February 26th 2014 – Changing Legal Landscapes

Changing Legal landscapes → Drybones

- R.v. Drybones (1970)
- The drybones case was 1970 1st instance
- Was found intoxicated outside the reserve in a hotel lobby,
- Contrary to sec. 94 of the Indian act → they could not drink outside the reserve (1970)
- Punishment for this was harsher for natives than non-natives, because he plead guilty he was sentenced to pay a fine or stay 3 days in prison
- Canada bill of right (1960) provided for the right of 'equality before the law'
    - What the equality before the law meant was that 'individuals are entitled to have a law applied as it exists equally to all the people it is intended for'
- The court found that the Bill of rights – should apply to all laws of Canada
- Courts themselves are where those rights are recognized, courts should refuse to apply any law that infringes on rights and freedoms
- Thus, sec. 94 was deemed inoperable
- This was the only case where the court used the bill of rights equality provisions to make another statute inoperable

Changing Legal Landscapes → Van der Peet

- Van der Peet was a woman named Dorothy, her husband caught some salmon and she was selling it to people (she didn't catch it and use it for her own use)
- Van der Peet (1996) charged with selling 10 salmon caught under Indian fishing license
- Aboriginal fishing rights did not extend to commercial selling of fish
    - The judge said that the Indian act she can only fish for herself and for ceremonial purposes NOT commercial purposes
- The court that restrictions were not inconsistent with aboriginal rights
- Aboriginal rights are justified as they were here first

    - They have rights that are inherent as they are the founding people of this land
- What was significant about this case was that it established test for determining rights exist,
    - Test for determining rights exist
- Integral to a distinctive culture test (determine whether the activity is an element of practice/custom/tradition)
    - Include perspective of aboriginal people
    - Identify the nature of the claim to determine the existence of an aboriginal right
    - They also have to determine in order to be integral a tradition needs to be a central significance
    - They have to be able to establish that those practice and traditions have continuity with those prior to contact (perhaps fishing was not something going on before contact)
- The court needs to approach the review of evidence in a different way, they need to recognize evidentiary difficulties inherent to such claims
    - This claims need to be adjudicated on a specific case by case basis
    - Practice must be of independent significant to that culture
    - Practice must be distinctive, to that particular people
    - The influence of European culture will be relevant to the inquiry, it must be demonstrated if it's being argued
    - Consideration of relationship to land, society and culture

Changing Legal landscapes – Lavell

- Lavell v. Canada (Attorney General) 1974
- This supreme court case was a 5-4 split
- Two aboriginal women were deleted from the Indian registry, they lost privileges and rights to communal land upon marrying non-Indians

- Indian men who married non-Indian women did not lose their status, it only worked you would lose your status if you were a women
- Contentious clause should be inoperative as it discriminated between men and women
- It was contrary to the bill of rights – but court did not find sec, 12(1)(b) inoperative
- Court found that the bill was not intended to amend the BNA Act (their excuse for not changing it
- Between 1958-1968 over 100,000 people lost their status this way
- Sandra Lovelace took this case to the United Nations committee on Human rights
- The UN committee found that it was discriminatory as it denied ethnic, religious and linguistic minorities language/culture/religious rights

Bill C-31 an Act to amend the Indian Act (1985)

- Bill C-31 changed registration so entitlement was no longer based on sexually discriminatory rules
- Abolished the concept of enfranchisement, band membership is subject to band rules or Indian Act
- Almost 250,000 requests for registration
- Mary Two-Axe Earley was the first to have her status restored she lead the path for people to have their status restored
- Result was an increase in off-reserve living since they were able to gain their status

“Club native video”

March 2nd 2014

Aboriginal Title → Delgamuuku

- Deals with the history and concept of Aboriginal title for Gitxsan Wet'sckvet'en people of BC
- Chiefs wanted to negotiate ownership-government refused
    - Chiefs wanted rights not just to resources on land, but the land itself
- Trial began in 1987 (lawsuit in 1984) → unique as the elders testified In their own language for the first time (need for translation)
- Trial judge dismissed claims and said that Aboriginal rights were extinguished
    - Property rights, not human rights
- BC court of appeal – overturned this and state consultation should occur
- SCC – landmark decision
- Court accepted arguments by the Gitxsan that the province had no authority to extinguish Aboriginal rights
- Confirmed aboriginal title -→ as a right to land itself, not just to hunt, fish or gather
- Case significant decision regarding future decisions about aboriginal rights and aboriginal title → property right
- Must be consistent with practice → if culture based on hunting, the government cannot change how the aboriginal hunt (i.e. put in modern industry → mines)
- A constitutional right
- Permitted use of lands no longer limited to traditional practice
- Courts can now rely on oral history, traditional songs and stores

Resistance

- Pockets of resistance across the country

Ipperwash

- 1942 → land belonging to the Chippewa's of Kettle and Stony Point First Nation was expropriated under the war measures act to build military camp
- Land contained burial grounds and was never returned to the band
- 1972 → tensions were rising, and in 1993 → band members moved back, 1995 → military withdrew
- Barricades erected at Ipperwash provincial park to underline land claims
- 1995 OPP moved in to remove protestors from the park
- Police say protestors were arms, protestors say they were not and police used unnecessary force
- Dudley George was killed – police officer who killed him was found guilty of criminal negligence causing death
- OPP wanted peaceful resolution, but premier Mike Harris forced their hand
    - Mike Harris blamed for the whole event
- Conservative government refuse inquiry
    - Intentions not known → protestors and police did not understand the other sides message
- 2003 → liberal government announced public inquiry
- Original claim settled in 1998 - $26 million – land was to be cleaned up and returned to kettle and stony point first nation
    - Inquiry also found history of OPP maltreatment of natives in the area
- Every member of the band receive between $150,000-$400,000
- 2003- George family settled with OPP for $100,000 and an apology

Inquiry

- 2004 began mandate to inquire/report on events surrounding the death of Dudley Georg, who was shot and killed in 1995
- Sidney Liden – commissioner
- Two phases

