ARTICLE

EXPANDING THE REACH OF *GLADUE*: EXPLORING THE USE OF *GLADUE* REPORTS IN CHILD PROTECTION

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ABSTRACT

This paper explores the potential of the legislature or courts using *Gladue*-like reports in British Columbia's child protection laws and policies. It first lays out the current provincial legal frameworks and illustrates its shortcomings by comparing them with Indigenous legal orders; to argue that the Indigenous communities should control their child protection systems. Drawing parallels between sentencing and child protection cases, this paper explores a proposed restructuring of the child protection system focusing on the potential of implementing *Gladue*-like reports. The paper finds that this restructuring would have lasting and positive impacts on Indigenous children, their families, and communities. It identifies avenues for legal reform that would mandate *Gladue*-like reports in child protection.

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"*MCFD* [Ministry of Children & Family Development] *is meant to be there for the best interests of the child. Was what happened to me for the best interests of the child? Now I have all this trauma and all this undealt with stuff just because I was a ward of the government. And then I pass it on to my kids because I was parented by the government, so I had no one to care for me, so then how do I pass that on to my kids?*"[1]

These comments, made by an Indigenous woman during a storytelling circle organized by West Coast LEAF highlight British Columbia's (BC) current child protection system's weaknesses. Indigenous children have been and continue to be disproportionately affected and harmed by the system. To effectively care for Indigenous children, the current regime must be profoundly reformed to account for the legacy of colonialism, meaningfully involve Indigenous communities and their traditions and laws, support struggling caregivers, and ultimately keep Indigenous children in their families or communities.

Frances Rosner, a Métis child protection lawyer working in Vancouver, has proposed using *Gladue*-like reports in child protection to help achieve that needed reform.[2] This paper explores the potential of using *Gladue*-like reports in the child protection context, and suggests that such reports could significantly reform the child protection system, and benefit Indigenous children and their communities.

Part I of this paper will review the main issues in the provincial child protection system, and its disproportionately harmful impact on Indigenous children. Part II will lay out the current provincial legal framework for child protection, and illustrate its shortcomings by comparing it to two Indigenous legal orders. Part III will assess the *Gladue* decision, and draw parallels between the case's criminal context and the child protection context. Part IV will propose a structure for child protection *Gladue* reports, and will highlight lessons that can be learned from *Gladue* reports. Part V will explore the impact that *Gladue*-like reports could have on Indigenous children, their families and communities. Part VI will identify changes to the current legal framework that would mandate *Gladue*-like reports. Part VII will briefly consider how *Gladue*-like reports would help governments comply with international law. Finally, part VIII will anticipate potential criticisms of the reports in child protection, and offer counterarguments.

This paper was written by a white settler from the unceded territories of the xʷməθkʷəy̓əm (Musqueam), Sḵwx̱wú7mesh (Squamish), and Sel̓íl̓witulh (Tsleil-Waututh) Nations. While she has worked as a support worker for people who had their children apprehended by MCFD and those who were themselves apprehended as children, she has no personal experience with the child welfare system. The author wrote this paper for Professor David Milward's class, Current Topics in Indigenous Law: Criminal Justice and Family Law. Before starting the paper, the author contacted Frances Rosner to ask if Ms. Rosner had any work that would benefit from student research. Ms. Rosner provided the idea behind this paper, and later gave permission for it to be published, and the author is grateful to her for her time and generosity.

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1 "Pathways in a Forest: Indigenous guidance on prevention-based child welfare" (2019) at 43, online (pdf): *West Coast LEAF* <http://www.westcoastleaf.org/wp-content/uploads/2019/09/Pathways-in-a-Forest.pdf> [https://perma.cc/84US-8G5L] [*Pathways*].

2 Interview of Frances Rosner (22 October 2019) [Rosner].

I. REVIEW OF ISSUES IN CHILD PROTECTION

It is painfully evident that British Columbia's child protection system is failing Indigenous children, their families and communities. Indigenous children are overrepresented in the system, the system is harming children, and completely ignores the impact of colonialism on Indigenous communities.

Statistics demonstrate the severity of Indigenous children's overrepresentation in British Columbia's child protection system. They are 15 times more likely to enter governmental care than non-Indigenous children.[3] Indigenous children comprise less than 10% of British Columbia's population, but in 2018, 63% of children in foster care in British Columbia were Indigenous.[4] One in five Indigenous youth in British Columbia will come into contact with the child welfare system during their childhood.[5]

Alarmingly, the so-called child protection system is often not protecting children or improving their futures; in fact it is shown to frequently cause additional harm. *Reclaiming Power And Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* noted that children in care are more likely to end up in the criminal justice system than they are to graduate high school.[6] Additionally, the system places Indigenous children at greater risk of violence than if they were not in the system, both while they are involved with the system and in the future.[7] The system also causes immense disruption to Indigenous children's cultures, identities and families.[8]

The child protection system ignores the impact of colonialism and intergenerational trauma on Indigenous communities. In *Red Women Rising*, a report documenting the experiences of Indigenous women, a mother raised in care who had her children apprehended explains, "our intergenerational trauma like addictions and residential school history is used against

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3 Grand Chief Ed John, "Indigenous Resilience, Connectedness And Reunification–From Root Causes To Root Solutions: A Report on Indigenous Child Welfare in British Columbia" (2016) at 15, online (pdf): *First Nations Summit* <https://fns.bc.ca/our-resources/indigenous-resilience-connectedness-and-reunification-from-root-causes-to-root-solutions> [https://perma.cc/CP82-35P5] [*Indigenous Resilience*].

4 British Columbia, Ministry of Children and Family Development, *Children and Youth in Care (CYIC)* (Victoria: Ministry of Children and Family Development, 2018) <https://mcfd.gov.bc.ca/reporting/services/child-protection/permanency-for-children-and-youth/performance-indicators/children-in-care> [https://perma.cc/9PEZ-33WK] [MCFD].

5 "Aboriginal Children in Care: Report to Canada's Premiers" (2015) at 7, online (pdf): *Aboriginal Children in Care Working Group* <https://fncaringsociety.com/sites/default/files/Aboriginal%20Children%20in%20Care%20Report%20%28July%202015%29.pdf> [https://perma.cc/BR6B-XV6A].

6 *Reclaiming Power And Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Vol 1a* (2019) at 340, online (pdf): <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/Final_Report_Vol_1a-1.pdf> [https://perma.cc/F4QP-A36H] [*MMIWG*].

7 *Ibid at 339.*

8 *Ibid at 340.*

us to take our children."[9] This is especially problematic because Canada used Indigenous children as a tool to assimilate Indigenous peoples through the residential school system.[10] In *Calling Forth Our Future*, a Union of British Columbia Indian Chiefs (UBCIC) report, the child protection system is situated in the context of colonialism:

> "Colonization is the forced deconstruction of cultures and the imposition of alien ones. Colonization is theft. Theft of land, theft of resources, and theft of cultures, language and social organization. In Canada, the theft of Indigenous Peoples Nationhood occurred, and continues to occur, with the theft of our children."[11]

It is worth briefly reviewing the goals and methods of residential schools, as they were the colonial precursor to the child protection system. The purpose of residential schools was to "civilize" Indigenous children.[12] These schools forbade children from speaking their Indigenous languages, wearing their traditional clothes, and socializing with their siblings. Severe and repeated physical, sexual, and emotional abuse was commonplace.[13] The last residential school in British Columbia closed in 1984.[14] The provincial child welfare system continues to remove Indigenous children from their families and communities, supposedly in the "best interests" of the children.[15] Today, many Indigenous caregivers who have had their children apprehended feel the child protection system has replaced residential schools. As one mother explained: "The residential school agent is now the MCFD social worker."[16]

Contrary to pervasive stereotypes, the vast majority of Indigenous children in care have been apprehended due to concerns of neglect, not physical harm, emotional harm, or sexual abuse.[17] Many advocates believe neglect is essentially the conditions created by poverty. They contend that the disproportionate rate of Indigenous children in care does not stem from

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9 Carol Muree Martin & Harsha Walia, "Red Women Rising: Indigenous Women Survivors in Vancouver's Downtown Eastside" (2019) at 111, online (pdf): *Downtown Eastside Women's Centre* <http://dewc.ca/wp-content/uploads/2019/03/MMIW-Report-Final-March-10-WEB.pdf> [https://perma.cc/PW8A-QS9R] [*Red Women Rising*].

