

Justice for Aboriginals : Shared Responsibility and Accountability

The Honourable Judge Mary Ellen LAFOND*

To address the subject of Aboriginal peoples and the criminal justice system, I need to position myself, to describe the perspective I have on the topic. I have suffered under various labels in my life — the most recent of which is the "first Indian judge" in Saskatchewan. I live with both the privilege of that title and the burden it brings.

The privilege is that I am educated, employed in a reasonably secure position and have been given responsibility to administer justice. Lest you get the impression it is a state of nirvana, the flip side of privilege is the burden.

The burden of the task of Provincial Court judges in Saskatchewan is to bear witness, indeed judgment, to the most profound social and economic crisis of our times — the dispossession, disenfranchisement, poverty and conflict of the First Nations and Metis people with the criminal justice system.

Having lived under the label of judge for approaching nine months in the front line criminal courts, I can give birth to some insights or perspectives on the system I work within each day.

I can divide my professional life and reflections on the justice system into the period of B.P.J. and A.P.J. — that is before provincial court judge and after provincial court judge. The opinions I had before have been altered somewhat by the experiences since becoming a judge.

Dividing your working life into historical periods like this is an uncomfortable thing to do. First, for the obvious reason that the further you move from the beginning, the closer you come to the end. More significantly though, the divisions tend to be arbitrary because there are so many ways to divide up your life, and your experiences of it, that the divisions are rooted in little more than narrative convenience. But this professional role provides a dividing line if for no other reason than that I now live with limits on what I can say about various things that incite strong opinions.

But in a certain way, my coming into this new professional role has been seen by many to be emblematic of change. I agree that it is emblematic of something, but what it actually emblemizes is less clear. I suppose at the superficial level it is an emblem of the end of a period when judgment, legal accounts, and narratives were the sole territory of

* Provincial Court of Saskatchewan, Saskatoon, Saskatchewan.

the non-Aboriginal settler community. It is a small gesture toward shared responsibility and shared accountability as the topic for this panel suggests.

So, my A.P.J. period situates me as something of a bridge between communities. I would like to imagine it as a Confederation Bridge, long-awaited, broad-spanning and capable of withstanding the environment. Yet, it is little more than a simple rope strung across a large abyss. From this tenuous position one sees the large and the little in the relations between Aboriginal and non-aboriginal people; scene-framing background scenes, and the minute immediacies of the experiences in the faces of real people. Making sense of this jumble, let alone describing it, is not easy. It is critical, though. After all, the prison door does get locked based on what we decide. To have a sense of what is happening in the criminal justice system, and the trends for the future, is a duty for judges and indeed everyone connected with the criminal justice system. It is easier to describe demographics rather than despair, so I will start by drawing that picture.

The Aboriginal populations of Saskatchewan will grow from 13% of the population today to 33% by the year 2020. The community has the highest birth rate in Canada, winning out only slightly over Manitoba's Aboriginal population. The incarceration rates are grossly disproportionate today — nearly 80% now in the Provincial Correctional Centre, 70% in the Federal Penitentiary system and 95% in the Young Offenders' institutions. In the women's institutions, the representation of Aboriginal women is between 60-80%, with provincial being the latter and federal the former.

Without intervention, the disproportion will move from the realm of the despairing to the transformation of Saskatchewan into a society in which a significant industry is the imprisonment of one distinctive group. The Norwegian criminologist, Nils Christie, has called this tendency the "prison industry." Christie, although not writing about our province or our nation, has described the tendencies in those societies where one group systematically controls another group through penal sanction :

There are no natural limits. The industry is there. The capacity is there. Two thirds of the population will have a standard of living vastly above any found — for so large a population of a nation — anywhere else in the world. Mass media flourish on reports on the dangers of the crimes committed by the remaining one-third of the population. Rulers are elected on promises to keep the dangerous third behind bars. Why should this come to a stop? There are not natural limits for rational minds [...]

