

The Justice System in Canada: Does it Work for Aboriginal People?¹

JUSTICE HARRY S. LAFORME

Editors' Note:

On November 19, 2004, Canada witnessed a landmark event in its judicial landscape, the Honourable Mr. Justice Harry S. LaForme was appointed to the Ontario Court of Appeal. For the first time in Canadian history, an Aboriginal person had been appointed to an appellat level bench.

A Mississauga Indian and a member of the Mississaugas of New Credit First Nation, Justice LaForme was born and raised on his community's reserve in southern Ontario. He graduated from Osgoode Hall Law School in 1977 and was subsequently called to the Bar of Ontario in 1979.

Justice LaForme has enjoyed a diverse and exhaustive legal career. He practiced commercial law as an associate with the firm of Osler, Hoskin and Harcourt before starting his own Aboriginal law practice focusing on Constitutional and Charter litigation. In 1989, he was appointed Commissioner of the Indian Commission of Ontario and, in 1991, he chaired the Royal Commission on Aboriginal Land Claims. He was appointed to the Ontario Court of Justice in 1994 where he served until his 2004 appointment to the Court of Appeal.

Justice LaForme is the proud recipient of 1997 National Aboriginal Achievement Award for the field of Law and Justice and has been honoured to receive Eagle Feathers from Aboriginal elders on three separate occasions. He has published numerous academic articles on Aboriginal law and has been privileged to teach a course on Aboriginal rights at Osgoode Hall Law School.

To honour Justice LaForme and his achievements, the Indigenous Law Journal is pleased to publish the first speech Justice LaForme gave as an Appellate Judge. On February 7, 2005, the Native Law Students' Association at the Faculty of Law, University of Toronto, invited Justice LaForme to the Faculty of Law to speak as part of Aboriginal Awareness Week. He spoke powerfully to the current state of the criminal justice system

1. I recently presented a version of this topic and discussion on 8 March 2004 to an Ontario Crown Attorney's conference that examined violence against women. As one reads through this paper, one will note that a recent amendment occurred due to events on 19 November 2004.

as it affects Aboriginal people. Below is the text of his speech; we hope you find his words as inspiring and thought provoking as we have.

The ILJ Senior Editorial Board

INTRODUCTION

The purpose of this paper is to express my thoughts about the impact of the Canadian justice system on Aboriginal people. The views expressed herein include my experiences as a judge of the province of Ontario's superior trial court. However, they are also largely based on my life's experiences as an Aboriginal person who grew up on the Mississaugas of New Credit Indian Reserve.

As well, they reflect thoughts acquired from my professions as a lawyer and a law professor focused on the area of Aboriginal rights law. And finally, they are lessons and opinions formed from my experiences of chairing two Royal Commissions (the Indian Commission of Ontario and the Indian Claims Commission) that addressed Aboriginal socio-economic issues and land claims.²

I do not intend to provide answers to the concerns that are the subject of this conference and this topic; however, you may very well conclude that the concerns expressed will themselves reveal answers and that it only remains to implement them into action.

It seems to me that, in the context of this topic, interested persons will more likely wish to ponder the more narrow issue of criminal justice, rather than the whole of the Canadian justice model. Indeed, Canada's entire justice system is made up of so many aspects and components that we could spend a week merely introducing them. This is especially true if one is then assessing how any particular component impacts on Aboriginal issues, and then resolving whether it works for Aboriginal people. Consequently, I intend to confine my remarks to the narrower field of Canada's criminal justice system.

I believe that any comments on this subject will be better appreciated if I first provide a brief definition of the term *justice*. Legal dictionaries define *justice* as:

The principle of giving every person his or her due ...³

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2. Given my background, my comments and opinions herein will be mostly directed at the "Indian" component of Aboriginal people: That is, Indian as distinct from Inuit and Métis set out in s. 35 of the *Constitution Act*. However, it will no doubt be the case that my comments and opinions are equally applicable to all Aboriginal people.
 3. D. Dukelow & B. Nuse, *The Dictionary of Canadian Law*, 2d ed. (Toronto: Carswell, 1995).

Ordinary English language dictionaries define *justice* as including:

behaviour of oneself or to another, which is strictly in accord with currently accepted ethical law or as decreed by legal authority; the process of law (*i.e. to be brought to justice*); to act in such a way as to show full appreciation of the worth or importance of (*i.e. to do justice to an occasion*).⁴

With this by way of a brief introduction, I now propose to address my assigned topic through an analysis of the following question:

Does Canada's system of criminal justice determine the amount of good or evil in Aboriginal people being brought to justice—and does that justice system do justice to the occasion?

