whereby Gladue services take longer to procure than the client would spend in that form of custody. For instance, based on the same timelines used to assess the availability of Gladue documents, in 2018/2019, 69.89% of those remanded into custody spent less than 30 days in that custody. While even Gladue letters delivered within the 4-5 week timeline imply a stay in remand beyond 30 days (extending the length of time spent in custody for 69.89% of those in remand custody and 59.95% of those in sentenced custody), the actual timelines reported for Gladue services are such that the majority of those admitted into custody would have to serve additional time in remanded custody (a common occurrence)²⁵³ in order to access a Gladue report or letter. This outcome contradicts the main priority of defence counsel (and possibly their clients' priorities), which is to get their client out of custody as soon as possible.²⁵⁴ It is important to understand that these estimations are reflective of a best-case scenario, where the service provider can provide the Gladue report or Gladue letter within the stated timeframes. These timelines will fluctuate based on the relevant service provider; however, the findings in section one of the chapter four indicate that timelines are not always met.

There are numerous reasons why the current timelines are as long as they are. One interviewee reasoned that the process of procuring Gladue information does not begin until after a finding of guilt, stating, "the fact that preparation only begins after finding of guilt, you know, any sentence that's going to be you know, less than three months of length or yeah, anytime it is going to be three months or less...generally, there's just not enough time to prepare a Gladue sentence report." Some interviewees discussed that although the timelines for report production are problematic, it is understandable given the degree of effort required to produce Gladue reports:

When you talk about Gladue reports and like sort of, the importance of them are really limited to more serious cases. I think it's part of like is it is problematic, but I get it too

²⁵³ Indigenous persons are more likely to be denied bail and remanded into custody, so any servicing model must take this scenario into account, see Canadian centre for Justice Statistics, "Trends in the Use of Remand in Canada, 2004/2005-2014/2015", (2017) online:< <https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2017001/article/14691-eng.pdf?st=fu6Nl0iK>>.

²⁵⁴ See page 8 of the section titled "Defence Counsel Research".

because the Gladue reports are so intense, right. They're so detailed and labour intensive and traumatic for the person to go through, and you're not going to take someone through all that history and trauma and so forth. When you're talking about a theft under charge or, you know, something that person is looking at, you know, a couple days for, you know, so it's a, it's an interesting dilemma. But the thing is, is that courts. Don't know, I think, or really understand how to apply Gladue to sentencing or how to apply it to bail. And that's I think that's the missing linkage, you know you can read these reports and see, for example, this person is from a horrible, you know, background, this has happened, that's happened. The other things happened, but then what do you do? Courts don't get that. You know, like the criminal justice system is not equipped to deal with that.

But you know you can see remands going over and over for a Gladue report, and it taking quite a while, but my understanding is that's just purely a function of resources, and how many Gladue writers there are and how detailed there are and I would Hazard to say, and I believe see if someone else disagrees who might want to take their word more but you want to have a thorough report and it takes time, right?

However, one interviewee did state that they can sometimes access the required services from specific service providers in a timely manner for bail and quicker sentencing timelines, demonstrating that alternative approaches can remedy this deficit. The interviewee stated,

In Barrie, there's the native Friendship Centre, and they have their hands, you know, in every case almost. Maybe that's a smaller jurisdiction, but for example. I did a bail hearing yesterday and the Barrie Native Friendship Centre showed up on zoom and said, oh, we have a one-pager on your guy, a little mini Gladue report. Gave it to me. Lots of important background. They gave it to the Judge. Did the bail hearing that was like an automatic process in Barrie, nothing like that in Ottawa.

As well, it appears that it is possible to provide reports in a shorter timeline than interviewees typically experience. For instance, in Alberta through 2018-2019, 92% of the 926 requests for Gladue reports were completed within six weeks of their request. This level of consistency amongst Ontario service providers was not reported by defence counsel and reflects a far more expeditious timeframe than the stated timelines of Aboriginal Legal Services.²⁵⁵

Lastly, the impacts of these timelines on individuals released from custody also work to deter clients from ordering Gladue reports. One interviewee described time served by individuals out of

²⁵⁵ Justice and Solicitor General, "Annual Report 2018-2019" at page 37, online:<
<https://open.alberta.ca/dataset/a78bb4dd-3eb5-46f1-ad45-169ae9907bde/resource/ec0db507-2343-45ef-a39c-7d2fd62fc07c/download/justice-solicitor-general-annual-report-2018-2019-web.pdf>>.

custody but under the restrictions of imposed conditions to be the “harshest time for an individual.” Interviewees stated that releasing their clients, especially their more vulnerable clients with substance abuse problems or precarious housing situations, into the community for an extended period of time sets them up for failure. As well, despite the fact that Gladue reports work in part to allow the court to recommend and introduce adequate service provision to help clients, Gladue reports or letters are mostly absent from bail proceedings. This means that Indigenous accused are put in a position where they could be placed on conditions, which may lead to breach charges, without their unique circumstances being fully considered.

