

BRIEFING NOTE

Virtual NALSC Annual General Meeting



TO: Members of NALSC/ 49 NAN Chiefs
DATE: February 9, 2022
TOPIC: *Gladue & A Third Prong to current Two prong Approach to Over-representation & Over incarceration*
FROM: NALSC (NAN LEGAL)
CC: NAN LEGAL Board of Directors, Elders, and Ex-Officio Members

TOPIC PRESENTATION SUMMARY

Over incarceration of Indigenous people – 23 years ago & today – Systemic racism
Systems are made up of people; of individuals

SCC 's decisions in Gladue & Ipeelee & development of case law from them:

- Recognizes that over-incarceration is caused by systemic racism throughout the justice system against Indigenous people
- Judicial notice of ongoing trauma: the legacy of Indian Residential School System, 60s scoop, missing & murdered Indigenous women & girls, colonialism, poverty, intergenerational trauma etc.
- Recognizes jail does not work - Mandates new approach be taken & alternatives to sentencing be explored. Failure to do so – Reviewable error – Appellate review
- Crowns, court, defence - positive obligation to take steps to ameliorate over-representation / find alternatives

Glaude reports – Must they always be in writing?

Acceleration of over-representation- it has become worse since Glaude

Argue that SCC's decisions correct – Problem is not the court decisions - Problem is two-fold:

- Failure to implement *Glaude*- Courts' directions are being ignored by Crowns, Courts & Defence
- Failure to develop/ find alternatives to Euro-Canadian sentencing options

Suggest a three-prong approach:

1. KEEP current approach of education, CPD & conferences - works for those willing to learn & apply
2. Continue to Advocate for more community-based resources, programs & sentencing alternatives
3. Individual accountability – Hold those who fail or ignore Gladue professionally accountable
 - Bring the Gladue failures to the attention of law societies, Judicial councils etc.

NAN Legal has submitted three separate complaints to the Law Society of Ontario about conduct and competence of crown prosecutors arising out four criminal proceedings involving Indigenous people – foundational evidence is the transcript of the criminal proceedings

Will professional accountability lead to positive change: amelioration of racism & over-incarceration?

Anticipate lack of understanding and possibly resistance on the part of the Law Society ...but what other options exist? Simply speaking we want Crown lawyers, Defence lawyers and Judges to do their jobs and obey the law.

DIRECTION/FOLLOW UP REQUIRED

Consideration of more widely implementing the third prong to the current two-pronged approach to addressing: systemic racism, the overrepresentation of Indigenous people in the criminal justice system and over-incarceration

PRESENTERS BIOGRAPHY

Harry S. LaForme is Anishinabe, a member of the Eagle clan and a member of the Mississaugas of the Credit First Nation.

Harry graduated from Osgoode Hall Law School in 1977 and was called to the Ontario Bar in 1979. He articulated with the law firm of Osler, Hoskin and Harcourt; joined the firm as an associate; and after a brief time commenced his own practice specializing in Indigenous law. During his legal practice, Harry focused on matters involving the Constitution and the *Charter*. He has appeared before each level of Canadian Court, travelled extensively throughout Canada, and represented Canadian Indigenous interests in Geneva, Switzerland, New Zealand, and the British Parliament.

Harry served as co-chair of the independent National Chiefs Task Force on Native Land Claims; Chief Commissioner of the Indian Commission of Ontario; Chair of the Royal Commission on Aboriginal Land Claims; and taught the "Rights of Indigenous Peoples" at Osgoode Hall Law School. In January 1994 he was appointed a judge of the Superior Court of Justice, Ontario and was – at that time - one of only 3 Indigenous judges ever appointed to this level of trial court in Canada. In November 2004, he was appointed to the Ontario Court of Appeal and is the first Indigenous person to be appointed to sit on any appellate court in the history of Canada – he retired in October 2018. At which time he joined the law firm of Olthuis Kleer Townshend as one of its senior counsels.

Most recently Harry was part of the team of class action plaintiff counsel from Olthuis Kleer Townshend LLP and McCarthy Tetrault in the "clean water" pan Canada class action law suit against Canada.

In March 2021 Harry was appointed by Federal Justice Minister to lead, with the Honourable Juanita Westmoreland – Troaré, international and domestic consultations, to report their findings and to recommend to the justice minister about what an independent arms-length *Miscarriages of Justice Commission* could look like for Canada. On November 4th, 50 years to the day that an all-white jury wrongfully convicted Donald Marshall Jr, a Micmac man, the report containing over 50 recommendations were sent to the justice minister.

Harry is privileged to have been honoured with: numerous Eagle Feathers including one at his swearing in at Ontario Court of Appeal and one from the National Indian Residential School Survivors Society; the National Aboriginal Achievement Award in the area of Law & Justice; a Talking stick carved by Git'san artist Ya'Ya, Chuck Heit; a bursary created in his name for Indigenous first year law students by the University of Windsor Faculty of Law; and honorary Doctor of Law degrees from York University; University of Windsor, the Law Society of Upper Canada, the University of Toronto and an honorary Doctorate of Education from Nipissing University.

Harry has written and published numerous articles on issues related to indigenous law and justice. He speaks frequently on many topics that include indigenous issues, indigenous law, criminal law, constitutional law and civil and human rights.