

## *Aboriginal Peoples and the Criminal Justice System*

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\* Opinions expressed are those of the author and do not necessarily reflect those of the Ipperwash Inquiry or the Commissioner.

## EXECUTIVE SUMMARY

This paper, written for the Ipperwash Inquiry, deals with the relationship between Aboriginal people and the criminal justice system, with particular emphasis on the situation of Aboriginal people in Ontario. The paper argues that an understanding of the dynamics of this relationship helps explain the way in which attitudes and responses to events such as the occupation of Ipperwash Park can be understood. Further, unless changes are made in this relationship, similar responses from both Aboriginal and non-Aboriginal people can be expected.

Aboriginal overrepresentation in the criminal justice system is one of the clearest markers of what the Supreme Court of Canada has referred to as “a crisis in the Canadian justice system.” Aboriginal overrepresentation is often thought of as a problem in western Canada but, in fact, Ontario ranks third in terms of overrepresentation across the country. Aboriginal youth are overrepresented in Ontario correctional facilities at a much higher rate than Aboriginal adults. While recent sentencing amendments and Supreme Court decisions have led to a lowering of the overall jail population, the drop in Aboriginal admissions is much smaller than that of non-Aboriginal admissions. This is true in both the adult and youth justice spheres. This suggests that overrepresentation will continue to be a problem for the years to come.

In order to address this problem, it is first necessary to understand what the major causes of the problem are. The three explanations that have been advanced as significant causal factors are: 1) culture clash, 2) socio-economic, and 3) colonialism. While all three explanations have their strengths, the paper agrees with the Royal Commission on Aboriginal Peoples and other commissions and reports that it is the experience of colonialism that best explains the persistence of Aboriginal overrepresentation.

While overrepresentation may be the most obvious example of the problems Aboriginal people have with the criminal justice system, in many ways over- and under-policing, although more difficult to demonstrate statistically, are equally serious. Over-policing refers to the practice of police targeting people of particular ethnic or racial backgrounds or people who live in particular neighbourhoods. While Aboriginal people are clearly over-policed today, over-policing has a particular history with regards to Aboriginal people. Governments in Canada have historically used the police to pre-emptively attempt to resolve Aboriginal rights disputes by arresting those attempting to exercise those rights prior to any determination as to the validity of the claims. In addition, police have been used to further the objectives of the government in terms of assimilation of Aboriginal people through apprehension of children in order to have them attend residential school, and later in support of child welfare agencies. Police also were used to support many of the most egregious provisions of the *Indian Act*.

The impact of over-policing has led to a great distrust of the police by Aboriginal people. Over-policing also leads to the police forming attitudes that view Aboriginal people as violent, dangerous, and prone to criminal behaviour. These sorts of attitudes are not counteracted by Aboriginal awareness programs or similar initiatives.

At the same time, Aboriginal people are also under-policed. Aboriginal people are not only overrepresented in the criminal justice system as accused persons, but as victims as well. Nevertheless, Aboriginal people are often seen as less worthy victims by the police, and thus

requests for assistance are often ignored or downplayed. This attitude is mirrored by governments who also routinely downplay the significance of Aboriginal rights claims and ignore long-standing grievances. Just as over-policing has a significant impact on Aboriginal peoples attitudes toward the police, under-policing also plays a great role in fostering a deep distrust of police. Under-policing and over-policing are really two sides of the same coin.

Governments and the courts have undertaken a number of initiatives to address the problems discussed in this paper. In 1996, the sentencing provisions of the *Criminal Code* were significantly amended. Among the amendments was s. 718.2(e), which instructs judges to look for all alternatives to imprisonment that are reasonable in the circumstances for all offenders “with particular attention to the circumstances of aboriginal offenders.” The meaning of this section was elaborated upon by the Supreme Court of Canada in the 1999 decision of *R. v. Gladue*. Subsequent to *Gladue*, the federal government, in the 2001 Throne Speech, pledged to eliminate Aboriginal overrepresentation within a generation.

