

COMMONWEALTH MAGISTRATES & JUDGES ASSOCIATION

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I. INTRODUCTION

The topic for this session is ensuring justice for Indigenous persons and other minorities in all walks of life. I have chosen to speak more narrowly on Canada's Indigenous population and the injustices visited upon them. I will address the impact of those injustices, the recognition of the injustices done and the changes being made and that need to be made to ensure Indigenous persons are justly treated.

II. WHERE WE HAVE BEEN

It is my view that one must understand the plight of Indigenous persons and their historic treatment by government in order to properly address the need to ensure that Indigenous persons are justly treated. As a result, one must recognize that before the arrival of Europeans in North America, Indigenous persons were free to go and do as they pleased subject only to

the territorial claims and actions of other Aboriginal persons. In that sense, the term “Aboriginal or Indigenous Lands” could encompass vast tracts of wilderness. In land claim actions, both past and present, such demands have often been made by First Nations or Indigenous bands. That is especially the case with nomadic bands. I will have more to say on this subject later.

A. Reservations:

The arrival of Europeans eventually resulted in confining the bulk of Canada’s Indigenous bands to reservations. Reservations were the product of treaties negotiated between bands, or as we now describe them, First Nations, and the Queen as represented by her national government.

By relegating Indigenous persons to reservations, they could be largely ignored except where trading interests required contact. Reservations facilitated the settlement of our vast country.

Unfortunately, no one seems to have foreseen the cultural impact of the reservation/treaty system. While Indigenous persons were free to practice their culture, they became more and more impoverished and were ill equipped to withstand the European traders' wiles, alcohol and the influence of religion.

While the reserve system provided a means to allow Indigenous persons to continue their way of life, it also doomed Aboriginals to a future of poverty and idleness. Prosperity left them behind.

In result, it became apparent that something needed to be done. Unfortunately, in our arrogance, we acted without consultation. In the name of religion and arguably because we felt a need to help Indigenous persons become more like us, governments and churches took steps to normalize or to Canadianize our Aboriginal population.

Those steps included the creation of residential schools.

B. Residential Schools:

As with the world, so with Canada, the Roman Catholic Church saw a need to bring God's word and laws to the unconverted and in keeping with the global model, education became the tool to achieve that result. Plainly, we all agree that education is essential. In Canada, government and churches hit on residential schools as the manner in which Indigenous children were to be educated.

Residential schools in Canada were run by churches with government approval and funding. A brief explanation is necessary. Residential schools were buildings designed to teach and house Aboriginal children. The school focussed upon religious instruction and living in a Godly way. Traditional educational content was also part of the schooling but it is worth recognizing that while this was about making Indigenous persons more like us, the educational aspect of the indoctrination was inadequate to provide the children with the skills and abilities white children were being taught. Despite the fact that the goal was, of course, to help

Indigenous persons become productive members of society, which at the time was predominantly white.

Our first prime minister said this:

“Take them from their parents’ influence and put them in central training industrial schools where they will acquire the habits and modes of thought of white men.”

To achieve that end, children were taken from their families, often forcefully, and forced to cut their hair, change their clothes, speak English or French and generally act like white children. They were forced to abandon all aspects of their culture and their customs. They were only to be allowed contact with their parents or extended families during the summer months, but often the schools were so far from their communities, that contact could not occur.

This educational initiative lasted roughly 100 years and involved approximately 150,000 Indigenous children. It is estimated that 6,000 children in that

100-year period died while resident in one of the residential schools. Many of those deceased children were the victims of violence at the hands of the persons responsible for their education and care.

Most of the schools were closed by 1986, although, a few of those near reserves continued as schools run by the local Indigenous band.

It is also important to remember that despite the pride we Canadians take in our belief in equality, racism was a common feature throughout this period. Canadian children were routinely exposed to such epithets as dirty Indian kid, drunken Indian, chief, Cochise, squaw, sitting bull, and the like. Indigenous persons were routinely referred to in this way. This is not a proud period in Canadian history.

As a result of residential schools, Canada's Indigenous population could be fairly described as broken. They had been stripped of their culture, deprived of their communities until they became adults. Their

communities were abominably poor. Alcohol and government welfare became the tool for economic and emotional survival. Generations of abused children became abusers and the reserves became places of extreme violence. Not in all places, but in a clear majority, hopelessness was rampant.