It appears that the current Gladue service model does not work harmoniously with the practices of the criminal justice system. The statements made by defense counsel suggest that the current Gladue servicing model operates as an objective and subjective barrier to procedural and substantive justice. The model for delivery of reports reduces the quality of justice accessed due to slow timelines for completion of a report (an objective barrier). A second objective barrier arises from the failure of the current Gladue service model to account for the legal circumstances of the client. Lastly, a subjective barrier arises due to the negative impact on clients’ well-being which results from extending the period of supervision a client experiences.

Barrier Six: The presence of delay in the Gladue report production and delivery process (objective barrier to substantive justice).

It appears that timelines for report delivery in the province vary considerably. As discussed in section one of the findings, delays in the procurement of Gladue reports outside stated timelines, such as ALS’ 6-8 week timeline, are common. The existence of delay in Gladue report production presents as an objective and subjective barrier to procedural and substantive justice. The barrier is clearly objective as it is measurable (despite the fact that it goes largely unmeasured in Ontario). However, due to the view that delay is prevalent, it can operate as a subjective barrier, deterring counsel from ordering a Gladue report as they may view the service as unreliable. More information regarding timelines and the rate at which reports are delivered on time would allow for a proper assessment of access to justice for Indigenous persons. Alberta is able to articulate timelines for completion of provincially funded reports and this suggests it is neither impractical nor unprecedented to request that provincially funded service providers provide the same metrics here in Ontario.

Barrier Seven: The lack of harmony between the timelines of the criminal justice system and the timelines prescribed by Gladue report service providers, including the dates on which Gladue reports are delivered (Objective and subjective barrier to substantive and symbolic justice).

Beyond the barriers to access imposed by timelines, further delays may occur due to the timelines associated with Gladue report production not corresponding with the timelines of the criminal justice system. For instance, as one interviewee stated,

When you're looking at the circumstances of the court, so, for instance, ALS says I can do this in six weeks, but there's not a court date in six weeks, because outside of Toronto jurisdictions that we run weekly or plea courts may not run weekly. So the next time we may be able to get that person before the court is after the six weeks is actually eight weeks, so they'll always hit their [publicly stated] target, but it often causes further delays [in the judicial process].

The problems resulting from the interaction of the criminal justice system and the current Gladue servicing model in Ontario present an objective barrier to symbolic justice. It appears that Gladue service providers generally, but specifically Aboriginal Legal Services, have developed timelines and services which cannot account for and adapt to the criminal justice system. The lack of harmony between service provision and the practices and timelines of the criminal justice system harms the capacity of justice seekers to access justice. It impacts the substance or quality of justice accessed but, more significantly, reflects a lack of consideration of the actual needs of justice seekers. Justice seekers need servicing that allows their Gladue factors to be presented as effectively and quickly as possible. However, it appears that the clients and their unique legal needs are not centred or acknowledged in the policies of service providers, resulting in a barrier to symbolic justice. It is important to note that more flexible models of service provision may require greater resources and the development of new approaches to service provision. As a result, this barrier to symbolic justice may be due to the poor funding of service providers in the province. As a result remedying this barrier will likely require greater resourcing.

Barrier Eight: The perception of Gladue's relevance in particular legal circumstances as held by different legal decision makers (Subjective barrier to substantive justice).

The perceptions of Gladue’s relevance held by defence counsel may present a subjective barrier to accessing procedural justice. This extends to several of the criteria raised by counsel, including the seriousness of their client’s offence(s), the perceived usefulness of the report and the Indigenous status of the individual. Many interviewees indicated that Gladue reports are only for more serious cases, and two cited the number of days a client is facing in custody as proof that the matter is not serious enough to justify a Gladue report. However, Gladue is not limited to any particular class of offences as it applies to all Indigenous persons. A belief held by counsel that rigorous Gladue submissions are only required when the case is “serious” may influence the decision to request a report and lead counsel to satisfy the requirements by oral submissions. Insofar as courts have indicated that oral submissions are the ‘least satisfactory’ means of presenting Gladue information,²⁵⁶ these lower quality Gladue submissions are, in themselves, may constitute a lower quality of justice accessed by Indigenous persons. To ensure access to substantive and symbolic justice, factors which impact the form of Gladue information must be grounded, consistent and applied fairly in all circumstances. Currently, it appears that the factors – including importantly counsel beliefs about the efficacy and impact of a Gladue report - and their application may vary considerably. If they are not applied in a consistent manner and grounded in evidence, these beliefs could result in disparities in accessing justice.

Barrier Nine: The reliance on previous Gladue reports (subjective barrier to substantive justice).

The reliance on previous reports, though practically beneficial given the limited resources and lengthy timelines associated with Gladue report production, may also result in subjective barriers to accessing substantive justice. If the recommended services in the older Gladue report are not reflective of the offenders’ current needs or, as is often the case, no longer available owing to the precarious funding of many community-based programs, the quality of justice accessed will be reduced. Further research is required to fully understand the prevalence of this barrier.

Barrier Ten: The lack of available data on the timelines associated with Gladue report production (objective barrier to substantive justice).

²⁵⁶ Supra note 245.