Generally speaking, the Canadian criminal justice system is grounded in the “rule of law.” That is to say, Canada's democratic foundation rests on the legal doctrine that every person is subject to the ordinary law within the jurisdiction of Canada. More specifically, and since the patriation of Canada's constitution in 1982, the rule of law is described as meaning at least two things:

First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.⁵

The area of criminal justice is one such actual order of positive laws. Criminal justice has within it four broad basic components: (1) Legislation - that is, the laws that are to rule society within Canada; (2) Enforcement - generally speaking, this means those persons delegated and empowered to police and monitor the laws; (3) Prosecution - this includes those institutions and individuals who interpret and impose the laws; and (4) Punishment - or the sanctions that are a potential consequence of violating the laws.

Now, before examining these four basic components, I believe that it is first necessary to consider why there is even a need for us to explore this topic. And again, that topic is:

4. *The New Lexicon Webster's Dictionary of the English Language*, Encyclopedic ed., (New York: Lexicon Publications, 1987).

5. *Reference re Language Rights Under s. 23 of Manitoba Act, 1870, and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 at 748-9.

Does the Canadian criminal justice system work for Aboriginal people?

I will at this stage presume—perhaps not unfairly—that there is at least a perception by some that the criminal justice system does not work for Aboriginal people. Some would go so far as to say that it cannot work for Aboriginal people. This, I submit, flows—at least in part—from the following real and philosophical cultural differences between Aboriginal people and most other Canadians.

There is the reality that Aboriginal people have persisted for thousands of years as distinct cultural entities. They have never been conquered in a war and they have never surrendered their original right to govern themselves in accordance with their customs and cultures. This remains true in spite of the fact that, throughout history, successive federal governments have tried to interfere with, or diminish, that right and to replace it with *their* concepts of “Native” government.⁶

Aboriginal people do not adhere to a single life philosophy, religious belief or moral code. Contrary to much popular thought, an Indian is not simply an Indian. There are currently at least 50 distinct linguistic groupings among First Nations and, among Inuit and Métis there are different dialects and languages spoken. Many of these Aboriginal philosophies differ from Canadian or mainstream society. For example, compare the Judeo-Christian tradition that man is to “fill the earth and subdue it”—he is to “rule over the fish in the sea, the birds of heaven and every living thing that moves upon the earth.”⁷ In Ojibwa culture and thought, man does not hold dominion over the earth and all its creatures. Rather, man is last in order and is the most dependent and least necessary of all the orders.

The very meaning of the word *justice* is understood differently by Aboriginal society from that of what I will refer to as “mainstream society.” Aboriginal people believe justice is about restoration of peace and equilibrium within the community, and reconciling the wrongdoer with his or her own conscience and with the individual or family who has been wronged. Mainstream society, on the other hand, is about controlling actions it considers potentially or actually harmful to society. The emphasis is on punishment for the deviant behaviour as a means of making people conform—and to inform other members of society in respect of similar deviant behaviour. In my court, we call it specific deterrence and general deterrence.

Finally, it is important in examining the issue to also know a little about where Aboriginal people in Canada presently come from. Perhaps this will

6. Manitoba, *Public Inquiry into the Administration of Justice and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen’s Printer, 1991) at 18 [*Manitoba Justice Inquiry*].

7. Genesis 1:28-30, *New English Bible*.

also begin to address why this issue is fitting for our examination and comment.

Usually Aboriginal Indian people come from a reserve community:

- Where the rate of suicide is over 2 times that of non-Aboriginal Canadians;
- Where violent deaths occur at a rate over 3 times greater than the rest of Canada;
- Where they live in overcrowded housing at a rate 15 times that of other Canadians;
- Where about 45 per cent do not attend high school—while with other Canadians, it is about 15 per cent;
- Where the average family income for Aboriginal people on and off reserve is about half that of other Canadians;⁸
- Where, in some Aboriginal communities, it is believed that between 75 and 90 per cent of the women are battered, and 40 per cent of the children have been abused;
- Where a study involving seven reserves in northern Manitoba reported that over 70 per cent of the women and 50 per cent of the men reported being abused; and
- Where, from 1991–1999, spouses were responsible for killing 62 Aboriginal women and 32 Aboriginal men (a rate that is eight times higher than for non-Aboriginal women and 18 times higher than for non-Aboriginal men).⁹

Now, with that as a bit of background, I believe it will be more informative for me to go on to briefly examine the four corners of criminal justice, as we know it; or at least as we believe we know it.

