NOVA SCOTIA
PUBLIC PROSECUTION SERVICE

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FAIR TREATMENT OF INDIGENOUS PEOPLES IN CRIMINAL PROSECUTIONS IN NOVA SCOTIA

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NOTE:
THIS POLICY DOCUMENT IS TO BE READ IN THE CONTEXT PROVIDED BY THE **PREFACE** TO THIS PART OF THE MANUAL.
CERTAIN WORDS AND PHRASES HAVE THE MEANINGS ESTABLISHED IN THE **"WORDS & PHRASES"** SECTION OF THIS PART OF THE MANUAL.

FAIR TREATMENT OF INDIGENOUS PEOPLES IN CRIMINAL PROSECUTIONS IN NS

NOTE: For the purposes of this policy, "Indigenous peoples" means any person who self-identifies as Indigenous. If a Crown Attorney has questions about this, they should speak with their Chief Crown Attorney.

INTRODUCTION

The Supreme Court of Canada has recognized the unique history of Indigenous (also known as Aboriginal) peoples[1] in Canada and has distinguished them from other minority groups. Their treatment by the criminal justice system in Canada is likewise unique and the governing authorities are *R. v. Gladue*, [1999] 1 S.C.R. 688 ("Gladue") and *R. v. Ipeelee*, [2012] 1 S.C.R. 433 ("Ipeelee"). Beyond these authorities, Indigenous peoples have special legal and constitutional status.

Despite their unique status, Indigenous peoples have been historically disadvantaged as a result of colonial laws and policies, and have become disproportionately involved in the criminal justice system in Nova Scotia, as elsewhere in Canada. *Gladue* and *Ipeelee* address this in detail and subsequent case law has expanded on their application.

Indigenous peoples have experienced years of dislocation, deprivation of economic opportunity and enforced familial disruption through residential schooling and child welfare systems, where Indigenous children were taken from their communities in large numbers (which is still an ongoing issue within Canada). They have also suffered years of lost culture, language and traditions; access to historic hunting and fishing resources; family and estate proceedings; and land disputes. This has led many Indigenous peoples to low incomes, high unemployment, lack of opportunities, lack of education, loneliness and community fragmentation. The disproportionate rate of suicide, imprisonment and substance abuse among the Indigenous peoples is a testimony to the wrongs suffered by Indigenous peoples over decades.[2]

Many Indigenous offenders have been subject to systemic and direct discrimination and racism. Traditional sentencing principles of deterrence and denunciation are, for many Indigenous peoples, far removed from their understanding of sentencing. The traditional concepts of sentencing in Indigenous communities place a primary emphasis upon the principles of rehabilitation and restoration. Indigenous communities have a fundamentally

[1] In this policy document, the terms 'Aboriginal' and 'Indigenous' are both used to include all persons who identify as First Nations, Métis, Inuit, and Innu, regardless of whether they reside on a Reserve or are registered or are entitled to be registered under *The Indian Act* R.S.C., 1985, c. I-5

[2] *Aboriginal Justice*, Province of Ontario Ministry of Attorney General, March 21, 2005, at para. 2.

different perspective on the process of achieving justice – one that emphasizes community healing and community based sanctions.

In recognition of their particular circumstances, culture, and history of marginalization, racism and discrimination, Indigenous peoples warrant special, and sometimes differential, consideration within the criminal justice system.[3] Considering the individual facts of each case and the specific *Gladue* background of the accused person, this may require an emphasis on restorative justice and remedial/rehabilitative measures, rather than incarceration.[4]

In reflection of this principle, the *Criminal Code* requires a different methodology for assessing a fit sentence for an Indigenous offender, in order to achieve a truly fit and proper sentence. The fundamental purpose of s.718.2(e) of the *Criminal Code* is to treat Indigenous offenders fairly by taking into account their differences.