As demonstrated under barrier two, there is a lack of clear, directly applicable data regarding the extent to which Gladue services are accessed in Ontario. The current lack of information available to the public and researchers hampers discussion around access to justice and reform. For example, the province does not aggregate and disclose the number of reports their funding initiatives provide. As well, the real timelines for report production are not publicly available (unlike in Alberta,) ²⁵⁷ and the demographics (gender, age, and region) of clients are not disclosed. All of this presents an objective barrier to substantive justice as it is difficult to fully document or propose solutions to problems when the details of those problems are not publicly disclosed. Defence counsel stated that reports take too long to produce. However, it is difficult to set a benchmark without knowing the current standards. Those interested in reform cannot work to provide justice seekers with a better quality of justice without knowing what justice seekers are currently accessing.

Barrier Eleven: The current Gladue practices utilized by a large portion of interviewees may not adequately present the information or be trauma conscious (subjective barrier to substantive and symbolic justice).

As interviewees indicated in section two of the findings, defence counsel do not appear to have access to the best strategies and training that could enable them to gather and relate full and appropriate Gladue information to the court. A key concern in this regard is lack of counsel competency in trauma-informed practices that are integral to safe and respectful Gladue interviews that inform oral submissions in the absence of a Gladue report or letter. Council indicated that Gladue submissions are often made in the form of an oral submission. This can be problematic for clients and impact their capacity to access substantive and symbolic justice in two ways. First, oral submissions must be made, as the name suggests, out loud in a courtroom in front of the client. This opens the potential for the client to be re-traumatized and, in general, may conflict with a trauma-aware approach to representing a client in sentencing. This may lead to defence counsel mincing words or alluding to a factor and its impact on a client in order to avoid re-traumatizing their client, thus resulting in less substantial Gladue submissions. Alternatively, defence counsel may describe the full array of the client's Gladue factors, which for the purposes of s.718.2(e), is important. However, this may also impact the client negatively and re-traumatize the client. These

²⁵⁷ See Alberta, “Justice and Solicitor General Annual Report 2018-2019,” (2019) at page 37, for a breakdown of how long publicly funded Gladue report requests took to be fulfilled.

outcomes do not respect the justice seeker nor do they fully account for their needs. The lack of respect accorded to the experiences of justice seekers in either scenario limits their capacity to access symbolic justice. If the oral submissions are of a lower quality, that represents a barrier to substantive justice. Alternatively, written submissions, such as a Gladue report, allow for the Judge and the Crown to engage with the material before a hearing, thus limiting the necessity for open relation or discussion of deeply personal Gladue information in the public forum of the courts. As such, reports foster the ability for court personnel to engage in the full breadth of applicable Gladue factors and preserve the dignity of the client. Further research into the quality of Gladue submissions made by defence counsel is required to provide any further critiques of how Gladue information is gathered and presented by defence counsel. This research should also enquire into whether written Gladue submissions do, in practice, reduce the tendency of some courts and counsel to openly discuss Gladue factors in court.

Barrier Twelve: The lack of standards shaping how Gladue information is collected and presented (subjective barrier to substantive justice).

Currently, there are general practices but no standards regarding how Gladue information is to be collected and presented to the court. Beyond the capacity of the court to ensure the adequate collection and consideration of a client's Gladue information, there is no oversight or active monitoring of the quality and form of the Gladue information presented to the court. While it appears most Gladue services 'review' reports prior to submitting them to courts and counsel, there do not appear to be any consistent or standard practices informing the review process. This creates a scenario whereby researchers, courts and counsels cannot and do not know the standard quality of Gladue information across the province nor what they should be able to expect in the quality or quantity of that information. As such, defence counsel are not held to any clear or consistent standards in how they collect and present the Gladue information to the court. Similar to barrier 10, this information gap and lack of oversight limits the capacity of reform efforts and leaves Indigenous persons vulnerable to 'poor lawyering' or low-quality Gladue submissions when attempting to access justice. This barrier also contributes to barrier 11, as the lack of standard setting enables poor practices to be perpetuated.

Barrier Thirteen: The lack of training required and offered to defence counsel regarding the best practices for collection and presentation of the Gladue information (subjective barrier to substantive justice).

A substantial barrier faced by counsel is the capacity of defence counsel to collect and present their Gladue information. The term “capacity” refers to the skill set of defence counsel and the available and/or compensated time defence available to work on these submissions. Most counsel who commented on how they collect the Gladue information from their clients stated that they interview their clients. However, Legal Aid Ontario does not require counsel on its ‘Gladue panel’ to undergo training, whether in the trauma-informed interview practices mentioned above or in regard to the subject matter relevant to Gladue submissions, beyond a review of relevant case law. This means that clients may face subjective barriers to accessing substantive justice because of the capacity of their defence counsel to do the work of Gladue service providers. This is not to say that defence counsel are bad at their job. It is to say that the work of Gladue service providers and Gladue writers is a specialized skill set that requires training. The potential skill deficits noted by defence counsel were discussed in section two of the findings and included trauma aware interviewing, research skills, rapport building with clients and developing knowledge of Indigenous communities.

Barrier Fourteen: The current Gladue tariff presents an objective barrier to accessing procedural, substantive and symbolic justice.