Legislation

As I set out at the beginning, Canada prides itself on being a nation that governs its society by the rule of law. Further to this, it is said that our criminal laws are intended to be a reflection of our society. That is to say, our laws reveal and advise on the acceptable—or more correctly, what is not acceptable—behaviour and conduct by persons when they are within the boundaries of society.

8. Indian and Northern Affairs Canada, *Highlights of Aboriginal Conditions 1981-2001* (Ottawa: Minister of Indian Affairs and Northern Development, 1989).

9. In connection with the last three bullets: M. Bopp, J. Bopp & P. Lane Jr., *Aboriginal Domestic Violence in Canada* (Ottawa: Aboriginal Healing Foundation, 2003) at 26.

All criminal laws in Canada are within the exclusive jurisdiction of the federal Parliament and all crimes *per se* are set out in the federal statute called the *Criminal Code*. There is, of course, other conduct that can give rise to punishment equal to that of committing a crime. For example, Canadians can be held accountable under the food and drug laws or, perhaps even more relevant, the *Indian Act*, where it currently provides for offences such as:

A person who trespasses on a reserve is guilty of an offence and is liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month, or to both.¹⁰

Until 1951, the *Indian Act* made it an offence for an Indian to participate in a dance or ceremony at which presents were given away (*i.e.* a pow wow), or for any person to receive money from an Indian for the prosecution of a claim (*i.e.* a lawsuit).¹¹

Provincial legislatures pass laws that also attract criminal proceedings and similar punishment. Examples include environmental protection, corporate or business conduct, and tobacco tax legislation. Violation of, and subsequent conviction for, provincial laws such as these can result in fines and prison terms.

Common to all these laws is the underlying notion that the laws supposedly reflect the wishes of the majority of society as to the kind of social environment they want Canada to have. In other words, the rules of law are those that society wants to be ruled by.

This notion is perhaps the first of many aspects of Canada's justice system that upon examination may reveal itself to be myth—particularly as it pertains to the experience of Aboriginal people. Ask yourself: Who really decides what laws Aboriginal persons will be ruled under and bound by?

Does anyone know of any Aboriginal person who participated in the decision that Indians, as defined by the *Indian Act*, need to be governed by a separate act? More importantly, what majority, exactly, decided that not only would Indians and “their” lands be governed by some separate legislation, but that virtually every aspect of an Indian's life—from cradle to grave—would be decided by some faceless non-Indian government official living in Ottawa?

Further in this regard, all laws passed by Parliament, or a provincial legislature, must also comply with our *Charter of Rights and Freedoms*, which forms a part of Canada's *Constitution*. *Charter* rights have become particularly significant in criminal law proceedings. For example, section 8 of the *Charter* provides:

10. *Indian Act*, R.S.C. 1970, c. I-6, s. 30.

11. R.S.C. 1927, c. 98, ss. 140-141.

Everyone has the right to be secure against unreasonable search and seizure.

Does this mean that provincial enforcement officers—not police—can stake out and conduct surveillance operations of an Indian-owned business establishment on a reserve for the purposes of enforcing the provincial *Tobacco Tax Act*? You should know that an appellate court has tacitly approved of this as a valid provincial law enforcement technique.¹² Should it make any difference if the reserve has its own First Nation police force?

Consider also the “equality” provisions of the *Charter*, namely, s. 15. It provides:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Will this accommodate Aboriginal self-government laws that are based upon cultural and tribal differences? For example, consider where women and men have traditionally played different and distinct roles in tribal government. And what exactly does *equal* mean? Does it mean that Indians get to hunt and fish in accordance with their Aboriginal and treaty rights as recognized and affirmed by s. 35 of the *Constitution Act*, even though it provides for rights not afforded to other non-Indian fishermen and hunters? Clearly, that is not equal treatment in substance, but is it unfair? Is it unlawful? Is every thief a thief and therefore to be punished the same? Finally, should *equal* mean *fair*, or does it mean—indeed should it mean—*exactly the same*?

Let me now turn to the issue of enforcement of legislation, or perhaps more gently stated, the manner in which obedience with legislation is imposed.