10 Ardith Walkem, "Calling Forth Our Future: Options for the Exercise of Indigenous Peoples' Authority in Child Welfare" (2002) at 12, online (pdf): *Union of B.C. Indian Chiefs* <http://caravan.ubcic.bc.ca/sites/caravan.ubcic.bc.ca/files/UBCIC_OurFuture.pdf> [https://perma.cc/M687-AAGS] [*Calling Forth*].

11 *Ibid at 9*.

12 *Ibid*.

13 "Violations of Indigenous Human Rights" (2002) at 17, online (pdf): *Native Women's Association of Canada* <https://www.nwac.ca/wp-content/uploads/2015/05/2002-NWAC-Violations-of-Indigenous-Human-Rights-Submission.pdf> [https://perma.cc/C969-3SKP].

14 "Project of Heart Illuminating the hidden history of Indian Residential Schools in BC" (2015) at 14, online (pdf): *The BC Teachers' Federation: Educating for truth and reconciliation* <https://bctf.ca/HiddenHistory/eBook.pdf> [https://perma.cc/JVD6-62H2].

15 *Calling Forth*, *supra* note 10 at 11-12.

16 *Red Women Rising*, *supra* note 9 at 24.

17 British Columbia, Ministry of Children and Family Development, *Ministry Of Children And Family Development Performance Management Report vol 9* (Victoria: Ministry of Children and Family Development, 2017) at 37 <https://www2.gov.bc.ca/assets/gov/family-and-social-supports/services-supports-for-parents-with-young-children/reporting-monitoring/00-public-ministry-reports/volume_9_mar_2017.pdf> [https://perma.cc/9Q3C-2TH8].

high numbers of Indigenous parents abusing their children but rather from high numbers of impoverished Indigenous families.[18] *Honouring the Truth, Reconciling for the Future, a Summary of the Final Report of the Truth and Reconciliation Commission of Canada (TRC)* explains that a tendency to see Aboriginal poverty as a symptom of neglect, rather than as a consequence of failed government policies, has resulted in grossly disproportionate rates of child apprehension.[19]

Over forty percent of First Nations children in BC live in poverty.[20] As a result of the enduring effects of colonization, Indiegnous people live in high rates of poverty.[21] A wide range of factors contribute to this poverty, including Indigenous people being stripped of their land, livelihoods, and cultures, through policies such as residential schools.[22] For example, the lack of an education offered by residential schools has led to chronic unemployment or underemployment for many survivors of residential schools.[23] This legacy still persists. Today, communities with the highest percentages of descendants of residential school survivors have the lowest levels of educational success.[24] The TRC also notes a significant income-gap between Aboriginal and non-Aboriginal Canadians, with Aboriginal people living in deeper poverty that is likely to last for longer periods.[25]

Today's child protection system is harming children, repeating the mistakes of the past, and is highly ineffective. It is common for the same parents or caregivers to come into contact with the system multiple times.[26] Parents who were apprehended as children have their own children apprehended by the same agency that was responsible for raising them.[27] Radically improving the child-protection system is not only critical for children but for communities as a whole to enable communities and families to keep their children and build better futures.[28]

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18 Katie Hyslop, "How Poverty and Underfunding Land Indigenous Kids in Care", *The Tyee* (14 May 2018), online: <https://thetyee.ca/News/2018/05/14/Indigenous-Kids-Poverty-Care/> [https://perma.cc/9HHP-ZH74].

19 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 138, online (pdf): <http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf> [https://perma.cc/X8X8-UN6L] [*TRC Summary*].

20 "Towards Justice: Tackling Indigenous Child Poverty in Canada" (2019) at 14, online (pdf): *Upstream* <https://www.afn.ca/wp-content/uploads/2019/07/Upstream_report_final_English_June-24-2019.pdf> [https://perma.cc/M9JN-9PQ5].

21 *TRC Summary*, *supra* note 19 at 133.

22 "First Nations Poverty in Canada", online: *Ryerson University Chair in Indigenous Governance* <https://www.ryerson.ca/chair-indigenous-governance/research-projects/ongoing/first-nations-poverty-in-canada/#:~:text=The%20poverty%20of%20First%20Nations,Neu%20%26%20Therrien%2C%220200)> [https://perma.cc/8SUG-4KET].

23 *TRC Summary*, *supra* note 19 at 145.

24 *Ibid at 146.*

25 *Ibid at 147.*

26 MCFD, *supra* note 4.

27 *Pathways, supra* note 1 at 27.

28 Ardith Walkem, "Wrapping Our Ways Around Them The CFCSA, Aboriginal Communities And Parents" (2015) at 3, online (pdf): *ShchEma-mee.tkt Project* <https://cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf> [https://perma.cc/44LM-DEWR] [*Wrapping*].

II. CURRENT LEGAL FRAMEWORK IN BRITISH COLUMBIA

It is perhaps not surprising that the legislation that created the child protection system is highly problematic for Indigenous children. Although the federal government funds programs and services for Indigenous children, the *Child, Family and Community Service Act* (*CFCSA*) governs child protection in British Columbia.[29] The *CFCSA* focuses on protecting the "best interests of the child," and the act's emphasis and characterization of this concept has serious consequences for Indigenous children. As set out below, and as illustrated through comparison with First Nation child protection laws, there are shortcomings in both the implementation and the text of the *CFCSA* as it relates to Indigenous children.

A. Issues with Implementation

First, while the *CFCSA* does include special provisions regarding the guiding principles, service delivery principles and the "best interests" of Indigenous children, those provisions remain inadequate. For example, section 4, on the Best Interests of Child, provides that:

> (2) If the child is an Indigenous child[…] the following factors must be considered in determining the child's best interests:
>
> (a) the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language;
>
> (b) the importance of the child belonging to the child's Indigenous community.[30]

While these provisions may look powerful on paper, the unfortunate reality is that rulings on *CFCSA* matters involve balancing many factors. Courts often give these culturally-specific provisions less weight than other factors that ignore cultural backgrounds, such as a judge's perceptions of the child's physical and emotional needs, as well as their development level.[31]

B. Structural and Conceptual Limitations

Second, and more fundamentally, the "best interests" concept – the *CFCSA*'s paramount consideration – is flawed in its conceptualization of individual children as separate entities from their communities.[32] The *CFCSA*'s narrow focus on the best interests of the child fails to recognize the essential role that extended families and communities play in caregiving. Many scholars and activists, including Grand Chief Ed John, have pointed out that the child welfare system's focus on the best interest of the child is not harmonious with Indigenous communities' holistic approach toward family and community.[33] For example, communities

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29 *Child, Family And Community Service Act*, RSBC 1996, c 46 [CFCSA].

30 *Ibid, s 4.*

31 See e.g. *Wrapping*, *supra* note 28 at 39 citing *In the matter of the children NP and BP: NP and SM v the Director of Child, Family and Community Service* (BCSC Prince George Registry 03998, 1999), where the court gave more weight to the non-Aboriginal couple's understanding of the child's special educational needs than to the First Nations aunt and uncle's understanding of the child's cultural needs.