    - Evidentiary hearing that dealt with the events surround George's death
    - Policy and research that dealt with the issues directed to the avoidance of violence in similar circumstances
- Raid of occupation → supposed to be peaceful
- Shortcomings
    - Communication with occupiers →both sides did not want to listen to each other. This problem is not going away
    - Intelligence (i.e. informants) → pushed by Mike Harris
- OPP misperceived the intentions of the occupiers (and vice versa)
- Cultural insensitivity and racism were evident on the part of some OPP officers
    - Barrier to communication and trust
    - Made peace resolution difficult
- E.g. language, production of offensive t-shirts, etc.
- Not possible to attribute shooting to a single person, factor, decision, or institution
- Urgent priority → return land
- "Land claims" → not asking for more land, but for governments to fulfill the promises they have already made

Outcome of Inquiry

- Ipperwash Inquiry Priorities and Action Committee (IIPAC)
    - Resource benefit sharing → share resources of disputed lands
    - First nation policing
    - Consultation and accommodation → government previously ignored claims
    - Treaty commissions → lock at all the claims, not just Ipperwash
    - Jurisdiction/harmonization between groups
    - Reconciliation found
    - Heritage and burial sites → needed to respect this

March 5th 2014

Grassy Narrows

- Longest running indigenous logging blockade in Canadian history → 10 years
- Asusubpeeschoseewagong Anishinabek (Grassy Narrows indigenous people) have lived in the boreal forest thousands of years
- Colonization began in 1850s
- 1873 – signing of treaty 3 – guaranteed right to continue hunting, trapping, and fishing as before
- Provincial government has never acknowledged rights over traditional land
- Government grants multinational corporations rights to log on land without their consent
- Children were removed to residential schools
- 1950s damming of the English river – flooded burial grounds, destroyed wild rice beds (major food staple), drowned fur bearing animals, displaced families
- Displacement 1960 – near Kenora, Ont. → promises of schooling, medical care and modern infrastructure
- 1970s – Discovered that fish contained dangerous levels of mercury – source was the Dryden paper mill – Dryden, Ont.
- Mercury bio accumulated in the tissues of small aquatic organisms, fish and people
- Effects on physical health, economic opportunities and collective psychosocial security were severe
- Destroying basic food staples
- Further destruction of resources and land through logging
- Clear-cut logging 50% of land has now been logged by Weyerhaeuser and contractors
- After logging, land is sprayed with herbicides and replaced with single species tree farms
- Devoid of traditional plants and bushes used for medicine; wildlife disappeared

- 1990s logging intensified, letters written, peaceful protects, environmental assessments and judicial reviews ignored
    - The government and the multinational corporations went ahead with what they were doing, there was no stopping it
- 1999 → grassy narrows trappers challenged industrial clear-cutting
- 2002 – blockade erected to prevent passage of logging trucks through traditional territory
- Also asserting treaty rights and renewing land-based way of life

Glassy narrows – resistance

- Support has come from across Canada from environmentalists, human rights advocates, indigenous activists and consumers of paper products
- 2008 – US Boise Cascade – stopped logging unless consent from Grassy Narrows
- AbitibiBowater ultimately surrender its license to log Grassy Narrows
- 2011 – Trappers lawsuit decision that Ontario lacks legal authority to issue forestry licenses that interfere with treaty rights (federal jurisdiction)
- 2011 – Government agreed to suspend logging in Whiskey Jack Forest while the appeal is underway
- 2012 – Government of Ontario appealing ruling "needlessly hamper the economy"
- Right to say no recognized by the UN Declaration on the rights of indigenous peoples
- 2012 – Ontario court of appeals overturned that ruling, opening the door for further clear-cutting
- 2014 Premier Wynne's government announced a ten-year forest management plan for the whiskey jack forest
- Encompasses Grassy Narrows' traditional territories, permitting extensive logging
- Hypocritical approach as Wynne had visited the reserve in 2012 as Minister of Aboriginal Affairs and promised to improve relations between the government and the first nation

Over representation in the criminal justice system (New slideshow)*

- The issue of over representation is something that has been discussed, if we look at our CJS it's shameful how many aboriginal peoples are in the system

Issues of Over-representation

- Discrimination against aboriginal peoples pervades the criminal justice system and they are significantly disadvantaged as a result
- Research has indicated that:
    - Aboriginal are overrepresented in the CJS as offenders, prisoners and victims
    - Aboriginal accused comprise the single largest minority group being processed through the system
    - They are more likely than any other Canadians to come into conflict with the law
- The issue of over-representation is historical as well, has been around for quite some time

Vast over-representation

1. Studies show over-representation in prisons
2. Aboriginal peoples make up 3% of Canadians, but 17% of federal prison populations (overall)
3. Prairie provinces have higher rates:
    - Saskatchewan – 8% of the province is aboriginal, 76% of prison population is aboriginal peoples
    - Manitoba – 9& of the province aboriginal, 61% of prison population is aboriginal
4. Study indicated that 70% of 16 year old aboriginal males would be incarcerated at least once by the time they were 35 (34% if Metis, 8% of Non- Aboriginal)

    - Higher chance of going to prison than going to college or finishing high school

Overrepresentation

- At pre-trial detention as well as among sentence inmates
- Admissions to pre-trial detention is Ab, Sask, Man, NWT, Ont, found to be 2 to 7 times higher (All disproportionate)
- Historical roots of discrimination
- Study of capital murder from 1926-1957 found the risk of execution of a non-aboriginal Canadian who killed a white person was 21%, for an aboriginal person it was 96%
- There is no indication that it is diminishing
- Overrepresentation occurs amongst adult male offenders, young offenders and female offenders
    - Nearly half of women admitted to provincial facilities were aboriginal
- Some dismiss overrepresentation as an inevitable consequence of higher crime rates among Aboriginal people and other racialized groups
- Is it a result of systemic discrimination or overt discrimination?
    - A bit of both, things are not changing but not changing fast enough, these issues are still occurring

Manitoba Aboriginal Justice Inquiry?