Enforcement

Having laws that are designed to rule society, it then becomes necessary to police and monitor those laws. To this end, our society has police officers, some appointed federally while others are appointed provincially. Many First Nations have their own Aboriginal police forces. All of which have differing responsibilities based upon what laws they monitor, and the boundaries of the territory they police.

In addition to police officers, governments in Canada also appoint enforcement officers to monitor and ensure compliance with some of its

12. *R. v. Yang* (1998), 125 C.C.C. (3d) 328 (Ont. C.A.) at 334.

other laws. I mentioned already the example of those appointed to enforce the provisions of the *Tobacco Tax Act*. Other enforcement officers would include those given the task of enforcing laws that govern and regulate matters such as *game and fish* in a given province. There is, as most may know, a significant and often turbulent history between Aboriginal people and those game and fish officers appointed under, and responsible to, the provincial Ministry of Natural Resources.

There are many aspects and competing interests in the sometimes thankless and quite often dangerous profession of policing. It is said that our police forces—and police in general—wield the most power over residents, of anyone, or anything, else in Canada. They are the ones that are mandated with the legal right to stop and detain people; to search them; arrest them, and to deny them their freedom if they choose. Moreover, to perform these tasks, they are given the additional extraordinary legal right to use force in the performance of their duties if *they* deem it necessary. It is the same power and authority that is given to military soldiers who fight and kill in wars. And it allows for conduct that—if any of us who are not police officers were to exercise—we could be prosecuted and likely imprisoned for.

Given the extraordinary powers that our police are fixed with, we must then ask the question: Does our system of criminal justice actually designate and empower those who reflect Canada's values, especially those values that Aboriginal people cherish, along with those that are spelled out in our *Charter*? Indeed, we must also ask: Where the values of segments of Canadian society seem to compete, are the police willing or able to deal with these competing interests? Or, perhaps more importantly, do they even understand the problem? Here are three examples to help think through these issues:

First, consider the tragic case of Dudley George, and the related contested issues of the Stoney Point First Nation and those of the Ontario government. Were the Aboriginal people correct in their desire to protect their traditional lands, or was the government correct in its desire to secure from occupation one of *their* parks? In other words, was it correct to describe the Indians as “protestors”—as the media willingly subscribed to and continues to—or were they simply occupiers of traditional land with a legal colour of right to do so? Do labels such as “protestor” invoke a particular mindset, and do they matter? Especially at the outset of such an encounter, whose interests should be protected and enforced, and why? Was it impossible for the police to appreciate the competing interests and resolve the matter another way? If not, why not?

Second, there is the equally tragic case that occurred several years ago on the Akwasasne First Nation territory where again an Aboriginal person died in a dispute over competing Aboriginal interests related to gambling. Is there any understandable and rational reason why the Ontario Provincial

Police (“OPP”) were hesitant to answer the request for assistance by the First Nation Police Force? Is it fair to ask: Would the OPP have been as reluctant to assist if the matter occurred in Toronto and it was the Metro Police who made the request?

Third, there are other incidents such as those in Oka, Quebec; Kanawaki, Quebec; and Gustafsen Lake, B.C. On reflection, whose interests were paramount and deserved protection over another’s equally held and cherished interests? Ask the question: How are such decisions made and who makes them? Should it change, and if so, how?

Perhaps the answer lies, yet again, in history.

There can be no doubt that, historically, the interests of Aboriginal people were secondary and perhaps even deemed meaningless. One need only recall the *Indian Act* provisions I set out earlier. Indeed, to this day the *Indian Act* allows that the Minister of Indian Affairs can invalidate a duly executed will of an Indian.¹³ In other words, the current law allows that I could make a will, and solely because I am an Indian, and without any due process, the Minister of Indian Affairs, for a variety of reasons, could cancel it.

Given that, and the examples of some of the police enforcement choices I gave above, one could be forgiven if they were to conclude that the historical attitude towards Aboriginal interests has not changed at all. Aboriginal people were once described as “background noise” within the political landscape of Canada: I wonder, is it possible that in the minds of many Aboriginal grievances and issues remain nothing more than background noise?

No doubt all of this history plays a significant role in the current distrust that exists on behalf of Aboriginal people towards the police. And, it is not a matter for anyone to take a defensive position on or be offended by, because to do so ignores the history that is real, and that accounts for the genuine views of Aboriginal people. Police, perhaps even more than others, must accept the accuracy and depth of the attitudes and views Aboriginal people have with respect to the discrimination they experience, and demonstrate to them that they no longer need to be distrustful of the police.

