

Judicial Findings From The Inter-Tribal Tribunal on Residential Schools in Canada
(Held June 12-14 in Vancouver, B.C.)
Submitted by James M. Craven, Tribunal Judge
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“You Can Recognize a Red Indian by His [or Her] Way of Life, Not by His [or Her] Blood Percentage.” Chief Lame Deer, Lakota

Some Principles and Concepts of Aboriginal Life and Law Guiding My Inquiry and Findings:

1. TRUTH, JUSTICE, HEALING, RECONCILIATION AND PREVENTION OF FUTURE ABUSES: THE FOCUS OF INQUIRY, JUDGMENT and DISPOSITION:

“Probably one of the most serious gaps in the system is the different perception of wrongdoing and how to treat it. In the non-Indian community, committing a crime seems to mean that the individual is a ‘bad person’ and therefore must be punished...The Indian communities view a wrongdoing as ‘a misbehavior which requires teaching or an illness which requires healing.’ “ (Justice proposal by Sandy Lake First Nation (Oji-Cree) quoted in Ross, 1996, p. 5)

“Peacemaking is generally not as concerned with distributive justice or ‘rough and wild justice’ (revenge, punishment, control, determining who is right) as it is with ‘sacred justice’. Sacred justice is that way of handling disagreements that helps mend relationships and provides solutions. It deals with the underlying causes of the disagreement...’Sacred justice is found when the importance of restoring understanding and balance to relationships has been acknowledged. A peacemaking process tends to be viewed as a ‘guiding process’, relationship-healing’ journey to assist people in returning to harmony.” (Quoted in Ross, 1996, p. 27)

We recognize that “eye-for-an-eye” “justice” may lead to the whole world going blind and we recognize that it is in everyone’s interest--including the accused--to focus on healing, rehabilitation, solving problems by understanding and removing the root causes of those problems--as opposed to a total and sole focus on “punishment”. The real challenge is to pay due respect and sensitivity to the obvious pain, anguish and suffering of alleged victims making their accusations on the one hand while paying due respect to the imperative for due process for the accused on the other hand. It is a real challenge to shame and deter criminal acts while retaining respect for all people--creations of the Creator--and the potential for accused to turn their lives around. All people must be seen as many--sided and whole people, with mental, physical, emotional and spiritual dimensions and not to be reduced to being simply “offenders” and victims”. On the other hand, we also recognize that the healing approaches may be misused to obstruct Truth and Justice. According to Rupert Ross:

“Fourth, I don’t mean to suggest that all Aboriginal leaders who now speak the language of healing are doing so out of an honest commitment to the betterment of

...their communities. Sadly, there are many dysfunctional communities where the groups in power promote ‘traditional healing programs’ for one reason only: to prevent their abusive friends from being truly called to account in ‘anyone’s’ justice system, Western or Aboriginal. It is not the teachings themselves that are responsible for such abuse; it is their misuse by desperate people in desperately ill communities.” (Ross, 1996, p. 15)

2. “WE ARE ALL RELATED”:

We are all related. For accusers and accused alike, allegations are serious. Accusers and accused alike are members of a Family, Clan, Tribe and Nation and what affects one affects all. As Susan Guyette put it:

“Cultural preservation is not a romantic ideal, but rather a practical necessity. Traditional Cultures are tightly organized systems of belief and behavior, which nourish and protect social groups as well as the individuals who belong to them. The loss of traditional cultures places extreme social and psychological stress on tribal and rural peoples, exacerbating economic problems and creating additional social and health problems such as the lack of family cohesion and substance abuse.” (Guyette, 1996, p. xiii)

The processes of Aboriginal or Indigenous Justice must balance protection of the rights of the accused with the imperative of preservation of the whole society and of what is worth preserving of the whole society--which also protects the individual, including the accused. Forms of revenge, retribution, abuse, injustice, duplicity and failure to seek truth and justice--against the accused or his/her family--add to cumulative spirals of abuse and dysfunction that progressively damage and destroy the whole society including those practicing the forms of abuse, duplicity, retribution, revenge etc.

3. TRUTH, JUSTICE, HEALING, RECONCILIATION AND PREVENTION OF FUTURE ABUSES ARE SACRED:

We are human beings from different backgrounds, with some different interests and agenda. In Aboriginal Law there is a recognition that adversarial processes often and easily degenerate into an emphasis on winning and not on discovery of truth per se. There can be no stopping of further abuses, rehabilitation and/or restrictions of abusers, healing, just compensation for victims or proper lessons learned until that which needs to be stopped, corrected and healed is fully and fairly understood with all contending perspectives fully and fairly taken into account. Still, Truth, Justice, Healing, Reconciliation and Prevention of Future

Abuses--the fundamental mandates and goals of Aboriginal Law--are often very illusive An old Cree saying goes:

“You cannot pass along what another person ‘really’ told you; you can only pass along what you heard.”