The worst nightmare will never materialize. The dangerous population will not be exterminated [...] But the risks are great that those seen as core members of the dangerous population may be confined, warehoused, stored away, and forced to live their most active years as consumers of control. It can be done democratically, and under the strict control of the legal institutions.¹

1. N. Christie, *Crime Control as Industry : Towards Gulags, Western Style?* (London : Routledge, 1993) at 166-167.

I do not suggest that Christie's analysis is immediately applicable to Saskatchewan but that he identifies a trend which we need to reflect on and guard against. I do reflect on my place in such a scenario and believe we need to discuss this openly and frankly within the legal profession.

The other startling demographic trend is that of the age composition of the Aboriginal population : over 60% are under the age of 25 years old. It is a burgeoning population, youthful and increasingly urban with more than 60% of the First Nations population living off-reserve. It is a youthful urban population without a sense of belonging either in the city or in the Province. The cultural symbols and attachments of the youth are not present in the city or in the court. Their attachment to the city, like their observance of probation or other court orders, is nominal. It has little meaning for them. It is something imposed, to be endured, not understood or respected.

This is because the construction of the criminal justice system (despite the treaties in place in what is now Saskatchewan) has been largely an unshared experience. In order to create shared experiences and mutually meaningful symbols of authority and respect, one needs a relationship among communities. This is one of the great challenges of the immediate future : to construct the relationship such that there is genuine shared accountability and responsibility.

The demographic trends are dehumanizing numbers. To the Provincial Court of Saskatchewan, the numbers translate into the real faces and stories of countless aboriginal people in conflict with the law. It is an enormous caseload, indeed turnstile. I cannot speak for my brother and sister judges, and I do not claim to. Our Chief Judge is here to do that for us and he ably rises to the task when asked.

However, I can bear witness to the constant stream of tragedy and despair — the faces, stories, identities and, gratefully, humour and resilience which every so often allows a release from the tense air of defeat.

The judges have a difficult task. We are imprisoned in a different sense. Our power is extremely limited, but our burden is great. Justice is difficult to craft when the social welfare conditions are such that a large group of the population is disenfranchised. When a large group of the population has little shared history and cultural symbols in the community it is impossible to appeal to common ground in sentencing an Aboriginal person.

During my nearly nine months on the court, I have never heard counsel argue section 718.2(e) of the *Criminal Code*, which advises that we should take into account all available sanctions other than imprisonment, for Aboriginal offenders. When a community has few other sanctions, in the way of programming or support in the community (either urban or reserve), I suppose this provision is of little meaning.

I have a fundamental commitment to justice. I believe in it. I do not believe it requires a rigid conceptualism or a rigid formalism. Justice is about people. I believe the biblical adage that the people make the law not the law the people. Justice for me has to be concerned with hope. It has to be anchored in a system which believes in success rather than failure. I believe that the purpose of the criminal justice system must be, among other

things, to make people broader and more completely realised as members of a community, with a sense of their duty to the community and themselves to reach their potential and not to impair others in their similar pursuit.

The philosopher Ernst Bloch, in a seminal work, *The Principle of Hope*, described the task in the following way :

It is a question of learning hope. Its work does not renounce, it is in love with success rather than failure. Hope, superior to fear, is neither passible like the latter, nor locked into nothingness. The emotion of hope goes out of itself, makes people broad rather than confining them, cannot know nearly enough of what it is that makes them inwardly aimed, of what may be allied to them outwardly.²

I believe in hope but, on the bench, I feel like Dr. Pangloss from Voltaire's *Candide*. The ever optimistic Dr. Pangloss who believes everything will work out for the best without having to do anything, is the eternal fool. Is believing in hope a sham if the system is only concerned with the dangerous one-third? This is a question I cannot answer on my own without more experience and reflection.

As a First Nations person, I did not lose my identity on the steps of the courthouse. One cannot lose what is bred in the bone. I have an understanding of the lived experiences of Aboriginal peoples. This is not to say that I am biased or lack independence in the court. Will the bonds we were raised with, under the guidance of our Elders, be replaced by the bonds of belonging to a criminal organization — the gang, which exalts in the label of dangerous and criminal? Gang organization provides a security net when the social welfare state fails. It provides parental stand-in when there are no parents. It is the perfect refrain to a chorus from the prison industry. If a group is labelled as criminal and criminalized, the organization provides meaning to that experience; indeed, it is its collective bargaining unit with an economic base.