The implications of the current structure of the Gladue tariff (described on pages 19-20 and 74-75) which structures compensation for Legal Aid-funded defense counsel representing a majority of Indigenous accused/offenders, are alarming. There are three contextual factors that must be considered when determining the real impact of the current Gladue tariff. First, defence counsel appears to be responsible for the work associated with requesting a Gladue report. Second, most of the time, Gladue reports are not available to Indigenous persons being sentenced due to the policies of Gladue service providers. Third, in the absence of a Gladue report, defence counsel are responsible for collecting and presenting the Gladue information as part of their submissions on sentence. These three factors combine to create a common scenario in which counsel must work hours above and beyond those allocated to them by the tariff when a Gladue report is not available to their client.

The Gladue tariff only pays defence counsel for the extra work associated with researching and presenting the Gladue factors when this work is done for them through a publicly funded Gladue report. Where a report is denied by the Gladue service or not requested because a client does not meet the service's criteria, defense counsel is still required to present some Gladue information to the court. Given that the tariff is paid only where a Gladue report is provided and denied in those cases where the Gladue research and submissions must be completed by counsel, lawyers are effectively required to work without pay to compile Gladue submissions. As framed by one interviewee, "ultimately, you do more work, and you get paid less in these circumstances", while another expressed concerns that "the financial incentive for lawyers to work harder is very low." These implications are alarming for several reasons.

When a Gladue report is not available, lawyers are charged with providing Gladue submissions to the court. However, it appears that these hours do not get recognized or compensated by Legal Aid Ontario. This means that lawyers who accept Indigenous clients have three options. First, defence counsel can do the work despite those hours being unpaid, essentially providing charity to their client on behalf of the state. Alternatively, as indicated by one interviewee, they can do additional work and apply for discretionary funding and receive payment for their hours worked in these circumstances. This procedure appears to be onerous and inconsistent. Second, lawyers can neglect their obligations under Gladue, only doing what work they can do in the normal allocation of hours they would receive for the legal matter before them, such as a block fee for a particular resolution or an hourly tariff for a more complex matter. Thirdly, they can make a cost-benefit analysis and refuse to take on Indigenous clients due to these uncompensated hours. All three scenarios are a direct consequence of the negative financial incentive that exists for lawyers taking on Gladue clients and can be expected to negatively impact the quality of the justice accessed by Indigenous people.

The current structure of the Gladue tariff can be understood as a possible objective barrier to procedural, substantive, and symbolic justice. It is a barrier to procedural justice in that it may dissuade defence counsel from offering services to Indigenous persons. Though this barrier is pure conjecture insofar as it relies on general but relevant statements by interviews and there is no specific data in the surveys to confirm or deny it, it is a possible outcome, which is problematic. The Gladue tariff may present an objective barrier to substantive justice as it constitutes a disincentive to defence counsel to put in the hours required to adequately collect and present the

Gladue information. Lastly, if the tariff acts as it appears, it represents an objective barrier to symbolic justice because it essentially states to all Indigenous persons who cannot access a Gladue report that their counsel do not deserve to be compensated for the work they do to meet the legal standard of s.718.2(e) as defined by the *Supreme Court of Canada*. This is a scenario that is disrespectful to the lived experiences of Indigenous persons and discriminatory.

Barrier Fifteen: The availability of services in the community of the client (objective barrier to procedural and substantive justice).

Based on the responses of defence counsel, the barriers that can be identified regarding the quality of Gladue servicing available to interviewees concern the recommendations made in reports and the availability of healing services and alternatives to incarceration. Interviewees stated that the recommendations in Gladue reports were often boilerplate and not particularly helpful. This view may contribute to the impact of barrier number eight. However, a common theme and potential reason for these boilerplate recommendations and thus also for the views held by defence counsel, is that even when the recommended services were beneficial for their clients, the availability of those services was often limited. One interviewee who practices in a rural area of Ontario indicated that there were simply no programs or services available in the region that could address their clients' needs. It is hard to determine the specific barriers faced by clients in these circumstances beyond the apparent lack of services available to them.

It is problematic to state that the quality of Gladue services is insufficient when the issue may really rest with the availability of servicing in the community. As such, more research is required to ascertain whether the problem lies with 'boilerplate recommendations' or with Gladue writers hamstrung by the failure of governments support community-based, culturally appropriate services. However, if the lack of available services impacts the outcomes justice seekers receive, this gap can be seen as an objective barrier to both procedural justice and substantive justice.

Barrier Sixteen: The length of time Gladue services take to procure limits access to them at bail (Objective barrier to procedural justice).

Barriers 16 – 19 include issues described by defence counsel which occur at the bail stage. Though these barriers were minimally discussed by respondents and require further research, these four unique barriers are related to a unique problem presented by participants. Barrier 16 touches on

the length of time Gladue services take to produce and deliver, barrier 17 briefly touches on the availability of Gladue services at bail, barrier 18 touches on the potential impact of poor bail servicing on sentencing and the offenders generally, and barrier 19 touches on the negative impacts of release conditions on justice seekers.