- Examined how the legal system treats aboriginal people
- Impetus: deaths of J.J Harper and Helen Betty Osborne
    - Helen betty Osborne was a girl who was sexually assaulted and murdered in her community by 3 white men, was well known in the community
- Race was a major factor in both deaths
- Indicts Canadian criminal justice system's treatment of all aboriginal people

- Whether discrimination is intentional or not, the standard practices have an adverse effect

Issues of Overrepresentation → policing

- Prejudice and discrimination among police, acting on the basis of stereotypes
    - Ex. Police punish people by driving them in the middle of nowhere in very cold weather, forcing them to walk back (unjust and unwarranted)
- Aboriginal people are critical of the police in terms of fairness and effectiveness
- Officers on patrol have been found to act on the basis of stereotypes and discriminatory views of people and circumstances
- Many incidents of police and correctional workers using racial slurs and stereotyping

Issues of Overrepresentation → Crown's role

- Pre-trial and crown decisions:
    - Aboriginal people face more charges
    - Less likely to get diversion or given bail in similar offence circumstances
    - More likely to be detained pre-trial,
    - More often plead guilty, more often are unrepresented
    - Spend less time with lawyers
    - Spend more time in jail

Issues of Over-representation – sentencing disparity

- Sentencing: means of promoting a just society
- Reality is that many offenders are sentenced for minor offences
- Prison not the last resort – but the only option
- Judges need more information to craft fairer sentenced to hold individuals accountable and preserve respect for the law

    - If they could have elders have a say it could help with what would be seen as a fairer sentence, not many aboriginal judges, or aboriginal lawyers who should help look at the background and look for fairer sentences
- Disparity in sentencing:
    - Aboriginal people are more often sent to jail
    - More often incarcerated for minor offences
    - Have higher rates of fine default
    - Evidence of racist language used in judgements to justify harsher sentences

Sentencing to address disparity

- Criminal code: s. 718.2(e) → requires judges to take cultural factors into consideration
    - This is significant for aboriginal people, we call this decision the 'Gladue decision'
- R. v. Gladue
    - An aboriginal woman who was intoxicated, thought her boyfriend was having an affair with her sister she stabbed him and he died (tried for manslaughter)
    - This said that you have to take into consideration all other options instead of incarceration for people who are aboriginal
    - Gladue reports should be a part of aboriginal sentencing
- Youth criminal justice act s. 38(2)(d) → to take into consideration cultural factors as well
- Can the law change the results?

March 9th 2015

Issues of Over-representation – Probation

- Pre-sentence reports are meant to provide judges with info and are necessary to make a decision:
    - Provide information that he would not have in front of him, give information on their life
- Pre-sentence reports They are not compulsory, must be requested
- Prepared by probation officers – the majority are not aboriginal, nor trained in cultural values
- What the stats tend to show is that aboriginals are less likely to receive probation
- Pre-sentence reports/probation are often based on criteria that puts aboriginals in a disadvantage (may not have a fixed address, steady employment)
- May be excluded from their community → making it harder to contact them
- Those who live traditional lifestyles such as hunting and trapping faces disadvantages, how will they be able to regularly report to a probation officer?

Issues of Over-representation – Corrections

- Aboriginals are less likely to receive parole and more likely to be re-admitted on parole violations
    - If you're on parole and you do not have mean certain criteria you lose your parole, this happens more often to aboriginals
- Corrections Services Canada (CSC) → when elders began to help aboriginals in the prison system CSC looked at them suspiciously, did not treat them the same as priests and rabbis were treated (this has changed now elders have more respect than they used to)
- Aboriginal people are often not given the same help with release preparation process
- Because prisons have fewer aboriginal staff there is a lack of communication with staff → less relations
- Recent advent of specific programs
    - CSC have designated specific programs for aboriginal woman and men, this is an attempt to address these issues

Issues of Over-representation (What needs to be done)

- Need for more involvement in planning and delivery of services
    - Policing, parole, programs
- More community responsibility for programs
- Increased aboriginal staff
    - Parole and policing
- More advisory group at all levels
    - People need to listen at all levels, even when a sentencing circle comes up with one recommendation listen to all the recommendations of experts and community members
- Increased recognition of aboriginal culture
    - Ex. "all Indians are the same" → not true, need cultural awareness
- More latitude for self-determinism

Some initiatives to address the problems of over-representation

- Affirmative action hiring policies
- Specialized units within large organizations
    - You might have peace keeping forces on some reserves
- Cultural awareness
    - Start cultural discussions young, children will learn non-racist views
- Input from groups
    - Input from community groups on racism of police officers
- Some traditional practices allowed within mainstream programs
    - Sweat lodged, elders helping - giving advice and direction

Causes of over-representation

- Problems originated in social-historic conditions, perpetuated by the CJS
- People are drawn into the system due to their life conditions (these things make them 'targets', high link between criminality and poverty):

    - Shorter life expectancy
    - Higher infant mortality rates
    - Higher numbers of dwellings substandard
    - Less education, higher unemployment
    - Higher rates of violent death and suicide
    - Detrimental/debilitating effects
    - Hopelessness, despair, boredom
    - Stats show that alcohol is the single largest cause of CJS contact
- Over representation begins with police
    - Police make many decisions about where they are going to do surveillance, who they are going to arrest and who they are going to charge
    - Such relations create distrust
        - Many aboriginals do not get proper services
- There's a need for appropriate cultural training for non-aboriginal police and representation on reserve

***Film on policing in Saskatoon (Two worlds colliding)**

- Police investigation launched after native men kept showing up dead outside of town due to hypothermia (police were picking them up and dropping them off in the middle of nowhere in extreme conditions)

March 11th 2015

Stonechild's death (video… continued from last class)

- Police in Saskatoon had picked up aboriginal men, dropping them off in the cold (out of town), two died.

