



# **Aboriginal Women and the Legal Justice System in Canada**

## **An Issue Paper**

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## Background

Aboriginal people have a unique history and relationship with the government of Canada. There have been numerous reports, commissions and studies that have highlighted the overwhelmingly negative impacts of policies directed at achieving colonization and assimilation. Under these policies the Canadian government agencies carried out on Aboriginal people various actions that resulted in extreme socio-economic disadvantages. The Justice system has played its role as an agent of Canadian society through its government, in perpetrating actions that have contributed to the devaluation of Aboriginal people.

The Justice system acts as the foundation of Canadian society and it informs Canadian society of the values and attitudes which underpin actions among people which achieve justice and civility. As the foundational institution of society its actions may be perceived to be even more devastating to people than other governmental institutions, i.e. social structures, churches, educational institutions, health agencies, and government itself. Therefore the Justice Institution can have a devastating effect on Aboriginal women in particular, and in the perception and treatment of these women.

The Justice Institution in Canada is composed of various elements;

- ❖ The front line of the justice system are the police officers;
- ❖ The justice system are the lawyers, both prosecutors and the defence attorneys;
- ❖ The justices of the various levels of the justice system; and
- ❖ The final element is the Supreme Court.

Each of these components contributes uniquely to the treatment of Aboriginal women and to the perceptions by Canadians of the value of Aboriginal women, the place of Aboriginal women in society, the rights of Aboriginal women, and the acceptable treatment of Aboriginal women.

One consequence of severe socio-economic marginalization resulted in Aboriginal women being over represented in the criminal justice system both as offenders and as victims of crimes. There is a strong need to address the root causes of the disproportionate incarceration rates of Aboriginal women and the high rates of criminal victimization both with the Aboriginal community and Canadian society, as evidenced by the alarmingly high rates of Aboriginal women who are missing and/or murdered.

In the *Report of the Manitoba Justice Inquiry* (1991) it was concluded that the overrepresentation of Aboriginal people in the criminal justice system has deep

historical and social roots. The Manitoba Justice Inquiry also highlighted concerns that systemic discrimination at every level of the justice system, from policing to sentencing, contributes to the high incarceration rates of Aboriginal offenders. In 2004, the Canadian Human Rights Commission (CHRC) released its report, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, the report concluded that while CSC has made some progress in developing a system specifically for women offenders, systemic human rights problems remain, particularly with regards to Aboriginal women, minority women and women with disabilities. This systemic discrimination may in part be contributing to the growing numbers of Aboriginal women federally incarcerated.

For Aboriginal women the rates of incarceration are particularly disturbing. Correctional Service (CSC) data reveals although Aboriginal women account for only 3% of the female population in Canada, on July 27 2003, they made up 29% of the women in federal correctional facilities. Aboriginal women are not only disproportionately over represented but also the fastest growing population sentenced to federal prisons. CSC data highlights that;

The number of Aboriginal women sentenced to federal institutions is increasing, and at a rate that exceeds that of Aboriginal men. From 1996-1997 to 2001-2002, the number of federally sentenced Aboriginal women increased by 36.7%, compared with 5.5% for Aboriginal men.<sup>1</sup>

The lack of appropriate facilities near their homes means that many Aboriginal women offenders are faced with long-term geographic separation from their children, families and communities. Aboriginal women offenders may be housed in men's federal prisons and psychiatric wards with little access to common areas. Serving time in a men's prison not only puts these women at risk for male violence, but also denies them equal access to programs and services that men receive. Correctional system institutions and programs that serve women are not funded equally with those that are provided for men. This is a violation of their sexual and racial equality rights as guaranteed by section 15 of the *Canadian Charter of Rights and Freedoms*.

Aboriginal women may also experience discrimination within the correctional facilities from inmates, staff and other prisoners. Many Aboriginal women offenders are affected by depression, substance abuse, and/or fetal alcohol syndrome disorder: these conditions are not always accurately diagnosed nor treated while they are incarcerated.