Included in this examination is—of course—the ever-present ugly spectre of racism. However, this day does not allow me to comment to any extent on that issue. And, it certainly is not an issue that is exclusive to the concerns of Aboriginal people, even if in Canada they have suffered most and longer from it. It is sufficient to simply say, it exists; we all know it does; and it must be confronted. I will say a bit more on this as I proceed.

13. *Supra* note 10 at s. 46(1).

This takes me to the next component, namely prosecution, or the manner of putting an offender on trial.

Prosecution

This is the aspect of our criminal justice system that I have often viewed as having the greatest potential for ensuring *injustice*. People may find this surprising, so allow me to explain; and keep in mind the often-stated cliché: “*How much justice can you afford?*”

Consider that prosecution of an offender requires the “state”—whether it be federal, provincial, or First Nations—to first interpret the “deviant behaviour” prohibited by law, which it believes to have been violated by the social deviant (*i.e.* the “accused”). Thereafter, the state must then prove its case in one of our courts of law before a judge, and often a jury. That is to say, the state is required to decide the question: Did this alleged offender violate one of our rules of law? I will presume at this stage—and for purposes of this examination—that an unprejudiced *serve and protect* member of the policing community legitimately arrested the offender.

It then becomes necessary for the accused person to defend himself or herself against the state and all of its resources. Now it is true that the state’s resources are not inexhaustible, but nonetheless, they will be what the state deems is necessary. In other words, it is at this stage the question gets asked: How much justice can he or she afford?

I would submit that there are very few accused Aboriginal people in Canada who are able to afford what is often referred to as “high-priced legal talent.” Indeed, beyond the cost of the lawyer, there is the cost of investigation and experts to challenge those presented by the state. In the end, the costs to truly defend oneself in this country against any criminal charge are virtually prohibitive for most Aboriginal people. For example, consider the wrongful conviction of Guy Paul Morin.

Guy Paul Morin was exposed to prosecution on two separate occasions and, after acquittal in his first trial, was ultimately convicted, in large part, on the basis of expert evidence that was no doubt costly to the state, but was nevertheless available within some government budget. Aside from whatever the contribution might be from Legal Aid: Where does someone in the shoes of Mr. Morin obtain the funds to defend himself when, at the end of the whole process, the cost to the state must surely be measured in the millions of dollars?¹⁴

At least equally tragic is the case of Donald Marshall who was wrongfully convicted of murder—in part—because he was poorly

14. Ontario, *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Queen’s Printer, 31 March 1998).

represented at trial and was not able to afford his lawyer of choice. In the public inquiry that took place after Donald Marshall had spent 11 years in prison for this miscarriage of justice, it was found that all aspects of the criminal justice system failed him, including his legal representation. In other words, he could not afford the justice he deserved.¹⁵

Contrast this with the challenge of former Prime Minister Brian Mulroney against the state's wrongful naming of him in a criminal fraud allegation. His costs to defend himself against that wrongful action were several million dollars for which the state was ultimately required to reimburse him. Thus, the overall cost to the state was probably almost twice that amount. The point in this is that Brian Mulroney could afford the justice he needed. How many Aboriginal people could afford to undertake such a challenge against the apparent endless resources of the state—even if there was the possibility of reimbursement?¹⁶

Several years ago while in my former life as a practicing lawyer, I had the privilege of representing the Aboriginal people of Nippissing First Nation. Twenty-five members of that First Nation were charged with some 250 fishing offences. The defence of each of the people accused was protection against prosecution by virtue of their treaty rights, and the facts were not disputed. Given the treaty rights issue, the First Nation government agreed to fund their members' legal costs. Separate trials for each alleged offender were necessary because the specific offences were separate in time and place. Yet, it was also the case that even had they wanted to—they could not afford to plead guilty. Any offers of settlement or any plea bargains by the state were prohibitive because a guilty plea included payment of a fine. For some offences, the fines were as high as \$5,000 upon conviction. However, even if a plea and an agreed upon fine was \$50 for each of the 250 offences, the aggregate costs of the fines alone to the First Nation would have been \$12,500.¹⁷

Finally, in this regard, for Aboriginal people Legal Aid funding for many of the social issues they are called upon to litigate or defend themselves against is of little comfort or assistance because it is simply not available. That is to say, Legal Aid funding is not provided for these types of