Saskatoon Situation

- 2000 arrest per year for drunkenness, most are aboriginals
- Aboriginals are charged with 50% of crimes in the city
- 70% aboriginal in local jails (20% of population)
- Resentment of the police is high amongst youth, in particular
- Saskatchewan created a commission to investigate the system, but it didn't go far enough

"Starlight tours"

- Neil Stonechild: found frozen in 1990
- Saskatchewan provincial government held a formal inquiry into his death in 2003-2004
- Report included that he had been picked up by the police shortly before he died on the outskirts of town
- Investigator in the case undertook a superficial and totally inadequate investigation of his death.
- The investigation was inadequate to conclude the circumstances around his death
- Important witness information was ignored
- Report found that relations between the police and first nations are problematic
- The injuries found on his wrists are consistent with handcuffs, however, this was ignored by the prosecutor

Stonechild Inquiry

- Reports from family members and media were ignored in the years following Stonechild's death that cast doubt on the adequacy of the investigation. The media and family pushed them to make an inquiry.
- The police investigation was not adequate to conclude what the circumstances were surrounding his death

Recommendations

- Establish programs to attract more aboriginal members to police force. However, this may not be good because they are resented
- Establish a board to recommend programs to attract more aboriginal members to police forces.
- Review and improve procedures for dealing with civilian complaints made about the police
- To designate an aboriginal peace officer amongst the force to act as a liaison with first nations
- Municipal peace officers should receive in depth training in race relations: including information about their culture, history, society and family structures
- In general, all police officers should review courses in anger management and dispute resolution *

Problems with Policing

1. Over policing: shows that aboriginal people were being stopped more often, being charged with more offences, and it turned to harassment, kept in custody more.
2. Under policing: police only come to the communities to make arrests. Were rarely friendly, just there to charge them and to get them into trouble. They felt they had no contact with them, unless they were being accused of criminal activity
3. Police often seen as a remote and foreign authority

Policing off Reserves

- Ten urban centres that have aboriginal populations over 5000 people. Issues with policing can become more challenging.

- Issues of policing are linked to wider issues of multiculturalism and policing of non-white populations. The greatest challenge is having these kinds of relations.
- Attempt to meet the needs of aboriginals:
- Recruitment of minority police officers
- Cross cultural race relations training
- Community policing policy

Policing on Reserves

- Different forms:
- Non-native RCMP (most common) - often right out of school
- Some native RCMP (not many)
- Native police forces
- Peace- keepers

Why is Policing important?

- Individual racism: personal prejudice, deliberate acts of discrimination. Police have a lot of power (weapons, use of force, privileged link to a powerful institution: the police force)
- Institutional racism: beliefs, rules, and structures systematically discriminate (this is worse than individual racism). Can involve racist names, how do you deal or fight with this kind of racism? It is very difficult
- Problems/tensions:
- Western style policing and aboriginal philosophy are contradictory

Historical Perspective

- Aboriginal policing: a federal responsibility.
- As early as 1912 when RCMP recommended that the Aboriginal people should have their own aboriginal police force-- this was ignored.
- Policy developments in 1960s-1970s with policing.
- Until the 1960s, they were only policed by the RCMP.
- Band constables were created, and should be able to create and ban band laws

- In the 1970s, there was the first "tribal Forces": these are the first aboriginal police forces. They protected their own community. Peace keeping.
- In 1973 there was a task force on policing on reserves. They looked at how to improve policing for Aboriginal people.

The Task force recommended:

1. Band council policing: have officers employed by the band to enforce bylaw, federal law and criminal law.
2. Municipal policing: similar to large cities.
3. Provincial policing

- Native provincial police force: operates on its own, under authority of provincial general, separate
- Under existing provincial police forces: received the most attention, use native people as constables, under the direction of the other police forces. Policy makes liked this option best. Aboriginal people policed themselves. This also offered flexibility: it allowed the aboriginal police officers to accommodate the needs of their reserve, while showing equality. It enhanced RCMP awareness of aboriginal issues. It also encouraged crime prevention programs. The goal was to decrease the amount of aboriginal people to come in contact with the police.

Task Force Criticisms

- Lacked aboriginal input
- Failed to define the role of the RCMP
- It offered lower salaries
- The aboriginals were reluctant to get involved because of tension of the RCMP and themselves.
- Social isolation was also a factor

Other Initiatives

- The RCMP deleted that program and established an Aboriginal Constable Development Program in 1990. The idea was to increase the numbers of

aboriginals eligible to become regular RCMP (equals). Helped them get the skills needed to compete fairly with everyone else

- First nations policing policy in 1991: culturally appropriate policing
- Now there are 36 fully independent first nations' police forces, operating across the country. A movement away from bilateral agreements (federal and first nations), now its provincial, federal, and first nation's agreement.

Problems of Police Forces

- High attrition rates: sometimes not enough money to get more than one police officer, hard to stay with that job with that low of salary
- Lack of proper detachment offices/housing
- Role conflict: conflict with family relations and the people you know (biased). They have to deal with their own family and friends in their community, it is difficult.
- Isolation: one or two police officers
- Lack of resources: unsolvable social problems, lack of programs and materials to address them appropriately
- Lack of training and there is an inexperience

*March 16th – Class cancelled

March 19th 2015 (Sentencing)

R. V. Gladue

- Was an aboriginal woman living in Nanaimo, British Columbia, pled guilty to manslaughter for the killing of her common law husband
- Ms. Gladue has been living with the deceased, Reuben Beaver, since she was 17 years old. They had one daughter, with another child on the way when he was killed
- The relationship included a history of physical and alcohol abuse
- Mr. Beaver was fatally stabbed following a night of drinking and fighting over whether the deceased was having an affair with the accused's sister
- Criminal Code: 718.(e) A court that imposes a sentence shall also take into consideration the following principles:
    - (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of *aboriginal* offenders
- Ms. Gladue appealed her sentence (not because it was a long sentence but because the judge did not take into consideration 718.(e)
- Supreme court upheld the disposition as to sentencing, but provided detailed reasons on the operation of section 718.2(e) and the duty of sentencing judges is to find alternatives to incarceration for aboriginal defendants
    - When this decision first came down many people thought of this as a 'get out of jail free card' for aboriginals.
- Case acknowledged how systemic factors contribute to overrepresentation of aboriginal people in the criminal justice system;
- Explicitly endorsed restorative justice
- Underscored the need to develop creative responses approach to the unique circumstances of aboriginal individuals and communities
- Set out the steps according to which judges must take systemic and background factors into account in sentencing