Indigenous peoples are entitled to be treated fairly by the criminal justice system, in accordance with their special circumstances.[5] **Crown Attorneys should recognize and factor in the unique systemic or background factors that may have contributed to an Indigenous person's criminal conduct. As well, Crown Attorneys should also consider procedures and sanctions appropriate in the circumstances of the offender because of his or her particular Indigenous heritage or connection.** The maintenance of social harmony, safety and stability, within Indigenous communities, and as between these communities and non-Indigenous communities, should be a significant consideration of a Crown Attorney, in cases involving an Indigenous offender.[6]

Crown Attorneys should maintain a flexible and open approach to all criminal matters, including serious offences, arising in the Indigenous community and, whenever possible, should work with the Indigenous community (such as the *Mi'kmaw Legal Support Network*), to ensure that the ultimate dispositions represent the wisest possible choices in terms of community safety and social harmony, in both the short and the long term.[7]

This policy is also intended to align, in part, with those standards adopted by the Federal Department of Justice in the *Aboriginal Justice Strategy,*[8] but is particularized to the individual and unique circumstances of the Mi'kmaq of Nova Scotia, as well as those of other Indigenous heritage interacting with the justice system in Nova Scotia.

In addition to providing strategic guidance for criminal prosecutions in Nova Scotia, the purpose of this policy is also to support Indigenous community-based justice programs that offer alternatives to mainstream justice processes in appropriate circumstances and,

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[3] *Ibid*, para. 4.
[4] *Ibid*, not verbatim but influenced.
[5] *Ibid*, para. 5.
[6] *Ibid*.
[7] *Supra*, note 2, para. 6.
[8] *Aboriginal Justice Strategy*, Department of Justice, Canada, 2015, Ottawa.

where available, through specialized *Gladue Courts* and the *Mi'kmaw Customary Law Program*.

This policy is in part a response to the specific recommendations of the 1989 *Royal Commission on the Donald Marshall Jr. Prosecution*, directed at the Attorney General, that Crown Attorneys[9]:

a) Gain exposure to materials explaining the nature of systemic discrimination toward Black and Native peoples in Nova Scotia in the criminal justice system; and
b) Explore means by which Crown Attorneys can carry out their functions so as to reduce the effects of systemic discrimination in the Nova Scotia criminal justice system.

Finally, this policy is also an acknowledgement of the *Truth and Reconciliation Commission: Calls to Action* regarding Justice, and in particular the following specific *Calls to Action* that have relevance to the role of Crown Attorneys[10]:

- #27 – which speaks to (among other things) the need to ensure lawyers receive appropriate skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism;
- #30 – which speaks to the need for provincial governments (among others) to commit to eliminating the overrepresentation of Indigenous peoples in custody over the next decade; and
- #38 – which speaks to the need for provincial governments (among others) to commit to eliminating the overrepresentation of Indigenous youth in custody over the next decade.

POLICY OBJECTIVES

The objectives of this policy are multi-faceted, and include:

1. To acknowledge, within the criminal justice system in Nova Scotia, the generations of formal and informal discrimination, suppression, subjugation and segregation of Indigenous communities in Canada, including the impact on victims, and descendants of victims, of residential schooling which were state-sponsored institutions designed to eradicate the cultures, languages and community integrity of Indigenous communities.[11]

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[9] *Royal Commission on the Donald Marshall Jr. Prosecution*, Recommendation #14, December 1989

[10] *Truth and Reconciliation Commission: Calls to Action*, 2015

[11] Canada, Truth and Reconciliation Commission of Canada, The Final Report of the Truth and Reconciliation Commission of Canada: Canada's Residential Schools: The History, Volume I, Parts. 1-2 (Ottawa: The Commission, 2015). For the legal classification of such injustices, see Convention on the Prevention and Punishment of the Crime of Genocide, 28 November 1949, Can TS 1949/27, arts 2-4.

2. To contribute to a decrease in the rates of victimization, crime and incarceration among Indigenous peoples in Nova Scotia by conducting culturally competent prosecutions involving Indigenous peoples.

3. To provide Crown Attorneys with the training, education and direction needed to properly identify and address issues of racism and discrimination within individual cases and the criminal justice system as a whole.

4. To respect and meaningfully implement those guiding principles enunciated by the Supreme Court of Canada in *Gladue,* and then those further clarified and strengthened in *Ipeelee* and many other cases thereafter, both at the bail and sentencing stages.

