

Bridging The Cultural Divide:

A Report On Aboriginal People And Criminal Justice In Canada, Royal Commission On Aboriginal peoples 1995

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The Problem Described

During its public hearings held across the country, the Royal Commission on Aboriginal People (RCAP) made a strong commitment to bring the voices of the people to the attention of the public and of the governments in Canada. Commenting upon the prison system in Canada, the late elder Art Solomon told us his view of the system; 'it is an evil empire, a blasphemy in the face of God...' The prison system is only one part of the so-called 'criminal justice system' and the RCAP concluded essentially that the system is criminal in its effects upon Aboriginal people. Recently an Anishanaabe leader commented 'there is no justice for Aboriginal people in Canada...'

To do our work the RCAP studied the Indian Tribal Courts in the U.S.A. and the Greenland Criminal Code. Our arguments are made in the context of the Canadian situation,- including the circumstances of the indigenous peoples there and the constitutional framework. In a sense then, the RCAP recommendations will not always be applicable to Aotearoa and the Maori people, but I will offer an explanation of the basis upon which the RCAP proposed that establishing separate Aboriginal justice systems was a worthy moral and political objective and a feasible proposition.

It is difficult to decide how best to illustrate the problems of how the Canadian criminal justice system treats Aboriginal people. I have chosen to use the results of only two studies in the Prairie Provinces of Saskatchewan and Manitoba, where Aboriginal people comprise over 10 per cent of the general population, not unlike the proportion of the Maori in New Zealand's total population.

Two studies on admissions to provincial prisons in Saskatchewan for the years 1976-77 and 1992-93 were compared. Aboriginal people in the justice system were over-represented and growing worse. Growth projections in the first study that by some thought were too extreme, have proven to be conservative, particularly in the case of female Aboriginal admissions.

In the province of Manitoba, an inquiry into the criminal justice system was followed outrage over the police killing of a well-known Aboriginal man in a city street. Its conclusion was that

‘Aboriginal over-representation is the end point of a series of decisions made by those with decision-making power in the justice system. An examination of each of these decisions suggests that the way that decisions are made within the justice system discriminates against Aboriginal people at virtually every point...

In Manitoba, the over-representation of Aboriginal people occurs at virtually every step of the judicial process, from charging to sentencing.

- More than half of the inmates jailed are Aboriginal
- Aboriginal accused are more likely to be denied bail
- Aboriginal people spend more time in pre-trial detention than do non-Aboriginal people
- Aboriginal accused are more likely to be charged with multiple offences than are non-Aboriginal accused
- Lawyers spend less time with their Aboriginal clients than with non-Aboriginal clients
- Aboriginal offenders are more than twice as likely as non-Aboriginal people to be incarcerated

In a society that places a high value on equality before the law, documenting the appalling figures of over-representation might seem to be enough to place the resolution of this problem at the very top of the national human rights agenda without further analysis. However, as compelling as the figures are, RCAP proposed that it is equally important to understand what lies behind these extraordinary figures, which are a primary index of the individual and social devastation that the criminal justice system has come to represent for Aboriginal people. Understanding the root causes is critical to understanding what it will take by way of a national commitment to bring about real change.

The Root Causes Of Aboriginal Over-Representation and Crime

The RCAP examined the studies and conclusions of many other reports on the subject and adopted their conclusions. A

typical expression is that of the Aboriginal Justice Inquiry of the province of Manitoba in 1991;

“...we believe that the relatively higher rates of crime among Aboriginal people are a result of the despair, dependency, anger, frustration and sense of injustice prevalent in Aboriginal communities, stemming from the cultural and community breakdown that has occurred over the past century.”

The conclusions of the Canadian studies were replicated by similar conclusions from studies in Australia and New Zealand, such as Moana Jackson's 1988 work. [1](#)

The Royal Commission opined that locating the root causes of Aboriginal crime in the history of colonialism, and understanding its continuing effects, pointed unambiguously to a critical need for a new relationship that rejects each and every assumption underlying colonial relationships between Aboriginal peoples and non-Aboriginal society.