Toronto Gladue (aboriginal persons) court

- The significance of the R. v. Gladue case was that it affected all other courts in the country, this meant that all judges had to take into consideration the aboriginal status in their sentencing
- Because there was a lot of confusion how to apply the decision people welcomed it as it was a way to address this representation (but were not sure what to do with it so the gladue court was developed_
- Gladue court developed and has identified aboriginal people in the courts, has publicized the court so accused persons know about it
- In this court judges are specifically trained in knowing about aboriginal people and crafting and creating an appropriate sentence
- Liberal interpretation of bail provisions
    - Bail is very problematic as if someone is denied bail they lose a lot, i.e. losing their job, family, higher likelihood of being sentenced guilty; liberal interpretation created to reduce these problems in aboriginal people
- Brings all aboriginal persons into one court where resources are available

Toronto Gladue (aboriginal persons) court –Identification-

- Court is able to address the circumstances of every person who self-identifies as Indian, Metis, or Inuit (s.35(2))
    - As long as you self-identify with being aboriginal you can go through this court, you do not need to prove your status
- Identification may occur through name, appearance or family history
- Through publicity to judges, correction workers and counsels
- Involves aboriginal court workers, gladue court case worker

Toronto Gladue (aboriginal persons) court –Resources-

- Each is aware of all the services available to aboriginal people in the Toronto area

- After a finding of guilty the court must request a report on the circumstances surrounding the offence
- Differs from a pre-sentence report, is less formal and more focused on life circumstances rather than criminal history

Gladue Reports

- Any court can provide a gladue report (if requested this is done)
- Reports are written at the request of defence counsel, the crown attorney or the judge (there needs to be resources for it to happen, anyone can request it)
- Contains information of the life circumstances of an aboriginal offender
- Also contain recommendations that the court can consider in sentencing in light of the circumstances of the offender
- Can be done for aboriginal offenders in any court in Toronto as well as for Aboriginal offenders in Hamilton and Brantford

Toronto Gladue (aboriginal persons) court –bail-

- 718. 2(e) does not deal with bail issues
- Important as a detention order has an impact on ultimate sentence of prison
- Credit given for pre-trail detention often results in a sentence of fine, probation…
- Judge then cannot consider unique circumstances of person
- This court is thus less lenient with respect to bail

Toronto Gladue (aboriginal persons) court –atmosphere-

- Court attempts to respond to the needs, experiences and perceptions of aboriginal people
- Organizational features differ from regular court:
    - Aboriginal presence
    - Judges, lawyers and staff encouraged to show respect towards culture

    - Court takes its time
    - Eagle feather, smudging available

Gladue background cultural impact factors

- Substance abuse; personally, in the immediate family, extended family and community
- Poverty; as a child, as an adult, offenders family or community
- Over/covert racism; in the community, by family members, strangers school or workplace
- Family (divorce, born out of wedlock) or community breakdown
- Abuse: sexual, emotional, verbal, physical and spiritual
- Who was the perpetrator of the abuse: stranger, family member, authority figure, friend
- Witness violence; spousal, family, community
- Unemployment, low income, lack of employment opportunity
- Lack of educational opportunities
- Dislocation from an aboriginal community, loneliness and community fragmentation
- Loss of identity, culture, ancestral knowledge
- Foster care or adoption: at what age, for how long, was the foster/adopted family non-aboriginal?
- Family involvement in the criminal environment
- Has the offender or family members attended residential school? Is so, where how many years, how were they treated, how long were they denied family contact?
- What are the main social issues affecting the offender's home/original community?
- How was the offender's family/community addressing those issues?
- How has the offender, offender's family, and the community been affected by economic conditions?
- What is the quality of the offender's relationship with family, extended family, community?

- Who comprise the offender's support network: spiritual, cultural, family, community
- What culturally relevant or mainstream healing resources are available to the offender?
- What culturally relevant alternative to incarceration can be set in place that are healing for the offender and all others involved, including the community as a whole?

Problems with Gladue

- Stenning & Roberts (2002) found:
    - Over-representation occurs with other groups and requires a larger response
    - Solution to the problem does not lie with sentencing judge
    - Argue that many groups suffer from social disadvantage and its reverse discrimination to ignore them, and focus on aboriginal people
- Daubney (responds to Stenning & Roberts)
    - Disappointed that they question that special nature of aboriginal experience
    - They effectively ignore the systemic and direct discrimination that occurred historically and still occurs today

***Read R.v. John and R.v. Cappo for final exam will have questions on each (these cases are on blackboard learn) ***

Problems with Gladue

- More demands placed on lawyers – Crown and defense counsel
- Also gladue factors in court focus on restorative sanctions
- More use of already overtaxed community services
    - May not be enough resources for this to be done anyway
- Need for more investment in resources
- Unrealistic to expect CJS to solve essentially social welfare problems

March 23, 2015 (Sentencing and Sentencing Circles)

R. v. John (2005) SKCA 13

- Appeal by John from the sentence imposed for criminal negligence causing death
- John lived in the wilderness of Saskatchewan, he hunted, trapped and fished for a living
- He had never attended school and was a member of the English River First Nation (this nation had a justice committee within it, there was some restorative justice occurring)
- No evidence of alcohol abuse and it had been 10 years since he was involved in the CJS
    - The points above are all something that the gladue factor would look at
- Accident occurred on a gravel road with much dust – reducing visibility – John overtook a tractor and struck the rear
- Ms. McIntyre was killed
- John was driving 50 kms faster truck
- Sentence – 3 years penitentiary, 3 year driving prohibition
- He appealed based on the fact that the judge failed to apply sec. 718.2(e), that she should have looked at all the other options before considering imprisonment
- John was raised in the traditional Aboriginal lifestyle- operates a commercial fishing business
- Appeal – what the appeal cord found was that the trial judge made a mistake. That the judge erred by imposing a custodial sentence on John who lives a traditional lifestyle and has difficulty coping in mainstream society
- So in order for there to be a conditional sentence (so they could serve it in the community, would only be two years less a day) a judge must ascertain if the offender would endanger the safety of the community if released
- John was assessed as a medium risk to reoffend (past history + lack of education)
- He is not considered to be a danger to the community, he is remorseful and accepts responsibility → this is an important when it comes to applying the gladue factor

