

# Making an ‘ASH’ out of *Gladue*: The Bowden Experiment<sup>1</sup>

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## ABSTRACT

The *Gladue* requirements have been an active element of the criminal law in Canada for over two decades, yet Indigenous incarceration rates have continued to rise precipitously and established approaches to risk management in sentencing and corrections have relegated many Indigenous offenders to longer sentences served predominantly in higher security institutions. In 2006, Correctional Service Canada “incorporated the spirit and intent of Gladue [into] case management practices both in the institutions and in the community,” stressing that *Gladue* provided ‘direction’ and that Indigenous “social history must be taken into consideration in developing policies and in decision-making impacting on the individual offender.” This paper analyzes CSC’s adoption of *Gladue* principles in its practices, focussing on the use of the ‘Aboriginal Social History’ and its impacts on Indigenous case management, especially with regard to security classifications and overrides. A comparison of *Gladue* reports and Aboriginal Social Histories informs of the troubles in the trickle-down from *Gladue* principles to practice in CSC.

**Keywords:** *Gladue*; Indigenous; Corrections; Incarceration; Risk

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<sup>1</sup> This research project was reviewed and cleared by the Carleton University Research Ethics Board (CUREB A). **Ethics Clearance ID: Project #114540**. Please note that CSC has recently revised ‘Aboriginal Social Histories’ to ‘Indigenous Social Histories’.

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## I. INTRODUCTION

In the early 1990s, the federal government undertook the most comprehensive revision of the sentencing provisions of the *Canadian Criminal Code*<sup>2</sup> to date. Inspired by the rise of restorative justice principles, the revisions directed courts to focus on decarceration and alternatives to imprisonment wherever reasonable. To this end, s. 718.2(e) directed courts that “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.”<sup>3</sup> The paragraph’s emphasis on Indigenous offenders reflected a longstanding problem of over-incarceration of Indigenous people that saw them imprisoned at rates grossly disproportionate to their percentage in the general Canadian population. In 1996, the year the changes took effect, Indigenous people comprised approximately 3% of the total Canadian population but constituted 15% of federal admissions to custody nationally, and 16% of those admitted to provincial and territorial institutions.<sup>4</sup>

Three years later, the Supreme Court of Canada breathed life into s. 718.2(e) through its decision in *R v Gladue*, and henceforth courts sentencing an Indigenous person were required to consider not only “[t]he unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts”, but also “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 and connection.”<sup>5</sup> The stated goal of these strategies was clear: s. 718.2(e) and the Gladue requirements were intended to “remedy” the over-incarceration of Indigenous men, women, and youth in Canadian

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<sup>2</sup> RSC 1985, c C-46 [*Criminal Code*].

<sup>3</sup> *Ibid*, s 718.2(e).

<sup>4</sup> The admissions rate at the provincial and territorial level masked considerable, troubling numbers across the provinces and territories. As noted by Roberts and Reid, in 1996–97, Indigenous offenders accounted for 74% of admissions to custody in Saskatchewan, 65% in the Yukon, 58% in Manitoba, and 39% in Alberta. In contrast, Indigenous peoples accounted for 11% of Saskatchewan’s population, 20% of Yukon’s, 12% of Manitoba’s, and 5% of Alberta’s. Indigenous offenders accounted for 5% or less of admissions in Nova Scotia, New Brunswick, and Quebec. See Julian V. Roberts & Andrew A. Reid, “Aboriginal Incarceration Since 1978: Every Picture Tells the Same Story” (2017) 59:3 Can J Corr 313 at 313.

<sup>5</sup> [1999] 1 SCR 688 at para 66, 171 DLR (4th) 385 [*Gladue*].

correctional facilities. To this end, a series of cases decided in the wake of *Gladue* determined that the requirements apply to any context in which an Indigenous person is facing a possible loss of liberty<sup>6</sup> and throughout the entire criminal justice process,<sup>7</sup> including, for example, at bail hearings,<sup>8</sup> hearings before the mental health review board,<sup>9</sup> Dangerous and Long-term Offender hearings, and parole hearings.<sup>10</sup>

What we do with *Gladue* in the courts has a direct impact on whether and how *Gladue* shapes the correctional experiences of Indigenous offenders. While it falls largely to defence counsel to further the requirements within the courts, advocates should be no less concerned with what becomes of their Indigenous clients and their ‘*Gladue* rights’ whilst serving the sentences championed by legal counsel. The realization of *Gladue*’s remedial goals depends greatly on the vindication of the healing needs and sentencing options promoted through the *Gladue* requirements, and to the realization of healing and reintegration, rather than recidivism and a return to the system, post-sentence. If *Gladue* is vindicated in the courts, but not within correctional facilities, it will likely fall to the same legal counsel that defend Indigenous clients to press for the meaningful integration of *Gladue* and Indigenous interests within the correctional settings.

This paper will analyze the approach to the *Gladue* requirements adopted by Correctional Service Canada (CSC), whereby *Gladue* information provided in offender files is summarized in “Aboriginal Social Histories” (ASH) compiled by Institutional Parole Officers guided by CSC’s Aboriginal Social History tool.<sup>11</sup> ASH appears to be the mechanism through which CSC integrates “the spirit and intent of *Gladue*”<sup>12</sup> into case

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<sup>6</sup> *R v Ipeelee*, 2012 SCC 13 [*Ipeelee*].

<sup>7</sup> *R v Sim*, [2005] 78 OR (3d) 183, [2005] OJ No 4432 (Ont CA) [*Sim*].

<sup>8</sup> *R v Robinson*, 2009 ONCA 205; *R v Hope*, 2016 ONCA 648 [*Hope*]; *Rich v Her Majesty the Queen*, 2009 NLTD 69; Jillian Rogin, “*Gladue* and Bail: The Pre-Trial Sentencing of Aboriginal People in Canada” (2017) 95:2 Can Bar Rev 325.

<sup>9</sup> *Sim*, *supra* note 7.

<sup>10</sup> *Twins v AG Canada*, 2016 FC 537.

<sup>11</sup> Correctional Services Canada, *Evaluation Report: The Strategic Plan for Aboriginal Corrections*. Correctional Service Canada Evaluation Division, File 394-249 (Ottawa: Correctional Services Canada, Policy Sector, 2012) at 33–37 [CSC, *Evaluation Report*].

<sup>12</sup> Correctional Services Canada, “Aboriginal Social History and Corrections” (Violence and Aggression Symposium at the University of Saskatchewan, June 2014) at 7 [CSC, “Aboriginal Social History and Corrections”].

management and such important determinations as security classifications, institutional placements, segregation, and access to programming, as well as discretionary release.<sup>13</sup> Given the importance of ASH in the case management of Indigenous offenders and thus, to their healing path, it is important to query CSC's ASH policies and practices for evidence of the degree to which they respect the *Gladue* requirements and further *Gladue*'s remedial goals. To this end, we will explore the evolution of ASH through CSC's Aboriginal Continuum of Care to what appears to be the current approach to ASH in case management, elucidating the training and support for CSC staff to compile ASH and incorporate ASH information into Assessments for Decision. As an illustration of CSC's approach, the paper will discuss the Bowden Institution Experiment in which the security classifications of 15 Indigenous offenders were reconsidered with greater attention to *Gladue* and *Gladue*-relevant information in the offenders' court files and CSC's Offender Management System.

Central to the elucidation of the Bowden experiment and CSC's approach to *Gladue* and ASH is a comparison of a small sample of redacted ASH and *Gladue* reports included in the Bowden experiment. These materials as well as related, supporting documents, were described in detail by three confidential sources (referred to hereafter as 'Confidential Source A,' 'Confidential Source B,' and 'Confidential Source C') recruited through purposive convenience sampling. The sources share a combined experience of over 40 years in CSC and direct involvement with the Services' Indigenous programming, *Gladue*, and ASH through front line work in CSC institutions and Healing Lodges, as well as senior positions shaping and reviewing CSC's Indigenous policies and programs. They are well-situated to speak to the latter and thus to the role and impact of *Gladue* in CSC.

