5.0 Judges, Prosecutors and Lawyers

Preamble

It would be safe to say in general, that court personnel know little about the culture of the Aboriginal people of Alberta. This statement includes, but is not limited to, judges, crown prosecutors and lawyers. One author wrote:

> *in general, judges [prosecutors and lawyers] have no better knowledge than the general public and arguably, as a group, they suffer from a somewhat poorer exposure to the day-to-day life and struggle of the Indian Nations. It can therefore be expected that certain judges will fail to appreciate the history and aspirations of the Indian Nations.*[1]

During our visits to Aboriginal communities, we heard the common complaint that judges, prosecutors, lawyers and police never visit Aboriginal communities other than in their official capacities. On several occasions, the Task Force received hints of invitations such as "drop in for coffee, come and participate in our community activities, come and learn about us so that you will know who it is you are dealing with when our people appear before you in your system." There is a very definite perception that judges, prosecutors and lawyers do not know very much about the Aboriginal people with whom they deal.

Findings and Recommendations

Term of Reference:

Judges, Prosecutors and Lawyers 5.0

to determine whether and the extent to which differences exist in the exercise of prosecutorial discretion between Indian and Metis people and non-Indian and non-Metis people.

Judges

> *'In the long run,' wrote Judge Cardozo, 'there is no guarantee of justice except the personality of the judge.'*[2]

The role of the Judge simply cannot be underestimated. Most people who have come into contact with the courts and actually go to trial seldom go beyond the trial court. The trial Judge

> *is the law to most people and most legal purposes. Whenever a trial judge fails in probity, energy, objectivity, or patience, his failure is observable and cannot but impair public fidelity to law.*[3]

Most Aboriginal people come into contact with Judges at the provincial court level. It is at this level that views about Judges are formed. For instance, Gift Lake Council intimates that court officials do not have much knowledge about Aboriginal communities and their views on justice:

> *On at least two occasions, Gift Lake Council has written to the court informing them of such things and on both accounts the letter and its contents were not considered. Court officials must know what each community considers serious, how it should be dealt with, and the kind of sentence the community expects. Court officials do not act in a void: their acts, deliberations, and results affect not only the offender but the victims and communities as well. Judges and prosecutors must know the people and communities on whose behalf they are acting. They too must be accountable to the people.*
>
> *These comments apply especially to judges. These people are mere mortals like the rest of us. However, they pass judgement without knowing the circumstances that exist outside the walls of their courtroom.* [4]

In an article called "Wrist-watch Justice," Mick Lowe describes a similar opinion of the court held by Indians in northern Ontario. According to Lowe, the Indians consider court slipshod, perfunctory and inadequate. The adjective most used to describe the court was "kangaroo."

> *Upon learning that a reporter was present at the court, a native special constable sneered. "So you saw our 'court'? Good. It's about time that this story got out. Maybe then our MPs will do something." He, too, was unhappy that so many criminal cases had again been delayed.*[5]

Not surprisingly, many Aboriginal people are contemptuous of judges and other court personnel and have "going through the motions" attitudes about the whole criminal justice system. Rupert Ross captures the attitude of Indians toward the criminal justice system when he observes that the function of the Indian dispute resolution system is to arrive at real resolutions of disputes. Resolution is achieved when the disputive parties return to peaceful co-existence and bad feelings are eliminated. According to Ross, Indians expected the "white" man's system to do the same. Having realized that the criminal justice system does not aspire to the restoring of friendship and harmony, Indians now want the system removed from their communities and aspire to a form of "self-government."[6]

These observations underline the importance of the role of the trial judge and the need to be knowledgeable about the people on whom the criminal justice system is imposed. Lack of knowledge can result in a travesty of justice.

The Trial Judge as Fact-Finder

That most court cases never go beyond the trial level emphasizes the importance of the trial Judge. Courts of Appeal rarely reverse the findings of fact by lower courts. Generally, most court cases are not about what the law says but about discovering what really happened.