- No evidence of alcohol abuse or involvement in the accident
- Likelihood of he abiding by the court order is strong
- Three of the victim's children are prepared to participate in reconciliation and healing circle with John – John is also willing.
    - He had a community willing to take him back in and the victim's family trying to help him, these were all factors in his favour
- Appeal court found – trial judge failed to take into account John's unique circumstances
- Community based sentence was substituted – 2 years less a day with conditions:
    - Keep the peace and be of good behaviour → standard in parole sentences
    - Appear before court/supervisor (meet with your probation officer)
    - 2 months house arrest + community service
    - He had to do 240 hours of community service (shall include assisting the elders in their work)
    - He had to participate in a healing and reconciliation circle with the victim's daughters
    - He should all sustain from purchasing and consuming any alcohol or drugs

R. v. Cappo (2005) SKCA 134

- Motor vehicle accident – conviction got criminal negligence causing death
- Cappo (aboriginal male) – drove home from a bar in a car with no headlights and struck another car head on – 2 people died, 3 injured
- The other driver was impaired
- Following a sentencing circle, Cappo was given:
    - Conditional sentence of 2 years less a day
    - 240 hours community service
    - Abstain from drugs/alcohol
    - Undertake treatment
    - Participate in healing, talking and reconciliation circles
- What makes this interesting was the crown appealed the sentence, they thought this was not a harsh enough sentence for this individual

- If we look at his background:
    - 39 years old, married with 6 children
    - 7 previous convictions (2 motor vehicle offences)
    - Presentence report addressed "Gladue" factors found Cappo was affected by poverty, alcohol use in the community and racism
    - Assessed as high risk to reoffend
- Crown appealed the sentence on the basis that the sentence was unfit based on what he had been previously involved with
- The appeal court judges agreed they said that:
    - Cappo lived in Regina and on the reserve
    - Grade 12 education and has a job in Regina
    - Appeals court considered that a prison sentence would not work the same hardship on Cappo – as it would have in R. v. John
    - Important word to use to use with gladue factor → disadvantaged
        - You need to look if they were disadvantaged in any way
    - PSR – Cappo did not claim to be disadvantaged in any way that could be related to the offence which he committed
- "… the fact that the respondent is an aboriginal does not, per se, entitle him to a lesser sentence than any other person in like circumstances, and the trial judge erred in doing so." (Paragraph 17) → judges are saying this sentence is not enough to go along with a conditional sentence
- Case does not meet the requirement of the law respecting proportionality to the gravity of the offence and responsibility of the offender
- The conditional sentence that the first instance judge gave was replaced with a sentence of 18 months less one day imprisonment
    - They believed the only deterrence was to send him to prison

- These cases illustrate how judges will look at the gladue factor analysis but that does not mean that it will be applied

Sentencing Circles

- Attempt to use traditional aboriginal method of dealing with community members who break the law
- Circle is made up of accused, victim, their families, elders and other community members
- Everyone in the circle has the same power – operates on consensus
    - The idea is that it is consensus but the judge has the final say
- Judge, defense, prosecutor, police may be present
- Person must plead guilty

Judge must consider

- Accused must agree to referral
- Accused must have roots in community
- Elders/non-political community leaders must be willing to participate
- The victim must be willing to participate without coercion or pressure

Sentencing circles

- Process: circle, (inner/outer), taped, prayer, everyone has chance to talk, all discuss offender, crime and suitable sentences;
- Circle may recommend:
    - Jail
    - Banishment
    - Probation
    - Hours of community services
    - Working with the elders, other types of treatment, specific tasks in the community

Pauchay case

- Two children died from exposure as he took them outside while he was intoxicated
- Pled guilty to criminal negligence causing death
- He was hospitalized with frost bite and hypothermia himself that night
- Crown wanted jail time, conditional sentence not available – 2.5-5 years penitentiary + firearms prohibition
- Defense sought no more than 18 months followed by probation
- Background on Pauchay:
    - 51 previous convictions
    - This case was serious and tragic
    - Sentence was 3 years' incarceration and firearms prohibition despite the fact that there was a sentencing circle and another recommendation

Court found

- The sentencing circle gave valuable insight into the community's view towards the offender
- The court listened to his families pleas and the communities but they found that the offender lacked insight into the reasons for his offending behaviour and appeared unable/unwilling to accept personal responsibility for some of the problems he faced
    - They said this as he was found drinking alcohol
- Sentence must be proportionate to the gravity of offence and degree of responsibility of offender
- Alcohol was precipitating factor here (disadvantaged background), but it could not act in mitigation in these circumstances, given lengthy record past failure to address alcohol issues
- Conditional sentence was possible
- Some remorse on offenders part and guilt, two defenceless young victims lost their lives as a direct consequence of his reckless behaviour

- Principle of denunciation, and need to foster respect for the judicial system, mandated a significant response
- But at sentencing circle Pauchay claimed he shouldn't have been charged with a crime as it was an accident
- Input of the community was appreciated, but Court could not agree with the circle's recommendations
- Judge said Pauchay lacked insight into his behaviour and wasn't willing to accept responsibility for what happened
- While on bail, he twice breached bail conditions that prohibited him from using alcohol

*Missing March 26th

March 30th 2015

Intervention with aboriginal prisoners

- Programs aim at rehabilitation
- Aboriginal prisons → Aboriginal spirituality programs and symbolic healing
- Healing
    - Cultural element/relevant
    - Spiritual → connection with the creator
    - Suggestion, catharsis, social restructuring
- For many prisoners → first time for spirituality
    - Gain knowledge
    - Live off reserve before
- Prisoners problems is thus redefined in terms of family or social problems
    - Gladue factors concerned with this
- CSC/ Provs: two streams since early 1980s
    - 1. Spirituality → religious
    - 2. Cultural and academic education → make a place for all this in corrections
    - Considerable overlap for many aboriginal inmates, first exposure to aboriginal spirituality in prison
    - Waldram (1993) 30 aboriginal prisoners, study cultural background for treatment in correctional facility