And from Ohiyesa:

“The worship of the Great Mystery is silent, solitary, free from all self-seeking. It is silent, because all speech is of necessity feeble and imperfect; therefore the souls of our ancestors ascended to God in wordless adoration.” (Ohiyesa, 1993, pp. 1-2)

People will invariably react to what was said or done in very different ways and as Rupert Ross, a non-Indian observer of “Aboriginal Justice” put it:

“discussions become a celebration of the rich diversity of life rather than a contest between opposing views about what we ‘ought’ to think and feel.” (Ross, 1996, p. x)

Still, however illusive, we believe that there are objective truths and standards of justice that transcend the myriad differences and subjective perceptions and opinions as to what was/is true or what was/is justice. We get closer to those objective truths and forms of justice by allowing a full--yet structured--interplay of diverse opinions, evidence etc.

The search for Truth, Justice, Healing, Reconciliation and Prevention of Future Abuses are the sacred and the fundamental imperatives. Any attempts to block or thwart these imperatives, bring dishonor not only upon the person doing this, but also bring dishonor upon the family, clan, Tribe and Nation of that person. An Indian Trial or Tribunal is a sacred and a spiritual event as well as a secular one and calls for the triumph of the spiritual mind over the physical mind. According to Ohiyesa:

“We Indian people have traditionally divided the mind into two parts--the spiritualmind and the physical mind. The first--the spiritual mind--is concerned only with the essence of things, and it is this we seek to strengthen by spiritual prayer, ... The second, or physical mind, is lower. It is concerned with all personal or selfish matters...” (Ohiyesa, 1993, pp7-8)

And:

“Before there were any cities on this continent, before there were bridges to span the Mississippi, before the great network of railroads was even dreamed of, we Indian people had councils which gave their decisions in accordance with the

highest ideal of human justice. Though the occurrence of murder was rare, it was a grave offense, to be atoned for as the council might decree. Often it happened

that the slayer was called upon to pay the penalty with his own life. In such cases, the murderer made no attempt to escape or evade justice. That the crime was committed in the depths of the forest or at dead of night, witnessed by no human eye, made no difference to his mind. He was thoroughly convinced that all is known to the Great Mystery, and hence did not hesitate to give himself up, to stand trial by the old and wise men of the victim's clan.

Even his own family and clan might by no means attempt to excuse or to defend him. But his judges took all the known circumstances into consideration, and if it appeared that he slew in self-defense, or that the provocation was severe, he might be set free after a thirty days' period of mourning in solitude. The ceremonial mourning was a sign of reverence for the departed spirit." (Ohiyesa, 1993, pp. 33-34)

And:

"Such is the importance of our honor and our word that in the early days, lying was a capital offense. Because we believed that the deliberate liar is capable of committing any crime behind the screen of cowardly untruth and double dealing, the destroyer of mutual confidence was summarily put to death, that the evil might go no further." (Ohiyesa, 1993, p. 36)

4. FORM, PROTOCOL AND RITUAL MUST ASSIST AND BE SUBSERVIENT TO THE SEARCH FOR TRUTH, JUSTICE, HEALING, RECONCILIATION AND PREVENTION OF FUTURE ABUSES:

Even the physical layout of the Aboriginal Court must be considered to facilitate the search for truth and justice For example:

"...putting those tables in a 'circle' shape, hoping that this will reduce the adversarial nature of the process. Instead of having the accused and his lawyer sit directly opposite the Crown and the police like boxers on opposite sides of the ring, they are spread around the circle together with probation officers, translators, alcohol workers and anyone else who might have a contribution to make. My own impression is that such an arrangement does make people feel more comfortable and also contributes to a fuller community participation. Perhaps people feel better joining as equals a group discussion aimed at finding solutions than they do making formal and solitary suggestions to an all-powerful judge." (Ross, 1996, P. 8)

Many of the usual processes and tactics associated with the adversarial systems of non-Indian Courts often thwart rather than assist the causes of truth and justice. Such tactics as forum shopping, judge and jury shopping, contrived order of witnesses, rhetorical tricks designed to cast

doubt on or prevent admission of credible evidence, abusing witnesses, ad hominem attacks with irrelevant opinion and evidence, ultra-formalism or ultra-ritualism, artificial distinctions between “non-argumentative” vs “argumentative” phases of a trial or evidence (all speech is rhetoric in the classical sense--non-coercive forms of persuasion), obstruction of full discovery for any party, conscious introduction of contrived or partial evidence, rhetorical appeals to prejudices, deliberate refusal to pose relevant but uncomfortable questions, contrived highlighting of weak points and minimizing strong points of an opponents case while doing the reverse for one’s own case, use of paid career experts, etc are to be avoided as they thwart rather than enhance “due process” and discovery of truth and justice--even for the accused.