Fact-finding is crucial not only to justice being done but in justice appearing to be done:

> *When injustice occurs in our legal system, it is less often because of some archaicism or unfairness in the general law than because of some error in the ascertainment of facts, that is, from some failure in the reconstruction at the trial of what had actually happened outside the courtroom.*[7]

Little Bear writes:

> *The Nacirema believe that the best and only way to bring about justice is through the verbal battle. This is a fight theory of justice which assumes a disputatious and contentious transgressor. The Great Spirit knows they are not! It assumes that in a dispute settlement each tribesman, in the sacred chamber's competitive strife, will, through his talking specialist, intelligently and energetically use the evidence to present a story favourable to him and unfavourable to his opponent; and thereby the dispute shaman and the tribal listeners will discover the truth. The shaman will then apply tribal social policies embodied in the sacred birch bark code to the actual facts and somehow miraculously avoid the application of the sacred code to a mistaken version of the facts.*[8]

If Judges lack knowledge about the community and the people, the fact-finding process, which is largely based on the adversarial process and the consequent finding of fault, will likely be suspect. The suspicion will likely result in the perception that judges do not know too much about the world outside the walls of their courtrooms. In this respect, Horowitz observes:

> *To make this clear, it is necessary to distinguish between two kinds of facts: historical facts and social facts. Historical facts are the events that have transpired between the parties to a lawsuit. Social facts are the recurrent patterns of behaviour on which policy must be based.*[9]

Generally, courts are well suited to historical fact-finding but not very skilled in social fact-finding. Horowitz suggests that there is an increasing call for a sociological type of jurisprudence – a judicial type of reasoning that is linked to the daily life of society.[10] He also observes that Canadian Judges lean toward a textually-oriented type of reasoning. This results in highly conceptual decision-making that is poorly grounded in socio-economic facts. In other words, Judges make decisions in an "Ivory Tower" and are rather removed from the real world "out there."

It appears that when Aboriginal people say that judges, prosecutors and lawyers neither know nor understand them, and that the criminal justice system should be brought home, they are asking for a fact-finding and interpretive process based on the Aboriginal "real-world," rather then on standards that are relevant to white people in downtown Edmonton and Calgary.

Who is Qualified?

The above discussion leads to a consideration of desired qualities in trial judges. Harry W. Jones states:

> *The role of umpire in an adversary court proceeding is not one that can be played effectively by a judge who is mediocre in intellect or professional skill, lacking in decisiveness, or in any way emotionally insecure.*[11]

Jones further suggests that a judge must have a strong professional character, be able to stand up to abrasive legal counsel and command respect and confidence in his judgements if justice is to function properly. Weak Judges, he notes, cannot "call them as they see them."

Jones then lists probity, professional skill and acumen, character, energy, and personality as desired qualities for trial Judges.

> *To be authentic in his role, the trial judge must be an unusually honest man, a man of exceptional integrity financially, politically, and socially... Insistence on personal integrity as an indispensable qualification, almost as the indispensable qualification, for judicial office reflects an apprehensive awareness in the legal profession of the immensity of the damage that can be done to the legal order by judicial corruption . . . revelations of judicial corruption create suspicion and loss of confidence in legal processes generally and endanger public respect for law.*[12]

In the case of Indian and Metis people, there is long-standing recognition that the criminal justice system is both irrelevant to their needs and treats them unfairly. Their attitude is *"What's the use? The cards are stacked against us."* In Aboriginal people's minds, if courts are not fair, then they must be corrupt. In other words, when it comes to Aboriginal people, many of Horowitz's desired qualities are largely absent. Indeed, as Ross says:

> *It is little wonder that an elder recently complained that the court doesn't do what it should do, that it only passes sentence, collects fines, takes off and 'leaves us with the problem'.*[13]

Jones goes on to say:

> *Professional excellence on a trial court of general jurisdiction means at least: 1) wide ranging analytical power comparable to that of the qualified internist in medical practice; 2) mastery, or the intellectual capacity to achieve mastery, of the intricacies of legal procedure and evidence; 3) unusual discernment in dealing with facts and weighing conflicting testimony; and 4) unusual skill at communication with jurymen and witnesses.*[14]

The qualities and skills desirable in judges come about as a result of knowledge of people, their culture and their communities. Aboriginal people have complained repeatedly about the lack of these qualities in judges, prosecutors and defense lawyers.