- Types of aboriginal prisoners
    - Corrections Canada guilty of pan-Canadianism → plains Cree most of the time

      1) Traditional people → spoke language, little exposure to Euro-Canadian culture → John court case

      2) Assimilated → oriented toward Euro-Canadian culture, fostered or adopted

      3) Bicultural → spoke language, comfortable in both worlds

- Different orientation to cultural traditions
- Solicited data on involvement in prison spirituality program
- Aspects of programs
    - Elders → men or women, psychologist, social worker, priest, educator, physician → many roles
        - Many bicultural → legitimacy in eyes of prisoners
        - Many had served time themselves
        - Often involved sweats, counselling, cultural and spiritual knowledge
        - Contact confidential, empathetic, greatly respected
        - In 1980s → not given much respect by CSC → more respect now
    - Sweat lodge → cultural/spiritual means to link prisoner to the creator; done through prayer, peer support, info (cultural) sharing
        - Institutional function of reducing stress and illegal activity in prison
        - Want to work towards rehabilitation
        - Differing cultures may clash
        - Need to beware of Pan-Indianism → not all cultures (aboriginals) are the same
    - Elders sometimes reinforce Pan-Indianism themselves; enhancing common themes, discrediting differences → usually from specific culture (Cree → 'Plains Indian')
    - Inuit present a difference case as some aboriginal practices are foreign to them
        - Language barrier also present

Aboriginal women prisoners

- They receive least attention
- Most overrepresented in prisons
- Profile includes:

- 70% sexually assaulted in childhood
- 90% spousal assault victims
- 80% alcohol problems
- Many cases of attempted suicide and self-injurious behaviour
- Difficult to maintain contact with kids

Aboriginal Gangs (CSC) – Report 2002

- Late 1990's – Large numbers of youth (25 and under) were affiliated with a gang → named Indian posse, Manitoba Warriors, etc.
  - Can't have members from different gangs in same wing of prison → creates problems inside the prison
- 80% of prisoners associated with a gang were 25 and under
- 75% were of aboriginal descent
- 2,792 aboriginal offenders → 6.6% were gang members
- Compared with others → more likely to reside in a "criminogenic" area and more likely to have criminal friends

- Gang membership → youth, socio-economic factors
- Members most likely to:
  - Have no employment history
  - Be aggressive & hostile
  - Drug use, starts at an early age
  - Negative attitude to law enforcement
  - Youth court appearance
  - Served sentences for robbery/assault
  - Less likely to commit sexual offences

Aboriginal Gang Initiative CSC

- Aboriginal facilitators working with those involved with or affected by Aboriginal gangs
- Offers range of support services to those in federal institutions or on conditional release in community
- Services include
    - Teaching and cultural activities with elders
    - Changing attitudes and behaviours
    - Increase skills and abilities
    - Conflict resolution skills
    - Provide training and education opportunities

Intervention for aboriginal prisoners – Origins CCRA

- Corrections and conditional release act passed in 1992
    - Contains Aboriginal-specific provisions to enhance Aboriginal community involvement in corrections
        - CCRA, Gladue, and common law to address over-representation
- Spirit matter report
    - Section 81 → minister of public safety, allows for aboriginal communities to take custody of Aboriginal offender → decided by minister
        - Allows for greater degree of aboriginal control
        - After the fact, not preventative
        - Only 68 section 81 bed spaces exist → none are in BC, ON, Atlantic Canada and North
        - Limited to only minimum security offenders → only 11.3% of males (aboriginal) in prison
        - Policy excludes 90% of Aboriginal offenders
        - Problematic → only for minimum security, you exclude a high number of individuals

- CSC never wants to look bad
    - Don't want people to recidivate
    - Minimize risk and exposure
- Section 81 Healing Lodge: aboriginal cultural/spiritual & correctional programs
    - Four operated by CSC (four run privately as well)
        - Prince albert grand council spiritual healing lodge (5 beds)
        - Stan Daniels healing centre (30 beds)
        - Minimum security → except for women which also accepts medium security
    - Operate on 5 year agreement – no permanency (private ones)
        - Need to renew funding
        - Instability in employees
    - Lack of community acceptance (similar to NIMBY → private one)
    - 3 on reserve lands, while most are released to urban setting → disconnect, people don't stay in community (private ones)
    - Provide beds for 194 federal inmates (44 for women)
    - Budgets greater
    - Better training – thus attracts more staff than sec. 81 lodges
- Section 84
    - Enhance info → provided to parole board
    - Allow community to help set parole conditions for individuals who want to serve time in the community → outside of Gladue, for parole not sentencing
    - Individuals have input about what is going on
    - Hasn't worked out well
    - Only 12 Aboriginal community development officers across Canada to facilitate this

April 2nd 2015

- CSC operates 4 healing lodges as well- which operate as minimum-security institutions
    - CSC operates its own healing lodges and then section 81 has their own healing lodges which are in the community
- Provide beds for 194 federal inmates (44 women)
- Problems with Section 84 → Section 84 System is:
    - Overly complex and bureaucratic → it takes a long time to get things done, lots of procedures
    - Not well understood within or outside CSC → they can have access to this and it won't cost them anything (many do not know it's available in their community)
    - Unevenly applied across the country

Key findings from "Spirit Matters"

- Restricted eligibility criteria excludes most aboriginal offenders from going into these facilities (from section 81 consideration)
- Limited understanding of aboriginal peoples, cultures and approaches to healing with federal corrections → problems have not been addressed because it is truly hard for people to understand, did not grow up there
- Inadequate and uneven application of Gladue social history considerations in correctional decision-making → when we think about gladue we think of it as more of a sentencing consideration, but CSC have taken it further and say that we should still consider it when they are in these facilities. Their background does not go away. CSC has introduced gladue ideas in their framework.
- Funding and contractual limitations impeded the work of elders inside federal institutions
- Inadequate response to the urban realities and demographics of aboriginal people

    - We have one person who has more an urban experience and one who has more of a traditional experience and these things need to be considerations on the correctional level as well
- Penitentiary-based interventions far out-number community reintegration alternatives for aboriginal offenders → should be more emphasis there but there isn't