The only reply is hope. Justice as healing. Restoration not of the system to its singular and imposed origins through the expansion of the prison industry. Like hope, the justice system has to go out of itself to embrace success. It has to invest in success, not fear. Invest in hope, not despair. To embrace healing. To believe that there is a way to heal, to build strong stable bridges. To reinforce the bonds of positive identity in the Aboriginal community and to value it in the wider society.

I will share an example. A respected Elder aged 75 years is convicted of sexually abusing his granddaughters. It is a tragedy for a community, for a family, and especially for the young women. The Elder is sent to the federal penitentiary to serve a significant sentence. The community has taken back responsibility for justice by organizing, engaging in healing circles and sentencing circles and educating young people about the bonds of positive connection through mediation circles in the schools. The community, a poor one, indeed a community saddled with debt, still believes in hope. In healing.

2. E. Bloch, *The Principle of Hope*, ed. by N. Plaice, S. Plaice & P. Knight (London : Basil, Blackwell) Volume 1 at 1.

The Elder applies for early release. The Community holds a release circle to determine if the elder can return home before the expiration of his sentence. The community spends a lot of time and energy on the issue of whether there can be healing after the offensive conduct of the Elder. The young women are involved, the families are involved. The community decides that there is a way to heal from the experience. It is their overriding concern.

The Elder is allowed to return on very strict conditions. First, he must put on a feast for the community, the purpose of which is to publicly acknowledge his wrong, to speak to his family, friends, fellow band-members and, especially, his granddaughters. In an emotional feast, he pledges to spend the rest of his years working to restore the dignity he took from his granddaughters by his misconduct. He is told he is not respected, indeed, to expect people to spit in his face in the community. However, if his conduct demonstrates his commitment to healing, he will be accepted in time.

The story is true. The First Nations community is near the city of Saskatoon. The healing journey continues as we speak. What is significant? The belief that there is a way to heal. That it involves the offender, the victim and the community. That it is not easy. That it is essential to the bonds of community for healing to happen with the symbols of significance for those people. You see, bonds of community : place and people are of enormous importance in the First Nations community. Bonding is the leitmotif of First Nations culture.

For example, the grass dancer does not just jump around wantonly to the beat of a drum. He must watch the prairie grass move against the wind and become the grass in his dancing. To achieve this makes him a champion — one that shows the spirit of the grass, *is* the grass. The same approach holds for the hunter — the hunter must so acutely understand and bond with the animal in the hunt that he knows the animal enough to take its spirit, take its life, understand its suffering and death.

The fact that First Nations people are rooted — have complex representations of this territory in dance and song, and know that to take something requires you understand it is important for the criminal justice system. The criminal justice system does not root itself in the same sense, as the doctrines were often imported from elsewhere and imposed here. The creation of the criminal justice system must involve the symbols, norms, procedures and practices of all communities.

The philosopher Kierkegaard provided the most useful guidance on how to view our life experiences. He wrote : "Life is lived forward, but it is understood backward." We need to move into the future with a keen appreciation of what has passed. The lack of a shared past can mean the absence of a shared future. The understanding has to be acute so that the future involves the construction of a system of shared responsibility and accountability.

I want to close with the metaphor of the hoop dancer. The hoop dance is a special one for First Nations plains people. It represents what shared responsibility means. The dance is complex and takes a high level of mastery; thus, the very best hoop dancers are well respected.

Out of the same basic elements, the hoop, the dancer shapes the images of the world around him or her. The butterfly or the eagle. But the hoop represents the circle of creation. The connectedness of people to each other and the earth. The intersecting circles of the hoops in the hoop dance can inspire us to think about justice as just that — intersections which provide meaning, reflect coherence, and beauty rather than just a pile of hoops on the ground. The intersecting circles can be like the intersection of Aboriginal and non-Aboriginal people. It cannot be by creating two societies — the society of privilege and the society of need — but by supporting each other and creating something together which represents this place.

Finally, I apologize if you wanted to hear an exposition on solutions to the problem. I am not sure that it is my role or responsibility. I live close to the criminal justice system, perhaps in a relationship more akin to Jonah and the whale, thus my insights may not be terribly illuminating. New approaches, building on hope, seem required and my comments are only offered to challenge you to consider justice in that manner.