The non-fulfilment of cultural expectations may lead to an Aboriginal view of most judges as "Judicial tyrants." Jones characterizes judicial tyrants as follows:

> *Every multi-judge trial court of general jurisdiction has at least one tyrant in residence. Sometimes he is a short-tempered man of professional ability and irascible disposition. If his technical qualifications are outstanding, they may compensate in large degree for the unpleasantness of his personality, although the excessively crusty judge will leave a bad taste with litigants, witnesses, and jurymen, however impressive his technical endowments may be to the lawyers in the case.*
>
> *Far more often, as would be expected, the judicial tyrant is a man of inferior intellect and professional skill whose impatient and overbearing manner reflects deeply rooted feelings of his own inferiority. In any metropolitan community, arrogant judges of this second category are readily identified by experienced trial lawyers. There are regular ways by which the sophisticated advocate manages to avoid having his cases assigned to them for trial, with the ironical consequence that the worst judges are likely to get more than their ratable share of the cases in which trial counsel are inferior or inexperienced, and so least able to cope with impatience, oppression, or undue interference from the bench.*[15]

In his article, "Judging Judges," Crawford states:

> *Yet, for the most part, judges are sheltered from the glare of public scrutiny. Safely cloaked in solemnity and the power to punish those who threaten the administration of justice, a few act*

as mini-despots who rule until retirement. While in the minority, these judges can colour the entire legal system.[16]

Acknowledging that these Judges are in the minority, Crawford also states:

> *lawyers say other judges out there are a continuing detriment to the justice system because of their behaviour and attitudes. These few may be given to seemingly random outbursts, yelling at witnesses and counsel or even throwing books at lawyers. Then there are the bizarre cases like the judge who insists on bringing a gun into court and the circuit judge who stops on the highway to collect beer bottles in ditches on the way to court. And a handful allegedly have severe alcohol or drug problems.*[17]

Judges who are not sensitive to cultural differences and who know little about the community in which they conduct court may well be perceived as judicial tyrants, and receive reactions accordingly – especially when expectations are not met. Such conditions are likely to result in perceptions such as 'kangaroo' court.

Judicial Bias

Chief Judge Heino Lilles has suggested that lack of knowledge of the value system of Aboriginal accused persons may result in inappropriate dispositions or disparity in sentencing:

> *But it is imperative to admit the bias beyond bigotry: to recognize the individualized and personal values that intrude on the deliberations of any human being; to understand that there is no judgment of human behaviour that is not subjective; and to appreciate that objective sentencing is a myth that will never be achieved even if we were capable of elevating to judgeship solely the purest in heart.*
>
> *Cross-cultural bias, or inadvertent discrimination resulting from failure to fully appreciate the value system and resulting actions of native accuseds, can result in inappropriate dispositions or disparity in sentencing. The brief comparison of differences in cross-cultural values between natives and non-natives earlier in this paper illustrates how easy it is to misunderstand the actions to someone with a different cultural background.*[18]

Chief Judge Lilles has also made observations about cross-cultural bias and discrimination:

> *The concept of equality in court proceedings is based on the premise that any law is equally applicable to, understood by and concurred in by all those subject to it. It is, in fact, an assumption of cultural homogeneity; it operates to maintain the existing socio-cultural order.*
>
> *In non-legal terms, this assumption is patently false. It is obviously false in the many small, often isolated communities in the territories and northern parts of the provinces where native peoples have a significant, and often predominant, presence. The 'equal' treatment by the justice system of those native people who are culturally and otherwise distinctive is, at best, problematic and, at worst, discriminatory.*
>
> *The term 'criminal justice system' includes many more players and institutions than judges and courts. It is in fact a 'decision network' which includes the complainant, police, Crown attorneys, defence counsel, probation officers and youth workers, judges and correctional agencies. The treatment of a defendant, including the sentence imposed by the judge, depends on the decisions made by all persons within the system. It is important to note that people, not institutions, make these critical decisions. Moreover, most of these decisions are not automatic, but involve the interpretation and application of imprecise rules or procedures and the exercise of considerable discretion.*
>
> *In the remote and isolated communities of northern Canada, these 'decision makers' generally have a different cultural, social and economic background than the majority of the persons in the communities where they serve. For a number of understandable reasons, they*

often remain in the community for relatively short periods and leave before they are fully in tune with it and the culture of its residents. In these communities, the probability of systematic cultural bias impacting on decision making at all stages of the criminal justice system is significantly greater than in larger population centres.

The term 'cultural bias' as used in this paper, is intended to denote a subconscious proclivity, as opposed to the more obvious preformed judgments implied by the word 'prejudice.' One author described bias as follows: "Acting upon the same propositions and under the same apparent conditions one individual will decide one way, and another, another way. This runs through all human experience. It means that there is a bias in every personality. The nature of this bias is a composite of hereditary tendencies, parental influences, personal experiences and the particular environmental pressure."[19]

Others would seem to agree with the remarks of Chief Judge Lilles about judicial bias. For instance, Ominayak and Ryan conclude that a hunting and trapping way of life is a viable way of life for the Cree and that the Cree want to pursue this lifestyle. But some Judges do not seem to understand this desire. It appears that they consider urban middle-class life-style, and wage economy to be the only viable way of life. Ominayak and Ryan have said that:

Not surprisingly, the courts reflected the prevailing sentiments of the majority society in their decisions and in so doing failed to comprehend the magnitude of their decisions.[20]

The sentiments to which Ominayak and Ryan refer are very well captured by Mr. Justice Steel:

At that time, Europeans did not consider Indians to be equal to themselves and it is inconceivable that the king would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense.[21]

To Aboriginal people, this view of Aboriginals continues to persist. Ominayak and Ryan conclude that:

In essence, we have evidence here of judicial bias against those whose lives are not only different and therefore somehow suspect, but also who are too poor to provide an undertaking thus making them doubly suspicious. We are then left with the conclusion that the poor cannot look to the courts for injunctive relief against the rich and so we have a class bias as well as a racial one.[22]

Although subtle and usually unconscious, judicial bias still exists. The judiciary must face this fact and act to remedy it. Cross-cultural education may be a good starting point. The appointment of Aboriginal judicial personnel would be a true improvement. Some Aboriginal people believe that a separate justice system is the best answer.

Prosecutors

Although most of what has been said about judges applies to prosecutors and lawyers as well, a number of issues and concerns are specific to prosecutors. Among them are the role of the prosecutor, prosecutorial discretion, multiple charges, and plea bargaining.

The Role of the Prosecutor

The Royal Commission on the Donald Marshall, Jr. Prosecution commented on the role of the prosecutor:

While the courtroom setting is adversarial, the Crown prosecutor must make sure the criminal justice system itself functions in a manner that is scrupulously fair. The phrase "criminal justice

system" is not a mistake of history - we do not have a "criminal convictions system." Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The Crown prosecutor as the representative of the State is responsible for seeing that the State's system of law enforcement works fairly.[23]

Some Aboriginals do not view the role of the prosecutor in the same way. The view of the Blood Tribe, presented in a Brief to the Task Force, is an example:

The prosecutor is viewed as the lawyer for the police and not as the lawyer for the Crown whose duty is to bring a matter to the Court's attention in an unbiased manner. He conducts his prosecutions in a courtroom physically located with the police and consults with them at every turn. No efforts are made by the prosecutor to enlighten himself to the customs and traditions of the local Indian community that ought to be brought to the attention of the Court. The Prosecutor is not imaginative in his submissions to the Court when prosecuting an Indian Offender that would take into account unique customs and traditions.[24]

The Blood Tribe also stated:

In the courts our tribal members frequently attend, there is a profound perception where a prosecutor is viewed as the lawyer for the "police", who arrives ten minutes before Court opens, takes over a stack of files provided by the Police, and whose job then, is to "win" a conviction against those appearing before the court and against him. This perception is undeniably real and does not serve to improve Indian-Judicial relations.[25]

According to the Blood Tribe, the prosecutor usually accepts information supplied by the police without question. Consequently, the personal biases of the police are incorporated in the information available to the Prosecutor.

It is the duty of the prosecuting counsel to satisfy himself that the charges being commenced against an Indian defendant are based on real reasonable and probable grounds.[26]

In other words, the prosecutors seldom satisfy themselves independently that the information given to them is true. The public impression of prosecutors is often one that envisions them coming into docket court fumbling through police files in an attempt to read them for the first time on their way to the "podium."

Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.[27]

Prosecutorial Discretion

Chief Judge Lilles states that discretion is an important part of the justice system but that it is often associated with differences in treatment of individuals. He feels that discretion is strongly affected by biases resulting from combinations of age, religion, social class, parental influences, personal experiences and environmental pressure. These factors become especially relevant when the accused person is from a different culture with different values. Chief Judge Lilles believes that there is a strong probability that prosecutors are influenced by the police and that they therefore bring police practices and attitudes into the courtroom. This problem is compounded by the fact that the public generally views the Prosecutor as a lawyer for the police. According to Judge Lilles, prosecutorial discretion exists but is exercised only in the rarest and clearest of cases.

Plea Bargaining, Multiple-Charges and the Prosecutor

Augustine Brannigan observes that most criminal cases never go to trial. Of the few that do go to court, many are disposed of through plea bargaining. Most of the cases that do go to trial concern "negotiated guilty pleas."[28] Plea bargaining is an informal process of consultation between the prosecutor and defense counsel for the purpose of arriving at a mutually agreeable outcome without a formal trial or to effect a reduction in charges.

Plea bargaining as a disposition mechanism was developed for two main reasons: expediency and overcharging.

> *If everyone facing criminal charges elected to have his or her case heard at a trial, the already crowded court calendar would face mayhem.*[29]

> *A second related argument has to do with overcharging by the police. This argument holds that for any given criminal behaviour the police lay as many charges as possible in order to register a conviction on at least one of them. The rationale is to convict the offender but to do this with whatever charge will work.*[30]

While plea bargaining may be a useful mechanism for disposing of relatively minor cases, it has also been criticized. Brannigan suggests that plea bargaining may be a travesty of justice because it ignores certain basic principles like the rule of law and due process.[31]

> *Cases for which there exist factual bases are discarded in a secretive and hence unaccountable fashion as a result of the subjective decisions of individual prosecutors.*[32]

According to Brannigan, criminologists believe that defendants are motivated to accept plea bargains by the idea of "getting away" with the smallest penalty, or the least serious police record possible – regardless of the original offence.[33] A serious possibility of injustice exists for persons who are culturally different – about whom the Prosecutor knows nothing – especially if these persons do not understand the criminal justice system. For instance, when multiple charges are laid by police, an accused may be faced with multiple convictions and punishments. In Kienapple *v* The Queen, 1974, the Supreme Court of Canada reasoned that when a case meets the requirement of more than one offence, an accused person can only be convicted on one charge. If a criminal act meets the requirements of more than one offence, the charges must be in the alternative. The importance of the Kienapple case is that legally required reductions of charges may be perceived as plea bargaining. This misperception may operate to the detriment of an accused person. In other words, the offer of a prosecutor to drop a number of charges in exchange for a guilty plea to one charge may not be plea-bargaining at all.