While the sources are well-placed to provide a 'reality check' on CSC's approach to *Gladue*, it is acknowledged that the information provided by such a small number of insiders must be treated cautiously and consistent with the limitations dictated by the sample size. It should be further noted that the Bowden experiment was a modest one, and the term 'experiment' must be used cautiously. The sample of 15 cases is obviously small and limits

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<sup>13</sup> Correctional Services Canada, *Research Report: Aboriginal Social History Factors in Case Management*, by Leslie A. Keown et al, Report No R-356 (Ottawa: CSC, 2015) [CSC, *Research Report*].

the inferences that can be drawn from the information about the experiment provided by the confidential sources. These limitations acknowledged, it remains the case that what happened at Bowden Institution between 2013 and 2016 was important and it, along with the knowledge shared by those with hands-on experience with CSC's approach to *Gladue* and ASH, can provide important insights into the limitations of that approach and thus to the remedial potential of *Gladue* in federal corrections.

This paper relies extensively on the 'insider knowledge,' expertise, and determination of the confidential sources. Although they will remain anonymous throughout the analysis, without their commitment to justice for Indigenous people and their willingness to share their knowledge, this paper would not have been possible. It is hoped that the discussion that follows will shed some light on the role of *Gladue* in CSC and encourage greater attention to Indigenous stories in charting the healing paths of federally sentenced Indigenous peoples.

## II. THE CONTEXT FOR CSC'S RESPONSE TO *GLADUE*: THE 'ABORIGINAL CONTINUUM OF CARE' AND THE RISE OF ASH

At the core of CSC's Indigenous programming is the Aboriginal Continuum of Care model (ACC)<sup>14</sup> that was adopted by CSC in 2003 and which spans all facets of Indigenous programming from intake to warrant expiry.<sup>15</sup> The ACC builds on the spiritual/cultural<sup>16</sup> approach to Indigenous programming taken by CSC since the early 1960s and is

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<sup>14</sup> See Correctional Service Canada, *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11: Innovation, Learning and Adjustment* (Ottawa: CSC) at 11, online: <[www.csc-ccc.gc.ca/aboriginal/092/002003-1000-eng.pdf](http://www.csc-ccc.gc.ca/aboriginal/092/002003-1000-eng.pdf)> [perma.cc/Y5GQ-HMJV]. See also Correctional Service Canada, *Commissioner's Directive 702 Aboriginal Offenders* (Ottawa: CSC, 2013), online: <[www.csc-ccc.gc.ca/lois-et-reglements/702-cd-eng.shtml#s5](http://www.csc-ccc.gc.ca/lois-et-reglements/702-cd-eng.shtml#s5)> [perma.cc/68MS-3J8N].

<sup>15</sup> CSC, "Aboriginal Social History and Corrections", *supra* note 12.

<sup>16</sup> This programming appears to have been premised upon a "belief that unique solutions are required to reflect the unique cultural backgrounds of aboriginal inmates, and that loss or lack of cultural roots and identity are the primary causes of involvement in the criminal justice system." See Ministry of the Solicitor General, *Aboriginal People in Federal Corrections*, by Carol LaPrairie, Phil Mun & Bruno Steinke (Ottawa: Ministry of the Solicitor General, 1996) at iii, online: <[www.publicsafety.gc.ca/cnt/rsrscs/pblctns/xmng-brgnl-crrctns/xmng-brgnl-crrctns-eng.pdf](http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/xmng-brgnl-crrctns/xmng-brgnl-crrctns-eng.pdf)> [perma.cc/LH7R-2QK3].

premised on a belief that a loss or lack of cultural roots and Indigenous identity are the primary causes of involvement with the criminal justice system.<sup>17</sup> As such, and like its precursors, the ACC is comprised primarily of programming that emphasizes (re)connection with culture through ceremony, spirituality, Elder support, and indigenization of CSC staff working with Indigenous offenders. The Continuum has remained at the core of CSC's Indigenous policies as expressed in the 2006 Strategic Plan for Aboriginal Corrections and more recently in the 2017 National Plan for Aboriginal Corrections.<sup>18</sup>

ASH are integral to the Aboriginal Continuum of Care and Indigenous case management. It is the policy of CSC that an Indigenous offender's Aboriginal Social History must be actively considered in case management and decision-making for Indigenous inmates "when written decisions/recommendations are made."<sup>19</sup> This approach is underscored by

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<sup>17</sup> *Ibid.*

<sup>18</sup> According to CSC documents, the "Strategic Plan for Aboriginal Corrections (SPAC) was developed in 2006 to promote integration across the Service, establish service standards and foster shared accountability in meeting the needs of, and improving results for, Indigenous offenders. Specifically, the SPAC sought to expand the *Aboriginal Continuum of Care* services to all institutions, for both men and women; to promote horizontal collaboration so that Aboriginal specific services were integrated into the fabric of CSC; and, to eliminate systemic barriers through policy and by providing training. Accountability for reducing the gap in correctional results between Indigenous and non-Indigenous offenders across the Service was strengthened and CSC identified, as one of its key priorities, "[e]ffective, culturally appropriate interventions and reintegration support for First Nations, Métis and Inuit offenders." See Correctional Services Canada, *The National Indigenous Plan: A National Framework to Transform Indigenous Case Management and Corrections* (Ottawa: CSC, 2006) <[www.csc-scc.gc.ca/002/003/002003-0008-en.shtml](http://www.csc-scc.gc.ca/002/003/002003-0008-en.shtml)> [perma.cc/BCZ3-RR3B]. Most recently, in 2017, CSC launched its National Plan for Aboriginal Corrections as a "national framework designed to transform Indigenous case management and corrections." "The National Indigenous Plan was developed in 2017 and incorporates advice and guidance from the Office of the Auditor General (OAG) and the National Aboriginal Advisory Committee (NAAC). The Plan is the foundation of the collective renewal of CSC activities at all levels to respond to the OAG's recommendations, as outlined in the 2016 audit report, *Preparing Indigenous Offenders for Release*, and is a national framework designed to transform Indigenous case management and corrections."

<sup>19</sup> Memorandum from Anne Kelly, Senior Deputy Commissioner, CSC, to Regional Deputy Commissioners (unclassified) (1 December 2015), *Consistency and clarification when referencing an offender's Aboriginal Social History in CSC decision-making documentation*, File No. SDCEI-PC-2015-277886, as described by Confidential Source A) [Kelly, "Memorandum"].

the Corrections and Conditional Release Act which, in ss. 79.1(1)–(2), directs CSC to inform decision-making with respect for Indigenous culture, identity, and systemic and background factors that have impacted Indigenous people:

79.1 (1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:

- (a) systemic and background factors affecting Indigenous peoples of Canada;
- (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender’s involvement in the criminal justice system; and
- (c) the Indigenous culture and identity of the offender, including his or her family and adoption history.

(2) The factors described in paragraphs (1)(a) to (c) are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.<sup>20</sup>

While the public record tracing the development of ASH as a formal element of CSC’s Indigenous policy is unclear, it appears that around 2005, Elders, who by this time had been a fairly consistent presence in CSC institutions for over four decades, were asked to complete Elder Assessments Aboriginal History for incoming Indigenous inmates. The addition of this administrative task to their ongoing role as spiritual advisors was queried by some staff who were troubled by potential conflicts between the Elders’ traditional role and their new involvement with what was, in effect, risk assessment.<sup>21</sup> There were also concerns about a lack of ASH training for Elders, whose preparation for the role was a two-page list of questions and talking points to guide a compilation of the Initial Elder Assessment Social History and the Initial Elder Assessment Healing Plan. The putative logic behind this approach was that Elders were hired as ‘contractors’ on the assumption that they would know how to do the work they were contracted to complete, thus training was not necessary.<sup>22</sup> It is not

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<sup>20</sup> RSC 1992, c 20, s 79 [CCRA].