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<sup>1</sup> Solicitor General Canada, Corrections and Conditional Release statistical Overview, Ottawa, Public Works and Government, Services Canada, November 2002, at 57

## **Impacts on Aboriginal Women of Justice related actions**

Various factors often contribute to a woman coming into conflict with the law. Aboriginal women often:

- live in poverty;
- are single parents;
- are first time offenders;
- have been victims of prior abuse; and
- experience high rates of mental illness including depression and substance abuse problems.

Under Section 81 and 84 of the *Corrections and Conditional Release Act* Aboriginal communities are able to work towards alternatives to incarceration for Aboriginal offenders and more effective and culturally appropriate community corrections. However, currently there are no Aboriginal women under section 84 and section 81 community release, even though there have been many Aboriginal women who could have qualified and benefited from this option.

Aboriginal women offenders are most likely to return to custody for a breach of a condition of community supervision. While getting tougher on repeat offenders scaling back on community supports will have significant impacts on the numbers of Aboriginal women incarcerated and the numbers will remain high.

Federal departments such as Correctional Services Canada over the last few years have created Aboriginal employment strategies for recruitment and training, while this will help increase the number of Aboriginal Correctional Officers, Native Liaison Officers and Elders in order to help bridge the gap of cultural and systemic barriers that exist inside the walls, seemingly many are not applying due to the poor working conditions of the institutions.

When it comes to Aboriginal women and girls in the justice systems they are often victims within the system and as well victims of violent crimes. The following case highlights how upon entrance into the criminal justice system, they are victimized by those who hold power and who we entrust to keep our society a safe haven.

A Former provincial court judge David William Ramsay abused his power with young Aboriginal women between the ages of 12 and 16 who appeared before him in court. He had access to their personal backgrounds and psychiatric histories and used promises of lighter sentences if they didn't tell anyone that they were coerced to perform sexual acts for him, these acts often turned violent. He was charged with and pleaded guilty to one count of sexual assault causing bodily harm, three counts of purchasing sex from three women under the age of 18 and one count of breach of trust. It's interesting to note that he was never

charged with a hate crime even though his victims were chosen based on their Aboriginal identity.

The Victoria Status of Women stated the following about the Judge Ramsey case:

“Ramsay abused his power with the most vulnerable young girls and women. He must not be allowed to hide behind his higher status in the community due to his being a former judge. The young women who were victims of this perpetrator must be sent a message that their inherent right to dignity, safety, happiness and well-being is being treated with the utmost seriousness and importance by the legal system and by society in general. In the present climate of today, we, as mother's, aunt's and grandmother's and all other citizens, have a duty to speak out that our young girls and women are not available for violence, degradation, exploitation and inhuman indignities such as was suffered by the young victims of judge Ramsay.”<sup>2</sup>

### **Aboriginal women and the court system**

Many Aboriginal people who come in contact with the criminal justice system have a negative experience due to systemic barriers such as lack of knowledge of the system, cultural and language gaps and lack of council representation. It is crucial that the justice system have an Aboriginal perspective and this can occur by hiring Aboriginal lawyers and judges. The justice system has responded to this need by embracing Aboriginal lawyers who want to defend Aboriginal offenders or Aboriginal defendants; Crown Attorneys who prosecute fairly offenders of crime against Aboriginal people and Judges who decide Aboriginal cases without discrimination.

While this is meaningful, the number of Aboriginal people employed within the justice system is still minimal as systemic and institutional discrimination is present. Many Aboriginal law graduates struggle to be admitted to the provincial bar and abandoned the idea of being litigators. Those who become members of the provincial bar struggle with little career advancement such as becoming judges and with the attitudinal and systemic barriers against the representation of Aboriginal peoples at all levels. Unfortunately, these factors only help to maintain a flawed justice system. It will take an overall system response to these issues for improvement both within and outside the walls of justice.

There is no Aboriginal sensitization course in formal legal studies. As statistics demonstrate, there is a great need to integrate a mandatory Aboriginal sensitization course as part of the curriculum of legal studies program. Legal studies graduates would have a better understanding of the systemic and gender

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<sup>2</sup> <http://pacificcoast.net/~swag/Ramsay.htm>

discrimination against Aboriginal offenders. This would also decrease the stereotypes faced by Aboriginal offenders entering the justice system by court workers and professionals.