There are a number of specific programs funded by both the federal and provincial governments that are meant to address overrepresentation and related issues. Aboriginal Courtworkers have been in place in Ontario since the 1970s. In the 1990s, both levels of government began funding Aboriginal justice programs that were specifically aimed to take Aboriginal offenders out of the criminal justice system and have them dealt with in more culturally appropriate and meaningful ways. In Ontario, Legal Aid Ontario has also funded some of these programs. In Toronto, the Gladue (Aboriginal Persons) Court was established in 2001 to allow judges to truly respond to the *Gladue* decision. The court has a number of specific resources available to it in its work. One of the most important is the presence of a Gladue Caseworker who writes Gladue Reports, providing the sentencing judge with valuable information on the life circumstances of the offender and also possible recommendations for sentences that can address the problems that have brought the individual before the court.

Despite these initiatives, Aboriginal overrepresentation and concerns about over- and under-policing have not diminished in any significant way in the past 10 to 15 years. Among the reasons for this are the real systemic barriers to change in the criminal justice system.

The *Gladue* decision is not a sentencing discount case. The decision requires judges to approach the sentencing of an Aboriginal offender in a different manner. Crucial to this approach is the provision of information that the judge can use to craft the type of restorative sentence contemplated by the decision. Unfortunately, outside of the Gladue Court and the recent expansion of the Gladue Caseworker program by Aboriginal Legal Services of Toronto, judges are generally not getting the information they require to make Gladue meaningful to Aboriginal offenders before the court.

A further systemic issue that has blunted the impact of *Gladue* is the tendency of many Aboriginal accused persons to plead guilty to their offences if they are denied bail. In Ontario, there has been a significant rise in the remand population—those held in custody while awaiting trial—while there has been a reduction in custodial sentences imposed after a finding of guilt. This development means that many offenders are essentially receiving “time-served” sentences.

A number of factors work together to make Aboriginal people more likely to be denied bail or to be unable to meet bail conditions.

While Aboriginal justice programs may have the potential to make a positive impact on overrepresentation, the fact that many programs are relatively new and take on a limited range of offenders means that their potential has yet to be reached. In order for these programs to make a difference, Crown Attorneys must be willing to have matters that would otherwise result in jail sentences referred to these programs.

While some of the changes necessary to address the root causes of why Aboriginal people appear before the courts and are sentenced to jail in disproportionate numbers lie outside of the justice system, it is possible to make changes within the system that can have a real and significant impact. It is vital that such changes be undertaken in order that Aboriginal people experience the criminal justice system as one that can actually serve their needs. If the system is not changed, it will remain unable to resolve disputes such as the one that arose in Ipperwash.

This report recommends that:

- In order to make the promise of s. 718.2(e) and the *Gladue* decision real, the Province of Ontario create a Gladue Caseworker program throughout the province.
- The province develop a concrete plan to expand the range of Aboriginal justice programs and commit to ongoing funding for such programs.
- While the issue of policing is the subject of other papers written for the Ipperwash Inquiry, there is no question that change in the policing area must be of a substantive nature. The addition of an Aboriginal awareness program or a push to recruit Aboriginal people to join the police force will have no impact if the dynamics within the police force itself do not change.
- The delivery of victims services to Aboriginal people should be undertaken directly by Aboriginal organizations. In this context the concept of what constitutes victims services should be expanded to meet the real needs of Aboriginal people.
- It is recommended that the province undertake substantive consultations with Aboriginal organizations that might be affected by the development of government policies regarding Aboriginal and restorative justice initiatives.
- Crown policies of general application be examined for their impact on Aboriginal people charged with criminal offences.
- The province fund Aboriginal-specific Bail Programs where numbers warrant.
- The Ministry of the Attorney General accept the decision of Mr. Justice Archibald in *R v. Bain* and instruct local Crowns that the *Gladue* principles apply at bail hearings.

## INTRODUCTION

This paper, written for the Ipperwash Inquiry, deals with Aboriginal people and the criminal justice system, with particular emphasis on the situation of Aboriginal people in Ontario. In this paper, issues relating to overrepresentation of Aboriginal people in prison, the overrepresentation of Aboriginal people as victims of crime, and over- and under-policing of Aboriginal people will be examined. In addition, the paper will look at governmental and judicial initiatives that have been created to address problems in the difficult relationship between Aboriginal people and the justice system. In particular, the paper will focus on the 1996 amendments to the sentencing provisions of the *Criminal Code* and the decision of the Supreme Court of Canada in 1999 in *R. v. Gladue*<sup>1</sup> that gave the section renewed vigour and power. The paper will illustrate how initiatives developed to address overrepresentation can be the spur for more comprehensive and wide-ranging responses to some of the causes of social dislocation in Aboriginal communities. Finally, the paper will make some recommendations for how positive change might come about.