5. To sensitize and train Crown Attorneys to include Indigenous values such as those referenced in the *Gladue* decision throughout their range of contact with the criminal justice system in Nova Scotia.

6. To support Indigenous peoples in assuming greater responsibility for the administration of justice in their communities by partnering with those communities to implement culturally appropriate criminal prosecutions and, where available, conducting them in Gladue Courts, or in other culturally-appropriate methods.

7. To support the implementation of community-based justice programs funded by the Federal *Aboriginal Justice Strategy* (the "AJS"), such as Gladue Courts and the *Mi'kmaw Customary Law Program.*

8. To support the implementation of effective alternatives to the mainstream justice system in appropriate circumstances, in order to increase the involvement of Indigenous communities in the local administration of justice and to decrease rates of crime and incarceration of Indigenous peoples in communities through the Directives (below) and by collaborating with AJS-funded programs, such as the *Mi'kmaw Customary Law Program.*

DIRECTIVES FOR INDIVIDUAL CASE MANAGEMENT

I. The Decision to Prosecute

As with all cases, in making the decision to prosecute, Crown Attorneys must consider whether there is a realistic prospect of conviction and whether it is in the public interest to proceed. The presence of racism and discrimination within an individual case, can impact on both analyses.

Where a Crown Attorney is made aware that an Accused is Indigenous, the Crown should:

- Review disclosure to identify any possible issues of racism and discrimination in the conduct of the State, at every stage of the file, including any investigation done by law enforcement or any involvement of agencies such as Department of Community Services, Correctional Services, or Probation. Example: Is there concern for racial profiling or inappropriate "carding"?

- If issues of racism and discrimination are suspected, consider whether the issues impact on prospect of conviction or the public interest. Example: racial profiling or carding may constitute a violation of the *Charter* right not to be arbitrarily detained and could lead to remedies under s. 24(1) or s. 24(2) of the *Charter*.

- Consult with Chief Crown Attorney as well as members of the PPS Equity & Diversity Committee to obtain guidance on appropriate steps to address any suspected issues of racism and discrimination in a file, at the earliest stage possible.

In addition, the Crown Attorney should consider the circumstances of an Indigenous accused when:

- Making decisions that affect a referral to Restorative Justice (RJ); and
- Making decisions on Crown election (which can affect sentence).

II. Restorative Justice

Restorative Justice (RJ), whether it is pre or post-conviction, is an important means of reducing the number of Indigenous persons in custody and is consistent with Indigenous justice principles which place emphasis on community healing and community-based sanctions. In some cases, the *Mi'kmaw Legal Support Network* can facilitate an Indigenous person's completion of RJ. Crown Attorneys should consult with the PPS Restorative Justice policy for further guidance.

III. Support for the Indigenous Victim

As soon as a Crown Attorney becomes aware that a Victim is Indigenous, the Crown should make an inquiry with Victim Services or with the Victim directly, about the option of having a Victim Support Worker from the *Mi'kmaw Legal Support Network* (see contact information in Appendix B) and if there is interest, make the referral.

IV. Arraignment

The Crown Attorney should inform themselves of an accused's Indigenous status or heritage by:

- inquiring of Defence Counsel for an accused of their client's Indigenous status or heritage; or

- solicit the Court to make such inquiry at the time of arraignment or election.

The Crown Attorney should advise the Court of an accused's Indigenous status at the earliest possible stage in the proceedings, including at judicial interim release hearings.

The Crown Attorney should inquire of Defence Counsel or ask the Court to inquire with the Accused about whether they wish to have their case proceed in a Gladue Court (if possible). Where a Gladue Court is not available, the Crown Attorney should ensure that the accused is represented by *Mi'kmaw Legal Support Network* ("MLSN"), or having been advised of MLSN, waived their representation.