Concurrently, training sessions informing Aboriginal people about the Canadian justice system and their rights under this system should be delivered both on and off reserve. In addition, a course on the Canadian justice system should be part of the high school curriculum. Aboriginal people are misinformed about their rights in Canada and how the justice system interacts or can interact with their lives. Training for court system workers should be mandatory and recurring on a yearly basis and include lawyers, paralegals, clerks and judges.

### **Alternative Practices to the Canadian Court System**

Academics and Aboriginal organizations have called for a third legal court system for the Indigenous population in Canada to address Aboriginal over-representation in the criminal justice system. There are three Canadian courts for Aboriginal people only<sup>3</sup>.

1. Established in October 2001, the Saskatchewan Cree Court is the first Cree-speaking provincial court in Canada. Judge Gerald Morin, Crown Counsel Don Bird and the Cree Court team travel to three northern Saskatchewan communities from Prince Albert to hold court in those communities. Cree and English are spoken in the court and the court provides translators. The aim of the Judge is to probe into the behaviour behind the offences and attempt to heal the situation without sending people to jail. Few people have been sent to jail but are diverted to programs that promote healing and restorative justice in the community.
2. The Tsuu T'ina Nation Peacemaking commenced in October 2000 and is a traditional justice initiative where the Alberta provincial court operates beside the Peacemaker. The decision on which cases are sent to the peacemaking program is made by the Peacemaker Coordinator and Crown counsel. Homicide and sexual assault offenders may not be part of the program. In addition, the accused must admit to being responsible for the offence and the victim has to agree to take part in the oval-shaped court setting.
3. The Gladue (Aboriginal Persons) Court was established in October 2001 and is for downtown Toronto Aboriginal people charged with criminal offences. After talking to the accused, his acquaintances, and social services, Aboriginal Legal Services of Toronto provide the court with a history of the life of the accused in order for a fully informed sentencing decision may be made. Sentences may not be any shorter but the

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<sup>3</sup> A.J. Ehman, "A People's Justice" [*The Canadian Bar Association*] *National* 11:4 (June-July 2002) 12.

alternative to incarceration may, as in Peacemaking court, be compulsory treatment and counselling. The accused participates in the Gladue Court voluntarily. Unfortunately, since there are no holding cells for females, Aboriginal women in custody go to regular court elsewhere.

These Aboriginal courts have one common thread: restorative justice. Except for some grave offences like sexual assault crimes and murders, restorative justice is one way to respond to a criminal act. Restorative justice puts the emphasis on the wrong done to a person as well as on the wrong done to the community. It recognizes that crime is both a violation of relationships between specific people and an offence against everyone - the state.

Restorative justice programs involve the voluntary participation of the victim of the crime and the offender and ideally members of the community, in discussions. The goal is to "restore" the relationship, fix the damage that has been done and prevent further crimes from occurring.

Restorative justice requires wrongdoers to recognize the harm they have caused, to accept responsibility for their actions and to be actively involved in improving the situation. Wrongdoers must make reparation to victims, themselves and the community.<sup>4</sup>

A restorative approach also encourages personal healing as well as reconciliation between people who are in conflict when that is appropriate, while protecting the safety and interests of victims and the community. Overall, a restorative approach involves balancing the needs of victims, offenders, and communities, while using the most appropriate form of intervention at the most appropriate time.<sup>5</sup>

### **Aboriginal Restorative Justice Remedies**

The core of an Aboriginal restorative process is generally a healing circle, which aims at developing a consensus on how to repair the harmful results of the offence.