Inevitably, our local police forces were expending more and more resources investigating crimes on reserves and dealing with the criminal behaviour of Aboriginal persons off reserve. In virtually all cases, all of these behaviours were the product of deep emotional hurt, medicated by alcohol – that is the real legacy of the residential schools system.

C. The 60's Scoop:

Despite the obvious hash we had made of our unwanted attempts to indoctrinate our Indigenous population, we did not learn from that lesson. Instead, in the 1960's, we employed an even more ill-advised tool which has come to be known as the 60's Scoop. Let me explain.

Child welfare is a concern in all nations. In Canada, we saw Indigenous children residing in squalor, often abused and/or ignored by their alcoholic parents. These children were raised by the aunts, uncles, grand parents or fended for themselves. For some reason we failed to recognize that the residential school nightmare had created the abusers and alcoholics.

Motivated by concern for child welfare, governments felt obliged to intervene and they did so by apprehending Aboriginal children and placing them in white foster homes and adopting the Aboriginal children out to white families.

As an example, in my province of Alberta, it is estimated that around 25,000 Aboriginal children were thus taken in an approximate 20-year period. In Canada, more than half the population of foster children are Indigenous; yet only 7 percent of Canada's children are Aboriginal. Once placed in a white home, the children were routinely deprived of

their culture, language and customs. They had no exposure to their heritage or their Aboriginal families. They were essentially raised as a white child.

In addition, many of these children were sexually and physically abused by their foster families and were routinely treated as slave labor. Because of their skin color, it was common for an Indigenous child in this environment to be the subject of bullying both in the family and in the white community that the child became part of.

Canadians are only now coming to realize the horror that was the 60's Scoop and its impact upon our Indigenous citizens.

In this environment of abuse and ill-advised programs, it is little wonder that Indigenous groups started to organize. Militancy, obstructive behaviors against national infrastructure projects and general distrust and disillusionment is the harvest we have reaped. That brings us to our present circumstance.

III. WHERE WE ARE

Over the last 20 years, our community leaders and politicians have realized our follies and have apologized, in some cases repeatedly, for our arrogance and ignorance.

Dialogues between government and Indigenous groups have been occurring on issues of Indigenous health, welfare and education. We have recognized that reserve infrastructure, including basics such as potable water, are in desperate need of attention and resources.

We now consult with First Nations on projects that may impact their environments and lands. We have resolved many land claims although mostly in response to litigation by First Nations. Many more such claims remain in contention.

We have compensation agreements to pay damages to those victimized by the residential schools initiative and the 60's Scoop.

The Supreme Court of Canada has routinely recognized and protected traditional Aboriginal activities. That court has ruled that historic accounts, often by word of mouth, can be received as evidence in support of land claims.

In short, we have made progress.

In this environment, Indigenous culture has experienced a revival, both locally and nationally. Pow-wows and traditional native ceremonies are embraced by both Indigenous and non-Indigenous persons. Aboriginal persons are rediscovering their culture and finding their voice. Ironically, many of the Indigenous children who were scooped provide the strongest voices for acceptance of fault and encouraging change.

Perhaps the most potent catalyst for change is the 2015 Truth & Reconciliation Report and Recommendations. The Truth & Reconciliation Commission was chaired by one of Canada's Indigenous judges, Murray Sinclair. The commission heard testimony and received documents while conducting proceedings across the country. It is important to remember that while we have spoken at length about recent government actions to help Indigenous persons and to apologize for past sins, Indigenous persons remain the subject of pervasive, derogatory bias. Remember, white children of the 50's, 60's and 70's, who now make up the majority of our white population, were raised in an environment where derogatory terms were commonly used to describe Indigenous persons, and those attitudes continue to exist. That subject was specifically addressed in the Truth & Reconciliation Report.