Responding to the historical roots of Aboriginal crime and social disorder pointed directly to the need to heal relationships both internally within Aboriginal peoples and communities and externally between Aboriginal and non-Aboriginal people.

The Right of Self –Government and the Authority to Establish Aboriginal Justice Systems.

In making the case for Aboriginal control of 'Justice', the RCAP begins by recognizing that it has been through the law and the administration of justice that Aboriginal people have experienced the most repressive aspects of colonialism. The RCAP then proposed that it is in Aboriginal law, with Aboriginal law and through Aboriginal law that Aboriginal people aspire to regain control over their lives and communities. The establishment of systems of Aboriginal justice is seen as a necessary part of throwing off the suffocating mantle of a legal system imposed through colonialism. Reads the report

“It is difficult and disturbing to realize that Aboriginal people see the non Aboriginal justice system as alien and repressive, but the evidence permits no other conclusion”.[2](#)

The right of Aboriginal self-government is argued to be a common law right in Canada, one that is protected by the Constitution. Aboriginal control over the substance and process of justice flowing from the Aboriginal right of self-government would permit the contemporary expression of Aboriginal concepts and processes of justice. They are likely to be more effective than the existing non-Aboriginal justice system, both in responding to the wounds of colonialism, which are evident in a cycle of disruptive and destructive behaviour, and in meeting the challenges of maintaining peace and security in a changing world.

Continuing the argument, the RCAP pointed out that the non-Aboriginal justice system was never designed to address and redress the impact of the accumulated injustices of colonialism - nor do those involved in it, whether police officers, lawyers, judges or correctional administrators, see this as in their mandate. The principle of individual responsibility, which lies at the heart of western concepts of criminal law, requires that the system deal with the individual accused who is before the court, and the focus of the process is on his or her actions in the context of specific definitions of what constitutes a crime.

What the Aboriginal approach and process seek to do lies not simply at the periphery of the non-Aboriginal system; it lies outside the framework entirely. Many times sensitive judges have lamented the fact that ‘unfortunately the problems that have brought this accused before the court lie outside the ability of this court to resolve’. This lamentation is not acceptable for Aboriginal people.

They demanded and RCAP recommended, that through their own processes of justice they be able to deal with victimizer and victim in the context of their continuing relationships, in the context of their place in their communities, in the full understanding of the forces that have turned family members into victims and victimizers, and in the conviction that through their own justice systems they can do more than simply fuel the cycle of violence. To do that they need not only the strength of their own philosophies and, the skills of their healers, but also a share of the enormous resources consumed by the non-Aboriginal system in a manner that has failed to meet the needs of Canadian aboriginals.

Those resources must include the legal resource of recognized jurisdiction in relation to justice, as part of the right of self-government, and the fiscal resources to make that jurisdiction an effective one.³

The RCAP concluded that the foundation for a new relationship between Aboriginal peoples and other Canadians must be the recognition of an inherent right of Aboriginal peoples to self-government. This right encompasses the right of Aboriginal nations to establish and administer their own systems of justice, including the power to make laws within the Aboriginal nation’s territory. The Commission argued that federal, provincial and territorial policy in the area of justice should be formulated and implemented on that foundation.

The justice report then went on to consider some of the most important questions raised by these conclusions and endeavoured to grapple with the principal issues and challenges that arise from establishing and implementing Aboriginal justice systems. It was emphasized that the next portion of the report should not be viewed as providing a blueprint for the future containing the answers to all the questions that will ultimately have to be answered. Rather, it should provide a framework for the development of Aboriginal justice systems on a more comprehensive basis than has been possible up till now. Current initiatives, are small-scale and have been developed on an *ad hoc* basis.

Creating Conceptual Space for Aboriginal Justice Systems.

Of the many issues considered by RCAP that fit within this section, I have been guided by the questions in the conference programme and selected among them some options for the resolution of jurisdictional conflicts in an Aboriginal justice system. Some of the issues raised by questions of jurisdiction also ranked among those most keenly scrutinized by the public media when this report was released.