32 *Wrapping*, *supra* note 28 at 29.

33 *Indigenous Resilience*, *supra* note 3 at 91.

worry that if courts or social workers misunderstand shared caregiving, they may believe the child has been abandoned or neglected.[34] Further, the UBCIC notes that the "best interests" concept overlooks political, social, and economic aspects of the best interests of Indigenous children:

> "…when the best interests of the child test is applied within the provincial child welfare context, the interests of Indigenous children are harmed because the province is not suited to know or assess any of the factors which come into play in terms of membership within an Indigenous Nation, or the ways in which this citizenship is fostered and benefits Indigenous children. Membership within an Indigenous Nation is not merely "cultural" it involves Sovereign rights and incorporates political, social and economic rights that cannot be addressed under the provincial legislation; the fullness of the relationship of a child with, and within, their Indigenous Nation is not accounted for."[35]

According to scholar Marlee Kline, the colonial concept of the best interests of the child understands children as decontextualized people who have interests completely independent from their families, communities, and cultures.[36] This is a serious shortcoming of the *CFCSA*. *Wrapping Our Ways Around Them*, a report prepared for the Legal Services Society of British Columbia (LSS), emphasizes that true protection of the best interests of children will be achieved through the "full and active involvement" of their Indigenous community.[37]

The shortcomings of the *CFCSA's* "best interests" conception are especially stark if one compares it with First Nations' child protection laws. For example, Part 2, section 7.2 of the Carcross/Tagish First Nation's comprehensive family statutes emphasizes the importance of keeping children within the community:

> "All of our stories, all of our teaching emphasize the importance of family. Families are the foundation of a good kwáan (community). We know that we must do all we can as a kwáan (community) to support families. Our kwáan (community) is a family, each member caring for others. We as a kwáan (community) will not leave anyone behind. When families cannot provide and protect children, we must. Only as a united kwáan (community) can we keep our children with us, keep them out of state care, out of jails, and free of substance abuse…"[38]

The Splatsin or Spallumcheen Band child protection bylaw places a similar emphasis on ensuring that children remain integrated within their communities. The Band created the child welfare bylaw, the only one that has been allowed under section 81 of the *Indian Act,*[39]

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34 *Wrapping*, *supra* note 28 at 32.

35 *Calling Forth*, *supra* note 10 at 51.

36 Marlee Kline, "Child Welfare Law, 'Best Interests of the Child' Ideology, and First Nations" (1992) 30:2 Osgoode Hall LJ 375 at 395.

37 *Wrapping*, *supra* note 28 at 30.

38 *Statutes of Government of Carcross/Tagish First Nation*, Book Two: Government of Carcross/Tagish Traditional Family Beliefs and Practices, part 2, s 7.2 <https://www.ctfn.ca/media/documents/Publications/Legislation/2._Family_Act_2010.pdf> [https://perma.cc/G954-HMXL].

39 *Indian Act*, RSC 1985, c I-5, s 81.

in 1980, in response to high levels of its kids in care.[40] In section 10(iii), the bylaw provides that in deciding where to place the Indian child, Indian customs should guide the Chief and Council along with the preferences the bylaw lists.[41] It states:

> If a child cannot be placed with their family, placement is to be made according to the following order of preference:
>
> 1. a parent
> 2. a member of the extended family living on the reserve
> 3. a member of the extended family living on another Indian reserve
> 4. a member of the extended family living off the reserve
> 5. an Indian living on a reserve
> 6. an Indian living off a reserve
> 7. only as a last resort shall the child be placed in the home of a non-Indian living off the reserve[42]

Reviewing some of the laws of these two communities highlights the emphasis placed on communities caring for children. Both sets of laws acknowledge that a "family" encompasses much more than the nuclear family or blood relatives. The Carcross/Tagish First Nation explicitly says that "Our kwáan (community) is a family."[43] The Spallumcheen Band provides that if a child cannot be placed with their family, the first preference is for a child to be placed with their parents, demonstrating that family means much more than parents. Additionally, they stress the collective responsibility of caring for and protecting children: it is not only the children's parents but the whole community that is responsible for its children.

It is worth noting that many British Columbia First Nations play a role in their community's child protection system through "delegation agreements" as codified by the *CFCSA* or treaties.[44] However, the authority of those nations and delegated agencies are still subject to the *CFCSA* on child protection matters.[45] The Spallumcheen (Splatsin) Band is the only exception, since its bylaws were made through the *Indian Act*.[46]

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40 *Wrapping, supra* note 28 at 19.

41 *A By-Law For the Care of our Indian Children Spallumcheen Indian Band By-Law #3-1980*, s 10(iii) <https://www.mmiwg-ffada.ca/wp-content/uploads/2018/10/P02-03P03P0401_Winnipeg_Exhibit_49_Turpel-Lafond.pdf> [https://perma.cc/XR8M-SBU7].

42 *Ibid*.

43 *Statutes of Government of Carcross/Tagish First Nation, supra* note 38.

44 Amber Prince, "Your Rights On Reserve: A Legal Tool-Kit For Aboriginal Women In BC" (2014) at 60, online (pdf): *Atira Women's Resource Society* <https://www.atira.bc.ca/sites/default/files/Legal%20Tool-kit-April-14.pdf> [https://perma.cc/4WRN-DB6F].

45 *Wrapping, supra* note 28 at 18.

46 *Ibid at 19.*

III. *GLADUE* DECISION AND PARALLELS WITH CHILD PROTECTION

Before exploring the use of *Gladue*-like reports in child protection, it is instructive to review key elements of the *Gladue* and *Ipeelee* decisions, and the reports that have emanated from them. Identifying the principles underlying *Gladue*, *Ipeelee*, and *Gladue* reports illustrates the applicability of the reports in child protection contexts.

In *Gladue,* the Supreme Court outlined the tailored considerations to be applied when sentencing Indigenous offenders, and the rationale behind those considerations – a rationale that, as discussed below, has similar resonance in child protection contexts. The case involved the application of section 718.2(e) of the *Criminal Code*, which mandates restraint in the use of incarceration as a sentence for any offender, and called for specific attention to be given to an Aboriginal offender's circumstances.[47] *Gladue* increased the attention that courts should give, noting that Aboriginal offenders and their communities are often not "well served" by incarceration.[48] Similarly, the child protection system does not serve Indigenous communities well; in fact, it exacerbates the harm felt by children and their communities. The Court further noted that Aboriginal people's "different conceptions of appropriate sentencing procedures and sanctions" have contributed to the "excessive" incarceration of Aboriginal people.[49] The same is true in child protection; Indigenous communities' systems for protecting children stand in stark contrast to the provincial child protection system.

These parallels are deepened in *Ipeelee,* in which the Supreme Court further expounded upon section 718.2(e) and *Gladue.* The Court clarified that when sentencing Aboriginal offenders, judges must consider "the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts." Furthermore, the Court ruled that "the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."[50] Child protection cases also gravely need this analysis. It is essential that judges give serious consideration to the systemic and background factors that impacted the child's caregivers, such as residential schools, intergenerational trauma, or forced relocation.

The Court in *Ipeelee* then proceeded to instruct judges to take judicial notice of matters including:

> "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."

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47 Benjamin Ralston, "*Gladue*: Oft-cited but still woefully misunderstood? Paper prepared for Continuing Legal Education Society of British Columbia, *Gladue* Submissions Course" November 15-16 2018 at 3 [CLE].

48 *R v Gladue*, [1999] 1 SCR 688 at 74, 1999 CanLII 679 (SCC) [*Gladue*].

49 *Ibid* at para 70.