Defense Lawyers

Most people have confidence in lawyers. However, the usual activities of lawyers consist of providing advice and advocacy with respect to what a court might do in any particular case. Generally, lawyers do not study the societal impact of the law or a decision. However, if lawyers look beyond the law and court decisions, they often see statutes and court decisions as the dominant factors in the behaviour of the community.[34]

Moore and Sussman suggest that legally irrelevant criteria such as political and journalistic pressures, public hysteria, prejudice against minority groups and the personality of the Judge have an enormous influence on sentences passed by Judges. Most opinions on this subject agree on the view that the humour of Judges, their digestion, or their unconscious fears and desires – in short, the whims of "judicial temperament" – determine the penalties imposed on criminal offenders.[35] Are those lawyers who attempt to predict the behaviour of a court skilled and trained in psychoanalytical theory and, thus, able to base their predictions on the legally irrelevant criteria noted by Moore and Sussman? Do law schools teach such skills? These important questions must be asked if lawyers are to act in the best interests of Aboriginal clients.

The role of the defense lawyer in plea bargaining is crucial. Brannigan states that:

> *The alleged threat that the prosecutor will be punitive should the accused act taciturn and fail to cooperate is cited as the reason for submission to false charges. In fact, Blumberg characterizes the role of the defense counsel as a kind of confidence man who swindles the client by making deals with prosecutors that serve the interests of both professionals at the expense of the client.*[36]

Brannigan doubts that this happens systematically. However, the possibility is real in the case of Aboriginal offenders. During our visits to correction institutions in Alberta, we heard again and again, stories about inmates who were advised by their legal counsel to plead guilty to a lesser charge or to plead guilty to one charge and have others dropped, or were offered promises of lighter sentences if they pleaded guilty. Such complaints do not seem to be unfounded in view of at least one instance where duty counsel actually recommended a short sharp sentence.[37]

Conclusions

The lack of knowledge about Aboriginal people by the legal profession results in the application of a system that is alien to Aboriginals. The failure of the legal profession to understand this condition results in systemic discrimination.

> *The second term that is used consistently in this paper is 'institutionalized racism.' This I use in the sense of entrenched attitudes, carefully taught and assumed, usually unconscious and which are exhibited in often subtle but hostile racist behaviour towards people of another class and colour. Such behaviour is a normative part of bureaucratic behaviour within both the federal and provincial Indian affairs administration. The term harkens back to the concepts of the noble savage, the wardship mentality, the moral majority position. Racism is endemic in our society and is expressed most often in ethnocentric, moralistic ways. Its effect is the denigration of the value of other cultures, and it is a constant challenge to the dignity and acceptability of native peoples. Frideres states, "According to racist theory, no amount of efforts by natives or assistance from whites could compensate for the natives' natural inferiority. This conviction is evident in the government's decision to establish native reservations. The reserves were to act as holding pens for worthless people, inferior children, wards of the nation."*
>
> *Further, Frideres holds that the current myth of equality, that is, that all humans are equal no matter how different they are, is equally discriminatory because the mythology acts as rationale to deny special privileges, programs and affirmative action.*[38]

Ominayak and Ryan observe further:

If one looks carefully at the assumptions that the native life-styles are not commensurate with valued types of twentieth century living, then the double-edged dilemma is clear: whatever one is as a native, it is not good enough, or defensible, or acceptable. It is clear to me that the court failed to accept the statements of the Cree as believable because the Cree did not fit into the suitable categories of mythological Indians, that is, they had a viable way of life which was under assault, but because they used the technological trappings of our society, they ought not to be hunters and trappers. In other words, the court reflected the institutionalized, racist view of Canadian society while also applying criteria which were irrelevant to minority group arguments.[39]

Associate Chief Judge Murray Sinclair of the Provincial Court of Manitoba addressed the issue of judicial bias as follows:

One of the major issues with which we will have to come face to face, is the extent to which systemic discrimination plays a part in the problem of over-representation of aboriginal people in the justice system and the role played by cultural bias.