There are four basic ways of characterizing the jurisdictional issues facing Aboriginal justice systems. The first three, which may overlap in practice are

- jurisdiction over subject-matter - what types of issues the justice system can adjudicate;
- jurisdiction over the person - who is entitled or required to use the justice system;
- and territorial jurisdiction - where the justice system operates. The fourth area is comity - the mutual recognition by justice systems of each other's decisions.

A number of responses to these issues are available. The choices an Aboriginal nation makes will likely depend on a balancing of principles and pragmatism.

Territorial Jurisdiction

An Aboriginal nation should have jurisdiction over all persons within its territory. This is the same principle that now applies in Canadian jurisdictions. By the same token, Aboriginal accused persons must abide by the jurisdiction of the relevant court where they are charged outside the nation's territory. Once the areas of Aboriginal jurisdiction over justice have been negotiated with the other orders of government, the aboriginal nation itself should determine the extent to which it wishes to take on that jurisdiction.

Choice By the Nation Respecting Offences and Offenders

Aboriginal nations should not be constrained in the types of offences they can deal with. Instead Aboriginal peoples themselves should determine when they are ready to deal with particular offences. Offences that fall within their jurisdiction but that they are not prepared to deal with would continue to be handled by the non-Aboriginal courts.

Aboriginal justice systems should also be able to decide which alleged offenders come before them. Whether the individual is an Aboriginal person should not determine the issue; Aboriginal justice systems should be open to all. It is essential that Aboriginal justice systems be able to exercise choice with respect to offences and offenders. Requiring Aboriginal justice systems to handle every type of offence and every offender as soon as they are established would prevent development and evolution of such systems in accordance with their capacity.

Territorial Jurisdiction and Comity

Members of Aboriginal nations who commit crimes outside the territorial reach of their nations should expect to be dealt with by the judicial system in operation where the offence took place. The *Criminal Code* of Canada allows persons charged with criminal offences to plead guilty to those charges in any court in the province where the events giving rise to the charges took place, as long as they have the consent of the Crown Attorney's office in the jurisdiction where the charge was laid. This is called a traversal of charges. There is no reason why similar provisions could not be put in place to allow members of Aboriginal nations to have matters dealt with in their home communities if they agree to accept responsibility for the offences with which they have been charged. This right cannot be unfettered, however, or at the sole discretion of the accused. Before any decision to traverse charges, the individual's home community would have to be contacted to see whether it was willing to accept a traversal. The decision to accept or reject such a request would be based on the nature of the charge and the community's readiness to hear the case of the particular individual.

On the issue of comity, the Royal Commission on Aboriginal Peoples noted that the best efforts of Aboriginal nations to establish distinct justice systems will be largely for naught if their decisions are not recognized as binding by the courts of the non-Aboriginal system, or of other Aboriginal systems. A jurisdictional framework based on negotiated agreements between an Aboriginal nation and relevant governments, and one that gives non-Aboriginal accused a choice of venue, should mean that non-Aboriginal justice systems will have little difficulty respecting the decisions of Aboriginal decision-making bodies. Indeed, assuring this recognition would be a major part of negotiations to establish Aboriginal justice systems. At the same time, it would be expected that Aboriginal decision-making bodies would recognize the decisions of non-Aboriginal courts involving Aboriginal residents on non-Aboriginal territory who commit offences on that territory.

By clearly recognizing the right of Aboriginal nations to determine which offences and which offenders they are willing and ready to handle, and by giving non-Aboriginal accused who are not members of the Aboriginal nation a choice about which system will deal with them, most of the major stumbling blocks besetting discussions of the transfer of jurisdiction can be removed. Aboriginal nations that do not give non-Aboriginal accused a choice may have difficulty negotiating and achieving recognition of the decisions of their adjudicative bodies by non-Aboriginal governments and courts.

Conclusion

One point that became very clear to me in listening to the voices of indigenous people in all parts of Canada, is how the problems underlying the justice system and the prison system are interrelated.

In one federal maximum security prison on the prairies we heard an inmate serving a life sentence for a horrible crime which tells us the story of his life. It is not an easy story to forget. It is not an easy story to remember either. He did not have a happy childhood. His younger years were passed in a series of foster homes where he suffered the most horrible abuses imaginable at the hands of those entrusted with his care. A tall and strong man, he stood weeping in front of the other inmates and the armed prison guards, and pleaded with us to recommend to the government that they do the right thing to prevent other children today from growing up in a life like his. He did not ask anything for himself. We asked the one hundred or so inmates who were assembled there to raise their hand if they too had grown up in foster homes. Most of the prisoners put up their hands.

