

***Obstructions to an Individual's Ability to
Access Justice: Self-Serving Canadian
Politics and Governments***

2023 Access to Justice Competition — Youth Leaders in Law

Cindy Gladue was a Métis and Cree mother of three who lived in Edmonton, Alberta until she was found deceased in a hotel bathtub in 2011 at the age of 32. After initially being acquitted of first-degree murder by a lower court in 2015, Bradley Barton was ultimately found guilty of manslaughter in February 2021 when the case was retried by the Supreme Court of Canada following widespread protests throughout the country. Barton had murdered Cindy in an extremely violent way: an 11-centimetre wound to her vaginal wall caused by his fist during a sexual encounter. The reason this case was so controversial is because of the way it was handled; Cindy was referred to as a ‘Native girl’ and a prostitute, and these misinformed preconceptions hindered her from accessing the justice she is guaranteed by the *Canadian Charter of Rights and Freedoms*.¹ Not only this, but she was dehumanised, even in death, when her preserved pelvic tissue was submitted as evidence by prosecutors.² This case illustrates an important principle in law that we must uphold within Canada—access to justice.

These court proceedings could be said to have violated various provisions of the *Canadian Charter of Rights and Freedoms*; specifically section 7 (which pertains to the right to life, liberty, and security of the person) and section 15 (pertaining to equal treatment before and under the law). Cindy was discriminated against on the basis of several grounds, including race and social status, and her rights (both human rights and Indigenous rights) were also infringed upon with the submission of her preserved pelvic tissue. Additionally, the presiding judge of the retrial criticised the accused’s testimony, saying that it amounted to an “intolerable level of blameworthiness”³. Despite this, a jury— described as “visibly White”— still acquitted him of all charges in the first trial.⁴ The perpetuated stereotypes ultimately resulted in a prejudiced trial, as concluded by the Supreme Court of Canada. The reopening of the case is demonstrative of self-serving politics in that the government reacted to the protests to keep voters satisfied; true justice should have been dealt when the case was first brought to Canada’s courts.

Although eventually resolved, this case remains relevant because it demonstrates that Canada’s government and politics still have a long way to go in giving individuals equal opportunity to access justice. Access to justice, among other things, includes the ability to be heard by a fair and impartial tribunal, which was not present in this case. The Gladue case is illustrative of the systemic barriers Indigenous women face in accessing justice in Canada. If there weren’t protests calling for justice for Cindy, would the case still have been reopened? Fundamentally, the people of a country shouldn’t have to ask for justice from the government— justice should be equally accessible to all. Denying access to justice not only deprives one of their dignity and the freedoms outlined within the *Charter*, but it also suggests that some individuals are more worthy of justice than others. In this paper, we will explore the influence of self-serving politics on the government and how they lead to the enforcement of policies that target and create barriers for particular groups in society, ultimately hindering an individual’s ability to access justice. Under this umbrella, we will highlight the spheres of Indigenous minority treatment and legal aid policies.

The term “access to justice” can be nebulous, as it has different meanings in its technical and vernacular form. Therefore, before delving deeper into this discussion, we must establish a common understanding of the concept. According to the Alberta Civil Liberties Research Centre, access to justice

¹ R. v. Barton, 2019 SCC 33, [2019] 2 S.C.R. 579, [205-207]

² “Justice was served,” says Cindy Gladue’s mother after Bradley Barton sentenced to 12½ years for manslaughter”, CBC News, 2021

³ “Justice was served,” says Cindy Gladue’s mother after Bradley Barton sentenced to 12½ years for manslaughter”, CBC News, 2021

⁴ “Canada vowed to protect its Indigenous women. But they are still being blamed for their own deaths”, CTV News, 2021

is primarily the ability to appear in court. However, in a broader sense, it encapsulates the ability of every individual and community to obtain equal and effective access to the justice system, including access to legal counsel and representation when needed. Access to justice also covers being informed about the legal system, being aware of one's rights and liberties, and having one's legal rights and obligations enforced. It also includes the ability to be heard by an impartial and independent tribunal.⁵