The barriers faced at sentencing due to the timelines of Gladue report production and delivery are more apparent at the bail stage due to the more expedient timelines at this initial stage of the criminal process. The timelines for services, such as Gladue letters, provide an objective barrier to accessing procedural and substantive justice at bail. This is not universal across all service providers, however, as some interviewees did indicate that they were able to access timely Gladue resources for bail from providers such as the Barrie Native Friendship Centre. However, although the specific impacts of bail on Indigenous persons being sentenced have not been studied in great detail, the outcomes achieved at bail may be expected to impact the outcomes achieved at the sentencing stage by Indigenous persons.²⁵⁸

Barrier Seventeen: The general availability of Gladue services offered at bail (objective barrier to procedural justice).

From the responses of defence counsel, it appears that Gladue services are less frequently offered at bail, which results in an objective barrier procedural to justice. However, further research is required to clarify the full extent of this barrier.

Barrier Eighteen: The frequency in which clients proceed to bail without Gladue services (Objective barrier to substantive justice).

The apparent lack of Gladue servicing at bail may contribute to the problematic pattern of breach charges and recidivism some interviewees stated they experienced with their clients. The application of conditions, for whatever form of release, requires the consideration of an Indigenous person's unique circumstances as per s.718.2(e) and s.493.2(a) of the criminal code. However, if Gladue resources are not available, the sufficiency of their consideration is questionable.

²⁵⁸ Holly Pelvin, "Remand as a Cross-Institutional System: Examining the Process of Punishment before Conviction." Canadian Journal of Criminology and Criminal Justice, (2019) 61:2, p. 66-87. Project MUSE muse.jhu.edu/article/722739.

Barrier Nineteen: The compounding harms of overly onerous release conditions, which contribute to frequent breach charges (subjective barrier to substantive justice).

If conditions are placed on an Indigenous person without adequate consideration of these factors, then that individual may be set up for failure and end up breaching their conditions. This would result in more charges and further entrench the client within the criminal justice system. Further research should be conducted into the issue of breach charges and how they impact Indigenous persons specifically.

Responses to Barriers Identified

Recommended Changes

Though further research into the scale and scope of each identified barrier should be conducted, the data available on several of the barriers is sufficient to support consideration of specific steps that may be taken to remedy them. To start, barrier one operates as the catalyst for subsequent barriers. The fact that the production and delivery process for Gladue services is not part of the institutional framework of the court creates a point of failure and allows for a spectrum of factors to impact the capacity of a justice seeker to access a legal instrument. The problem with this barrier is that it introduces a broad range of factors influencing whether Gladue services will be sought, such as subjective views of the value of Gladue reports. Though these views can be remedied through training and education, it may be more effective to remove the barriers that make lawyers' subjective views relevant in the first place. This can be done by ensuring Gladue resources are accessible and that the decision whether a report is requested or available is placed on the administration of the court, using a consistent set of practical, data-informed factors. By shifting the power to request or order Gladue reports onto the court would also give the court the explicit power to order a Gladue report, a power that is currently subject to debate.²⁵⁹ This shift in policy will introduce a more consistent framework where less subjective variables are introduced into the Gladue production and delivery process.

Currently, the production and delivery process of Gladue reports is outsourced to service providers who decide who will have access to Gladue services. There is no place for unfounded, seemingly arbitrary policies such as “cut-off” policies in an accessible Gladue framework. As well,

²⁵⁹ See cases *R. v. Parent*, 2020 ONSC 3701 and *R v Sand* 2019 SKQB 18.

concerns surrounding introducing the Gladue factors earlier in the criminal justice process (such as preserving the presumption of innocence) can be remedied as discussed by the Ontario Superior Court in *R. v. E.B.*²⁶⁰ Service providers such as the Barrie Native Friendship Centre and the Ontario Native Women’s Association will also provide Gladue information on behalf of clients at the bail stage, meaning that it is possible to produce and present Gladue information before a finding of guilt is made. As a result, the production and delivery of Gladue information should begin earlier in the process of the criminal justice system.

Efforts to initiate the production of Gladue information earlier in the criminal justice process could also aid in remedying barrier number four (the lack of Gladue servicing available at the pre-trial phase), though further research into the feasibility of this shift in servicing are vital for it to be successful. It should also be stressed that any expansion of the potential demand for Gladue reports which would result from removing these policies must correspond with a substantial increase in resources for service providers.