Our shock was compounded a few days later when visiting a women's prison in the prairie region where indigenous women make up the overwhelming majority of the population. The women here told us their stories too, and revealed that when they came in to the jail, the government workers came for their children to take them away and put them in foster homes. The

vicious cycle of warehousing Aboriginal people within foster homes as children until their graduation to prison was made horrifyingly clear.

Recently I supervised a project whereby Aboriginal people working within the child and family services system in a province documented the way in which the government system takes children away from their homes and puts them into foster homes. We showed not only how the everyday practices of the social workers, the supervisors, and indeed the court system, breaches the standards laid down in the province's own legislation, we showed how these practices breached the fundamental human rights of children and families. The system is worse than useless. It causes terrible harm. I have no words stronger than those used by Art Solomon to condemn the prison system for this so-called child welfare system, but the system that harms children deserves even stronger condemnation. Taking the victim instead of the wrong-doer and short circuiting even the minimum safeguards of the criminal justice system, as the child apprehension system does, is an abomination and a shame upon any society.

Surely change in this area is change that would benefit everyone. These terrible institutions seem to go on and on without justification. They are not necessary yet they endure and prosper. Who benefits? The case for radical change within the criminal justice system modelled upon the English criminal law system is compelling, as is the case for the long-term establishment of separate Aboriginal justice systems. How do we move ahead now?

PART II

The *Gladue* case and sentencing of Aboriginal offenders. [1999] 2 CNLR 252.

Criminal Code of Canada Purpose and Principles of Sentencing

Purpose

s. 718 The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing such sanctions that have one or more of the following objectives:

- a) to denounce unlawful conduct;
- b) to deter the offender and other persons from committing offences;
- c) to separate offenders from society, where necessary;
- d) to assist in rehabilitating offenders;
- e) to provide reparations for harm done to victims or to the community; and
- f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.

Fundamental principle

s. 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

a) 718.2 A court that imposes a sentence shall also take into consideration the following principles: A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, shall be deemed to be aggravating circumstance

- i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
- ii) evidence that the offender, in committing the offence, abused the offender's spouse or child,
- iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
- iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization ';

b) A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar

circumstances;

- c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;
and
- 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.

Summary of the Court's View in Gladue [1999] 2 CNLR 252,@ 285-86.

Section 718.2 (e) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of over-representation of Aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.

Section 718.2 (e) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII through ss. 718, 718.2(e), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.

Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s.718.2(e) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for Aboriginal offenders.

Section 718.2(e) directs sentencing judges to undertake the sentencing of Aboriginal offenders individually, but also differently, because the circumstances of Aboriginal people are unique. In sentencing an Aboriginal offender, the judge must consider:

- (A) The unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and
- (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.

In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people, and of the priority given in Aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out above (A and B), which in turn may come from representations of the relevant Aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information. If there is no alternative to incarceration the length of the term must be

carefully considered.

The section is not to be taken as a means of automatically reducing the prison sentence of Aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed. The absence of alternative sentencing programs specific to an Aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

Section 718.2(e) applies to all Aboriginal persons wherever they reside, whether on or off reserve, in a large city or a rural area. In defining the relevant Aboriginal community for the purpose of achieving an effective sentence, the term 'community' must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the Aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

Based on the foregoing, the jail term for an Aboriginal offender may in some circumstances be less than the term imposed on a non-Aboriginal offender for the same offence. It is unreasonable to assume that Aboriginal people do not believe in the importance of traditional sentencing goals such as deference, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is Aboriginal or non-Aboriginal.

¹ Jackson, Moana, *The Maori and the Criminal Justice System, He Whaipanga Hou, A New Perspective* (New Zealand Department of Justice, 1988) esp. @ 44-45, 100, 102-103.

² RCAP Bridging the Cultural Divide @ 58.

³ RCAP @ 71.