*Watched movie inside the healing circle

April 9th

Aboriginal Justice

- Dominant societal conceptions of justice – focus on controlling deviance, punishment, conformity
- Aboriginal justice' – differs
- Looking for aspects of natural order, all things are interconnected
- Justice – restoring peace and equilibrium, offender makes amends to the community

Ongoing conflict: CJS and Native People

- Definition of 'crime'
    - Law now defines crime (our laws define crime, activities and forms of conduct that were intolerant to us they became criminal)
    - Establishes foreign rules and procedures
    - Legal system in alien, oppressive, insensitive
- Abuse of power
    - What many aboriginal people have spoken about is that those who have the power appear to use it. That use of power can be a different way of looking at how the CJS does not meet the aboriginal people's needs.
    - Police, courts and systems fail to protect them and have aboriginal peoples in mind
    - Many defense counsel have little understanding of their lives and culture (instances where the defense counsel meets their client for the first time in the court room
    - For those in remote communities, it is worse
- Language
    - Only languages permitted in courts are French and English
    - Lack many words to understand legal concepts
- Confrontation

    - Aboriginal approach to problem solving focuses on non-interference, reconciliation, restitution
    - Accusation and criticism are antagonistic to their culture
    - Avoidance of confrontation is the norm
- Rigid conceptualizations of behaviour
    - Many aboriginal societies are tolerant of many types of behaviours and personalities, but what we see in the CJS universe is the opposite of that
    - Reluctant to classify
    - Human beings are not viewed as fixed or unchanging → once you commit a crime in a CJS you receive a label that follows you "prisoner, ex prisoner"
- Notion of "truth" and remorse
    - The part of the court system to swear on a bible, it is not what they believe in
    - Illogical viewpoint – belief that no one can know the "whole" truth of anything → CJS frowns on those who seem uncertain of their evidence
    - Remorse is problematic for wrongful convictions → jury's, judges → we expect that when someone is accused and convicted we expect they will feel remorse and want to change their behaviour, but in aboriginal society, in their culture, they accept what is given to them, they also taught to hold in their emotions. Many will be controlled in the presence of authority

Danger of contrasting Non/Aboriginal conceptions of justice

- It is important when we chart difference because we do not want to go back to the stereotypes that are justified and perpetuated by the colonial process
- Typologizing aboriginal cultures results in gross generalizations which are not true
- When we do this is reduced aboriginal cultures to traits
- Infantilizes them (when we compare and contrast the cultures together)

Aboriginal Justice Initiatives

- We need to ask ourselves: how effective are these strategies on sentencing?
- Initiatives taken to improve the situation:
    - Indigenization → to make programs or attempt to make programs in the current justice system hospitable to Aboriginals; trying to lessen that feeling of alienation that people experience
    - Appointment aboriginal CJS personnel → employment equity, 13 federally/provincially appointed judges. This is limited though, as they are still appointing "Canadian" justice
    - Cultural awareness training programs → sensitize non-aboriginal actors to cultural norms (if a person is working in the justice system and more familiar with aboriginal cultural norms and values it will help accommodate aboriginals). Aboriginal people will find the judicial process less threatening and more accommodating to their needs
    - Aboriginal initiatives in Canadian prisons → aboriginal prisons have the freedom to practice their religion (charter right). CCRA mandates this. We see elders apart of it working with psychiatrists, sweats working and healing programs
    - Aboriginal policing → First nations constables are trained to work in aboriginal territories in contemporary conditions
    - Goals include peace-making, peace-making, restoring social harmony
    - Problems: still functioning within another society's system
    - Subject to 2 separate authorities – must meet the community expectations and report to the local detachment (these may be very different)
    - First nations constables apply peace-keeping model in line with traditional ways – but system is adversarial
    - Elder panels → opened up sentencing so we can have clan leaders sit with the judge and provide appropriate advice on sentencing
    - Sentencing circles → concerned individuals will sit in a circle and discuss together what sentence should be impose. Ultimate decision rests with the

judge, who is receptive to community input and places greater emphasis on traditional CJS punishments

Hollow Water

- Initiative that is controversial
- Designated by many as a true Aboriginal approach to justice
- This community had generations of sexual abuse
- Community was in Manitoba, had a population of 600
- In 1984 a group of social service providers got together and were very concerned about the kids in the community → as they started to look at these issues the home life of these children had a serious problem of intergenerational sexual abuse (root of many other social problems)
- 75% of populations were victims
- 35% of population were offenders
- In 1987 they created the community holistic circle healing program → they gave people the option to go to a facility that would help them get better, or go through the CJS.
- Providers formed a team to promote and respond to disclosures of sexual abuse
- Included: child protection workers, community health representatives, nurse, RCMP, church members (most of the workers were women)
- Addressed sexual abuse by providing support, counselling and guidance to everyone including the victim, victim's family, perpetrator
- CHCH method:
    - There had to be disclosure → once they knew who were the victims
    - Protect victim → help keep them safe, they needed to be removed from that person
    - Confront victimizer
    - Assist spouse/families
    - Meet assessment team/RCMP/crown → these people would be charged, but they were given a probation order that they could stay in the

community and integrate them back into the community to make sure they wouldn't engage in the same behaviour

- Victimization must accept/admit responsibility → otherwise they would have to go to trial and would most likely have a prison sentence
- Prepare victim/victimizers families → to let them know at what point they would be a part of the healing process
- Special gathering → from the community to deal with these issues
- Healing contract implemented → everyone involved in the issue to agree in certain behaviours and their own relationships in the family. It would include the victimizer and the victim and the victims' families.
- Cleansing ceremony → that they were moving forward that these things were in the past

Critique of Hollow Water

- Laroque calls it a "travesty of justice"
- Victim protection – psychological consequences
- Are healing circles "traditional" in cases of rape
    - For Laroque she said they were not
- Notion of forgiveness as Christian → she uses an anthropological basis saying that this is a very Christian idea to move forward. She says that pressuring someone to forgive is not an aboriginal value.
- She says programs like hollow water are meditation programs → falling prey to leftist, contemporary, white new age notions of healing, forgiveness and rehabilitation