<sup>21</sup> Personal Communication with Confidential Source A, May 28, 2020.

<sup>22</sup> Beyond the two-page list of questions or talking points, there is no publicly available information outlining how Elders were trained or supported, and anecdotal evidence suggests that CSC actively resisted providing any sort of training for Elders. The latter were apparently hired as ‘contractors’ and with the expectation that they would know

surprising that this initial approach to ASH foundered, as CSC staff increasingly indicated issues with the Elder Assessments. CSC's own evaluations indicated that while 88% of CSC staff felt Elder Reviews were 'somewhat' to 'very' important to their work, close to two-thirds of staff rated the quality of those reviews to be 'poor' to 'fair'.<sup>23</sup> Elders also indicated discomfort with their involvement with Assessments and only 22 percent felt they were "fully aware of the purpose or use of Elder Reviews within offender case management."<sup>24</sup> There were also documented concerns about the timeliness of Elder assessments, which were generally deemed to be 'insufficient'. This is not terribly surprising given apparent problems in CSC in the hiring and retaining of Elders, which would have necessarily affected the speed with which assessments were completed.<sup>25</sup>

While an apparent commitment to involving Elders in the intake and assessment components of the ACC seems to have been a tactical response to the CCRA direction and, after 1999, *Gladue*, CSC does not seem to have conspicuously connected their Aboriginal Programming to these developments until 2006 – roughly a decade after the implementation of the CCRA and seven years post-*Gladue*. In that year, the Strategic Plan for Aboriginal Corrections (SPAC) reportedly "incorporated the spirit and intent of *Gladue* into CSC's Commissioner's Directives that dealt with case management practices both in the institutions and in the community."<sup>26</sup> Under the banner of 'integrating the Aboriginal Continuum of Care,' CSC stressed that *Gladue* provided "direction" and that Indigenous "social history must be taken into consideration in developing policies and in

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how to do the work they were contracted to complete, thus training was unnecessary. Furthermore, many contracts with Elders were reported to contain specific clauses directing staff not to train Elders, as training could lead to an employer-employee relationship and possibly to a requirement that CSC would have to hire them as staff. It thus appears Elders were simply expected to arrive and complete their assigned tasks without any training or supports, and absent the status or security provided to CSC staff undertaking similar tasks (Personal communication from Confidential Source A, 28 May 2020).

<sup>23</sup> CSC, *Evaluation Report*, *supra* note 11 at 39.

<sup>24</sup> *Ibid.*

<sup>25</sup> Confidential Source A recalls that, "[w]e had 2 Elders for general population, 1 for Pathways, and 1 for Minimum-security... The ratio for Elders is 50:1, and then 100:2, so quite a limited resource." Personal communication, May 28, 2020.

<sup>26</sup> CSC, "Aboriginal Social History and Corrections", *supra* note 12 at 7.



decision-making impacting on the individual offender.”<sup>27</sup> In this latest incarnation, responsibility for Reviews was taken from Elders and given to Aboriginal Liaison Officers while completion of ASH was added to the duties of the Institutional Parole Officers, with the option of working with Elders in compiling the report.<sup>28</sup>

While CSC does not appear to have provided training to Elders to support their involvement with reviews and assessments, ASH training was provided to 93 Institutional Parole Officers (IPO) nationally in March and April of 2012. This reportedly “consisted of information regarding the social history of Aboriginal Peoples, the details of the Gladue decision, and information on Aboriginal offenders” as well as “workshops that allowed staff to practice identifying Aboriginal Social History factors and writing decisional recommendations.”<sup>29</sup> This was subsequently “expanded and implemented as a two-day component of the 2012–2014 mandatory Parole Officer Continuous Development Training sessions.”<sup>30</sup> This training was delivered nationally throughout the latter half of 2012–13 to all community and institutional parole officers employed by CSC.<sup>31</sup>

The IPO appear to be guided in their work by CSC’s Aboriginal Social History Tool, which is intended to guide “consideration of ASH in case management practices, recommendations and decisions for Aboriginal offenders.”<sup>32</sup> The ASH Tool consists of six pages of intimidatingly tiny print qualified with repeated reminders that the “examples and prompts provided here are not to be considered exhaustive”; it divides the ASH research process into four stages: (1) Examine; (2) Analyze; (3) Options; and (4) Document.<sup>33</sup> The first step directs the IPO to “examine the direct and indirect systemic factors and family history that may have impacted the individual,” which appear to include not only their Indigenous heritage and connection to community, but also the “potential impacts of colonization and the establishment of the *Indian Act*, residential schools, the sixties scoop and foster care, and the socio-economic circumstances of Indigenous

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<sup>27</sup> CSC, *Strategic Plan for Aboriginal Corrections 2006-07 to 2010-11*, *supra* note 14 at 11.

<sup>28</sup> Personal communication from Confidential Source A, May 28, 2020.

<sup>29</sup> CSC, *Research Report*, *supra* note 13 at 3.

<sup>30</sup> *Ibid* at 4.

<sup>31</sup> *Ibid* at 4.

<sup>32</sup> Correctional Services Canada, “Aboriginal Social History Tool”, undated, as described by Confidential Source A.

<sup>33</sup> *Ibid*.

communities,” among others. Having gathered this information, the second stage directs IPO to analyse “how the systemic and background factors have impacted the individual’s actions or behaviours,” and then to move on to “options” and the identification of “culturally appropriate and/or restorative options [that] could contribute to reducing, addressing, and managing overall risk.”<sup>34</sup> The latter include “resolution circles,”<sup>35</sup> “increased engagement with an Elder,” “engagement with the Aboriginal Continuum of Care and Aboriginal Services as alternatives to mainstream services,” and “healing lodges.” Finally, the author of the ASH is instructed to “document” the “rationale used in recommendations and decisions including culturally appropriate and/or restorative options.” The ASH Tool concludes with a reminder that the purpose of the ASH is to “inform a risk management plan for the offender” and “ensure compliance with CD 702, *Aboriginal Offenders*.”<sup>36</sup>

While it is not clear precisely how the Aboriginal Social History Tool fits into CSC’s ASH training for IPO, the initial ‘piloted training’ was the subject of an evaluation in 2013 of whether, how, and to what degree ASH is incorporated into assessments for decisions. The initial evaluation, which does not appear to be publicly available, indicated that IPO were more likely to consider the ASH factors once they completed the piloted training than prior to it.<sup>37</sup> In the absence of more information, it is impossible to know what this finding actually means. It is notable that between September 2012 and March 2013, CSC Prairie Region conducted a review of all assessments for decision and CSC Board Reviews to determine whether ASH was being considered in decision making as per Commissioner’s Directive 702. Like the 2013 evaluation, this review confirmed that ASH was, in fact, documented in assessments for decision, but with an important caveat:

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<sup>34</sup> *Ibid.* All information in this section of the paper is taken from the description of the ASH Tool provided by Confidential Source A, unless otherwise indicated.

<sup>35</sup> The ASH Tool reportedly does not contain any definition of a “restorative circle” but refers to it as appropriate for “disciplinary considerations to gather information and potentially identify other restorative and culturally appropriate options” (Confidential Source A, May 28, 2020).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* See also S. Gotschall, “Incorporating Aboriginal Social History in Offender Case Management: An Evaluation of Correctional Staff Pilot Training” (2013) [unpublished, archived at Carleton University].