V. Bail

When determining a position on bail, the Crown Attorney must apply the general principles set out in the *Criminal Code* and consider the background and unique circumstances of an Indigenous accused and their connections to the Indigenous community.[12] The Crown Attorney should also consider the distance and remoteness of many Indigenous communities and the barriers that this creates for access to bail hearings and forms of release.[13]

Seeking the detention of an Indigenous accused should remain an exceptional measure unless the release of the accused would jeopardize the safety and security of the victim or the public.[14] Although the Crown Attorney should keep in mind the principles referred to by the Supreme Court in *Gladue*, a Gladue report should not be requested by the Crown Attorney for a bail hearing[15]; however, if the accused wishes to consent to remand so that a Gladue Report can be prepared, the Crown should support this endeavor (see Appendix A for Gladue Report process).

As with all individuals who come before the court, conditions of release shall not be imposed with intent to change an Indigenous person's behaviour or to punish. Such conditions often relate to therapeutic or rehabilitative measures and are more appropriate following conviction. The Crown Attorney must ensure that any conditions they recommend on a bail release are necessary and appropriate to the circumstances of the Indigenous person and relate to the alleged offence. The Crown Attorney should only request conditions that are necessary to ensure public safety or to ensure attendance, and with which an accused can realistically comply.[16]

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[12] *D. 20: Indigenous peoples*, *Crown Prosecution Manual*, Criminal Law Division – Ministry of the Attorney General, Ontario, November 14, 2017, para. 15.
[13] *Ibid*.
[14] *Ibid*.
[15] *Ibid*.
[16] *Ibid.*

Where an Indigenous accused is brought to court in custody, the Crown Attorney should:

- If the Crown Attorney will oppose bail, inquire of Defence Counsel for an accused as to whether the accused wishes to have a formal Gladue Report prepared and considered at any bail hearing or alternatively, to have *Gladue* factors presented and considered by the Court at any bail hearing, without a formal Gladue Report being prepared;

- Inform the Court if an accused expresses interest in having *Gladue* factors considered at a bail hearing but does not wish to have a formal Gladue Report prepared, and only proceed with a bail hearing when those factors can be presented to the Court through one of the following means:

    - Submissions of Defence Counsel or Agent for the Accused,
    - Representations made by the *Mi'kmaw Legal Support Network* or another Indigenous organization;
    - The Accused (through assistance of questions from the Court or Crown); or
    - Relatives and/or friends of the Indigenous person who is before the court.

The Crown should consider opposing release of an Indigenous Accused as a last resort. In making this determination, the Crown Attorney should use any available sources to apply the following checklist of non-exhaustive biographical factors, to consider what, if any, impact those factors may have on the Indigenous person's ability to secure a release plan:

- Has the person been affected by substance abuse in the community?
- Has the person been affected by poverty?
- Has the person or their family faced overt or systemic racism?
- Has the person been affected by family breakdown?
- Has the person been affected by unemployment, low income and a lack of employment opportunity?
- Has the person been affected by dislocation from an Indigenous community, child welfare, loneliness and community fragmentation?[17]

Assessment of the factors, where present, compel a Crown to carefully consider all bail options which will safely release an accused Indigenous person into the community. Crowns should also take into account any difficulties the Accused may have in getting to court due to distance and inability to fund travel and make note of such issues in the file. If the Indigenous person does not attend a future court appearance, a Crown can weigh this circumstance in any subsequent bail proceeding.

[17] M.E. Turpel-LaFond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue", (2000), 43 C.L.Q. 34 at 40. And see Gillian Balfour, "Sentencing Aboriginal Women to Prison", in JM Kilty, ed, Within the Confines: Women and the Law in Canada (Toronto: Women's Press, 2014) at 100.

VI. Trial

When a victim and/or Accused is Indigenous, the Crown Attorney should canvas the following:

- The victim's and/or accused's interest in receiving support from the *Mi'kmaw Legal Support Network*;
- Whether the victim and/or accused require Mi'kmaw interpretation services at trial; and
- Whether the victim and/or accused wishes to use an eagle feather when promising to tell the truth before testifying.