A healing circle:

- Will include members of the community including the offender, elders, and often the victim if they agree to participate;
- Will discuss the offence and how it affected the victim, the community and the relationships between these and the offender;

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<sup>4</sup> [http://www.justice.gc.ca/en/ps/voc/rest\\_just.html](http://www.justice.gc.ca/en/ps/voc/rest_just.html)

<sup>5</sup> [http://www.saskjustice.gov.sk.ca/Comm\\_Services/restor-justice.shtml](http://www.saskjustice.gov.sk.ca/Comm_Services/restor-justice.shtml)

- In addition to healing community ties, the circle focuses on the offender and the underlying causes of their offence;
- For example, if alcohol or child abuse experiences contributed to the offence, these impact factors will be identified and discussed;
- The process is intensive and in many ways more difficult than a passive jail sentence since offenders are made to face and accept the harms they have caused. Victims often find the process much more satisfying and empowering than conventional justice procedures as well. They often report feeling less fear and trauma after taking part in a healing circle; and
- The healing circle often leads to an organic consensus of what steps should be taken by the offender to correct the harms caused by their actions. These could include:
  - Specialized counselling or treatment programs targeted at the impact factors that contributed to the offence (alcohol programs, abuse counselling);
  - Community work service at the direction of an elder's counsel;
  - Potlatch and other traditional remedies specific to the customs of the tribe;
  - Direct restitution to the victim or the community; and
  - Sometimes unique and creative solutions emerge, such as the offender agreeing to tell the public their story and speak out against the conduct that led to their offence.<sup>6</sup>

The potential that exists with the restorative movement far exceeds the lengths to which it has been used so far as it can be a broad based community driven process while still encompassing the major players (such as the lawyers, crowns and judges). Ultimately it should be a community driven approach, which means that an equal partnership will need to be created between communities and the justice system.

Such processes focus on healing those affected by the criminal act, including the offender, and so are more in line with traditional Aboriginal justice. Also, a restorative justice approach will often allow for a solution with no jail time, which helps reduce the drastic over-representation of Aboriginals in Canadian jails.

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<sup>6</sup> [http://www.lawcourtsed.ca/restorative\\_justice/](http://www.lawcourtsed.ca/restorative_justice/)

Section 718.2(e) of the *Criminal Code*, as well as the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 688 states that Judges should account for these considerations when making sentencing decisions. *Gladue* asks judges to apply a method of analysis that recognizes the adverse background cultural impact factors that many Aboriginals face. In a *Gladue* analysis these factors, if present in their personal history, work to mitigate or reduce the culpability of offenders. Judges are then asked to consider all reasonable alternatives to jail in light of this.

The following represent some of the types of Cultural Impact Factors considered when sentencing an Aboriginal person:

- Poverty; as a child, as an adult, offender's family, or community;
- Overt/Covert racism; in the community, by family members, strangers, school or workplace;
- Abuse: sexual, emotional, verbal, physical, and spiritual;
- Dislocation from an Aboriginal community, loneliness and community fragmentation;
- Loss of identity, culture, ancestral knowledge;
- Foster care or adoption: at what age, for how long, was the foster/adopted family non-Aboriginal;
- Has the offender or family members attended residential school? If so, where, how many years, how were they treated, how long were they denied family contact;
- What culturally relevant or healing resources are available to the offender; and
- What culturally relevant alternatives to incarceration can be set in place that are healing for the offender and all others involved, including the community as a whole.<sup>7</sup>

This list of possible points of consideration for Judges in sentencing Aboriginal offenders creates a rich basis for dialogue in the larger justice system where professionals might be able to adjust their practices with Aboriginal women.

## **Recommendations**

Canadian society through its foundational institution of Justice can impact the lives of Aboriginal women directly. This impact can be seen at the most basic level which is the social perception of the value of Aboriginal society by Canadians.

1. National Aboriginal Organizations must play a primary role when it comes to the discussion of Aboriginal peoples in the justice system.

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<sup>7</sup> Lang, S. "Reasons for Independent Background Cultural Impact Reports based on the Supreme Court of Canada Decision *R. v. Gladue* for Pre-Sentencing of an Aboriginal Offender".

2. Alternative practices such as restorative justice need to be brought into the justice system and used on a regular basis
3. Police officers, judges and lawyers must learn about the legislative and policy related history that impacted only Aboriginal peoples in Canada, especially Aboriginal women and the key factors which lead Aboriginal women into the justice system.
4. Developing programming, in consultation with Aboriginal communities, Elders and NAO's that meets the specific needs of Aboriginal women is essential.