An analysis of the data indicates that facts related to an offender's ASH were usually documented in the Assessment for Decision however the impact of the facts relating to OSL [Offender Security Level] was not outlined in the recommendation made by the Parole Officer. Results of the review also indicate that Managers of Assessment and Intervention normally made reference to ASH in the CSC Board Review but via comments such as "ASH was considered" or that "Gladue factors are applicable" but no other information was documented regarding the meaning of these statements. As well, decision-makers often indicated that "ASH was considered" when rendering their decision; however it was unclear how the ASH was considered when making a final decision without additional detail having been provided by the Parole Officer.... Overall, while comments in CSC Board Reviews indicated "ASH was considered" there was little evidence of how ASH translated into the formulation of the recommendation and therefore it is unclear how the information was considered in making an override in the security level decision.<sup>38</sup>

This would seem to suggest that ASH was not taken seriously in assessments for decisions or reviews, whether owing to a lack of understanding of its role, purpose, or possibly its importance. CSC did provide its IPO with *Gladue* training in its Parole Officer Continuing Training in 2013–2014, but this seems to have had limited impacts: A Briefing Note on "Applying Gladue to decision-making processes in CSC" circulated in 2016 confirmed that "other than generic statements like 'Gladue principles and/or Aboriginal Social History has been considered,' there is little evidence of how *Gladue* was applied or the impact of Gladue on a case."<sup>39</sup>

An evaluation of the SPAC in 2012 evinced further problems respecting the spirit and intent of *Gladue* in CSC practice. In its section on ASH, the evaluation notes that its findings were hampered by the absence of any mechanism in CSC's Offender Management System "to ensure that the social history of Aboriginal offenders had been documented"<sup>40</sup>, which meant no, or very limited, data was available to confirm the frequency with which ASH information was actually collected or used in assessments for decision. Focussing their attention on CSC staff and their knowledge of *Gladue* and ASH, the evaluation found that 82% of staff reported that they

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<sup>38</sup> Memorandum from [redacted] Prairie Region to [redacted] Bowden Institution Prairie Region (undated), Correctional Services Canada, as described by Confidential Source A.

<sup>39</sup> Correctional Services Canada, *Briefing Note: Applying Gladue to decision-making processes in CSC* (Ottawa: CSC, 2016), as described by Confidential Source A.

<sup>40</sup> CSC, *Evaluation Report*, *supra* note 11 at 34.

“were either moderately or very familiar” with the *Gladue* principles, while a further 89% “often or always consider Aboriginal offenders’ social history when making decisions concerning these offenders.”<sup>41</sup> While this was a promising finding, it was soon undermined by the discovery that:

[W]hen further examining the practical application of Aboriginal social history, multiple sources indicated discontinuity between the collection of this information and its subsequent use within decision making. They indicated that once the collection process is completed, the information is not consistently being used in case management and therefore does not respect the intent of the Gladue principles. Over half (50%; n= 3) of the [Assistant Wardens of Intervention] agreed that improvements could be made with respect to the amount and consistency of training provided to ALOs, Elders and other staff members on the collection and integration of social history information.<sup>42</sup>

CSC undertook a far more extensive evaluation of the incorporation of ASH factors into case management in 2015. This evaluation included and analyzed 618 assessments for decisions completed for Indigenous offenders in CSC before 2014; the focus was on two case management decision points: security classifications and discretionary release, and whether and how ASH factors impacted and were integrated into those decisions.<sup>43</sup> Given the proximity of this evaluation to the 2013–2014 IPO Continuing Training, it is reasonable to expect that the training would be fresh in the minds of the IPO and they would actively incorporate it in their work with Indigenous offenders.

Given the focus of the evaluation, a distinction was made between decisions that simply “mention” a factor and those in which a factor was given consideration (meaning the factors were “directly tied to the recommendation”).<sup>44</sup> Of the 16 factors included in the ASH tool, the evaluation notes the “median number of [ASH] factors mentioned was 6,

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> CSC, *Research Report*, *supra* note 13 at 3–4. The evaluation focused on three questions: (1) To what extent are Aboriginal social history factors documented and linked to recommendations in assessments for decision focused on security classifications and discretionary release? (2) Is the inclusion of Aboriginal social history factors associated with decisional recommendations? and (3) How do offenders for whom Aboriginal social history factors were considered differ from those for whom they were not?

<sup>44</sup> For example, by a statement such as “after considering the effects of residential school placement, the following is being recommended.” See CSC, *Research Report*, *supra* note 13 at 9.

and the median number of factors linked to a decision was 4.”<sup>45</sup> Across all 618 assessments for decisions included in the evaluation, 2% did not mention any ASH factors while 55% mentioned six or more, 26% did not consider any ASH factors, and a further 29% linked six or more factors to the decision.<sup>46</sup> The evaluators thus concluded that “virtually all coded assessments for decision included a mention of at least one factor; about three quarters... had at least one factor linked to the recommendation.”<sup>47</sup> This would seem to indicate that IPO were using the ASH tool, although it does appear that IPO were generally more likely to merely mention ASH factors than to link them directly to the recommendation in the assessment for decision.<sup>48</sup> This overall finding lead the CSC evaluators to conclude that there “may be room for improvement regarding the extent to which [IPO] move beyond merely mentioning to linking these factors to their recommendations.”<sup>49</sup> “Documenting a factor is not necessarily the same as considering it when formulating a recommendation.”<sup>50</sup>

When focussing on the two types of assessments for decision included in the evaluation, a distinction was observed between the degree of consideration of those factors in assessments for decision in regard to security classification and those related to discretionary release, with ASH factors significantly more likely to be considered in assessments to determine security classification than those related to discretionary release.<sup>51</sup> In this regard, it was found that a “greater proportion of those [assessments for decision recommending assignment] to maximum security than to minimum security were linked to at least one factor”; “[a]mong security reviews...the reverse pattern was found.”<sup>52</sup> This is interesting given

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<sup>45</sup> CSC, *Research Report*, *supra* note 13 at 9. It is not possible to determine the range for use of the 16 factors as the categories used to communicate the number of ASH factors ‘mentioned’ and ‘linked to recommendation’ were zero, one to three, four to five, and six or more. The latter category lacks an outside margin and thus, range cannot be determined. In the absence of the range, it is not possible to determine whether the average would have been more informative than the median in understanding trends in use of ASH factors in assessments for decision.

<sup>46</sup> CSC, *Research Report*, *supra* note 13 at 9.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid* at 18.

<sup>50</sup> *Ibid* at 19 [emphasis in original].

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* at 12.

the direction in s. 79.2 of the CCRA, which directs that the systemic background, culture, and identity of Aboriginal offenders are “not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.”<sup>53</sup> If mention or consideration of an ASH factor was more likely in assessments for decision resulting in maximum security classifications as opposed to those for minimum security, the concern is raised that the current approach to ASH by IPO in CSC goes against the CCRA requirements for use of Indigenous social context evidence in assessments for decisions with regard to security classifications.

The evaluation also revealed discrepancies in the application of ASH across different Indigenous groups: while “almost all” assessments for decisions for offenders identifying as First Nations or Inuit mentioned ASH factor(s), roughly 57% of assessments for decision for Metis offenders contained no mention of ASH factor(s). Similarly, First Nations and Inuit offenders were significantly more likely than Metis offenders to have ASH factors considered in their assessments for decision.<sup>54</sup> Where Metis offender’s assessments did include consideration of ASH factors, these were observed to be “relatively short.”<sup>55</sup> While more research is necessary, the differential use of ASH across Indigenous groups in CSC is troubling and may reflect value judgements by IPO about who ‘qualifies’ as Indigenous and, thus, for the consideration of ASH factors in assessments for decision. If this is the case, it would signal, at a minimum, the need for a more committed approach to training IPO in ASH and *Gladue*, with regard to the complexity and diversity within the Indigenous populations they are intended to serve.