As touched on above, barrier number five, “The length of time Gladue reports nominally take to produce, and the capacity of these timelines to extend both the length of time a client spends in custody and the length of time a client spends under supervision in the community,” was consistently identified as a barrier to accessing substantive justice by interviewees in section one of the findings. These statements were then corroborated by the estimations made when discussing barrier five. This barrier presents as an objective barrier to procedural and substantive justice as it creates a scenario where a legal instrument is unavailable. The absence of this legal instrument negatively impacts the quality of justice accessed by justice seekers. As stated before, the length of time these services take to produce creates a scenario where Indigenous persons can either extend their time in custody/released on conditions or access sub-optimal forms of Gladue submissions produced by someone who is not trained as a Gladue writer and is often uncompensated for that work. These timelines contribute to constructive waivers of Gladue report production. As such, reports and Gladue services generally need to be completed faster. As the data in tables 1 and 2 demonstrate, reducing the time reports take to produce by just a few weeks would expand the scope of access to these vital legal instruments. However, further inquiry and a review of how Gladue reports are researched and completed and the capacity of Gladue service providers ought to be conducted. Though research into the nuances of Gladue report production

²⁶⁰ See, *R. v. EB*. 2020 ONSC 4383.

and delivery is required to determine what is feasible and what is not, there is no question that things take too long. Beyond Gladue reports, service providers and researchers should embrace new approaches to old problems and determine the best way to respect the rights of Indigenous persons who encounter our criminal justice system.

Barrier number seven, “The lack of harmony between the timelines of the criminal justice system and the timelines prescribed by Gladue report service providers, including the dates on which Gladue reports are delivered,” is related to barrier number four, but instead of the length of time reports take to produce, this barrier touches on a more general problem which results in a lack of access to substantive and symbolic justice. It appears that service providers do not offer services in a flexible enough manner to prioritize the rights of an accused/offender, instead creating a scenario where accessing one right (the resources required to meet the standards of s.718.2(e)) conflicts with their best legal interests (getting out of prison). This subjective barrier to symbolic justice does not centre the needs of justice seekers or respect their unique circumstances. Instead, it heavily restricts the capacity of justice seekers to access justice. To remedy this, future servicing models should strive to centre the client and their unique legal circumstances and tailor services to the timelines of the criminal justice system.

Barrier number eight may be remedied through an expansion of Gladue-specific training for defence counsel, as well as the simplification of the production and delivery process as discussed under barrier number 1.

To remedy barrier number ten, service providers should begin releasing anonymized data related to their service provision to give policymakers, researchers and other service providers the required information to innovate Gladue service provision.

Lastly, Barrier number 14, “The current Gladue tariff presents as an objective barrier to accessing procedural, substantive and symbolic justice,” is alarming. Though more information should be gathered concerning the impact of this barrier, at its face, the existence of a financial disincentive for lawyers to take on Indigenous clients or provide counsel generated Gladue submissions for an Indigenous client, is discriminatory. The policy framework that creates this discriminatory incentive structure is an objective barrier to procedural, substantive and symbolic justice. It may result in lawyers refusing to take on Indigenous clients. It incentivizes lawyers to do less work, which may negatively impact the justice seeker's capacity to access substantive justice. It can be argued that it offends the basic tenants of the *Charter of Rights and Freedoms*

and disrespects justice seekers by not only discriminating against them but by actively contributing to the systemic discrimination that Gladue was intended to remedy.

Any adjustment to how lawyers are compensated for their Gladue submissions must consider the Gladue-related work conducted by defence lawyers *at any stage* of the criminal justice system, as well as the individual and legal circumstances of the client and the capacity of that client to access Gladue services. Accordingly, a standard tariff policy should be avoided for two reasons. First, the current tariff assumes that the level of work counsel must do to fulfill their obligations under s.718.2 (e) is the same in every scenario regardless of the presence of a Gladue report or the amount of time the client spends in custody before release or sentencing. Second, a tariff creates a financial incentive for lawyers to do the least amount of work to maximize their profit. Though this may appear to betray a cynical view of defence counsel, at the end of the day, private counsel must adhere to the traditional business norm of maximizing profit while minimizing output in order to succeed.

Using a universal tariff system may provide administrative benefits, but it does not centre the needs of justice seekers. Compensation should be based on an hourly rate that is capped based on the circumstances of the client and is associated with the completion of specific tasks, such as interviewing the client and discussing a pre-determined set of topics. A more nuanced compensation system allows for checks and balances to be put in place, guiding defence counsel through an optimal set of best practices regarding the collection and presentation of Gladue information and protecting the interests of Indigenous persons by ensuring their Gladue factors are adequately presented. Creating templates or guides which can be used to both provide written submissions to the court and provide documentation demonstrating how billable hours were spent would help defence counsel, their clients and provide Legal Aid Ontario with the due diligence it typically requires to compensate lawyers.

Future Research

Defence counsel raised a series of barriers, but further inquiry is required to define these barriers and the scope of the problem adequately. Barrier six, “The presence of delay in the Gladue report production and delivery process,” requires more data to define the problem's scope. It is clear that individuals experience delay, but without data to reflect how frequently and to what extent justice seekers incur delay, it is difficult to speak to the issue with certainty or develop policy responses

to address delay. Barrier number eight is difficult to quantify as it appears the subjective beliefs held by defence counsel impact the ability of justice seekers to access Gladue reports. However, it is unclear to what extent these beliefs impact the ultimate decisions made by counsel, ideally in collaboration with their clients. Barrier number nine, “The reliance on previous Gladue reports,” could impede substantive access to justice, but it is unclear if this happens and the extent to which it may happen. Barrier number ten was not extensively discussed by interviewees and would require input from a broader group of interviewees, including Crown lawyers. Barrier eleven would require a comprehensive review of the Gladue submissions made by defence counsel and the circumstances of those submissions. Barrier 12, “The lack of standards around how a client’s Gladue information is collected and presented,” and barrier 13, “The lack of training required or offered to defence counsel regarding the best practices for collection and presentation of the Gladue information,” allows for a subjective barrier to accessing substantive and symbolic justice to occur, but instances of this barrier occurring were not investigated. Barrier 15 would require a wholly unique study which determine the availability of services across jurisdictions. Lastly, barriers 16 – 19 would require a similar study conducted for this thesis but focused on bail.

