Indigenous Peoples & Access to Justice May 14, 2019

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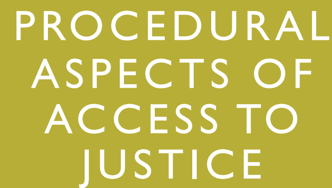
SUBSTANTIVE COMPONENTS OF ACCESS TO JUSTICE

"Not only must the process be justice, but the outcome of the process must be just. The social goal we all seek is justice. We attempt to instantiate this quest for justice through law." (McDonald, 2005)



"In imagining the range of procedural questions that shape understandings of the access to justice agenda, attention has been focused on social institutions and processes that are primarily conceived as engaged in dispute resolution. In Canada today, first among these (as institutions) are courts; and first (as a process) is adversarial adjudication". (McDonald, 2005)

WHAT DOES ACCESS TO JUSTICE MEAN FOR INDIGENOUS PEOPLES?

A) WITHIN A EUROCENTRIC LEGAL SYSTEM

B) WITHIN AN INDIGENOUS LEGAL SYSTEM

WITHIN A EUROCENTRIC LEGAL SYSTEM

- Constitutional Law, S. 91(24)
- Federal Law (ie Indian Act)
- Criminal Law, S. 91 (27)
- Corrections and Conditional Release Act (Federal)
- Correctional Services Act (Provincial)
- Family Law (Provincial)
- Child Welfare Law (Provincial)
- Youth Justice Law (Provincial)

WITHIN A EUROCENTRIC LEGAL SYSTEM

The Canadian Criminal Justice System has failed and continues to fail Indigenous Peoples. (RCAP, MJI, Donald Marshall Inquiry, Provincial Task Forces, TRC)

TABLE 2: Percentage of Indigenous Adults and Youth Admitted to Correctional Services

http://publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf

	Adults	Youth
Canadian population	3%	7%
Remand	25%	36%
Federally sentenced custody	25%	33%
Community sentence	24%	29%

STATISTICS: OVERREPRESENTATION OF INDIGENOUS PEOPLES IN FEDERAL AND PROVINCIAL JAILS

- In 2014/2015, Indigenous men accounted for 24% of adult male provincial/territorial custody admissions and 24% of male offenders in federal custody. By comparison, Indigenous women accounted for 38% of adult female provincial/territorial custody admissions and 36% of female offenders in federal custody. The proportion of Indigenous adults in custody relative to their proportion in the population was 8 times higher for Indigenous men and 12 times higher for Indigenous women.
- In 2014/2015, male Indigenous youth accounted for 34% of male youth provincial/territorial custody admissions, while female Indigenous youth accounted for 49% of female youth provincial/territorial custody admissions. The proportion of Indigenous youth in provincial/territorial custody relative to their proportion in the population was about 5 times higher for Indigenous male youth and 7 times higher for Indigenous female youth.

(https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html)

ABORIGINAL PEOPLE ARE NOT ONLY OVERREPRESENTED IN THE CRIMINAL JUSTICE SYSTEM AS ACCUSED PERSONS, BUT AS VICTIMS AS WELL.

- In 2014, 28% of Indigenous people (aged 15+) reported being victimized in the previous 12 months, compared to 18% of non-Indigenous people. The rate of violent victimization among Indigenous people was more than double that of non-Indigenous people (163 incidents per 1,000 people vs. 74).
- Indigenous females had an overall rate of violent victimization that was double that of Indigenous males and close to triple that of non-Indigenous females.
- When controlling for various risk factors, Indigenous males were no more at risk of violent victimization than their non-Indigenous counterparts. In contrast, high victimization rates among Indigenous females could not be fully explained by other risk factors. Even when controlling for various risk factors, Indigenous identity remained a risk factor for violent victimization of Indigenous females.

(https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/jan02.html)

SYSTEMIC CHANGES

1996 amendments to the sentencing provisions of the *Criminal Code:*

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

R. v. Gladue, (1996) decision in the Supreme Court of Canada

R v Ipeelee (2012) SCC reaffirmed its commitment to the principles enunciated in *Gladue*, addressed a number of critiques, and clarified concerns.

The Supreme Court set out "a framework for the sentencing judge to use in sentencing an aboriginal offender" (*Gladue*, para 28):

1. 718.2(e) is a remedial provision aimed at addressing the over incarceration of aboriginal people. Sentencing judges have a statutory duty to give force to the provision and are encouraged to use restorative approaches to sentencing.
2. 718.2(e) should be read with other provisions in Part XXIII of the *Criminal Code*, which state the purpose and principles of sentencing, and which places emphasis on decreasing the use of incarceration.
3. Sentencing is an individual process. Judges should ask, what is a fit sentence for this accused for this offence in this community? For aboriginal offenders, this requires a different method of analysis which considers:
    a. Unique systemic or background factors that have played a part in bringing the aboriginal offender before the court, and;
    b. Types of sentencing procedures/sanctions appropriate in the circumstances for the offender because of his/her aboriginal heritage or connection.

4. In determining an appropriate sentence for an aboriginal accused,

   a. Judges should take judicial notice of systemic and background factors, and the priority given to restorative approaches in Indigenous approaches to justice.

   b. Pre-sentence reports should provide information pertaining to (a) and (b) above, unless this requirement is waived by the aboriginal offender. Counsel has duty to assist in gathering this information.

   c. Incarceration should be seen as a sanction of last resort; if there are no alternatives to incarceration, length of term must be carefully considered.