It is trite to say that aboriginal people have unique cultures and histories. Part of the unique history of aboriginal people in this country is the way in which the relationship of aboriginal people to the criminal justice system evolved. Indian people in Canada were not always subject to the same criminal laws as were other Canadians. It is possible therefore from time to time that the question of the historical application of the criminal law to Indian people may arise and it may in fact become relevant in future litigation.

It is apparent from the historical evidence that Canadian lawmakers made liberal use of criminal and quasi-criminal laws to curtail traditional aboriginal rights and customs. This fact combined with the fact that for most of the history of the white man and the Indian in Canada, Indians were not subject to the white man's laws, can be important for us to come to an understanding about how and why cases come before us and perhaps give us some inkling about how best to resolve them.[40]

These comments lead us to conclude that the lack of knowledge on the part of Judges, Prosecutors, and defense counsel results in perceptions of and conclusions about racism by many Aboriginal people.

A different but not unrelated aspect of perceptions of and conclusions about racism is the seeming irrelevance of the criminal justice system to Aboriginal culture and values. Rupert Ross observes:

When we impose our institutions on them (or, as may be more accurate, when they invite our institutions to assist them without suspecting how foreign they are in both form and function), it is little wonder that success is meagre at best.[41]

These observations are affirmed by the Windigo Tribal Council:

[the Court] with its long delays and multiple adjournments, makes little sense to the communities in their quest to maintain order and ensure the resolutions of local problems in a timely fashion. For whatever reasons, there are delays in the disposition of cases once charges have been laid. It has been reported that other offenses are committed by individuals who are awaiting their cases to be heard in the courts. The court is thus seen as an ineffective means to control undesirable behaviour. Also, the longer the case is delayed before trial, the more chance there is that it will be lost due to a lack of witnesses. The end result is a lack of respect for the courts and the administration of justice.[42]

In view of the observations by Rupert Ross and the Windigo Tribal Council Justice Review Committee, we may conclude that the seeming irrelevance of the criminal justice system results in a lack of respect

for the system. The system does not meet its goals of deterring criminal behaviour.

The mechanistic, procedural, impersonal and methodical way of dealing with people in courts is another factor that contributes to lack of respect for the courts. Examples are long dockets; granting of numerous delays; Prosecutors familiarizing themselves with cases on their way to the courtroom; Judges realizing that tomorrow will not bring improvements and simply deciding to dispose of cases, motivated by the expediency of the moment, all of these factors contribute to a feeling of alienation on the part of accused persons. They are no longer persons but simply numbers on dockets.[43] The Task Force observed this phenomenon on at least two occasions.[44] Dockets were a "mile" long. It was rather obvious that the primary goal of the Judges, Prosecutors, and defense counsel was to get through the docket. This precise situation is captured by Lowe:

> *As an hour slips by, the judge is cool, but aware of the pressure of time on his flying court. He has to be in Niagara Falls tonight. In order to reach connecting flights in Sudbury and Toronto, he will have to leave Kashechewan no later than noon, and it is already nearly ten o'clock.*[45]

The Task Force Recommends:

5.1 That, in view of their apparent lack of knowledge about Aboriginal culture, Judges, lawyers, and Prosecutors receive cross-cultural education immediately, intensively, and on an on-going basis. The person in charge of education for each group should be given this responsibility.

5.2 That throughout the legal process, Judges be more sensitive and take into consideration cultural and socio-economic factors when Aboriginal people appear before them.

5.3 That Judges ensure that Aboriginal accused persons have been advised of all their rights and fully understand the legal process when they appear in court.