50 *R v Ipeelee*, 2012 SCC 13 at para 59 [*Ipeelee*].

It clarified that such matters "…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."[51] Again, this framework could easily fit child protection contexts. Judges must learn about colonialism's impact on Indigenous children, families and communities, and take judicial notice of it. Like Aboriginal offenders, Indigenous children and caregivers, should to be evaluated within the context of colonization and the harm the State continues to cause rather than have their actions judged in a vacuum. Context will not excuse maltreatment of children, but it may give judges greater insight into the situation and how to address it.

IV. *GLADUE*-LIKE REPORTS IN CHILD WELFARE

While the need for *Gladue*-like reports in child protection is arguably apparent, there is a challenge in identifying what these reports should contain, and how they will work. For these reports to be successful, Indigenous communities who are most familiar with the challenges they face and their community's strengths that can help address the childcare challenges should determine the content and implementation of the reports. Ideally, representatives from various Indigenous communities across British Columbia would form a committee (the committee) to create and implement the *Gladue*-like child protection reports. The provincial and federal governments would need to properly fund this group and compensate representatives for their work.

This paper will outline a proposal for the content of the reports and practical aspects of writing the reports, but it is merely a starting point and should be changed based on the committee's directions. This part of the paper will also review lessons learned from *Gladue* reports in the criminal context.

A. Content of the Reports

The reports should explain how colonialism impacts the child's community and caregivers, the caregiving role of extended family or community members, and the services the family already accessed. It should then recommend programs and strategies to help caregivers address their traumas and issues, so that they can keep their child at home. These ideas stem from *Gladue* reports, and shortcomings of the colonial child protection system. The *Gladue*-like report could contain three main sections: Contextual History, Record of Service Provision, and Healing Plan.

i. Contextual History

The contextual history would contain information about the child, their caregivers and their community, focusing on the continuing impacts of colonialism. Borrowing language from Maurutto and Hannah-Moffat, the goal of this section would be to "situate" caregivers within a "colonial heritage" that placed them "at risk."[52] This section would address the particular

51 *Ibid* at para 60.

52 Kelly Hannah-Moffat & Paula Maurutto, "Re-contextualizing pre-sentence reports Risk and Race" (2010) 12:3 Punishm & Soc 262 at 278.

colonial harms imposed on the child's community, identify the impact of the harms on the community as a whole, and specifically on the child and caregivers. It would identify how colonialism contributed to the caregiver's actions that appeared to have placed the child in danger.

Additionally, this section would explain the role the child's community plays in caring for the child. For example, perhaps a boy moves around every week to aunts or uncles who lovingly care for him, or he lives with his grandparents for months when his mom is unwell. Perhaps the mother has not spoken to her extended family in months and struggles because she cannot rely on them for support. The contextual history would also highlight the role that poverty may play in the parenting concern, to clarify that it is not the same as intentional neglect.

ii. Record of Service Provision

Next, the Record of Service Provision would outline all the services provided to the family, and why they were not adequate to protect the child. This section would examine whether there were substantive or logistical reasons that prevented the caregiver from benefitting from resources. For example, did a mother not attend recommended parenting classes because they were not culturally responsive? Was the instructor relying on racist stereotypes to teach the mother to parent? Did the mother actually wish to attend the classes but was unable to do so because she was working or unable to secure transport to the classes?

The section would also report on any positive steps the caregivers had already taken. For example, perhaps the father was previously drinking alcohol every night but now has reduced his reliance on substances and is only drinking once or twice a week. This section would also look at the services parents accessed independently, to help ensure their efforts are recognized. Perhaps the family reached out to a non-profit or Band Council to inquire about child-care or trauma counselling. The section would offer insight into the shortcomings of the services the caregiver has been given and illustrate efforts caregivers had made to rectify the situation.

iii. Healing Plan

Lastly, the Healing Plan would suggest how to address the harms and unresolved trauma caused by colonialism, as well as any other pertinent parenting issues. Its goal is to keep the child with their caregiver, or if that is not possible, with another family or community member. Subject to the caregiver's consent, the Healing Plan would be grounded in their particular community's laws and heavily involve their community. Healing Plans should be tailored to the child and community in question. It is essential for the Healing Plan to avoid a pan-Indigenous approach. Instead, the report writer should speak with Elders, Knowledge Keepers, or service providers in the particular community to explore their traditions, laws, and suggestions for how the community can support the child and caregiver.[53]

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53 See e.g. *R v Macintyre-Syrette*, 2018 ONCA 259 at 21-23 where the Court noted the *Gladue* report was insufficient because it did not address the submission that "removing an offender from the community is not the traditional way of First Nations." The report did not recommend specific opportunities for the offender to participate in his community's ceremonies, or suggest how such ceremonies could benefit the offender and help him reconcile with his community.

The Healing Plan would contain similar elements to the Aboriginal Cultural Preservation Plan suggested by *Wrapping Our Ways Around Them.*[54] The Healing Plan would consider the community's laws to address the issue, including solutions to the issue.[55] For example, it could suggest a traditional dispute resolution process for that community. For instance, the ShchEma-mee.tkt Project organized by the Lytton, Skuppah and Oregon Jack Creek communities within the Nlaka'pamux Nation organized an ongoing Circle of Care and Accountability process for child protection issues.[56] They facilitated one circle at the community level with emergency response teams, and community supports for substance issues, special needs, and spiritual knowledge. Another circle brought together parents (potentially with their lawyers), extended family, the child welfare agency (potentially with their lawyers), Elders, and community members. The Circles of Care continue until the concerns are resolved.

The Healing Plan would also aim to ensure that caregivers have the opportunity to benefit from culturally appropriate programs and that children can participate in cultural activities. It would identify supports for the child and caregiver, including Elders or cultural supports from the community. If the concerns are grounded in poverty, the Healing Plan will suggest resources to address the specific issue, such as vocational training or food security programs. When caregivers have behaved dangerously, the Healing Plan will not overlook or excuse the behaviour. Instead, it will give families a chance to tackle their issues. *Wrapping Our Ways Around Them* noted that Indigenous families also hold biases, such as not wanting to create tension or a rift within community, so people may be hesitant to challenge parenting practices that are known to be unsafe.[57] The Healing Plan would strive to provide ample opportunities for the caregiver to effectively address issues without shame or blame.

Some caregivers or community members may also be hesitant to raise child-care issues because the community may not be a safe or trusting environment, or because the community does not have the capacity to address the issues. The Healing Plan would take these nuances into account. If the caregiver did not want to involve the community, the Plan could incorporate other available resources and supports. If the community does not have the needed resources, the Plan would suggest the best possible resources. This situation will not be uncommon, as many communities do not have the funding to offer adequate programming for their members. For example, the Canadian Human Rights Tribunal found that Canada's funding for First Nations children living on reserve and in the Yukon is inequitable and discriminatory.[58] The Healing Plan will not hold the lack of available programming against the caregiver.

The Healing Plan should also address follow-up. The Plan should suggest whether, when, and how to check-in with the child and caregiver as they participate in the Healing Plan. Furthermore it would suggest whether, when, and how to follow-up with the child and

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54 *Wrapping*, *supra* note 28 at 89.

55 *Ibid*.

56 *Ibid* at 118.

57 *Ibid* at 46.

58 *First Nations Child and Family Caring Society of Canada et al v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2.

caregiver after the initial concerns have been addressed. Report writers, community members, or social workers could do the follow-up, depending on the needs of the family, and the direction of the committee.