Also, during trial, the Crown Attorney should be mindful of the cultural differences in the manner of speech of an Indigenous witness, and be further mindful of the differences in characteristic demeanor of a witness. For example, while direct eye-contact between Anglo-Europeans is typically perceived as a truthful hallmark, direct eye contact by speakers in Indigenous cultures is often considered to be a mark of profound disrespect.[18]

VII. Sentencing

While the *Gladue* case speaks specifically to the sentencing process, the principles that it embodies extend across the criminal justice system. This was recognized by the Supreme Court in *R. v. Ipeelee,* 2012 SCC 13 where LeBel, J. for the majority acknowledged that "certainly sentencing will not be the sole-or even the primary means of addressing Aboriginal overrepresentation in penal institutions (at para. 69)." The Ontario Court of Appeal has held that *Gladue* factors should be considered in all decisions within the justice system. In *Attorney General of Canada v. Leonard*, 2012 ONCA 622, Sharpe J.A. explained (at para. 60):[19]

> As I have already attempted to explain, *Gladue* stands for the proposition that insisting that Aboriginal defendants be treated as if they were exactly the same as non-Aboriginal defendants will only perpetuate the historical patterns of discrimination and neglect that have produced the crisis of criminality and over-representation of Aboriginals in our prisons. Yet it is on the idea of formal equality of treatment the minister rests his *Gladue* analysis. That approach was soundly rejected by the Supreme Court in both

[18] As per Justice Kilapatrick in *R v Hainnu*, 2011 NUCJ 14 where the Court held at para. 45, as follows: "*There are references in common law jurisprudence to direct eye contact between accuser and accused as being a reliable measure of truthfulness. The demeanour of a witness is culturally determined. For this reason, demeanour alone is an uncertain measure of reliability or truthfulness. Direct eye contact by speakers in some circumstances is considered to be a mark of profound disrespect. This is particularly true in many aboriginal cultures where a child may be taught to avoid direct eye contact. It makes little sense to apply Anglo-European values to a credibility assessment involving citizens from a different culture."*

[19] *Supra*, note 8, at section 10.

> *Gladue* and *Ipeelee*, which emphasize that consideration of the systemic wrongs inflicted on Aboriginals does not amount to discrimination in their favour or guarantee them an automatic reduction in sentence. Instead, *Gladue* factors must be considered in order to avoid the discrimination to which Aboriginal offenders are too often subjected and that so often flows from the failure of the justice system to address their special circumstances. Treating *Gladue* in this manner resonates with the principle of substantive equality grounded in the recognition that "equality does not necessarily mean identical treatment and that the formal 'like treatment' model of discrimination may in fact produce inequality": (references omitted).

The importance of addressing the historical disadvantages faced by Indigenous peoples makes it imperative that Crown attorneys, who occupy an important public office and serve as “ministers of justice”, take their role seriously in seeking to address the over-representation of Indigenous peoples in the justice system at each and every stage of proceedings.[20]

At sentencing, when an offender is Indigenous:

- The Crown Attorney should request a Gladue Report on the date a sentencing hearing is scheduled in a proceeding, unless expressly waived by the accused. The Crown Attorney should ask the Court to canvas this directly with all self-represented accused. Or, alternatively, the Crown Attorney should obtain any recently prepared Gladue Reports from other files involving the accused. **Note: Indigenous persons are entitled to a have a Gladue Report prepared for any offence, regardless of how minor or serious it is.**

- The Crown Attorney should not insist on the preparation of *both* a Pre-Sentence Report and a Gladue Report, if the Indigenous person only wants to have one of the two completed.

- If the Indigenous person requests a sentencing or justice circle, the Crown Attorney should ask the Court to pre-select a date for the circle, which will accommodate the schedules of the Court/Judge, Defense Counsel, the Indigenous person, and the Crown Attorney. This will assist the *Mi’kmaq Legal Support Network* in making the necessary arrangements for the circle. If the sentencing is for an assigned file, the assigned Crown Attorney should ensure they are able to attend the circle. If it is not for an assigned file, the Crown Attorney who is present in court to pre-select a date for the circle should ensure they are able to attend the circle or speak to their Chief Crown Attorney to arrange for another Crown Attorney to attend.

- The Crown Attorney should inform themselves of the personal and family biographies, as laid out in any Pre-Sentence Report and any Gladue Report.