The 2015 evaluation also repeated ongoing concerns about the lack of training and support for CSC staff tasked with implementing the ASH policy. As early as 2009, CSC was aware of low compliance rates within the collection and integration of ASH in offender assessments – a lapse that was acknowledged by the Office of the Federal Correctional Investigator. In its annual reports for 2010 and 2011, the Office expressed concern about CSC’s lack of transparency around the consideration of the *Gladue* principles in decision making, and that CSC “staff members continue to

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<sup>53</sup> CCRA, *supra* note 20, s 79.2 [emphasis added].

<sup>54</sup> CSC, *Research Report*, *supra* note 13 at 10.

<sup>55</sup> *Ibid* at 15.

struggle with operationalizing the “practical intent of the [Gladue] principles.”<sup>56</sup> The 2015 CSC evaluation repeated these concerns, stating that CSC policies provide “no clear direction of how to incorporate these [ASH] factors in correctional decisions. Although CD705-2: Information Collection states that staff should consider the social history of Aboriginal offenders within decision making...no detailed guidelines current exist on how to objectively integrate and operationalize this information into any decision-making process.”<sup>57</sup>

The failings noted in the 2015 evaluation are all that more troubling given CSC’s historic approach to *Gladue*, which was strange and confusing. Despite the clear overlap between the ASH factors CSC openly integrated into its policies and the *Gladue* requirements, CSC brass consistently seemed to push back against acknowledging the relevance or importance of the *Gladue* requirements and *Gladue*’s remedial goals in correctional practice. CSC has consistently taken the position that *Gladue*’s “intent is directly related to the work of the courts,” with the implication that it is somehow irrelevant to CSC practices.<sup>58</sup> This position is apparent in an unclassified memorandum distributed to Regional Deputy Commissioners by Senior Deputy Commissioner Anne Kelly in 2015, and which briefly recounts CSC’s position on s. 718.2(e) and the *Gladue* decision. In that document, Kelly directs CSC staff not to mention *Gladue* “when references are made in decision-making processes to the consideration of the offender’s Aboriginal social history.” Instead, staff were directed to “follow the wording of CSC policies” – meaning no mention of *Gladue* in favor of ASH,<sup>59</sup> implying that CSC’s ASH policy did not reflect any legal obligation on their part, but was rather one element of CSC’s Aboriginal Continuum of Care and a reflection of CSC’s putative commitment to its Indigenous inmates.<sup>60</sup> There is also some indication that some senior CSC staff understood CSC’s position to simply be one of not using *Gladue*<sup>61</sup> – a concern that resonates with the limited and partial approach to ASH evidenced in evaluations of CSC’s ASH and Indigenous policies for at least a decade.

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<sup>56</sup> CSC, *Evaluation Report*, *supra* note 11 at 35.

<sup>57</sup> *Ibid* at 34.

<sup>58</sup> Kelly, “Memorandum”, *supra* note 19.

<sup>59</sup> *Ibid*.

<sup>60</sup> *Ibid*.

<sup>61</sup> Personal communication with Confidential Source A, September 6, 2020.

There seems little doubt that CSC has struggled to incorporate the spirit and intent of *Gladue* in its decision-making and case management of Indigenous offenders, and to train and support those tasked with implementing CSC's response to *Gladue: The Aboriginal Social History*. The resistance to *Gladue* and its potential as means for supporting healing and reintegration is curious given CSC's mandate to "correct and rehabilitate" and the potential benefits of *Gladue* to this end. It also seems to be an odd approach to require IPO, and potentially Elders and ALO, to replicate the work already completed by *Gladue* Writers and probation officers in aid of the sentencing process: if a *Gladue* report or a PSR with *Gladue* content or perspective follow an Indigenous offender into CSC, why not enlist those documents to address the *Gladue* factors in assessments for decisions? While there may be a place for ASH in those cases when an offender enters CSC without any *Gladue* information, where a *Gladue* report or PSR with *Gladue* content exists, why not rely on that in assessments for decisions? As observed by the Office of the Correctional Investigator:

If a *Gladue* lens was fully and consistently applied to decision making affecting security classification, penitentiary placement, segregation, transfers and conditional release for Aboriginal offenders, then one could reasonably expect some amelioration of their situation in federal corrections. The fact that they are almost universally classified "high needs" on custody rating scales, the fact that nearly 50% of the maximum security women offender population is Aboriginal, the fact that statutory release now represents the most common form of release for Aboriginal offenders and the fact that there is no Aboriginal-specific classification instrument in use by CSC all suggests that *Gladue* has not yet made the kind of impact one would hope for in the management of Aboriginal sentences.<sup>62</sup>

### III. MAKING AN ASH OUT OF *GLADUE*: THE BOWDEN EXPERIMENT

The *Gladue* requirements are set in motion by Indigeneity and a possible loss of liberty. Thus, unless the Indigenous person before the courts clearly waives the requirements, the likelihood of a jail sentence (or similar deprivation of liberty) will require the court to hear and consider

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<sup>62</sup> Canada, *Annual Report of the Office of the Correctional Investigator, 2009-2010* (Ottawa: Office of the Correctional Investigator, 2010) at 45, online: <[www.oci-bec.gc.ca/cnt/rpt/t/pdf/annrpt/annrpt20092010-eng.pdf](http://www.oci-bec.gc.ca/cnt/rpt/t/pdf/annrpt/annrpt20092010-eng.pdf)> [perma.cc/JG7R-9ZG7].



Indigenous social context evidence in determining an appropriate sentence.<sup>63</sup> Given that CSC is the likely landing point for those found guilty of serious offences punishable by a jail sentence of two years or more, all those Indigenous persons who do not waive the *Gladue* requirements should come to CSC with a court file that includes a sufficient amount of *Gladue* information to meet the legal threshold of the requirements. What is implied in the latter is largely determined on a case-by-case basis, guided by the direction provided by *Gladue*<sup>64</sup> and *Ipeelee*<sup>65</sup> whereby the court must determine whether it is in possession of sufficient *Gladue* information to inform a fit sentence. As a rule, *Gladue* requires a court receive comprehensive, case-specific information pertaining to the unique background and circumstances of the Indigenous offender as well as options for sentencing that can further *Gladue*'s remedial goals and the healing of the Indigenous offender. What this information looks like in a specific case will be impacted by many things, but it is clear that the information provided to the court must be sufficient to permit the court to accurately assess the moral blameworthiness of the offender and craft a fit and proportionate sentence.

At the present time in Canada, *Gladue* information is presented to the court in a variety of ways, including through a full, 'standalone' *Gladue* report, a presentence report with '*Gladue* content' or '*perspective*', or through oral representations<sup>66</sup> from appropriately situated and knowledgeable persons. The approach to the *Gladue* requirements in lower courts generally appears to elevate substance over form<sup>67</sup> and, in most provinces, what appears to be foremost in the mind of the courts is that they

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<sup>63</sup> *Ipeelee* set a standard of loss of liberty as a key consideration triggering the *Gladue* requirements, although some lower courts have stressed that all Indigenous persons before the courts should benefit from the requirements as a way of supporting rehabilitation and reconciliation. See *R v CJHI*, 2017 BCPC 121; *R v Jensen*, 2005 CanLII 7649, (2005) 74 OR (3d) 561 (Ont CA); *R v Parent*, 2019 ONCJ 523 [*Parent*]; *R v Abraham*, 2000 ABCA 159

<sup>64</sup> *Gladue*, *supra* note 5.

<sup>65</sup> *Ipeelee*, *supra* note 6.

<sup>66</sup> *Parent*, *supra* note 63 at para 52: *Gladue* information may be provided through "viva voce testimony from extended family, elders, historians, academics and sentencing option experts."