As a whole, the reports would reflect the recommendation made in *Wrapping Our Ways Around Them*. This would allow "the Court, child welfare agencies, parents and Aboriginal communities to work together to ensure that the interests of children are protected and placed at the centre of decision-making, by recognizing an active voice for Aboriginal communities and creating space for Aboriginal ways of making decisions."[59]

B. PRACTICAL ASPECTS OF THE REPORTS

Practically, the courts or the government would need to create a framework that laid out who would be entitled to *Gladue*-like reports in child protection settings and who would write the reports. This framework would also have to consider how to foster the trust and involvement of Indigenous communities and specific children and caregivers.

i. Entitlement to Reports

This paper proposes that all Indigenous children would have access to a *Gladue*-like report, according to the *CFCSA*'s definition of an Indigenous child. This includes First Nations, Nisga'a, and Treaty First Nation children. It also includes children under 12 who have a biological parent of Indigenous ancestry, including Métis and Inuit, who consider themselves to be Indigenous, and children over 12 of Indigenous ancestry, including Métis and Inuit, who consider themselves to be Indigenous.[60] A child separated from their Indigenous culture, would still be entitled to a *Gladue*-like report.

If the child is old enough to give consent, they would have the option of opting out of the report. If the child is too young to consent, the caregiver would have the ability to opt-out of the report. If the child is old enough to consent but disagreed with the caregiver about whether they wish to have a report, the report writer would first try to understand why the person is opposed to the report and see if there is a way to address their concerns. However, at times it may not be possible to agree. The committee would create rules on if and how to write reports when the child and caregiver disagree about whether to obtain or opt-out of the report.

ii. Report Writers

The success of the reports largely hinges on report writers. Report writers have to be able to write clear, insightful reports with helpful and practical recommendations. The report writers would have to be certified through specialized training programs. The training programs should be offered in-person across the province and online, so people living throughout British Columbia can take the training, regardless of whether they have reliable internet access. Training would cover the legacy of colonialism, the structure of the provincial child protection system, children's developmental and safety needs, examples of some Indigenous

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59 *Wrapping*, *supra* note 28 at 4.

60 *CFCSA, supra* note 29, s 1.

communities' conceptualizations of family and child protection, and trauma-informed interviewing. It would also teach writers about the required content of the reports, and how to effectively write them. Ideally, the writers would be Indigenous, but if that is not feasible, then non-Indigenous people could also author reports, provided they have demonstrated cultural sensitivity and proficiency. Funding will be central in determining the success of the reports. Ideally, the Legal Services Society of British Columbia would fund the reports, with additional funding from the provincial and federal governments. Social workers play a critical role in child protection, so it would be important to ensure they believe in the *Gladue*-like reports' importance. They might support the reports as it will ease their workload because outside authors will write the reports. Social workers will be able to learn a great deal by reading the reports.

iii. Fostering Trust of Communities and Families

The program will have to gain the trust of children, caregivers, and communities for them to wish to participate in the report process and fully engage with it. Many communities and individuals are distrustful of both MCFD and the court system, because of the history of institutional abuse at residential schools and within the child welfare and criminal justice systems.[61] The committee will have to consider how to overcome this distrust. It will likely involve the program being visibly directed by the committee, and implemented by people whom individuals and communities do not already distrust.

For example, the committee will have to decide whether the MCFD social workers should be involved with any aspects of the reports or whether the processes should remain distinct. MCFD or delegated agency social workers conduct assessments once an issue puts a child's safety into question. They decide whether the child is in danger and whether they need to further investigate. In the investigation, social workers gather information from different places, including the caregiver, the child, and other relatives or caregivers.[62] For Indigenous children who receive *Gladue*-like reports, there will likely be an overlap between the report writer's and social worker's conversations. It may seem efficient to have the report writer accompany the social worker, but this may cause people to distrust the report writer.

iv. Admissibility of the Reports

For the reports to be effective, they will have to be deemed admissible by judges. The reports would contain hearsay evidence, which is generally not admissible. A distinction between child protection and sentencing proceedings is that section 723(5) of the *Criminal Code* states that "[h]earsay evidence is admissible at sentencing proceedings", while no such clear rule exists in child protection. Ideally, the legislature would amend the *CFCSA* to state that such evidence is admissible, as it has in sentencing proceedings. Even in the absence of such an amendment, however, there is a range of other potential solutions. Section 68(2) of the *CFCSA* permits the court to admit any hearsay evidence it considers reliable or any reports it considers relevant, and counsel may be able to have such reports admitted under either of those provisions.

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61 *Wrapping*, *supra* note 28 at 45.

62 "Child protection process", online: *Legal Aid BC Family Law* <https://familylaw.lss.bc.ca/children/child-protection/child-protection-process> [https://perma.cc/4THT-TJYC].

C. Lessons Learned from *Gladue* Reports

To enhance the efficacy of *Gladue*-like reports in child protection, we can use the lessons learned from some of the challenges with traditional *Gladue* reports. Five lessons are discussed in this paper:

1. The reports need to identify solutions;
2. The reports need to be culturally specific;
3. The reports need to be accessible to all Indigenous children within a reasonable time frame;
4. The reports do not need to demonstrate a link between systemic and background factors and the parenting concern;
5. The reports need to have and meet provincial standards.

First, the Healing Plans need to be robust enough to address the issues outlined in the contextual history, to address the concern of highlighting problems without generating solutions. In his research on *Gladue* reports, Benjamin Ralston noted that at least as much attention should be paid to the proposed sentencing and sanctions as to the systemic and background factors.[63] Reports should support families moving forward, not hold them back.

Second, the reports should be grounded in the specific community's or nation's laws, customs, practices, and traditions.[64] A pan-Indigenous approach is insufficient. Healing Plans that do not incorporate relevant legal traditions will be insufficient. Few sentencing decisions have specifically noted Indigenous legal traditions, which may stem from *Gladue* reports not adequately explaining the laws.[65] However, there have been some promising exceptions, which *Gladue*-like reports in child protection can build on. For example, in *R v. Itturiligaq*, when applying *Gladue* principles, the court explored Inuit Qaujimajatuqangit (societal values), which, when factored in, helped create a just and fit sentence.[66]

Third, the legislature or court should not replicate the limited availability of and long wait times for *Gladue* reports. Full reports must be accessible to all who want them across the province. It is common for a "*Gladue* factors" section to be inserted into pre-sentence reports (PSR) in the criminal context.[67] Just as that is inappropriate in the criminal context, it will also be inadequate for social workers to add a few sentences about the impact of colonialism or culturally responsive programming options into their care plans or recommendations. Report writers should be situated to write reports that better describe the Indigenous social

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63 Benjamin Ralston, "Paper prepared for the Legal Services Society of British Columbia's *Gladue* Writers Conference" 22-23 November 2018 at 8 [Writer's Conference].

64 *Ibid at 9*.

65 *CLE, supra* note 46 at 17.

66 *R v Itturiligaq*, 2018 NUCJ 31 at para 62.

67 David Milward & Debra Parkes, "*Gladue*: Beyond Myth and towards Implementation in Manitoba" (2011) 35:1 Man LJ 84 at 88.

circumstances and culturally appropriate resources than what social workers currently write. The committee, in cooperation with the courts and MCFD, will need to determine whether the reports should be substituted for social workers' reports or care plans, as *Gladue* reports are sometimes used in place of PSRs.[68] Regardless, the reports must be accessible to children and caregivers who live on reserve, off-reserve, in rural areas, and in urban centres.

