



## **Précis Paper**

### **Reducing Indigenous Prison Rates**

A discussion about the overrepresentation of incarcerated Indigenous offenders in Canada, the effectiveness of various state/national initiatives (including a comprehensive review of the Gladue Report) and similarities between the Canadian and Australian criminal justice system.

#### **Discussion Includes**

- The data disparity
- Canada's criminal justice system
- Canada's criminal justice history
- The state's response
- Aboriginal Legal Services
- S 718 of the Criminal Code
- The Gladue decision
- Justice Sheppard's efforts
- Pre-sentencing reports

## Précis Paper

# Reducing Indigenous Prison Rates

1. In this edition of BenchTV, Thalia Anthony (Professor at UTS faculty of law) and Jonathan Rudin (Director of Aboriginal Legal Services in Ontario, Canada) discuss the worsening Indigenous overrepresentation trend, organizational responses and ways to humanize offenders instead of viewing them as a 'cipher'. There will be a specific focus on similarities between Canada and Australia's criminal justice system.

### The data disparity

2. Approximately 30% of Canada's Indigenous people have been incarcerated. However, the community only makes up 4% of the national population. The Supreme Court of Canada has labelled the overrepresentation as a 'national disgrace'.

### Canada's criminal justice system

3. Canadian criminal law follows a nationalised model - 1 criminal code. However, territories differ in terms of administration. Canada and Australia share the following similarities - colonisation, segregation-centred policies, protectionist measures, land grabbing and the domination of Christianity. Imprisonment is an outcome of this institution-generated damage.

### Canada's criminal justice history

4. Canada's residential school system had transparent genocidal motives - *"take the Indian out of the child"*. The country's political attitude is against this increasingly marginalised community.

### The State's response

5. *"The reaction of the state to Indigenous people who commit crime is much more frequently to resort to imprisonment"*. The lack of legal accessibility continues to be a "systemic factor"/issue which leads to prolonged periods in prison.

### Aboriginal Legal Services

6. Aboriginal Legal Services (ALS) is *"not a lawyer-heavy organisation"*. It aims to help the community navigate through various aspects of the legal process. Priority is given to inquests and attempts to lessen sentences for those found guilty. ALS has worked on a range of iconic cases like 'Williams' (1998) and 'Gladue' (2013). The organisation's work is primarily in court.

#### S 718 of the Criminal Code

7. In the late 1980s, the Canadian system reviewed the sentencing process and reformed s 718 (and others) of the Criminal Code, to better guide judges and their approaches to sentencing. Subsequently, judges began to resort to alternative (non-imprisonment) punishments, placing the legal concepts of 'proportionality' and 'restraint' at the forefront.

#### The Gladue Decision

8. The Gladue decision captured an immense degree media attention and public interest. It taught the system to pay attention to an individual's personal experiences, upbringing and other systemic issues, instilling a holistic humanitarian element. In turn this positive change reflected in sentences which had strong potential for judicial discretion.
9. *"The criminal justice system is a very cumbersome slow ship..."*. There was an underlying communication issue. Whilst the Supreme Court encouraged legal change, they did not provide a sufficient degree of direction.
10. Following the Gladue decision, the ALS actively tried to send the public message that the legal system has not majorly changed. During a legal conference in September of 2000, the idea of a court which exclusively caters to Indigenous people was proposed. Efforts were taken to establish the court over the next year.
11. The Gladue Report has been subject to multiple changes over the years. These narrative-style reports are written by Indigenous people and they aim to go back as far as possible to understand the grassroots dimension of this systemic issue. *"We let people tell the story"*, hence it is an edited compilation of first-hand experiences and knowledge. It largely works because storytelling is a core pillar of Aboriginal culture,
12. The Gladue Report prides itself on frequent client engagement, ongoing support and its motive to understand Indigenous people rather than simply acting as a legal data

collection agency. Their services are even valued once an individual has reached the endpoint of their legal battle.

13. *"The availability of Gladue Reports is not universal"*, thus accessibility issues are raised once again. Bail alternatives are currently being looked into as an alternative to people unnecessarily being kept in remand who *"tend to plead guilty"*.
14. Clients who engage with Gladue Reports are now showing a stronger belief in the legal system, are more trusting and patient. However, there is still much more room for improvement.

#### Justice Sheppard's efforts

15. Justice Sheppard dedicated efforts to creating a Indigenous court. and quickly gained approval. It was termed the 'Gladue Court'. Once the court reached the operational stage, the founding members proposed a new idea - pre sentencing reports which provide judges with an idea of the guilty party's life journey and all the negative external factors attached to it.

#### Pre-sentencing reports

16. The pre sentence reports were criticised for being disjointed and often containing information that its irrelevant and/or unneeded. They are also often reliant on 'risk assessment tools' which are inherently known to be against the best interests of the Indigenous community.
17. Static (fixed factors like ethnicity) and dynamic (changing factors such as financial status) factors have created many 'risk assessment-related' flaws in the system. For example, the model illogically concluded that an Indigenous Crown attorney was more likely to re offend than a convicted sexual predator - *"this is a great example of the systemic discrimination"*.
18. Canada's sentencing process is known to consume only a brief amount of time. Often for the purpose of efficiency, those who stand before the court are viewed as 'ciphers' instead of individuals with unique life stories and circumstances. In essence, the Gladue Report aims to overcome this issue.
19. The 'Ipeelee' case helped the Supreme Court (Canada's highest ranking court) to determine the two most important elements of sentencing:

1. 'Gravity of the offence'
  2. 'Moral blameworthiness of the offender' (it was assumed by courts prior to the existence of the Gladue report)
20. The Gladue Report concept is going to be trialled among 40 clients in Australia, to enable "the voices. of those who are impacted by the criminal justice system before sentencing". The ultimate goal is to increase de carceration rates. The general consensus among female Indigenous offenders in Australia, is that the mindsets of judges are already pre-determined and biased. Consequently, there is a lack of confidence in the legal system and *"the whole notion of justice being delivered"*.
21. An example of a Gladue report is appended to this precis paper.

## BIOGRAPHY

### Thalia Anthony

Professor at UTS Law, Sydney

Thalia's research specialises in legal areas surrounding Indigenous people and the broader criminal justice system. She completed her PhD in law at the University of Sydney in 2010. Over the years, she has contributed quality advice and research output towards High Court trials, Royal Commissions, Aboriginal Justice Agreements and bail applications. Her legal opinion and commentary has consistently been valued by media entities and public interest organisations, and she continues to liaise and collaborate with a range of Indigenous advocacy groups like UTS Jumbunna and Aboriginal Legal Services.

### Jonathan Rudin

Director at Aboriginal Legal Services in Ontario, Canada

After graduating with a LLB and LLM from Osgoode Hall Law School, Jonathan's career has heavily revolved around Aboriginal Legal Services. He was involved in drafting the Royal Commission on Aboriginal Peoples' report on Justice (Bridging the Cultural Divide) and has been a long time member of the Research Advisory Committee of the Ipperwash Inquiry. Jonathan is also renowned for representing Aboriginal Legal Services during the Supreme Court trial of *R v. Ipeelee*.

## BIBLIOGRAPHY

### Focus Case

*R v Gladue* [1999] 1 S.C.R. 688

### Cases

*R v Ipeelee* [2012] 1 S.C.R. 433

*R v Williams* [1998] 1 S.C.R. 1128

### Legislation

S 718 of Criminal Code R.S.C., 1985