Firstly, the Indian Act is a piece of legislation enacted in 1876 that governs matters regarding Indian (Indigenous) status, bands, and reserves.⁶ Despite the Indian Act being a piece of legislation with a long history of racism, discrimination, and aims to both control and assimilate Indigenous peoples, it is still in effect today. Outlined in the current Indian Act are reserves which are lands set aside by the Canadian Government for the use of Indigenous peoples. It is important to note that they are federally-owned land, meaning that the funding for education, housing, social welfare, and infrastructure is dependent on the federal government.⁷ Despite this, Indigenous peoples living on reserves face poverty, poorer quality of education, crowded housing, and higher rates of violence and crime.⁸ These conditions limit opportunities for Indigenous peoples, limit the education about their rights and freedoms, as well as limit the resources to access legal services available to them when needed; this increases their vulnerability and chances of being involved with the criminal system.⁹ This shows the poor allocation of funds and resources in supporting Indigenous peoples. This is a result of self-serving political capital—which refers to “the goodwill, trust and influence that politicians earn or build up with the public through the pursuit of policies that people like or respect.”¹⁰ Since Indigenous peoples make up 5% of the population¹¹ and are considered a minority group, the government would rather cater to the majority of peoples and their wants, including the problems that majority of peoples want fixed—which most of the time does not include Indigenous issues such as allocating more funds and resources towards reserves. This would allow governments to give themselves an advantage in elections as their votes would come from the people they spent their political capital to cater towards—the majority. Ultimately, this hinders one's ability to access justice because Indigenous peoples continue to be placed in conditions that put them at disadvantages socially, economically, and legally as a result of governments spending their political capital to cater towards the majority of people's wants, in order to give themselves an advantage, thus self-serving. In this way, the government disregards the issues of Indigenous peoples and views them as extraneous.

It is evident that policies with self-serving motives enforced by governments have deeply affected generations of Indigenous peoples in Canada; subsequently becoming the origin of intergenerational trauma, victimisation, poor education, overrepresentation within the criminal system and Indigenous youth in foster care, and reaffirming the systemic and structural discrimination against Indigenous peoples.¹² The correlation between the conditions and experiences Indigenous peoples are faced with in conjunction to the high incarceration rates becomes clear. This creates a “domino effect” as Indigenous youth often grow up without parental figures as they have trouble with the legal

⁵ “What is Access to Justice? Five Different Ways of Considering Access to Justice”, ACLRC, 2021

⁶ “The Indian Act”, the University of British Columbia, n.d

⁷ “The Reserve System”, BCcampus, n.d.

⁸ “First Nations Poverty in Canada”, Toronto Metropolitan University, n.d.

⁹ “Understanding the Overrepresentation of Indigenous people in the Criminal Justice System”, Department of Justice Canada, 2023

¹⁰ “What is Political Capital?”, Market Business News, n.d.

¹¹ “Indigenous identity by Registered or Treaty Indian status: Canada, provinces and territories, census metropolitan areas and census agglomerations with parts”, Statistics Canada, 2022

¹² “The Overrepresentation of Indigenous people in the Criminal Justice System”, Department of Justice Canada, 2023

system—often serving long sentences. This instigates placing Indigenous youth in foster care systems—where they are not always provided adequate support to cope with trauma, being isolated from their culture, and losing a sense of home; resulting in instability that puts them at a higher risk of developing behavioural, social, or psychological issues in comparison to their counterparts not in foster care.¹³ This increases the likelihood of Indigenous youth turning to crime as a way to cope with issues; creating the “domino effect” that continues to repeat itself and destroy future generations. To substantiate our argument, we were lucky enough to conduct an interview with a former group home employee at Oak Hill Ranch, Bon Accord that has requested to stay anonymous. We first asked about their thoughts of working at the group home—the overall environment and their experience. They responded, “At least 90% of the kids there were Indigenous [despite the group home being meant for everyone]. They were constantly in fight or flight mode.” When asked about the structure of the home, they said, “... It was institutionalised. The key word in ‘group home’ is ‘home,’ but... it didn’t feel like home.” When asked about their idea of the foster care and group home system in Canada, they replied, “There is no logic in reconciling with someone if we are just going to isolate them.”