[20] *Supra*, note 8, at section 10.

- The Crown Attorney should, at any Indigenous person's sentencing hearing, ask the Court to note the express direction of the Supreme Court of Canada in *Ipeelee* to take judicial notice of the systemic and background factors affecting Indigenous peoples in Canadian society.[21]

- The Crown Attorney *must not* seek to find proof of a causal link between systemic factors and the offending behaviour which brings the Indigenous person before the Court.[22]

- The Crown Attorney should consider secure custody as a sentence of last-resort for Indigenous persons, canvassing in every instance the suitability of sentencing alternatives, with sentencing principles 718.2(d)&(e) being considered in every case where secure custody is a possible outcome.[23]

- The Crown Attorney should use any available sources of information to apply the following checklist of non-exhaustive biographical factors in situating the moral responsibility of an Indigenous person when formulating a recommendation for a sentencing hearing:

    - Has the person been affected by substance abuse in the community?
    - Has the person been affected by poverty?
    - Has the person faced overt or systemic racism?
    - Has the person been affected by family breakdown?
    - Has the person been affected by unemployment, low income and a lack of employment opportunity?
    - Has the person been affected by dislocation from an Indigenous community, child welfare, loneliness and community fragmentation?[24]

  Guidance about how such factors would be applied is discussed in *R. v. Ipeelee*, supra, at paragraph 60 which notes that such factors contextualize the case specific information to be considered in formulating a sentencing recommendation.

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[21] *R. v. Ipeelee*, supra, at paragraph 60: *Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society (see, e.g., R. v. Laliberte, 2000 SKCA 27, 189 Sask. R. 190). To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples*.

[22] As per Rosinski, J. citing *Ipeelee*, supra at paras. 80-83 in *R. v. Denny*, 2016 NSSC 76.

[23] These important principles of restraint are set out in paras. 718.2(d) and (e) of the Code. In *R. v. Gladue*, at paras. 31-33, 36, the Supreme Court of Canada stated that sentencing courts consider all available sanctions other than imprisonment—and that imprisonment was to be a sanction of last resort for Indigenous peoples.

[24] As applied by Atwood JPC in *Denny*, supra, note 2, citing: M.E. Turpel-LaFond, *Sentencing within a Restorative Justice Paradigm: Procedural Implications of R. v. Gladue*, (2000), 43 C.L.Q. 34 at 40. And see Gillian Balfour, Sentencing Aboriginal Women to Prison, in JM Kilty, ed, Within the Confines: Women and the Law in Canada (Toronto: Women's Press, 2014) at 100.

While such factors may not necessarily lead to a different sentence, consideration of the factors, where present, compel a Crown Attorney to carefully consider all non-custodial options, including custody served in the community in conjunction with all other sentencing considerations.

> …To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary *context* for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered…[25]

- The Crown Attorney should consider circumstances of an Indigenous accused when:
  - making decisions that impact sentencing options including, but not limited to, Notice to Seek Increased Penalty. [26]
  - factor the information contained in any Pre-Sentence Report and/or Gladue Report when formalizing a sentence position; especially in cases where secure custody is available.

[25] *R. v. Ipeelee*, supra, at paragraph 60

[26] Per *R. v. Anderson*, 2014 SCC 41 Crown Attorneys are not constitutionally required to consider the Aboriginal status of an accused when deciding whether to seek a mandatory minimum. However, pursuant to this APS, Nova Scotia Crown Attorneys should consider Aboriginal status in the exercise of prosecutorial discretion at every stage of the proceedings.

LANGUAGES

French

In support of Section 41 of the *Official Languages Act,* the Nova Scotia Public Prosecution Service is committed to respecting the needs of official language minority communities in the context of all Canadian Indigenous communities by:

- Recognizing that many Indigenous persons in Canada speak French as a first language and that some Indigenous persons in Nova Scotia may also speak French as a first language.[27] In accordance with section 530 of the *Criminal Code,* an accused has a statutory right to French or bilingual criminal court proceedings.[28]

Mi'kmaw

- Recognizing that Indigenous communities in Nova Scotia have different language needs than the majority population; that Mi'kmaw is the mother-tongue and principle language spoken in certain Indigenous communities in Nova Scotia; that, especially in Cape Breton, some Indigenous persons have limited function in English and may require translation services for both simple and complex court proceedings.