15. Nova Scotia, *Royal Commission on Donald Marshall, Jr., Prosecution* (Nova Scotia: Queen's Printer, December 1989).

16. The costs issue was agreed upon between counsel for Mr. Mulroney and representatives of the Canadian government.

17. It is of note that the First Nation funded each member's defence provided it was based upon a right to fish that was guaranteed in the treaties. However, had there not been such a defence, all the usual arguments would need to have been made, including the possibility of plea bargains. The fines that the state indicated they would consider if early pleas of guilty were entered were all in the neighbourhood of \$200 per offence. Thus, the costs to the First Nation to settle would have been about \$50,000.

litigation: for example, a right of the First Nation to fish in accordance with an Aboriginal or treaty right.

With the limited resources allocated to the Legal Aid Plan in Ontario measured against the overwhelming demand, and strict policies and criteria, attached to such funding, it amounts to virtually nothing by way of an answer. And, my understanding is that the problems and limitations associated with the Ontario Legal Aid Plan are the same as those with similar litigation funding programs in all the other provinces.

Another negative factor in the area of prosecution centres on those who occupy and exercise the various roles, especially at the stage when an Aboriginal person is “brought to justice.”

To begin with, Aboriginal people—inclusive of Indian, Inuit and Métis—make up approximately 3 per cent of the total population of Canada, or approximately 1,050,000 of a total of 35 million. Status Indians number around 800,000 with approximately 51 per cent living off reserves and roughly one third resident in Ontario.¹⁸

We know also that, unlike any other people of Canada, the rights of Aboriginal people are recognized and affirmed in Canada’s supreme constitutional law. It is an historical fact that Aboriginal people are—together with the English and the French—the founding nations of peoples of Canada. And, it is a current reality that there are significant unresolved Aboriginal historical legal issues of virtually every kind that await resolution of one kind or another in Canada.

With that by way of background, consider the fact that there are approximately 1000 federally appointed judges in Canada, with 250 in Ontario where approximately one third of Canada’s overall population is located. Of those 1000 federally appointed judges, six are Aboriginal people: four in Ontario, one in Manitoba and one in Quebec. All six are the first judges appointed to this level of court in the history of Canada. The most recent Indian appointment was some eight years ago, while the most recent Métis appointment was made in early 2004. And, it is of note that all sit on the trial division court.

Until November 19, 2004, there had never been an Aboriginal person presiding on an Appellate Court in Canada.¹⁹ However, in 2004—and almost daily for the first seven months—senior Cabinet Ministers of the Federal government commented about this historical void; other commentators

18. Canada, House of Commons Standing Committee on Aboriginal Affairs, *Unfinished Business: An Agenda for all Canadians in the 1990's* (Ottawa: Queen’s Printer, 1990).

19. On November 19, 2004, I received a call from Irwin Cotler, Minister of Justice, and was advised that I had been appointed to sit on the Ontario Court of Appeal. Both the Minister and I were thrilled about this historic first for Canada.

called it Canada's historical shame.²⁰ They espoused how the time was at hand to resolve this tragic and obvious oversight and neglect. Indeed, the comments were about appointing an Aboriginal person to Canada's highest court, the Supreme Court of Canada.

In the end—and even though there were competent Aboriginal professionals to choose from—the Prime Minister chose not to appoint an Aboriginal supreme court justice. Nevertheless, the issue has now been made public and it has perhaps been brought closer to becoming a reality.

To put this issue in some context: I believe currently there are in excess of 300 actions related to Aboriginal issues that are at one stage or another, working their way through Canada's justice system. And, save for some possible quirk of assignment at the trial level, it is unlikely that an Aboriginal person will be a part of the decision-making process for any of these claims.

As with the issue of racism, there is not enough time for me to comment on the courts themselves. Such comments would include consideration of how the courts are run, for whose benefit, and pursuant to whose cultural, traditional, and spiritual beliefs. However, allow me to simply leave you with this: Do you think the courts intimidate people who are required to attend them—and if so, do they do so positively in their professed and intended desire to search out the truth?

I turn now to my final component of justice, which is that of punishment.

Punishment

No aspect of our criminal justice system has attracted more attention over the years than this issue of punishment and incarceration. The libraries and government office shelves are full of studies and papers that address this matter and how it relates to Aboriginal people, and are far more informative and thought provoking than I could ever hope to be. As a result, I intend to touch on this area of my address only briefly.