At the outset it is important to make clear how the issues that are the subject of this paper relate to the Ipperwash Inquiry. The connection is not immediately apparent. What relevance does the fact that Ontario has the third-highest rate of overrepresentation of Aboriginal people in prison in Canada have to do with a dispute over a provincial park? How does knowing that Aboriginal people continue to be both over- and under-policed help us to understand the response by government and police to the occupation of the park by residents of the traditional lands of Stoney Point and their supporters? And how could addressing the problems raised in this paper help prevent disputes such as the ones that occurred at Ipperwash from occurring again?

In his recent report on the death of Neil Stonechild in Saskatoon, Mr. Justice David Wright spoke of the two solitudes that exist in Saskatoon and in Saskatchewan as a whole between Aboriginal and non-Aboriginal people: “As I reviewed the evidence in this Inquiry, I was reminded, again and again, of the chasm that separates Aboriginal and non-Aboriginal people in this city and province. Our two communities do not know each other and do not seem to want to.”<sup>2</sup>

The existence of such divergent views has an impact on every aspect of the relationship of Aboriginal people with the criminal justice system. This problem is not unique to Saskatchewan, it is found throughout the country.

The first conclusion of *Bridging the Cultural Divide*—the Royal Commission on Aboriginal Peoples’ study on the criminal law—was unequivocal:

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

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<sup>1</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688.

<sup>2</sup> *Report of the Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild*, The Honourable David H. Wright, Commissioner (Regina, 2004), p. 208.

respect to such elemental issues as the substantive content of justice and the process of achieving justice.<sup>3</sup>

This conclusion of the Royal Commission was accepted by the Supreme Court of Canada in *Gladue*. In the context of a discussion of Aboriginal overrepresentation in prison the court stated the case quite dramatically: “These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian justice system.”<sup>4</sup>

The findings of the Royal Commission and Supreme Court of Canada are repeated in the many judicial inquiries and commissions held across Canada dealing with Aboriginal justice issues. In Ontario, The Report of the Osnaburgh/Windigo Tribal Council Justice Review called by the Attorney General reported in 1990:

The arrival of Europeans produced a profound effect on [Aboriginal] societies and their way of life.... First Nations people have become dispossessed—the Fourth World.... What Euro-Canadians accept as common-place for themselves and their children are absent from these communities....

While this report addresses the justice system it is but a flash point where the two cultures come in poignant conflict.... The justice system, in all of its manifestations from police through the courts to corrections, is seen as a foreign one designed to continue the cycle of poverty and powerlessness. It is evident that the frustration of the First Nations communities is internalized; the victims, faced with what they experience as a repressive and racist society, victimize themselves.

The clash of the two cultures has been exacerbated by the attempts of the Euro-Canadian system to address the problems faced by the First Nations people. It lacks legitimacy in their eyes. It is seen as a very repressive system and as an adjunct to ensuring the continuing dominance of Euro-Canadian society.... Any attempt to reform the justice system must address this central fact; the continuing subjugation of First Nations people.<sup>5</sup>

Recent reports by Amnesty International<sup>6</sup> and the Ontario Human Rights Commission<sup>7</sup> both sadly confirm that over-policing and under-policing of Aboriginal people continue to this day. The realities of the interactions of Aboriginal people with the justice system have a profound influence on the way that Aboriginal and non-Aboriginal people view each other.

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<sup>3</sup> Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Ottawa: Canada Communication Group, 1995), p. 309

<sup>4</sup> *Gladue*, para. 64.

<sup>5</sup> *Report of the Osnaburgh/Windigo Tribal Justice Review Committee*, prepared for the Attorney General (Ontario) and the Minister Responsible for Native Affairs and the Solicitor General (Ontario), (1990), pp. 4–6.

<sup>6</sup> Amnesty International Canada, *Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada*, AI Index: AMR 20/003/2004 (Ottawa: Amnesty International Canada, 2004).

<sup>7</sup> Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling* (Toronto: Ontario Human Rights Commission, 2004).

