Natives and the Court System

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Picture a court room in a jurisdiction adjacent to an Indian reserve at 10:00 a.m. As you enter, a hushed silence prevails. You glance left to right in the seating area and you observe a room, full of predominantly Native people who are in wonderment as to what is in store for them. In the body of the Court, the judge is non-Native, the prosecutor, non-Native, the R.C.M.P. (except Special Constables), non-Native, the duty Counsel, non-Native, the clerks, non-Native, and the defence counsel, non-Native. The only Natives visible are the Defendants and the Native Counsellor.

Court begins with the prisoners who usually plead guilty in order to get out of jail. The prisoners with more serious charges are represented by Duty Counsel, who is usually instructed to agree to anything to get the prisoner out of jail. The docket is then presented and normally consists of pleadings by Defendants who are not represented by Counsel. The Defendants that are represented, are represented mostly by Legal Aid-appointed lawyers. Very few Native defendants ever get to trial because most are either guilty of something or they are too impatient to have the matters resolved properly, which results in unjust convictions and sentencing.

Faced with the above, there is little wonder that judges are inherently prejudiced in trials which involve Native defendants. The outcome is predictable.

Under normal circumstances, at the conclusion of a trial the Defence lawyer stands before the trier of fact with his house in order, his theme fully developed, which includes destroying all negative facts and emphasizing the strong points to create a reasonable doubt or to prove that the Accused did not commit the offence. In my experience as a lawyer I have defended as many as six Native Defendants in trials in a week. I find that the onus shifts to the Defence to prove beyond a reasonable doubt the innocence of the Accused. Lawyers defending Native clients, without this knowledge, will invariably be disappointed after presenting the defence. Most Native Defendants can never rely on witnesses to come to their defence and subsequently the Defence lawyer's only choice is to put his client on the stand. Very seldom are Native clients believed and no matter how they conduct themselves on the stand, their credibility is predictably questioned.

For example, Powder Moon, a full blooded Indian, is charged with sexual assault. His sole defence is that he never had any sex with the victim. The following facts are not in dispute. Powder Moon picked up the victim to give her a ride home. Approximately ten minutes later, around midnight, he stopped his car in a deserted area of the Reserve and offered to share his bottle of whiskey with the victim. They stay in that spot for approximately one hour. They then drive on to her father's residence, whereupon he drops her off. The next

day at approximately 3:00 in the afternoon, the victim calls the R.C.M.P. alleging that Powder Moon sexually assaulted her during the period of time they were together in the vehicle.

What happened during this period was contradictory. The victim claims Powder Moon ripped the buttons off her blouse and proceeded to take off her blouse and bra. Then, she claims, he forcibly took off her jeans, despite her struggles. He then undressed himself, crawled into the back seat of the car and grabbing her wrists, pulled her into the back seat whereupon he forced her to have intercourse three separate times.

Powder Moon claims that she voluntarily took off her blouse and bra and wanted him to have sex with her. He refused, telling her it was not right because they were related. He adamantly claims his innocence.

Upon the arrest of Powder Moon, his car was impounded and searched. In searching the vehicle, a pubic hair belonging to the victim was found on a blanket. A pubic hair and a scalp hair belonging to Powder Moon was found in the back seat despite his testimony that he had never had sex there.

In cross examination, the R.C.M.P. officer, who was experienced in investigating sexual assaults in vehicles, testified that there was no evidence of any struggle, nor evidence of any semen anywhere in the vehicle. He also testified that despite searching for the missing buttons, he was unable to locate them.

The victim, upon reporting the matter to the R.C.M.P. was taken to a hospital where she was examined and samples were obtained pursuant to an R.C.M.P. Sexual Assault Kit. The results of the examination were that there was no evidence of intercourse, no evidence of semen in her urine or vagina and no evidence of any semen on her underpants. There was no evidence of any bruising on her wrists or body.

Powder Moon did not testify, but his cautioned statement to the R.C.M.P. was introduced.

Despite all of the above, the judge found Powder Moon guilty because he believed the victim was a credible witness. Powder Moon was sentenced to nine months, even though he had a bad record which included incarceration for theft and driving related offences.

The obvious question is, why did the judge convict on evidence which should have led to an acquittal? I submit that the inherent judicial prejudice towards Native Defendants dictates that the Native offender be found guilty. The overall aim is to reduce or eliminate the risk of repetition of criminal acts, not so much directed at the Offender as to the general population on the Reserve. In simpler terms, the judicial prejudice dictates the judge's decisions instead of the judge making decisions as provided by law.

Why is this type of discrimination so harmful? I submit that any violation of equality which diminishes the dignity of Native people threatens every other Canadian's right to equality. These Natives, who are unsophisticated, uneducated and without financial means, are victims of a form of inequality for which society has no answer.

Since the introduction of the *Charter of Rights and Freedoms*, these equality rights are an illusionary attempt to guarantee fundamental freedom. Unless these rights are enforced, the majority of Canadians, although not suffering now, could be subjected to these same inequalities.

The *Charter of Rights and Freedoms* was created in an attempt to balance the rights of the individual as against those of society and the rights of individuals against each other. Court have a policy-making role but in reality, in areas which I have described earlier , the role is reversed. The Courts allow prejudice to dictate decisions rather than the Court making its decisions subject to the *Charter*.

This is not in any manner an attempt to criticize the judiciary, but merely to point out the reality the judiciary is faced with. The present system will not allow a change in attitude until such time as the Legislators are made aware of the behaviour of Native people. It has always been my contention that the criminal element existing on Reserves is no different than in areas where non-Natives reside. Why then is there a disproportionate number of Natives in jail? I believe that most of the offences with which Natives are charged are fuelled by drugs, alcohol and impulse. Most Native offences against society (including suicides), are very seldom planned and deliberate. The Natives committing these acts do so without any forbearance as to illegality or consequence.

A prime example is two Natives, drunk, walking down the street in the middle of the night, who run out of cigarettes. They come upon a convenience store. On impulse, they break in, take only the cigarettes and maybe some chocolate bars and leave.

Another example, a Native married couple get drunk, get into an argument over each other's previous relationships with the opposite sex and, taking into account that Natives are inherently jealous on this subject, he hits her without any warning.

As I have previously indicated, the Native Defendant is found guilty and any leniency is found in sentencing. What, then, is the remedy when the Judge convicts on prejudice? If the judge actively participates in the trial, the Defence Lawyer has the opportunity to seek a Writ of Prohibition to disqualify him or her. But what about judges who remain silent and whose prejudice can only be detected in their verbal summation? The Appeal Courts can only rely on law and if the judge makes a finding of fact, the possibility of overturning the conviction is nonexistent.

There is no easy answer to correct this inherent form of discrimination. Society has refused to address the fundamental cause. It is simply left to the Courts, which makes the trial lawyer's job a very difficult one indeed.

I would submit that as Canadian legislators have provided the Canadian people with a *Charter of Rights and Freedoms*, the *Charter* should apply to all Canadian citizens, including Native Indians. Judges, without prejudice, should decide cases on their merits, not basing their decisions in an attempt to reduce or eliminate the risk of criminal acts within the general population on Reserves.

The solution to the reality of Native behaviour, in relation to the committing of illegal acts without consideration of the illegality or consequences of such acts, must rely on the understanding of legislators and the education of society. Judicial prejudice as a whole should be reviewed by the courts with a view towards developing an attitude within the judiciary that results in equality for all Canadian citizens.