The report writers must prepare child protection *Gladue* reports quicker than *Gladue* reports currently are currently prepared, particularly if children have already been removed from their home. It is common for offenders to be in custody for longer than would otherwise be necessary while waiting for their *Gladue* reports.[69] At times, offenders waive their right to a *Gladue* report to be released from pre-custody detention sooner.[70]

In the child protection context, it is essential that waiting for reports does not result in kids remaining in care, away from home, for longer. Each day away from their caregiver results in lost family and cultural bonding time, and trauma for the child and their caregiver. Further, temporary custody orders can be extended, and may form the status quo, eventually becoming permanent through adoption.[71] Section 43 of the *CFCSA* lays out time limits for temporary custody orders ranging from 3 to 12 months, depending on the child's age.[72] The reports would ideally be written within the time limit, hopefully preventing the extension of the orders. Ultimately, this will come down to governments providing sufficient funding to create a robust network of funded report writers.

Fourth, the reports do not need to show a "causal connection" between systemic and background factors and the caregiver's seemingly dangerous behaviour. Many lower courts required *Gladue* reports to make such a link,[73] but the Court in *Ipeelee* clarified that direct causation was unnecessary.[74] Further decisions have explained that no link or causal connections are needed for *Gladue* principles to apply.[75] Courts considering *Gladue*-like reports in child protection can borrow from the *Gladue* jurisprudence, and consider systemic and background factors, whether or not they are directly linked to child protection concerns.

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68 Patricia Barkaskas et al, "Production and Delivery of Gladue Pre-sentence Reports: A Review of Selected Canadian Programs" (2019), online: *International Centre for Criminal Law Reform & Criminal Justice Policy* <https://icclr.org/2020/02/26/production-and-delivery-of-gladue-pre-sentence-reports-a-review-of-selected-canadian-programs/> [https://perma.cc/9H77-3G2N].

69 "Report of Proceedings" (2018) at 25, online (pdf): *British Columbia Eleventh Justice Summit: Indigenous Justice II* <https://www.justicebc.ca/app/uploads/sites/11/2019/02/eleventh-summit-report.pdf> [https://perma.cc/HAL6-7ACU].

70 *Ibid*.

71 *Wrapping*, *supra* note 28 at 77.

72 *CFCSA, supra* note 29, s 43.

73 See e.g. *Writer's Conference*, *supra* note 62 at 5.

74 *Ipeelee*, *supra* note 49 at paras 81-83.

75 *R v Joe,* 2017 YKCA 13 at para 77.

Fifth, provincial standards for the application and content of the reports must be created and met. There are no national standards for applying *Gladue* in the criminal context, which has led to the reports not being used when they should be, and a lack of follow-up being offered, both to the offender, and to the report writers who witness and discuss serious trauma on a regular basis.[76] The committee should create standards including who can request a report, maximum wait-times for the reports, the content of the reports, and follow-up for children, caregivers, and writers. It is imperative that the provincial and federal governments adequately fund the program to ensure these standards can be satisfied.

Incorporating these lessons will hopefully amplify the anticipated positive impacts of *Gladue*-like reports on Indigenous children and families, which are explored in the next section.

V. THE POWER OF *GLADUE*-LIKE REPORTS IN CHILD PROTECTION

Gladue-like reports in child protection could have a massively positive influence on Indigenous children, their families, and their communities. Five primary potential benefits are likely to flow from the reports. The author recommends a pilot project to better evaluate the impact of the reports.

A. Education of Social Workers and Judges

First, the reports could educate social workers and judges without relying on a pan-Indigenous approach.[77] Each report would be unique to that child's community, teaching social workers and judges about colonialism's impact on that particular child and community. This would situate caregivers in the appropriate context, and help ensure that colonialism's legacy is not forgotten when social workers and judges make their decisions. This hopefully will lead to decisions and recommendations with better outcomes for children. For example, a judge might hesitate to impose a custody order separating a child from their family after reading about a community's history of its children being forcibly removed from their parents.

The reports would also help fulfill the Truth and Reconciliation Commission of Canada's (TRC) Calls to Action 1(iii) and 1(iv) by contributing to social workers' training on the history and impact of residential schools, and on the potential for Aboriginal communities to provide appropriate solutions for healing.[78] The reports would also make strides toward TRC Call to Action 4(ii) by providing child-welfare agencies and courts with the information they need to take the legacy of residential schools into account in their decision-making.[79]

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76 Catherine Lafferty, "Standards still lacking for Gladue reports, meant to support Indigenous people in the justice system, say legal experts", *The Star* (13 Dec 2020), online: <https://www.thestar.com/news/canada/2020/12/13/standards-still-lacking-for-gladue-reports-meant-to-support-indigenous-people-in-the-justice-system-say-legal-experts.html> [https://perma.cc/UE7D-R7KD].

77 Rosner, *supra* note 2.

78 *Truth and Reconciliation Commission of Canada: Calls to Action* (2015), online (pdf): <http://nctr.ca/assets/reports/Callsto Action English2.pdf> [https://perma.cc/EM7E-8GXW] [*TRC*].

79 *Ibid, at 1*.

B. Shifting the Focus to the Best Interests of the Family

Second, the reports would shift the focus to best interests of the family, from the current Eurocentric interest of the best interests of the child.[80] The reports would recognize that a child's family can be much larger than their nuclear family, or even their blood relatives. The contextual history could describe the collective nature of caregiving for the child. Then, the Healing Plan would outline ways to support all the caregivers, such as connecting them with alcohol and drug counselling, which will significantly benefit the children. Focusing on the best interests of the family would not ignore the child's best interests; it instead recognizes that the child and their family's best interests are inextricably linked, however the community conceives of their family (i.e. if a family is thriving, it is likely their child will thrive too; if a family is struggling, their child will probably also struggle).

C. Addressing Root Causes of Caregivers' Dangerous Actions

Third, the reports would provide caregivers with the opportunity to protect their children by addressing the root causes of their actions that are endangering their children. This has the potential to have long-term positive impacts on an entire community. This is different from the current system, which often removes children without fully considering why a caregiver acted in a particular way.[81]

Consider the hypothetical example of MCFD apprehending the son of an Indigenous mother who MCFD believes drinks excessively and neglects her son. In this situation, a report could show that the mother is a Sixties Scoop survivor, whose parenting style often replicates the way she was parented. This may lead to her sometimes overlooking her child. The mother's drinking is a form of self-medication in response to abuse she faced in her Sixties Scoop placement. The Healing Plan would recommend the son stay with his mother if she attends parenting classes designed for Sixties Scoop survivors, trauma counselling and alcohol counselling, and is supported by specified community members. Through these resources, the mother could learn new parenting strategies and ways to process her own trauma without endangering her son. This would allow her son to remain with his family and maintain cultural connections, rather than enter the harmful child protection system and become caught up in the same cycle of abuse and substance issues as his mother. *Gladue*-like reports could reduce the devastating cycles of involvement with the child protection system, and the negative outcomes associated with it.[82]

The Healing Plan would not only be more comprehensive and culturally specific than plans typically created by MCFD social workers, but it would ideally be grounded in trust amongst the caregiver, child, and community. The parties' current trust issues are a serious obstacle to creating the best environment for the child. For example, some parents report that they do not feel they can be honest with social workers because they fear the repercussions.[83] Reports written by authors whom the children, caregivers, and communities generally trust could produce more fulsome and beneficial recommendations.

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80 Rosner, *supra* note 2.

81 Ibid.

82 *Wrapping*, *supra* note 28 at 97.

83 *Pathways, supra* note 1 at 27.

D. Preventing Cultural Misunderstandings

Fourth, the reports would limit cultural misunderstandings, increasing the likelihood of children staying in their homes or family reunification if children have already been removed. The reports would recognize the validity of different caregiving practices in communities, such as multiple family members caring for a child. The reports would help prevent social workers from misunderstanding these practices as harmful to a child. For example, the contextual history could describe how a child benefits from moving between households in his community, such as learning cultural practices that his parent is not familiar with, or having more adults to confide in if something is wrong. The context provided by reports could help increase the number of children raised by their family, rather than by outsiders.