The 1988 report of the Canadian Bar Association, “Locking Up Natives in Canada,” put the matter quite starkly, in a statement that was adopted by the Supreme Court of Canada in *R. v. Williams*:<sup>8</sup> “There is an equation of being drunk, Indian and in prison. Like many stereotypes, this one has a dark underside. It reflects a view of native people as uncivilized and without a coherent social or moral order. The stereotype prevents us from seeing native people as equals.”<sup>9</sup>

In *Williams*, the Supreme Court upheld the validity of asking questions of potential jurors to determine if their ability to judge a case would be influenced by the fact that the accused was Aboriginal. In its judgment, the Supreme Court was not saying that non-Aboriginal Canadians were racist, but that stereotypes insidiously play on our perceptions and allow us to see others as less than equal, and to tolerate treatment of them that we would not tolerate for ourselves, our family, or our friends.<sup>10</sup>

If jurors are susceptible to stereotypes, there is no reason to believe that others involved in the justice system are any more immune to this phenomenon. The standard response of police to charges that they target Aboriginal people is that they treat everyone the same and that they just go where they are needed. Aboriginal people are overrepresented in prison, the argument goes, not because they are singled out by the police, but, because for a variety of reasons, Aboriginal people commit more crimes than non-Aboriginal people.

The commonly held view is that there is more criminality among Native people than among non-Natives, but is that true?... The apparent differences are more explainable by police conduct than by anything else.... Police use race as an indicator for patrols, arrests, detentions etc.... For instance police in cities tend to patrol bars where Native people congregate, rather than private clubs frequented by businessmen. Remote Native communities by comparison with largely white communities tend to have more policing.

Does this indicate that police are invariably racist? Not necessarily, since there is some empirical basis for the police view that proportionately, more Native people are involved in criminality. It is just that the police view then becomes a self-fulfilling prophecy ... they tend to police areas frequented by groups they believe are involved in criminality.<sup>11</sup>

Just as Aboriginal individuals are both over- and under-policed, the same has been true in relation to Aboriginal disputes with government—both historically and in the present day. Canadian governments at both the federal and provincial level have consistently relied on the police to deal with such matters. As a result, the police have often been used as the blunt instrument of government policy. This use of police has meant that, in the case of public order

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<sup>8</sup> *R. v. Williams*, [1988] 1 S.C.R. 1128.

<sup>9</sup> M. Jackson, “Locking Up Natives In Canada: A Report of the Committee of the Canadian Bar Association on Imprisonment and Release” (1989) 23 *U.B.C. Law Review* 220, cited by the Supreme Court of Canada in *R. v. Williams*, para. 58.

<sup>10</sup> “There is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system...” *R. v. Williams*, para. 58.

<sup>11</sup> Task Force on the Criminal Justice System and Its Impact on the Indian and Métis People of Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Métis People of Alberta (Canada)*, Vol. 1 (Edmonton: The Task Force, 1991), p. 49, quoting from Tim Quigley, “Introducing Cross-Cultural Awareness,” paper presented at the Western Judicial Workshop, 1990.

disputes involving Aboriginal communities, the police often play a unique role, one that they do not play in protests brought by other groups.

As this paper will show, the problem of Aboriginal overrepresentation in Ontario, as bad as it is at present, is likely to get worse over time unless significant action is taken. An increase in Aboriginal overrepresentation will fuel a corresponding increase in police presence in Aboriginal communities, which will continue to feed this vicious cycle. The impact of such a development will be to reinforce the view that Aboriginal people are a violent and dangerous people.

Closely tied to this view is the belief that Aboriginal people are less than equal. Historically, this belief has been an explicit part of government policy toward Aboriginal people extending well into the twentieth century. While that belief is now rarely articulated, it clearly influences the relations between Aboriginal and non-Aboriginal people, and particularly in the context of this paper, the relations between Aboriginal people and the various actors in the criminal justice system. Unless that belief is challenged and rooted out, violent clashes between Aboriginal people and the police are inevitable. Cross-cultural awareness programs are powerless to confront stereotypes rooted deeply in public perception. The best way to challenge the stereotypes of Aboriginal people is to change the reality that allows the stereotypes to flourish. In order to do this, we must first acquaint ourselves with the reality of the situation and then look at ways in which change can occur. This is the purpose of this paper.