Punishment for criminal deviant behaviour for purposes of my address refers to jail or incarceration. That is the aspect of criminal justice which is the most real and, sadly, that which is most familiar to Aboriginal people. No analysis of this issue, in my view, is probably even necessary since I believe the statistics tell the entire story. And while the statistics I use are a

20. Most notably, various speeches from the Honourable Irwin Cotler, federal Minister of Justice, and statements of the Honourable Ethel Blondin-Andrew, then federal Secretary of State for Youth and Education, in early 2004 in connection with vacancies on the Supreme Court of Canada. See also an open letter from Chris McCormick, Grand Chief, Association of Iroquois and Allied Indians, to the Right Honourable Paul Martin, Prime Minister of Canada, in March 2004 (online: Turtle Island Native Network <<http://www.turtleisland.org/>>).

bit dated, I have no reason to believe they have improved, certainly not proportionately.

Let me begin with the following statistics from the 1990s. In Manitoba, 10 per cent of that province's population was Aboriginal people, yet almost 60 per cent of the prisoners in Manitoba's provincial jails were Aboriginal. Newfoundland and New Brunswick had incarceration rates of Aboriginal people that were four to six times the provincial average. In British Columbia and Alberta, 20 to 30 per cent of the prison population was Aboriginal, yet they represent only 5 per cent of the total population. In Saskatchewan, where 10 per cent of the population was Aboriginal, more than 60 per cent of the jail population was Aboriginal. Nationally—and as I noted earlier—Aboriginal people make up about 3 per cent of the overall population, but they also make up about 17 per cent of the total prison population.²¹

In the 1990s, it was predicted that these statistics were growing worse—and as I said before—I have no reason to doubt that.

It has always been an accurately noted fact that Aboriginal youth have a much greater chance of going to prison than obtaining a full high school education. Once again, there does not appear to be any reason to believe that expectation does not remain the sad and tragic reality.

Most recently, in 1999, our Supreme Court in the case of *R. v. Gladue*²² found that there was a drastic overrepresentation of Aboriginal people within both the Canadian criminal population and the criminal justice system. The Court made a very significant finding with regard to Aboriginal people and the prison system:

[A]s has been emphasised repeatedly in studies and commission reports, [A]boriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be “rehabilitated” thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.²³

The Supreme Court labelled this reality as “a crisis in the Canadian criminal justice system.”²⁴ The Court went on to decide that subsection 718.2(e) of the *Criminal Code*²⁵ was

21. *Manitoba Justice Inquiry*, *supra* note 6; see also Julian Roberts & Ronald Melchers, *The Incarceration of Aboriginal Offenders: Trends for 1978 to 2001* (Ottawa: University of Ottawa, 2003). See also *Gladue*, *infra* note 22 at para. 58 *et seq.*

22. [1999] 1 S.C.R. 688 [*Gladue*].

23. *Ibid.* at para. 68.

24. *Ibid.* at para. 64.

a direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process.²⁶

I believe that is an incredibly important—if not daunting—directive to the Canadian courts.

At the outset, it is very important to understand that s. 718.2(e) of the *Criminal Code* is not legislation that mandates better treatment for Aboriginal people. Rather, what it does mandate—as noted by our Supreme Court—is that our courts must accept that serious unique social issues pertain to Aboriginal people that require creative, sensitive and novel solutions. In other words, differential treatment is required because simply putting them in jail is not working, and it is not the answer.

Moreover, the Supreme Court pointed out in *Gladue* that there is widespread racism in Canada toward Aboriginal people that has manifest itself as systemic discrimination in the criminal justice system.²⁷ Indeed, over the past 20 years, various commissions of inquiry have confirmed the existence of systemic racism against Aboriginal people at all stages of Canada's criminal justice system. The most recent is the commission of inquiry in Saskatchewan.²⁸ No doubt this reality is a foundation for Aboriginal peoples' distrust in that system.

Nonetheless, in spite of that directive, and in spite of recent *Criminal Code* reforms passed in 1996—such as that referenced in *Gladue* and those related to conditional sentences—nothing appears to be changing. Indeed, some could legitimately argue it is getting worse.

Consider that since 1996 there has actually been an increase in the volume of Aboriginal admissions to custody. It is the case that, while these *Criminal Code* revisions have resulted in a 22 per cent decline in non-Aboriginal admissions to custody, there has actually been a 3 per cent increase for Aboriginal offenders.²⁹ To me personally, this is a shocking result.