5. 718.2(e) applies to all aboriginal offenders regardless of whether they live on- or off- reserve. The relevant "aboriginal community" is to be defined broadly, and an aboriginal offender in an urban centre not having networks for support does not relieve the sentencing judge of the obligation to find an alternative to imprisonment. Absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a judge to craft a sentence that takes into account the principles of restorative justice, and the needs of the parties involved.

6. While the application of 718.2(e) may mean that an aboriginal offender may have a shorter jail term than a non-aboriginal offender for the same offence, the provision should not be considered an automatic reduction of sentence. The use of alternatives to imprisonment should not be considered a more lenient sentence. As the traditional sentencing goals of deterrence, denunciation and separation are still relevant, it is likely that the more serious or violent the crime, the more likely that terms of imprisonment will be the same for offences and offenders whether aboriginal or not.

ARE CHANGES TO SYSTEM HELPING?

Despite the Court's commitment, as well as increasing availability of *Gladue*-related government-funded programming, "the over-incarceration of Indigenous peoples remains a persistent, growing, and urgent issue for the Canadian criminal justice system. The justice system, as it relates to Indigenous peoples, continues to be in a state of crisis" (Canada, 2017; Iacobucci 2013; *Gladue* para 64).

WITHIN A EUROCENTRIC LEGAL SYSTEM

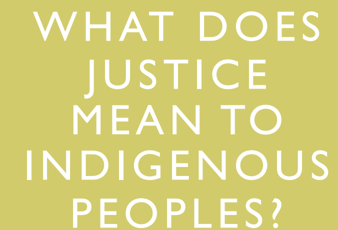
How do Indigenous Peoples achieve Access to Justice in a system that continues to fail them?

UNDERSTANDING THE BARRIERS TO ACCESS TO JUSTICE

BARRIERS

- Colonization
- Impacts of Colonization
- Racism
- Sexism
- Horrific Statistics of Violence and Bullying
- MMIWG
- Addictions
- Sexual Exploitation and Human Trafficking

- Justice vs "Just Us"
- "By meaningful participation we suggest that aboriginal people must be encouraged to participate in the system by defining the meaning, institutions and standards of justice in their own communities." (Monture-Okanee & Turpel, 1990)
- "Aboriginal criminal justice must mean justice as understood by aboriginal peoples for our communities and not only as conceptualized by non-aboriginal Canadians. In other words, justice must encompass inclusion and not reinforce exclusion: it must include aboriginal systems for aboriginal communities and not ignore basic cultural differences irrespective of where an aboriginal person resides." (p.257)



ROYAL COMMISSION ON ABORIGINAL PEOPLES, *BRIDGING THE CULTURAL DIVIDE*, 1995

The Canadian criminal justice system has failed the Aboriginal peoples of Canada—First Nations, Inuit and Metis people, on-reserve and off-, urban and rural—in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.

COMPARISON OF EUROCENTRIC LEGAL PRINCIPLES AND HAUDENOSAUNEE TRADITIONAL LEGAL PRINCIPLES

ADVERSARIAL

WHOLISTIC

Eurocentric Criminal Legal Principals	Haudenosaunee Legal Principles
Innocent until Proven Guilty **Crown must Prove Beyond a Reasonable Doubt**	Unconditional Love Respect Individual Responsibility
Owing A Debt to Society	Collective (Clan & Nation) Responsibility
Retribution **Punishment** **Jail**	Integrity Accountability Honesty
Adversarial **Evidentiary Rules** **Incapacitation**	Peace Good Mind Friendship
Deterrence	Compassion Benevelonce
Rehabilitation	Restore Harmony Enable Healing Giving Thanks Condolence
No victim Representation	Healthy Relationships with All of Creation

WITHIN AN INDIGENOUS LEGAL SYSTEM

Since colonization, there are no Indigenous legal systems/institutions that incorporate Indigenous legal orders.

WITHIN AN INDIGENOUS LEGAL SYSTEM

Development of Indigenous Legal

Systems that incorporate

Indigenous Legal Orders

DEVELOPMENT OF A WHOLISTIC INDIGENOUS LEGAL INSTITUTIONS

WHOLISTIC

Self-determination In Indigenous Communities Must Include The Development Of Conflict Resolution Systems Based On Indigenous Legal Traditions

EDUCATE, EDUCATE, EDUCATE!!

impacts of colonization (internalized oppression, all types of violence), historical and intergenerational trauma

AWARENESS

Ability to be aware of self, family, nationhood within our Indigenous communities

Stop being a Perpetual Victim (ie. stop blaming everyone and everything else and take responsibility for our Actions)

Self-determination In Indigenous Communities Must Include The Development Of Conflict Resolution Systems Based On Indigenous Legal Traditions

Resilience
Revitalization
Reclamation

Language, Recitals of Indigenous Laws, Participation in and Knowledge of Ceremony

Bringing Back the Balance

Healing Self

Healing, Reclaiming and Supporting Family

Healing, Rebuilding Community and Nationhood

- Building Trust, Respect & Friendship

IMPLICATIONS OF A WHOLISTICE INDIGENOUS LEGAL INSTITUTION

- Practicing Indigenous legal orders (ie. ceremonies, Rites of Passage)
- Learning from Mentors/Elders/Knowledge Holders
- Strong Voices
- Connection to land, water, family
- Healthy People
- Language Immersion Programs
- UNDRIP

HOW WE MAKE DECISIONS IN THIS LIFETIME IS CRITICAL FOR FUTURE GENERATIONS

&

WHAT DECISIONS WE MAKE IN THIS LIFETIME IS CRITICAL FOR FUTURE GENERATIONS

NIA:WEN

THANK YOU