Ultimately, foster care and group home systems created to “take care” of these Indigenous youth—majority of the time—are unsuccessful as they isolate youth from their culture and cannot adequately support their unique experiences. It is not a coincidence that Indigenous youth make up approximately 53.8% of foster care despite accounting for 7.7% of the child population.¹⁴ It is also not a coincidence that 50% of youth admissions to correctional services were Indigenous as of 2020/2021.¹⁵ The point being made is that Indigenous populations continuously suffer from the consequences of government actions—or inaction. A large contributing factor to this inaction is the government’s lack of focus toward this sector as a result of Indigenous youth representing a fraction of the population. Where the vast public views these youth as ‘dangerous’ and pathologises them, the government cannot justify spending resources on attempting to treat them fairly, as it would not generate voter favour. The *Youth Criminal Justice Act* mandates that courts must consider alternatives to custody for Indigenous youth, but these alternatives are often just as bad, if not worse, than custody.¹⁶ This further exacerbates the “domino effect” for generations of Indigenous peoples by creating a feedback loop where they come in contact with the criminal justice system, which affects their families, and later on, their children. This shows self-serving politics in the government hidden behind policies continue to hinder Indigenous peoples’ ability to access justice, and to a larger extent, reaffirms systemic and structural discrimination inflicted on particular groups by keeping them in this cycle.

Another of the primary barriers to accessing justice, especially for disadvantaged peoples, are economic factors; both federal and provincial governments determine where money goes, and this contributes to an element that can make or break access to the justice system— legal aid. According to the Government of Canada, “The Legal Aid Program provides contribution funding to the provinces and territories for the delivery of legal aid services for economically disadvantaged persons.”¹⁷ It “promotes access to justice for economically disadvantaged persons, and helps to ensure that the Canadian justice system is fair, efficient and accessible...”¹⁸

¹³ “Foster Care”, Homeless Hub, n.d.

¹⁴ “Reducing the Number of Indigenous Children in Care”, Government of Canada, 2023

¹⁵ “Youth Admissions to correctional services, by Indigenous identity and sex”, Statistics Canada, 2023

¹⁶ “Spotlight on *Gladue*: Challenges, Experiences, and Possibilities in Canada’s Criminal Justice System”, Government of Canada, 2023

¹⁷ “Legal Aid Program”, Gov’t of Canada, n.d.

¹⁸ “Legal Aid Program”, Gov’t of Canada, n.d.

In Canada, legal aid is a shared responsibility between the federal and provincial governments. The federal government's contribution was initially set at 50%, but this figure has fluctuated over the years. However, even though the legal aid program is free for low-income individuals, it isn't always completely effective in providing access to justice. For example, in Alberta, recipients of legal aid could be required to repay their plan; Alberta determines eligibility based on income and assets, while needs are determined by gross family income and the size of one's family. Alberta also considers liabilities, complexity of the case, and whether the case has merit before deciding to provide legal aid.¹⁹ With the annual income limit capped at \$25,200 for a family of four,²⁰ it is apparent that not many people qualify in the first place. Additional conditions placed upon legal aid in Alberta render legal aid almost impossible for most to access, limiting many people's access to justice.

Another factor that causes inadequate access to justice is the price of hiring private lawyers. When legal services are treated as a commodity—something that can be bought and sold—capitalism steps in and raises prices to exorbitant levels. Law firms determine how much legal services cost, but this does not necessarily stay on track with inflation. The buy side has to conform to the prices the sell side sets, with no say in the matter. Legal services are a necessity, and law firms take advantage of this desperation to raise prices without justification.²¹ Moreover, legal services in Canada aren't regulated the way other commodities are. Throughout Canada, rules say that legal fees must be “fair and reasonable” and “disclosed in a timely fashion”.²² Rules in Québec require that a lawyer must also avoid “greedily seeking a profit or abusing his status as a lawyer in order to enrich himself.”²³ However, these rules exist in name only and are not enforced in any way; this results in low-income communities being unable to access legal services— their only option becomes to either compulsorily plead guilty or represent themselves, both of which are unfavourable because they hinder access to justice.²⁴