E. Increasing Investment in Preventative and Culturally Responsive Programming

Fifth, the reports may lead to increased investment in preventative and culturally-responsive programming. If reports continually highlight that a particular community lacks an important resource, the judges and social workers reading those reports might advocate for MCFD or another governmental agency to provide that community funding to develop the resource. Alternatively, communities may wish to assess the reports produced about children from their community, which may also shed light on specific resources that are needed.

For this benefit to be realized, the provincial and federal governments must adequately fund the programs that address the specific needs of Indigenous communities. This would facilitate the attainment of TRC Call to Action 5, for the federal, provincial, territorial and Aboriginal governments to develop culturally appropriate parenting programs for Aboriginal families.[84] Overall, *Gladue*-like reports would help ensure more Indigenous children stay with their families and connect them with resources that will enhance caregivers' abilities to protect their children.

F. Pilot Project

These benefits are anticipated based on an understanding of the current child protection system and the identified benefits of *Gladue* reports in the criminal context. However, this is uncharted territory. The reports may have other positive consequences, or perhaps unexpected negative repercussions. It seems worthwhile to run a pilot project that enabled a random sample of Indigenous children to receive such reports, recognizing that there may be fairness implications in the short-term for families not in the project. The project could collect data on the outcomes of those children. Additionally, the project could speak with the children (depending on their ages), caregivers, communities, child protection agencies, and judges to learn about how the reports were effective, and how they could be improved. Best practices for the reports would then evolve based on the project to facilitate the reports' greatest possible impact.

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84 *TRC, supra* note 77 at 1.

VI. LEGAL FRAMEWORK TO MANDATE *GLADUE*-LIKE REPORTS

The benefits of *Gladue*-like reports appear significant, so the pressing question is how to change the current legal framework to make such reports mandatory in Indigenous child protection matters. There are two potential pathways to reforming the law: amending the *CFCSA* and expanding the use of *Gladue* reports through parents' counsel introducing the reports.

A. Amending the *CFCSA*

First, amendments to the *CFCSA* could lead to *Gladue*-like reports becoming mandatory, paralleling how *Gladue* reports became necessary in light of s. 718(2)(e) of the *Criminal Code*. Métis family lawyer Frances Rosner has advocated for shifts in the *CFCSA* from permissive to binding language, using *must* rather than *should*, in sections regarding Indigenous children.[85] This may be the most efficient strategy given that the *CFCSA* already has sections that encourage (but do not require) the consideration of many factors that the reports would explore.

Today these provisions are often not given much weight, but they would likely be more effective with mandatory language. For example, *should* in section 2(c) of the *CFCSA* (the provision setting out the guiding principles of the act) could be amended to *must*. The provision would read, "if, with available support services, a family can provide a safe and nurturing environment for a child, support services *must* be provided."[86] The Healing Plan would help fulfill this provision by outlining appropriate support services, and the law would ensure that the government provided the family said services. Similarly, changing *should* to *must* in section 3(b) (the provision setting out principles of service delivery) would make it read "Indigenous people *must* be involved in the planning and delivery of services to Indigenous families and their children."[87] The Healing Plan would fulfill the requirement of involving Indigenous people in the planning of services because writing a Healing Plan requires direction from Knowledge Keepers, Elders, family members and service providers in each child's Indigenous community.

Mandatory language would also require that judges adjudicating child protection issues consider the issues that the reports would address. For example, with mandatory language section 3(c.1) (the provision setting out principles of service delivery) could read, "the impact of residential schools on Indigenous children, families and communities *must* be considered in the planning and delivery of services to Indigenous children and families."[88] If such information was not evident in the report, a judge would be required to ask the child welfare agency how the impact of residential schools was considered in their plan. However, thorough reports should address this and other questions, so the judge would know they were complying with the law.

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85 Rosner, *supra* note 2.

86 *CFCSA, supra* note 29, s 2(c).

87 *Ibid,* s 3(b).

88 *Ibid,* s 3(c1).

A limitation of the language shift is that the *CFCSA* would still not consider the collective nature of caregiving in many Indigenous communities. Ideally, the legislature would add a provision to section 4, which sets out factors of a child's best interest, recognizing that an Indigenous child's best interests are inextricable from those of its family and community. This would enable the best interest concept to be more culturally sensitive. Healing Plans would aim to protect the child's best interests, recognizing that their interests are deeply connected to the interests of their family.

Amending the language of the *CFCSA* is likely the best option. Then, a ruling from a court that comprehensive *Gladue*-like reports are helpful or even necessary to comply with the *CFCSA* could provide the impetus for LSS or a government body to provide funding. However, it may be possible to introduce *Gladue*-type reports through the adversarial process, even without legislative amendments.

B. Expansion of *Gladue* Reports

The second way to mandate *Gladue*-like reports in child protection is for counsel to introduce them in their cases, without *CFCSA* amendments. This expanded use of *Gladue* reports would come in the midst of growing acceptance of *Gladue* factors in non-criminal contexts.

To date, the child protection process does not use *Gladue* reports. To prepare for this paper, the author conducted extensive research on the use of *Gladue* reports in civil cases. The research found no child protection case where a party created a *Gladue* report, which is likely a function of the expenses and resources required to write such a report, and the novelty of the proposed use of *Gladue* reports in this context.

However, the jurisprudence is quite promising as it discloses an expanding scope of influence for *Gladue,* which a court could expand to include the child protection context. For example, in *Alberta (Child, Youth and Family Enhancement Act, Director) v. JSA*, a child protection case regarding an Indigenous child, the mother's counsel encouraged the court to consider *Gladue* factors.[89] The court differentiated the child protection matters from criminal matters. Still, it noted that courts should consider *Gladue* factors in the context of the child protection agency's obligation to provide services to assist the family.

There are also other civil cases, unrelated to child protection, where courts have considered *Gladue* factors. The paper will briefly review three of them. In *O'Shea v. Vancouver (City),* an Indigenous plaintiff sued the Vancouver Police Department but failed to provide the City with the required notice.[90] Justice L.N. Bakan considered the *Gladue* principles as they applied to the plaintiff, and ruled that the plaintiff had a reasonable excuse for not providing the notice in the right time frame.[91] In *Law Society of Upper Canada v. Batstone,* a professional misconduct case against an Indigenous lawyer, Chair Wright considered *Gladue* principals, which contributed to a less severe penalty.[92] In *United States v. Leonard,* an extradition case

89 *Alberta (Child, Youth and Family Enhancement Act, Director) v JSA*, 2019 ABPC 32 at para 15.

90 *O'Shea v Vancouver (City)*, 2015 BCPC 398 at para 100.

91 *Ibid*.

92 *Law Society of Upper Canada v Batstone*, 2015 ONLSTH 214 at para 12, [2015] LSDD No. 263.

regarding two Indigenous accused, the court that held *Gladue* principals were relevant in considering *Charter of Rights and Freedoms* arguments, which led to the court setting aside the surrender order.[93]

Generally, support for increased use of *Gladue* principles is rising. As the Alberta Court of Queen's Bench recently stated:

> … it is time that we recognized that *Gladue* and *Ipeelee* should be taken for more than tokenism, and we should recognize what we have done to Aboriginal peoples, and we should attempt, through any means that we can, to re-establish and assist in re-establishing the culture, which worked quite well before we got here.[94]

If counsel provided complete *Gladue* reports in child protection cases, this would be a strong option. However, the reports are costly, and it would be difficult to secure funding to do so in the short term. A practical option is for counsel to start by raising *Gladue* principles and aspects of healing plans more frequently, to show the utility of such information. Over time, judges, social workers, and policymakers will arguably recognize the value of this type of reporting structure, and they may create a scheme for the creation of reports for every Indigenous child.