5.4 That prosecutors strictly adhere to principles of fairness and justice and before proceeding, the Prosecutor be satisfied that proceeding with a case is in the interest of the public.

5.5 That the concept of plea bargaining be reviewed by Crown Prosecutors and defence lawyers to establish ground rules on which plea bargaining may be based.

5.6 That no plea bargain be concluded without the informed consent of the Aboriginal accused person.

5.7 That the Attorney General of Alberta establish policy for the diversion of Aboriginal adults and that multiple charges be closely scrutinized and discouraged by Crown prosecutors.

5.8 That defence counsel always act in the best interest of Aboriginal clients by familiarizing themselves with the total situation of the accused person, by guarding against spurious charges, by educating clients about the legal process, by considering only legitimate plea bargain offers, and by refraining from raising expectations about reduction of charges and/or sentences.

References

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[5]Mick Lowe, "Wrist-Watch Justice," *Canadian Lawyer* (June 1985), 34.

[6]Rupert Ross, "Dancing With a Ghost; Exploring Indian Reality," 1987 (Draft).

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[15]*Ibid.* p137.

[16]Micheal Crawford. "Judging Judges," *Canadian Lawyer* (May 1989), 18.

[17]*Ibid.* p1.

[18]Chief Judge Lilles, "Some Problems in the Administration of Justice in Remote and Isolated Communities," p21-2.

[19]*Ibid.* p9-10.

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[21]Attorney-General for Ontario *v* Bear Island Foundation et al., Potts et al. *v* Attorney General for Ontario (1984) OR (2d) 353.

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[23]The Royal Commission on the Donald Marshall Jr. Prosecution, "Report of the Royal Commission on the Donald Marshall Jr. Prosecution," December 1989. p238.

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[27]Harry Jones, *The American Reality: The Courts, the Public and the Law Explosion*, Columbia: Ohio State UP. p87.

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[30]*Ibid.* p37.

[31]*Ibid.* p143.

[32]Moore and Sussman, Judicial Behaviour, *A Reader in Theory and Research*, ed. Glendon Schubert. p371.

[33]Augustine Brannigan, *Crimes, Courts and Corrections: An Introduction to Crime and Social Control in Canada*, Toronto: Holt, Rinehart and Winston of Canada, Ltd., 1984. pp139-40.

[34]Notes from Task Force Visit to Provincial Court, Cardston, Alberta, October 15, 1990.

[35]Moore and Sussman, "Judicial Behaviour," *A Reader in Theory and Research*[1], *ed. Glendon Schubert.*

[36]Augustine Brannigan, *Crimes, Courts and Corrections: An Introduction to Crime and Social Control in Canada*, Toronto: Holt, Rinehart and Winston of Canada, Ltd., 1984.

[37]Notes from Task Force visits to Provincial Court, Cardston AB, October 15, 1990.

[38]Joan Ryan and Bernard Ominayak, "The Cultural Effects of Judicial Bias," *Judicial Insensitivity to Native Culture*, p353.

[39]*Ibid*. 355-356.

[40]Associate Chief Judge Sinclair, presentation to "Western Workshop," Western Judicial Education Centre, May 1990. p18-19.

[41]Rupert Ross, "Dancing with a Ghost: Exploring Indian Reality," 1987 (Draft). p12.

[42]The Osinaburgh/Windigo Tribal Council Justice Review Committee, *Tay Bway Win: Truth, Justice and First Nations*, p57.

[43]Edward L. Barret, Jr., "Criminal Justice: The Problem of Mass Production." *The American Assembly: The Courts, the Public and the Law Explosion*. Columbia: Ohio State UP. p87.

[44]Notes from visits to Provincial Court in Assumption and Cardston AB, summer 1990.

[45]Mick Lowe, "Wrist-Watch Justice," *Canadian Lawyer* (June 1985) p31-2.