Another aspect of legal aid is that legal aid in most provinces underpays lawyers for their work, arbitrarily allocating a set amount of hours for each case; oftentimes this limit is far lower than the time required for a lawyer to prepare a good case. As a result, most lawyers do not voluntarily choose to work for legal aid, therefore leaving legal aid with inexperienced lawyers or lawyers who are unable to find other employment within the field. This combination of factors contributes to the fact that an individual in Canada representing themselves in a criminal trial faces the same 86% probability of conviction as those who are represented by a legal aid lawyer.²⁵ This means that legal aid does not provide the same level of services as private law firms, creating a two-tier justice system where people who can afford to hire private lawyers are at a distinct advantage over those who can't.²⁶

Furthermore, legal aid budget cuts further negatively impact the already weak legal aid system. In 2019, Ontario reduced their legal aid budget by 30%. According to lawyers, these cuts limit access to the justice system for low-income people, while also bogging down the justice system when those who

¹⁹ “What is legal aid and who is eligible?” Legalline.ca, n.d.

²⁰ “Legal Aid Eligibility and Coverage in Canada”, Gov't of Canada, n.d.

²¹ “There is no capitalism in legal services. Or is there?” Legal Evolution, 2020

²² “Model Code of Professional Conduct (As amended October 2022)” Federation of Law Societies of Canada, 2019

²³ “Code of Professional Conduct of Lawyers, chapter B-1, r. 3.1.”

²⁴ “Billing without Bilking: Regulating Time-Based Legal Fees”, Noel Semple, 2020

²⁵ “Court Site Study of Adult Unrepresented Accused in the Provincial Criminal Courts (Part 2: Site Reports)” Department of Justice Canada, 2002

²⁶ “Going Broke in Legal Aid”, The Walrus, 2020

cannot afford lawyers are forced to represent themselves. Law society treasurer Malcolm Mercer stated that such a major reduction in such a short period of time caused increased court delays and also seriously disrupted the administration of justice. The impact was so profoundly negative that subsequent planned legal aid budget reductions were cancelled. The Ontario government also announced that the legal aid budget could no longer be used for immigration or refugee cases, limiting access to justice for those marginalised groups; these budget cuts were unveiled with the slogan “Protecting What Matters Most”, which implies that immigrants and refugees, who Canada is supposed to protect, do not matter to the Ontario government. These budget cuts effectively took access to justice away from many groups of people.²⁷

All of the above can be tied back to one thing— self-serving politics present within the government of Canada. Legal aid is an extraneous issue for most governments because the people that benefit from legal aid are usually of low socioeconomic status, and thus won’t have too great an effect on voter outcomes. Additionally, reforming the entire legal aid system would require sustained effort over a long period of time. Governments have term limits, which leads to them focusing more on short-term policies that reap benefits relatively fast in order to stay popular with voters so they can be re-elected. Both the federal and provincial governments are also reluctant to set aside too much money for legal aid, because this would detract from other areas of focus that they believe would create more voter favour for them. Besides this, the government is aware that not many people are aware of the two-tiered justice system, and thus won’t appreciate the government attempting to improve it the way they would with the widely-known two-tiered healthcare system. As a result, self-serving politics greatly hinder access to justice because the government chooses to focus on itself and getting re-elected rather than the good of the people.

Taking the above into consideration, it is evident that self-serving politics within the government obstruct individuals’ ability to access justice—especially individuals from marginalised communities or of low socioeconomic status. By creating financial barriers and putting conditions on legal aid, it makes accessing justice a privilege, not a right or freedom. Additionally, by creating policies and spending political capital focused on benefiting the government itself, marginalised and racialised communities continue to be subjects of victimisation and become victims of the justice system that continues to reaffirm systemic and structural biases and discrimination—which then creates a domino effect that continues to impact further generations. In order to make justice more accessible for everyone, the Canadian government must focus on integrating policies that deconstruct the two-tiered justice system and instead create a singular system that is fair and effective for all who come into contact with it, regardless of race and socioeconomic status. If necessary, these policies must be implemented at the expense of the government’s political capital for the greater good of the people of the country rather than the good of the government’s reputation with the majority of peoples—mainly those who do not suffer to the same extent as some groups in Canada do. Ultimately, politics and governments have power to create change, especially change where we need it the most; accessing justice. To lessen the chasm of inequitable and unequal access to justice, the government must lay aside its self-interests and instead focus on what democracy is— for the *people*, and *all* people.

²⁷ “Lawyers condemn Doug Ford government cuts to legal-aid funding”, The Globe and Mail, 2019

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