<sup>67</sup> See for example, *R v Duxtator*, 2013 ONCJ 79; *R v HGR*, 2015 BCSC 681; *R v Mattson*, 2014 ABCA 178; *R v Florence*, 2013 BCSC 194; *R v Corbiere*, 2012 ONSC 2405; *R v Blanchard*, 2011 YKTC 86; *R v Lawson*, 2012 BCCA 508; *R v Sand*, 2019 SKQB 123.

have the necessary *Gladue* information and explicitly incorporate that information into their rationale for sentencing and in the sentence ultimately imposed on the offender.<sup>68</sup> Where the court feels the information before it is inadequate to meet the requirements, the court is obligated to make further inquiries, where appropriate and practical, to secure the necessary additional information to satisfy the *Gladue* requirements.<sup>69</sup> What all of this means is that most, if not all, Indigenous peoples receiving a federal sentence should arrive at a CSC institution accompanied by a court file that includes a *Gladue* report or PSR with *Gladue* content that met the threshold set by the courts.<sup>70</sup> The logic would thus follow that if the *Gladue* information met the legal standards of the courts, it should be adequate to provide a sufficient ‘Aboriginal Social History’ to inform CSC Intake Assessments, as well as Assessments for Decision and the case management of Indigenous offenders more generally.

It will necessarily be the case that some Indigenous offenders will arrive at CSC institutions without *Gladue* reports or a PSR with *Gladue* content, whether due to a waiver or perhaps because *Gladue* information was provided as part of defence counsel’s oral submissions on sentence.<sup>71</sup> It is also important to acknowledge that some courts seal *Gladue* reports, which would likely deny CSC access to its contents.<sup>72</sup> In such cases, the necessity

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<sup>68</sup> *R v Napesis*, 2014 ABCA 308; *R v Duxtator*, 2013 ONCJ 79.

<sup>69</sup> *R v Wells*, 2000 SCC 10.

<sup>70</sup> Confidential Source B notes: “the *Gladue* reports make into the institution with the court documents. The Intake Assessment report is completed on an offender using these reports; all other reports come from this report and court documents. These and all other documents are used when completing criminal profile, Assessments for Decision and so on. At this time, all these documents from court (court transcripts, victim impact statements, *Gladue*, judge’s reasons for sentencing, etc.), PSR, go to the Aboriginal Intervention Centers, whereby they are supposed to have a dream team who works on case management. All information on an inmate that comes into the institution are used to complete the Intake Assessment and Correctional Plan, the *Gladue* report (if there is one) is also used in this report. The most important doc is the Intake Assessment, Correctional Plan, Criminal Profile.”

<sup>71</sup> In fact, Confidential Source A recalls not seeing a *Gladue* report prior to 2010, and in Alberta, in particular, no reports were provided before 2013. Personal Communication from Confidential Source A, May 28, 2020.

<sup>72</sup> Sealing is something pressed by some *Gladue* service providers who doubt CSC’s commitment to respecting the confidentiality of offender’s stories and records. While there is little doubt that the contents of many, if not most, *Gladue* reports will contain very personal and traumatic memories and experiences, the move to seal is curious.

of gathering some background information for an Indigenous offender that can address the spirit and intent of *Gladue*, and ASH in case management decisions, would be necessary and important (again, unless the offender does not claim Indigenous heritage or does not wish for their heritage to inform their case management). As noted above, CSC does seem to have provided for this possibility in the creation of its ASH tool and in the training provided to IPO in using ASH in Assessments for Decision. Where an Indigenous offender lacks good *Gladue* information, it appears that IPO are both trained and instructed to ensure relevant ASH information is gathered and used in the case management of Indigenous offenders.

While it makes sense for IPO to compile an ASH where there is no *Gladue* information in an Indigenous offender's file, it is less obvious why an ASH would be necessary where adequate and sufficient *Gladue* information is provided in a *Gladue* report or PSR. The question is a good one, given the depth and quality of information in *Gladue* reports, in particular, as well as the duplication of work implicit in reducing a *Gladue* report to an ASH. The average *Gladue* report runs anywhere from 15–50 pages and should include detailed assessments of healing needs and appropriate interventions.<sup>73</sup> The reports are also distinct from both ASH and PSR with *Gladue* content insofar as “*Gladue* Reports are generally drafted following several extensive meetings between the offender and an

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There does not seem to be any public record of grounded concerns about confidentiality of offender information at CSC and, indeed, guarding access to records seems to be something to which CSC is strongly committed. It is also curious that a *Gladue* report in particular, which, when well-researched and written, can provide important information relevant to the offender's healing needs and path, would be seen as something to be withheld from CSC. This is certainly an issue deserving of more research and consideration, perhaps within the context of a much-needed national conversation about best practices and standards of practice with regard to *Gladue* reports, training, and writers, as per the recent report on Missing and Murdered Indigenous Women and Girls, which included among its calls to justice the following: “5.15 We call upon federal, provincial, and territorial governments and all actors in the justice system to consider *Gladue* reports as a right and to resource them appropriately, and to create national standards for *Gladue* reports, including strength-based reporting.” Canada, *Reclaiming Power and Place: The Final Report of the Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: Publications Canada, 2019) at 185, online: <[www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final\\_Report\\_Vol\\_1b.pdf](http://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1b.pdf)> [perma.cc/J68L-VBQR].

<sup>73</sup> See, for example, J. Dickson, *Gladue in Saskatchewan: Phase I Evaluation of the Gladue Pilot Project: Evaluation & Report Completed for Legal Aid Saskatchewan* (August 2015).

‘empathic peer’... and provide the offender with the opportunity to ‘critically contemplate his or her personal history and situate it in the constellation of family, land and ancestry that informs identity and worth’.<sup>74</sup> This would seem to suggest that, where a full, standalone *Gladue* report is available, it can provide an excellent alternative to ASH, which are compiled by an IPO whose empathy should not be assumed, who is likely to be non-Indigenous, and whose ASH will tend to be no more than one to two pages in length. The trickle-down from a 20–30-page *Gladue* report to a one-to-two-page ASH may be one part of the reason why the ASH appears to receive merely reflexive attention in Assessments for Decision in CSC.<sup>75</sup>

While there are undoubtedly a number of factors that feed into the lax attention to ASH in Assessments for Decision, and we should not assume that more information would necessarily be more seriously considered, it is important to query whether full *Gladue* reports would be more effective in relating an Indigenous offender’s Aboriginal social history than an ASH, and whether Assessments for Decision might be different if informed by *Gladue* reports as opposed to CSC’s ASH. It was really for the answering of these questions that the Bowden Experiment was undertaken in 2013.

Bowden Institution is located midway between the communities of Innisfail and Bowden in southern Alberta. Technically classified as a medium-security institution, Bowden is also a clustered institution, whereby a “group of separate units of different security levels administered by one Institutional Head”<sup>76</sup> – so, in effect, Bowden houses maximum, medium, and minimum-security inmates. As such, it is a good location to analyze *Gladue*, ASH, and their effects, if any, on security classifications in particular; it is also an institution where adherence to the ASH process was standard practice but also reflective of the problematic approach

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<sup>74</sup> *R v Sand*, 2019 SKQB 123 at para 47.

<sup>75</sup> Correctional Service Canada, Memorandum (Protected) from Paul Umson, ADCIO Prairie Region, to Dave Pelham, Warden, Bowden Institution Prairie Region, July 15, 2013, as described by Confidential Source A; CSC, *Research Report*, *supra* note 13.

<sup>76</sup> “The difference between a clustered institution and a multi-level institution is related to maintaining the distinction and separation of the various security levels, normally in relation to accommodation, structured activities and inmate movement.” See Correctional Service Canada, *Commissioner’s Directive 702: Classification of Institutions* (Ottawa: CSC, 2018), online: <[www.csc-scc.gc.ca/politiques-et-lois/706-cd-en.shtml](http://www.csc-scc.gc.ca/politiques-et-lois/706-cd-en.shtml)> [perma.cc/F6Q4-Z54R].

documented across CSC in their 2012<sup>77</sup> and 2015<sup>78</sup> reviews of ASH in Case Management.