25. This subsection provides that:

A court that imposes a sentence shall 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 [A]boriginal offenders* [my emphasis].

26. *Gladue*, *supra* note 22 at para. 64.

27. *Ibid.* at para. 61.

28. Saskatchewan, *Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatchewan: Queen's Printer, September 24, 2004).

29. Roberts & Melchers, *supra* note 21 at 226.

I can make no further comment on the aspect of criminal justice that is punishment—other than to refer to an excerpt from the *Manitoba Justice Inquiry* report:

Why, in a society where justice is supposed to be blind, are the inmates of our prisons selected so overwhelmingly from a single ethnic group? Two answers suggest themselves: either Aboriginal people commit a disproportionate number of crimes, or they are the victims of a discriminatory justice system. We believe that both answers are correct, but not in the simplistic sense that some people might interpret them. We do not believe, for instance, that there is anything about Aboriginal people or their culture that predisposes them to criminal behaviour. Instead, we believe that the causes of Aboriginal criminal behaviour are rooted in a long history of discrimination and social inequality that has impoverished Aboriginal people and consigned them to the margins of [Canadian] society.³⁰

Before closing, let me provide some additional information and insight as to why Aboriginal people might at least believe the criminal justice system does not work for them.

The Royal Commission on Aboriginal Peoples, in its 1996 report, noted:

While family violence experienced by Aboriginal people shares many features with violence in mainstream society, it also has a distinctive face that is important to recognize as we search for understanding of causes and identify solutions. First, Aboriginal family violence is distinct in that it has invaded whole communities and cannot be considered a problem of a particular couple or individual household. Second, the failure in family functioning can be traced, in many cases, to the interventions of the state deliberately introduced to disrupt and displace the Aboriginal family. Third, violence within Aboriginal communities is fostered and sustained by a racist social environment that promulgates demeaning stereotypes of Aboriginal women and men and seeks to diminish their value as human beings and their right to be treated with dignity.³¹

There are some researchers that argue that the social and political violence inflicted upon Aboriginal children, families and communities by the state and the church, through the residential school system, not only created the patterns of violence the communities are now experiencing, but also introduced the family and the community to behaviours that impede their collective recovery.³²

It has been observed that the marginalization of Aboriginal people in Canadian society has put them at greatly increased risk of high rates of family violence and abuse. This marginalization continues to contribute to

30. *Supra* note 6 at 85.

31. Canada, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 3 (Ottawa: Canada Communication Group, 1991) at 56-7.

32. Sylvia Maracle, "A Historical Viewpoint" (1993) 10:4 *Vis-à-Vis* 4 at 9-10, cited in Bopp, Bopp & Lane, *supra* note 9 at 66.

the types of social issues that are associated with high rates of family violence and abuse, including: unemployment, poverty, prevalent substance abuse, low levels of education, overcrowded and inadequate housing, intergenerational violence, ineffective parenting, the devaluation of the role of women, family breakdown and the widespread acceptance that violence is normal.

In urban areas, these issues are exacerbated by isolation, loneliness, racism, transience and the loss of family, community and cultural support systems.³³

CONCLUSION

In conclusion, I do not know whether I have answered the question I posed at the outset, which was:

Does Canada's system of justice determine the amount of good or evil in Aboriginal people being brought to justice—and does that justice system do justice to the occasion?

Let me, however, leave you with the thoughts of an Aboriginal leader a few years back. When asked to comment on the issue of the relationship of Aboriginal people, the courts and jail, and the notion of a foreign justice system that appears to consistently put Aboriginal people at a disadvantage, he replied:

[The Aboriginal person] will probably appear before a white judge, be defended and prosecuted by white lawyers, and if he goes to jail he'll be supervised by white guards. The justice system is often seen as a white man's weapon—a heavy hand that enforces his laws. It is them and us ... the white man's law.³⁴

You now have some information to assist you, but it will be for you to answer the question of whether the Canadian justice system works for Aboriginal people. More importantly, if your answer is what it ought to be, then the most important question becomes: What will you do about it?

Chi Miigwetch.

33. *Ibid.*

34. Al Chartrand, President of Native Clan Organization, which provides services to Natives in Winnipeg, Manitoba. Excerpted from Geoffrey York, *The Dispossessed* (U.K.: Vintage, 1990).