- Recognizing that some English legal terms are not conducive to direct translation, and that the translation thereof may require lengthy explanations in order to convey proper meaning into the Mi'kmaw language. Recognizing that Mi'kmaw translation services are readily available in the Courts of Nova Scotia.

[27] Such was the case with the aboriginal complainant in *R. v. Martin Comeau*, 2018 NSPC Yarmouth, pending/unreported.

[28] Per, *R. v. Beaulac*, [1999] 1 S.C.R. 768, [1999] S.C.J. No. 25, 134 C.C.C. (3d) 481 and on the provisions of ss. 530 and 530.1 of the *Criminal Code*.

Appendix A

GLADUE REPORT PROCESS

1. Identification of Aboriginal Offender

- Defense, Probation, and Crowns should ask: “Are you Aboriginal?” and/or “Has Gladue been canvassed?” before sentencing every offender, in order to identify eligible candidates for a Gladue Report, especially when custody is being considered.

2. Court Order for Preparation of Report

- Defense, Probation Services, Crown, or Self-Rep ask, in Court, for Report to be done before sentencing.
- Order is made for preparation of Report by the Court and sent to the Mi’kmaq Legal Support Network (“MLSN”).
- Sentencing should be adjourned for 2 months for preparation of Report (can be completed faster, when accused in custody).

3. Supporting Documentation Provided to MLSN

- Crown to fax MLSN Head Office in Eskasoni the following: JEIN Bail Report; PIS; any other relevant info regarding facts. This should be done immediately after Court makes order. MLSN Fax: 902-379-2047.

4. Referral Processed by MLSN

- All orders are sent to MLSN Head Office in Eskasoni.
- MLSN contracts a Researcher/Writer to prepare the Report and provides Writer with supporting documentation received from Crown. Once contract signed with the Writer, MLSN notifies the Court and confirms completion date.

5. Preparation of Gladue Report

- Interviews are conducted by Writer with four generations:
  - Initial interview with Client to learn their history, connection to Aboriginal community and names of individuals who have been influential in their life.
  - At least 3 other persons will be interviewed, hopefully spanning 3 other generations of Client’s family.

- Research:
  - Writer does research about Client's community and Aboriginal experiences in Canada, which are relevant to the experience of the Client (i.e. Indian Residential Schools, *Indian Act* references, life on reserve versus off reserve).

- Report:
  - Report is written in a manner that assumes the readers know little or nothing about Aboriginal people, to ensure depth of understanding.
  - It will include information obtained from interviews with four generations.
  - Information is provided about Client's community and about Aboriginal experiences in Canada in general.
  - Writer makes recommendations on sentence for client and identifies culturally relevant services to assist with treatment and rehabilitation.

- Screening:
  - In some cases, the MLSN will send a Report back to the Court indicating that a Gladue Report cannot be completed as Gladue factors do not apply to the offender. MLSN is in the best position to make this determination. Only they should screen-out clients.

6. Sentencing Hearing

- Parties receive the Gladue Report and it must be factored into determination of sentence. Questions to ask (taken from *R. v. Gladue*, [1999] 1 S.C.R. 688):
  - What understanding of criminal sanctions is held by the community?
  - What is the nature of the relationship between the offender and his or her community?
  - What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence?
  - How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown?
  - Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing?
  - What sentencing options present themselves in these circumstances?

Appendix B

CONTACT INFORMATION FOR MI'KMAW LEGAL SUPPORT NETWORK

Cape Breton Office
29 Medicine Trail
PO Box 7703
Eskasoni, Nova Scotia
B1W 1B2
1-902-379-2042

Millbrook Office
19 Church Road
Truro, Nova Scotia
B2N 6N5
1-902-895-1141

Dartmouth Office
15 Alderney Drive, Suite 3
Dartmouth, Nova Scotia
B2Y 2N2
1-902-468-0381