Bowden's approach to ASH was laid bare in a CSC regional audit that tracked the use of ASH in security overrides completed between September 2012 and March 2013.<sup>79</sup> The audit found a total of 84 relevant security overrides and included 79 in their final sample; of those 79 cases,<sup>80</sup> seven occurred at Bowden. Of those seven cases, five offenders received rises in security classification from minimum to medium while the remaining two offenders saw their security classification reduced from medium to minimum. Among these seven Assessments for Decision, it was found that two had no mention of ASH and the remaining five showed no analysis of ASH in the initial Assessment. As the cases moved up the decision-making process, it was noted that two of the Assessments for Decision had no comments from the MAI; two had comments that did not reference ASH while another three had MAI comments that did reference ASH. When the seven Assessments reached the Warden, five received comments from the Warden indicating 'consideration' of ASH, two had no such comments, and none of the Assessments for Decision had any comments about ASH in relation to the final decision. It is also notable that, consistent with the findings about differential use of ASH across Indigenous groups discussed earlier, the single Metis offender had "no ASH in A4D, MAI and Warden comments do not reflect any information about ASH" whilst the remaining six offenders' Assessments all included either mention of ASH information or that "ASH was considered" at some point in the review process, if not with regard to the final decision.<sup>81</sup>

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<sup>77</sup> CSC, *Research Report*, *supra* note 13.

<sup>78</sup> CSC, *Evaluation Report*, *supra* note 11 at 34.

<sup>79</sup> Memorandum (protected) from Paul Umson, ADCIO Prairie Region, to Dave Pelham, Warden, Bowden Institution Prairie Region (15 July 2013), Site results of the CRS/ASH review for Bowden Institution; Override of CRS in decision for OSL and where ASH was considered in the override- Bowden Institution, as described by Confidential Source A [Umson, "Memorandum"].

<sup>80</sup> Confidential Source A indicated that five cases were dropped from the audit because the overrides occurred prior to September 2012.

<sup>81</sup> Umson, "Memorandum", *supra* note 79. Site results of the CRS/ASH review for Bowden Institution. The results for Bowden in the audit set this institution firmly within what appears to be the standard practice of all those CSC institutions included within the regional audit, which found that "ASH was not considered in the majority

While the documentation of the use of ASH at Bowden at this juncture is too sparse to permit firm conclusions, it is notable that five of the seven override decisions in which ASH was considered prompted a rise in security ratings. If the ASH policy was undertaken to ensure respect for the spirit and intent of *Gladue* in CSC and address the direction in s. 79(1) of the CCRA to this end, Bowden's approach was not only problematic but also in direct contravention of s. 79(2) of the CCRA. The latter directs that the s. 79(1) factors – which overlap very clearly with the *Gladue* factors and those considerations integral to ASH – are “not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.”<sup>82</sup> While it is impossible to be certain that the overrides were directly due to the inclusion of ASH information in the decision-making process, the coincidence of ASH and higher security classifications is certainly worrisome.

The Confidential Sources shared their experiences with regard to three *Gladue* reports and their respective ASH reports reviewed by the administration of Bowden between 2013 and 2016 over the duration of what has come to be known as the Bowden Institution Experiment. As described by Confidential Source A and Confidential Source B, all the *Gladue* reports were produced in Alberta, two reports were completed by writers contracted by Native Counselling Services of Alberta, and the origins of the third report are not discernible. The Confidential Sources referred to the *Gladue* reports and their corresponding ASH as Gladue1 and ASH1; Gladue2 and ASH2; Gladue3 and ASH3.

As described by the Confidential Sources, the differences between the *Gladue* and ASH reports were significant and stark. In terms of length, the three ASH reports were all just over one page, single-spaced: ASH1 was comprised of eight paragraphs, ASH2 had ten paragraphs, and ASH3 had seven paragraphs. Their respective *Gladue* reports were considerably more robust: Gladue1 was 32 pages,<sup>83</sup> Gladue2 was 11 pages, and Gladue3 was 16 pages. The *Gladue* reports were reportedly based on interviews with at

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of the 79 cases considered for security overrides between September 2012 and March 2013.”

<sup>82</sup> CCRA, *supra* note 20.

<sup>83</sup> Confidential Source A indicated that the case specific *Gladue* information followed 6 pages of discussion of s. 718.2(e), *R v Gladue*, and broad contextual information – all of which are firmly within information a court is expected to know and thus, subject to judicial notice.

least three people, and Gladue1 and Gladue3 listed the sources consulted for the report. Gladue1 was based on interviews with the offender, his grandmother, his mother, and one of his siblings. Gladue3 similarly drew upon interviews with the offender, his younger sibling, his maternal grandmother, and his mother. Gladue2 did not indicate clearly who was interviewed, but Confidential Source A indicated that the report itself indicated that interviews were conducted with the offender, his father, and his mother.

While there is no standardized set of best practices for *Gladue* writers or reports, all three reports, based on the descriptions provided by the Confidential Sources, included both contextual and case-specific information on what are generally understood as key *Gladue* factors.<sup>84</sup> That is, to varying degrees, all three reports included information about the offender's community contemporarily and at least touched upon issues of poverty, rates of employment and education, and experiences of, or estrangement from, culture, spirituality, and traditional activities. Gladue1 and Gladue2 reportedly contained historical background on the community. Gladue3, however, contained the most extensive historical information, elucidating the community's treaty history and involvement with the Riel Rebellion, as well as information about residential schools that took children from the community.

As indicated by the Confidential Sources, all three reports also provided extensive information about the offender's family, commonly over three generations (grandparents, parents, and present) and spoke of residential school involvement and intergenerational effects resulting therefrom, including addictions, disorganized relationships, exposure to substance abuse and violence in the home and community, injuries, foster care, school-leaving, loss due to accidental deaths as well as completion of suicide, and experiences of neglect, and physical and sexual abuse. All reports spoke

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<sup>84</sup> Taken together, *Gladue* and *Ipeelee* indicate that the following experiences are relevant *Gladue* factors that should be considered by the courts in addressing the *Gladue* requirements: low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation, systemic and direct discrimination, and, more generally, those unique background and systemic factors which may have played a part in bringing the particular offender before the courts.

about experiences of racism and discrimination, as well as identity confusion and social marginalization.

Most reports also related past criminal activities and involvement with the criminal justice system. Gladue2, while speaking about estrangement from culture, dedicated roughly half of the report to detailing the criminal and incarceration experiences of the offender; Gladue1 and Gladue3 dedicated two to three paragraphs to this subject. Building on this 'social context' information, Gladue1 provided an extensive list of what appear to be addictions treatment and concurrent disorders programs, CSC institutions, and healing lodges as sentencing options, but with no apparent elucidation or connection of these different options with specific healing needs documented in the report or why these are appropriate for the offender. Gladue2, on the other hand, provided no sentencing options while Gladue3 provided targeted, detailed sentencing options related to addressing the offender's specific needs with regard to addictions, cultural renewal, wellness counselling, and academic upgrading.

So how did the relatively lengthy and detailed *Gladue* reports fare in their translation to ASH? As described by the Confidential Sources, two of the three ASH reports acknowledged their reliance on the Gladue reports, only ASH3 did not make this acknowledgement, and notwithstanding the variation in the length of the *Gladue* reports, as indicated above, all three were condensed into just over one page of ASH information. All the ASH identified the offender's community of origin, but none contained information about the culture or history of the community.<sup>85</sup> On the offender's specific connection to culture, ASH1 reportedly concluded with a single sentence noting the offender's lack of experience with and exposure to his culture, while ASH2 included three sentences on the offender's connection to culture in a paragraph focused on his incarceration history. ASH3 included one paragraph on the offender's experience of and connection to culture. Two of the three reports were disproportionately concerned with the offender's exposure to violence and substance abuse: ASH1 and ASH3 dedicated over half of the report to relating the offender's

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<sup>85</sup> As described by Confidential Source A, ASH3 states that "it is not uncommon in Cree families, for the grandparents to care for their grandchildren and raise them as their own." This is important insofar as it communicates the different understanding of family and childrearing among Indigenous versus non-Indigenous peoples, something that shows a measure of insight and sensitivity to the family arrangements traditional to many Indigenous peoples.



exposure to violence and substance abuse as a child while ASH2 summarized this in two of its 11 paragraphs. Where the *Gladue* reports indicated sexual abuse and/or foster care, this is acknowledged in the respective ASH; similarly, where the *Gladue*-related experiences of residential school attendance over the generations were included in the *Gladue* reports, these too were included in the ASH. The offender in ASH2 is a survivor and the ASH related his experiences at the school. Confidential Source A described ASH1 as recounting that the offender's grandmother attended Residential School and that "the influence of the school's legacy would have impacted him, as well." There is no elucidation of that legacy or its impacts on the offender.