As well, having concluded, in my view correctly, that there is a broad lack of understanding of the unjust and violent circumstances from which modern Canada emerged, the Report details many individual

stories of the damage done. The distribution of the Report and the publicity its contents received motivated many non-governmental groups to act to address their biases and inappropriate behaviours. Universities and colleges are now offering programs in Aboriginal Studies and many organizations engage in sensitivity training. As a result of the Report, individual Canadians have started to recognize their individual biases and have started to learn to be more tolerant and just, a national pride we have always claimed but are really just starting to earn in regard to our Indigenous brothers and sisters.

The next most important step in the process of ensuring justice is the recently commissioned Murdered and Missing Indigenous Women's Inquiry. That is an initiative of the Trudeau government to address a longstanding source of angst among all Canadians. In a nutshell, there is a grossly disproportionate number of Indigenous women who have been found dead or who have gone missing in Canada. The inquiry will help us understand the roles that poverty, alcohol and racism have played in those

lost lives. In doing so, we as Canadians will be forced to again confront our racist attitudes.

In this period of awakening, the Supreme Court of Canada has not just dealt with land claims, traditional rights and forms of evidence. It has also recognized the gross over-representation of Indigenous persons in our jails. Let me explain. According to Statistics Canada's 2017 report which details circumstances in our jails in 2016, Indigenous men represent 25.2% of all incarcerated males and Indigenous women represent 36.1% of all incarcerated females yet only 5% of Canada's population is Indigenous. 82.4% of Indigenous offenders served their complete sentence before release while just 65.2% of non-Indigenous offenders did so. To address this atrocious imbalance, the Supreme Court has directed sentencing courts to give effect to an accused's Aboriginal heritage in imposing a fit and proper sentence. That initiative motivated changes to our Criminal Code. In order to achieve that end, the Supreme Court has obligated sentencing courts to obtain full information about the accused's Aboriginal history and his or her personal

circumstances, including exposure to residential schools and child welfare. In Canada, we call them Gladue Reports, which is the name of the first Indigenous person whose sentence was considered by the Supreme Court.

As a trial court justice, I have had many opportunities to hear such circumstances and even if the circumstances did not substantially impact a particular sentence, the fact that the accused's story got told and heard is a powerful rehabilitative and educational process.

IV. FUTURE

As I have said, we pride ourselves on equality, acceptance and assisting of those in need. We cannot legitimately claim any of those laudable labels until we accept our obligation to redress our past wrongs. The Truth & Reconciliation Commission told us that. Both our governments and we, individually, need to accept the fact that we are responsible for the current plight of our Indigenous countrymen. We need to

acknowledge that the present, deplorable conditions in which our Indigenous populations live are born out of our arrogance and our prejudice.

As organizations, we must develop ways to encourage Aboriginal persons to seek or to pursue legal careers. We need to help those organizations to design programs, which are free of racial bias. We need to encourage governments to appoint more Indigenous judges and help governments develop and publish the criteria for selection, which will ensure that is possible.

Justice system stakeholders need to recognize that the fundamental difference between a penal and criminal adversarial system and the manner in which Indigenous cultures handle criminal behaviour. We need to be vocal supporters of systems modifications designed to allow for Indigenous persons who are alleged or who have committed crimes to be dealt with in a culturally sensitive way. Those modifications will help Indigenous persons accept the justice system as their own and thus overcome the present inequity

in our system. Indeed, we should consider empowering Indigenous groups to resort to their own legal systems and traditions and find a way to blend the systems together.

Those specific actions are necessary to develop a justice system that can truly be said to be fair and to treat all fairly.

However, justice for Indigenous persons depends on more than adjustments to justice systems. Fair treatment of Aboriginal populations also requires governments to resolve land claims and provide a mechanism for resource wealth distribution. Governments need to consult and properly provide for education, health and welfare of our Indigenous persons. Action in these areas will be recognized as a demonstration of our commitment to right past wrongs.

Let me end by saying that the biggest impediment to justice is our socially motivated disdain for the

differences between us. Canadians hold prejudices against Indigenous persons and other minorities. Therefore, it behooves us, everyone, to examine our own attitudes and behaviours and commit ourselves to overcome our prejudices and biases. We must, today, refuse to allow ourselves to think or act as our colonialist forefathers did and we must encourage those with whom we associate to do the same.

If we truly embrace fairness and equality, we will act in that fashion and there will indeed be justice for all of our citizens.