Constructive Waiver

Given that Indigenous persons face significant barriers including the timelines associated with Gladue report production and delivery, and restrictive service provider policies, it appears that Indigenous persons seeking a Gladue report in Ontario may be placed into a scenario of ‘constructive waiver.’ As discussed in chapter one, it has been expressed by defence counsel, that alongside their clients, the decision will frequently be made to waive their right to request a Gladue report. However, the term “waive” appears to misrepresent what is occurring. The term “waive” implies informed consent. What appears to be more accurate, drawing from the findings which support barriers one - ten, is that the circumstances of the current Gladue framework result a ‘constructive waiver,’ instead of a free and informed waiver being made by the client.

Conclusion

In its focus on criminal defense and Gladue services, this thesis has demonstrated that Indigenous persons face a series of barriers that impede their ability to access procedural, substantive, and

symbolic justice. The data and analysis has identified subjective and objective barriers, though more barriers likely exist. Institutional reform is required to remedy the financial incentives that discriminate against Indigenous persons, the lack of compatibility between systems and Gladue report production and delivery timelines, all of which appear to significantly negatively impact Indigenous people. Further research should focus on the symbolic barriers to justice faced by Indigenous persons. It is apparent that the current justice system does not serve the needs of Indigenous communities and does not respect each nation's unique approach to justice.²⁶¹ However, further access to justice research should explore what Indigenous communities want from their interactions with the Canadian justice system. It is important to acknowledge now that the current criminal justice system is not “Indigenous” justice and does not respect the sovereignty of Indigenous nations in Canada. Research inquiries and the reform that hopefully follows them should not be prescriptive and allow for the exercise of Indigenous sovereignty.

Beyond further research, current efforts to introduce Indigenous understandings and approaches to questions of criminal justice must be adequately funded and respectfully incorporated into responses to those questions. Core to the Gladue framework is the presentation of an Indigenous person’s unique background. However, if the resources required to adequately present this information are not made available to justice seekers, their unique worldview and backgrounds may not be respected.

Lastly, Gladue servicing as a sector requires the resources and space to embrace new solutions to these long-standing problems. It is apparent that further inquiry into the current provision of Gladue reports and letters and how policies and approaches to Gladue service provision can be made much more accessible to criminal justice system involved Indigenous people. However, we must not assume that Gladue reports and letters are the best tools to fulfill s.718.2(e), and new ways to account for the Gladue factors should be explored. Embracing new approaches to solving old problems can be difficult and often institutional resistance will arise – in this case from Gladue service providers as well as courts and the state. The scope of required reforms is broad, as the problems of access to Gladue span several components of our justice system. The ‘system of systems’ reproducing discriminatory outcomes for Indigenous persons

²⁶¹ For further reader on how the Criminal justice as a whole fails Indigenous communities and Nations, please see: Truth and Reconciliation Commission of Canada, Honouring the truth, reconciling for the future: summary of the final report of the Truth and Reconciliation Commission of Canada, by Truth and Reconciliation Commission of Canada, Open WorldCat (2015); Reclaiming Power and Place, The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls,” (2019).

needs to be addressed, from the law to the funding given to service providers, to those providers' policies, to the policies of Legal Aid Ontario. Though there are no perfect solutions to these “wicked” problems, those suffering at the hands of an unjust system cannot afford inaction. As Barack Obama stated in his memoir, “A Promised Land,” “Whatever you do won’t be enough, I heard their voices say. Try anyway.”²⁶²

²⁶² Barack Obama, “A Promised Land,” location 859 of 1601 epub.

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Appendix A



Research Consent Form Script for Oral Consent

Hello, my name is Jonathan Carlson, and I am a Master's student in the Department of Law and Legal Studies at Carleton University. I am working under the supervision of Dr. Jane Dickson.

I would like to invite you to participate in a study titled Access to Justice For Indigenous Offenders in Ottawa and Thunder Bay. This study aims to document the experiences of criminal defence lawyers in Ottawa and Thunder Bay concerning the accessibility, quality and general procurement of Gladue reports for their Indigenous clients. This project will accomplish this by surveying and interviewing defence attorneys about these experiences. The study is sponsored by the (DCAO or TBLA)

This part of the study involves an interview about the accessibility of Gladue reports in your community. **With your consent, the interview will be audio-recorded using the secure app called "tape a call." Once transcribed, the recording will be destroyed.**

We estimate that the interview will take about 20 minutes to complete. Your participation in this survey is voluntary, and you may choose not to take part or not to answer any of the questions. If you decide to withdraw after the interview, your responses will be removed if you notify the researcher within one week of the interview.