As described by the Confidential Sources, all three ASH spoke to the offender's relationships with siblings and parents growing up. ASH1 and ASH3 included additional information about the offenders' current romantic relationships and children, if any, while ASH2 noted that the offender has spent most of his adult life in prison. ASH3 also reportedly spoke to cultural experiences the offender had with his grandfather, while both ASH1 and ASH2 noted an absence of any significant connection to, or experience of, culture by the offender.

Perhaps most importantly, and as observed by the Confidential Sources, while ASH1 specifies healing needs related to "addictions to gambling, alcohol and drugs," none of the program themes or healing approaches related to the sentencing options provided in the *Gladue* report are included in the ASH. ASH3 apparently identified "relevant factors" - including residential school attendance by a grandparent, school leaving, addictions, unemployment, and incarceration as a youth - but there was reportedly no mention of the *Gladue* report's relation of previous program experience, periods of abstention from alcohol use, or the sentencing options or approaches that reflect this information. As previously noted, *Gladue2* provided no sentencing options. While the failure to include sentencing options in the ASH reports may seem unimportant and consistent with CSC's position that *Gladue* is for the courts, the oversight matters. The *Gladue* report's sentencing options could provide CSC with some insight into healing opportunities that could benefit the offender and are thus worth including in an ASH report.

The description of this small sample of *Gladue* reports and their respective ASH from the Bowden experiment suggest that, while they are

imperfect, *Gladue* reports clearly contain far more information relevant to the risks and needs presented by an Indigenous offender than ASH. They also should provide relevant information on healing needs and, as importantly, previous experience with treatment. As noted by Confidential Source A in sharing the experience with *Gladue* and ASH at Bowden, the presence of a *Gladue* report in eight files greatly expedited the review of those files as compared to the review of the seven files that did not include *Gladue* reports. While all the offenders whose files were reviewed with reference to *Gladue* considerations received a security override to a lower security classification, *Gladue* reports expedited the process and provided greater confidence in the Assessment for Decision – not small considerations especially in “a big institution like Bowden, there were maybe 15–20 decisions per week or more (not all security decisions)” that could take “1–2 weeks” of 10–12 hour days “to make the decision.”<sup>86</sup> The ability to rely on a full, standalone *Gladue* report may thus not only ease the administrative burden, but these reports may also inform greater confidence in administrative decisions.

The OCI reviewed the approach taken in the Bowden Experiment and followed up on the eight offenders who were reclassified on the basis of their *Gladue* reports, confirming that all “eight have adapted well and at the time of writing this report, were reportedly safely integrated at the lower security level.”<sup>87</sup> Source A stated that the offenders’ success in minimum security persisted, and only one offender was sent back to medium-security – “but for tobacco, not for drugs or violence (tobacco is considered an unauthorized item and it is of high value with the prison system) – again, totally against our traditional practices, but the Commissioner didn’t ask [Indigenous staff] when that was implemented.”<sup>88</sup> The OCI report went further in its praise of the Bowden experiment, asserting that this initiative was evidence of the importance of *Gladue* reports to CSC, Indigenous case management, and healing:

The approach taken by Bowden Institution is important because correctional authorities used the original *Gladue* sentencing report (often upwards of 50 pages or more when comprehensively completed). Correctional staff have access to a

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<sup>86</sup> Personal communication with Confidential Source A, May 28, 2020.

<sup>87</sup> Canada, *Office of the Correctional Investigator Annual Report 2015-16* (Ottawa: Office of the Correctional Investigator, 2016) at 45, online: <[www.oci-bec.gc.ca](http://www.oci-bec.gc.ca)> [perma.cc/ME28-C5RN] [Correctional Investigator, *Annual Report*].

<sup>88</sup> Personal communication with Confidential Source A, May 28, 2020.

wealth of information through these reports. While some institutions prepare Aboriginal Social History reports that are based on the *Gladue* report, these are typically very short (often only a page in length) and contain primarily high-level information. The original *Gladue* report, where it exists, is a much more complete source of information. Bowden Institution also provided a comprehensive analysis and evidence as to how the *Gladue* report impacted a decision, something my Office has identified as missing in most purportedly *Gladue*-informed correctional decisions to date.<sup>89</sup>

#### IV. CONCLUSION

The Bowden Experiment was a small spark of light illuminating the limited reach of *Gladue* in CSC and what can happen when *Gladue* is seriously integrated into the security classification of Indigenous offenders. Not only is *Gladue* a receptacle of Indigenous knowledge and experience, but it can also temper the impact of current approaches to risk assessment and case management by ensuring more informed decisions are made and the remedial goals of *Gladue* are furthered within CSC. The challenge of course resides in the reach of *Gladue*: Source A described the paucity of reports over her tenure at CSC, acknowledging that she did not see a *Gladue* report in her capacity at CSC before 2010; it is also notable that of the 15 offenders considered for security overrides at Bowden, nearly half did not have a *Gladue* report. This is problematic and reflects a failure on the part of most governments in Canada to commit to full, standalone *Gladue* reports and to demonstrate that commitment through greater resources and oversight of *Gladue* writers, training, and reports. CSC cannot be faulted for failing to embrace *Gladue* when the essential vehicle for *Gladue* information – the *Gladue* report – is only rarely part of an offender’s file. In short, then, *Gladue* reports could go some distance to assisting Indigenous offenders to locate a healing path and to CSC’s efforts to pave the way to that path, but only if governments step up and make that possible.

In an echo of the OCI, where CSC has access to a *Gladue* report, CSC is encouraged to rely on those reports and resist summarizing these into ASH wherever possible. Surely more information is better than less, especially if it informs a more accurate security classification that enhances the healing potential of an offender and reduces the workload of CSC staff. To ensure that the sacred stories carried within *Gladue* reports are received

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<sup>89</sup> Correctional Investigator, *Annual Report*, *supra* note 87 at 45.

with the respect and consideration they deserve, all CSC personal involved with case management should receive comprehensive, foundational training in *Gladue* and Indigenous culture and history. With proper training, a fuller understanding of Indigenous lives as well as the spirit and intent of *Gladue* could and should become the lens through which all materials in an Indigenous offender's file are considered. This training should include concrete, practical skills in integrating *Gladue* information into Assessments for Decision so that staff feel supported and capable of completing and communicating a full *Gladue* analysis in their Assessments for Decision, as opposed to simply noting that "ASH was considered."

While those of us who believe in *Gladue* and its remedial potential continue to press and wait for governments to commit fully and meaningfully to the spirit and intent of *Gladue* and its remedial goals, where a good *Gladue* report accompanies an offender into CSC, those working with that offender should take it seriously in charting their healing path. The results of the Bowden Institution Experiment suggest that when CSC staff take the *Gladue* factors seriously - whether fully detailed in a *Gladue* report or as the filter for reviewing an offender's entire file - those factors have the potential to positively impact case management and Assessments for Decision, and thus access to healing opportunities and early release for Indigenous offenders.