VII. COMPLIANCE WITH INTERNATIONAL LAW

While a robust analysis of international child protection law is beyond the scope of this paper, it is instructive to briefly consider the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) and the *United Nations Convention of the Rights of the Child* (UNCRC). *Gladue*-like reports would assist both Canada and British Columbia in complying with these international instruments.

A. United Nations Declaration of the Rights of Indigenous Peoples

UNDRIP establishes standards to achieve the human rights of Indigenous peoples, and to preserve their cultures, traditions, and law.[95] Canada is a full supporter of UNDRIP, and in December 2020 the federal government introduced legislation to implement UNDRIP, though at the time of writing this paper it has not yet been passed.[96] Provincially, UNDRIP is close to becoming binding law. Recently, British Columbia passed Bill 41, which legislates that "the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."[97] Courts must now interpret British Columbia's laws to be in line with UNDRIP.

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93 *United States v Leonard*, 2012 ONCA 622 at para 1.

94 *R v Holmes*, 2018 ABQB 916 at para 8.

95 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UNGAOR, 61st Sess, Supp No 53, UN Doc A/61/295 (2007) [*UNDRIP*].

96 Russ Diabo, "Federal UNDRIP Bill C-15 is an attack on Indigenous sovereignty and self-determination: Opinion", *APTN News* (21 Dec 2020), online: <https://www.aptnnews.ca/national-news/undrip-bill-c-15-federal-government-soverignty-russ-diabo/> [https://perma.cc/JWT4-46ZZ].

97 Bill 41, *Declaration on the Rights of Indigenous Peoples Act,* 4th Sess, 41st Parl, British Columbia, 2019, s 3.

The provincial and federal governments have a range of obligations regarding child protection under UNDRIP. Article 7(2), deals with rights to live freely and securely as distinct peoples, and article 8, deals with cultural destruction.

Article (7)2 states that:

> Indigenous Peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.[98]

Article 8 states that:

> Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.[99]

The strong wording of these provisions arguably makes any provincial law that allows child protection agencies to remove Indigenous children from their own group (or community) inconsistent with UNDRIP and British Columbia's new legislation. *Gladue*-like reports could enable the British Columbia government to meet its obligations, by exploring all options that would allow a child to stay in their community, including suggesting resources for the caregiver, or identifying other community members who can care for the child. Further, the articles provide that it is incumbent upon the government to build systems that prevent Indigenous children from forced assimilation and depriving children of their culture.[100] *Gladue*-like reports and assessments of the reports could identify gaps in culturally-responsive programming that the government should provide the funding to fill, to prevent children from being taken from their homes and being assimilated into a foreign community in violation of articles 7(2) and 8 of UNDRIP.

B. United Nations Convention of the Rights of the Child

The UNCRC also contains provisions that protect Indigenous children. Canada has ratified the UNCRC, indicating its support for the Convention.[101] While it is not binding law, courts should interpret the *CFCSA* in a way that is consistent with the UNCRC.

UNCRC provisions impose many obligations on Canada and its child protection systems, including article 5, which addresses the rights of families to help protect their children's rights, and article 30, which addresses children's rights to their own culture, language and religion.

Article 5 states that:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible

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98 *UNDRIP*, *supra* note 94, art 7(2).

99 *Ibid, art 8.*

100 *First Nations Child & Family Caring Society of Canada et al v Attorney General of Canada (Minister of Indigenous and Northern Affairs Canada),* 2018 CHRT 4 at para 76.

101 *United Nations Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 [*UNCRC*].

> for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the right recognized in the present Convention.[102]

Article 30 states that:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.[103]

These articles recognize the right of extended families and communities to care for their children. Further, they provide that states have a duty to respect the rights and responsibilities of the child's parents, extended family and community. The contextual history section of the report would illustrate the role that families and communities play in caring for their children, making it easier for courts to uphold their right to do so, rather than removing children and interfering with communities' rights.

Additionally, the articles clarify that a state should not deny children their right to enjoy their culture or use their own language. Implementing reports with Healing Plans that provide children with an opportunity to maintain their connection with their culture would help fully realize children's rights to their culture and language.

It is also possible that *Gladue*-like reports would help the federal and provincial governments comply with domestic legal obligations, such as those under section 35 of *The Constitution Act, 1982*. Additionally, the reports may help governments meet the recommendations of The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.[104] This is also beyond the scope of this paper, but deserves further research.

VIII: POTENTIAL CRITICISMS OF USING *GLADUE*-LIKE REPORTS IN CHILD PROTECTION

There are two main potential criticisms of using *Gladue*-like reports in child protection. First, some may argue that law reform that does not result in nations being completely in control of their own child protection system is unacceptable. For instance, the UBCIC's report on child protection asserted that child welfare systems need to flow from recognition of a nation's self-governance, jurisdiction and authority.[105] It also stressed that Indigenous nations have their own laws, traditions and customs to protect their kids, which delegated agencies likely interfere with.[106]

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102 *Ibid, art 5.*

103 *Ibid, art 30.*

104 *Master List of Report Recommendations* (2019), online: *The National Inquiry into Missing and Murdered Indigenous Women and Girls* <https://www.mmiwg-ffada.ca/wp-content/uploads/2019/06/National-Inquiry-Master-List-of-Report-Recommendations-Organized-By-Theme-and-Jurisdiction-2018-EN-FINAL.pdf> [https://perma.cc/8VFY-K23N].

105 *Calling Forth*, *supra* note 10 at 13.

106 *Ibid*.

However, one of the main nuances this criticism fails to consider is that it will realistically take a long time before all Indigenous nations completely control their own child protection systems. *Gladue*-like reports are not a replacement for self-governance; they are an interim solution striving to incorporate as much involvement and direction from Indigenous nations as possible. The reports would recognize the importance of Indigenous legal orders and traditions, and encourage child protection systems and courts to do the same. Healing Plans crafted appropriately will resemble how the community itself would respond to the child protection concern. *Gladue*-like reports would aim to support Indigenous children and their families until nations have full jurisdiction over child protection.

On the other hand, the second foreseeable criticism is that it is unfair for Indigenous people to receive "special treatment" by the courts. People may believe in the importance of formal equality, that the law ought to treat everyone identically.

One can find counter-arguments to this criticism in the case law on *Gladue* reports, which were subject to the same critique. For example, in *Gladue*, the Court stated that the "fundamental purpose of section 718.2(e) is to treat aboriginal offenders fairly by taking into account their difference."[107] The difference of the numbers of Indigenous children in the child protection system, that they are 15 times more likely to enter governmental care than non-Indigenous children, cannot be overlooked, and must be specifically addressed.[108]

CONCLUSION

The child protection system is crying out for reform. Another generation of Indigenous children is again suffering at the hands of the colonial government. *Gladue*-like reports have the potential to transform the system by recognizing the impact of colonialism on Indigenous communities, as well as the power of Indigenous nations and communities' laws, customs and traditions to care for children. The mother whose comments opened this paper was robbed not only of her childhood, but also of motherhood. With the current child protection system, the same will likely be true for her children. While they will certainly not solve every or even most problems facing Indigenous children, *Gladue*-like reports have the potential to enable more Indigenous children to remain safely in their communities. These reports might also significantly curtail the negative outcomes currently associated with the child protection system, and increase positive outcomes for children and their communities. They also have the potential to improve compliance with domestic and international legal obligations, and to take strides to protect Indigenous children's rights to their culture and homes.

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107 *Gladue, supra* note 47 at para 87.

108 *Indigenous Resilience*, *supra* note 3 at 15.