As this project will ask about service providers, Judicial decisions and the general practices of the legal profession surrounding Gladue and the sentencing of Indigenous offenders, there are some potential professional risks to you if your statements are critical of your co-workers, service providers or other figures within the profession.

We will treat your personal information as confidential, although absolute privacy cannot be guaranteed. No information that discloses your identity will be released or published without your specific consent. However, research records identifying you may be inspected by the Carleton University Research Ethics Board for the purpose of monitoring the research. The results of this study may be published, but the data will be presented so that it will not be possible to identify any participants. All research data will be password-protected, and any hard copies of data will be kept in a locked cabinet at Carleton University.

You will be assigned a code so that your identity will not be directly associated with the data you have provided. All data, including coded information, will be kept in a password-protected file on a secure computer.

The audio transcript from the interview will be stored locally on the researcher's computer. We will password protect any research data that we store or transfer. Your de-identified data will be retained for a period of 5 years and then securely destroyed.

This project was reviewed and cleared by the Carleton University Research Ethics Board. **Its protocol clearance number is 115557.** If you have any ethical concerns with the study, please contact the Carleton University Research Ethics Board by email at ethics@carleton.ca.

You can also reach me at 613-325-4768 or email me at jonathancarlson@cmail.carleton.ca. You may contact my supervisor at janedickson@cunet.carleton.ca.

Statement of consent

Do you have any questions about this study or need any clarification?

Do you voluntarily agree to participate in the study? Yes _____ No _____

Do you agree to be (audio recorded)? Yes _____ No _____

(Note: Please explain if recordings are optional to participation)

Date: _____

Participant's Code: _____

Research team member who interacted with the subject

I have explained the study to the participant and answered any and all of their questions. The participant appeared to understand and agree. I provided a copy of the consent information to the participant for their reference.

Signature of researcher

Date

DRAFT

Interview Script

I just have a few clarifying questions to start.

Q1: The primary region you practice law in is Ottawa and its surrounding regions?

Q2: As a lawyer, is it accurate to say your primary area of practice is criminal defence?

Q3: Would you be able to estimate the percentage of your clients who are Indigenous?

Q4: Could you please estimate the percentage of these clients who are held in custody because they are placed on remand awaiting sentencing?

Q5: Are publicly funded *Gladue* reports available in your community?

Q6: In your experience who determines whether your client will receive a publicly funded Gladue report? (some examples: Courts, Legal Aid Ontario, a service provider).

Q7: In your experience, what criteria appear to impact whether your clients receive a publicly funded Gladue report?

(Then ask if these criteria are relevant if they don't list them unprompted)

- Minimum period of Incarceration
- Proof of Indignity
- Economic Criteria
- Perceived usefulness

Q8: In your experience, how frequently are your Indigenous clients able to secure a publicly funded Gladue report?

Q9: Have you ever had a client privately fund a Gladue report?

Q10: Tell me more about that?

Q11: If publicly funded Gladue reports are not available, how are the *Gladue* requirements commonly met? (e.g., oral submission, standard presentence report, other?)

Q12: In your experience, have any of your clients waived the Gladue requirements?

Q13: (If yes) in what circumstances have they waived the Gladue requirement?

Q14: In your experience, is delay in production and receipt of Gladue reports a problem in your community?

Q15: What would you say is the average length of the delay in receiving a Gladue report?

Q16: If delays in production and receipt of Gladue reports is a problem, could you describe how it impacts you and your client?

Q17: In your experience, have delays in the preparation of a Gladue report extended your clients time in pre-sentence custody?

Q18: (If yes) How much longer would your clients spend in custody?

Q19: Based on your professional experience in your community, do you have concerns over the effectiveness and quality of the recommendations made in the Gladue reports compiled for your clients?

Q20: (If yes) what are those concerns?

Q21: Based on your professional experience, are the sentencing options made in your clients' Gladue reports often adopted by the court? Why or why not?

Q22: Based on your professional experiences, would you be able to speak to the cultural relevancy of the sentencing options recommended in the Gladue reports your clients receive?

Q24: In your experience, has COVID-19 impacted your clients' ability to access the programming/sentencing options provided in Gladue reports?

Q25: Is there anything you would like to add? (prompt or bring up talking points brought up before).

Appendix B

Figure 3: Release Data (Ontario)

Calendar Year	Type of Release	Total Released	Less Than 30 Days	1-3 Months	3-6 Months	6-12 Months	12-24 Months	24+ Months	Unknown
2016/2017	Remand	47,122	34,702	7,518	2,783	1,281	571	261	6
	Sentenced	18,748	11,973	3,655	1,663	966	412	78	1
2017/2018	Remand	43,877	31,645	7,355	2,772	1,302	533	265	5
	Sentenced	17,243	10,684	3,421	1,690	973	405	68	2
2018/2019	Remand	40,179	28,078	7,236	2,807	1,290	546	215	7
	Sentenced	15,663	9,388	3,292	1,579	949	383	70	2

Statistics Canada. [Table 35-10-0024-01 Adult releases from correctional services by sex and aggregate time served](#)