All parties having what they feel to be relevant evidence and opinion on a particular matter are urged to participate as a matter of duty--to the causes of Truth, Justice, Healing, Reconciliation and Prevention of Further Abuses. Further, the search for Truth, Justice, Healing, Reconciliation and Prevention of Future Abuses cannot be seen as a “9-to-5” matter and Judicial processes must be conducted when and for as long as necessary to serve these and other causes.

All crimes involve multiple past, present and future spirals of cumulative causality, implications on relatives of the accused and accusers as well as on the whole society, multiple dimensions and therefore requirements of varied areas of expertise. Those participating in judicial processes must be selected on the basis of demonstrated integrity, commitment and expertise in areas bearing on the issues of the judicial processes. In any judicial process, not only the accused is being examined, also being examined, is the integrity and credibility of the processes themselves, the participants in the process, the community sanctioning the process as well as core and guiding principles of Indian life and law. There is no place for using sacred proceedings dealing with sacred issues for self-promotion, grandstanding, rewarding friends and relatives, forging businesses alliances, revenge or for any purpose other than the sacred search for Truth, Justice, Healing, Reconciliation and Prevention of Future Abuses.

Compartmentation, hierarchies, models, rituals and organizations are all creations of human beings for various purposes and represent abstractions and conventions that can at best approximate or grasp small parts of the immense totality of all the interrelated creations of the Creator and creations of the creations of the Creator. The answer to the abuses of power and excesses of hierarchies is not more checks and balances, formalism, Compartmentation, strict rules and counter-rules within hierarchies, but rather elimination of essentially formalistic and dysfunctional hierarchies and hierarchical relations themselves. Leadership and authority arise from service, persuasion and skill and not from some fixed or inherited position.

In the Western tradition, human beings stand just below God and the Angels but above all other forms of life and matter based on the passage on Creation from Genesis:

“God said, ‘Let us make man in our image and likeness to rule the fish in the sea, the birds of heaven, the cattle, all wild animals on earth, and all reptiles that crawl upon the earth...’”

In the Ojibway tradition for example, and quite typical of Indigenous thinking in general, any hierarchy is based upon function and dependence in the totality of the creation of the Creator. The Order of Creation would go: Mother Earth, the plant realm, the animal realm and the human realm because without Mother Earth and her waters, there would be no plant, animal or human life, and without plant life there would be no animal or human life, and without animal life there would be no human life and yet Mother Earth, plant life, animal life existed and can exist without human life. This alternative world view, the Indigenous world-view, which emphasizes “wholeness” in the human as well as natural world, which emphasizes complexity rather than ultra-reductionism, which emphasizes non-linearity rather than linear uni-directional cause and effect, which emphasizes disharmony as a social as well as individual pathogen, which emphasizes connectedness with other parts of creation rather than disconnectedness, which recognizes inevitable change in cycles, spirals or patterns, helps to keep in mind humility and helps to balance judicial processes in ways that help to better search for Truth, Justice, Healing, Reconciliation and Prevention of Further Abuses.

Processes constructed and run on the basis of adversarial competition, ultra-formalism, ultra-reductionism, ultra-ritualism ultra-hierarchies, Compartmentation, linear thinking and modeling, punishment with no regard to the effects on those connected with the person being punished, punishment with no regard to healing or reconciliation will more often than not lead to more and not less future chains of abuse and dysfunction.

Often we find that what superficially appeared to be a “minor” matter turned out quite significant or what appears to be a “major” matter turns out to be relatively insignificant--in the scheme and totality of things. In Aboriginal Law, the time allotted for investigation, inquiry, judgment and disposition is not based upon a preliminary and summary judgment about the alleged severity of particular acts of a crime. Often as much time or even more will be allotted in a judicial proceeding dealing with what many might consider a “minor” crime relative to what others might consider a “major” crime. Substantial time may be allotted to investigating what some consider to be a “minor” question with the result that substantial and pervasive probative evidence is discovered.

Judgmental language and simplistic labels may often lead to preemptory conclusions, summary judgments, simplistic and reductionistic thinking, obfuscation, hiding or failure to introduce significant evidence, failure to pose necessary questions and failure to generally pursue Truth, Justice, Healing, Reconciliation and Prevention of Future Abuse. As Rupert Ross puts it:

“For one thing, English has an extraordinary number of adjectives that are not so much descriptions ‘of’ things, as they are conclusions ‘about’ things...adjectives like ‘horrible’, ‘uplifting’, ‘disgusting’, ‘inspiring’, ‘delightful’, ‘tedious’ and so on. When you really look at them, you discover that they don’t

tell us much about things-in-themselves, but only about the judgments speakers have made about them--and want the rest of us to accept.” (Ross, 1996, p. 102)

“Put simply, I worry that our simplistic, punitive responses to simplistic, judgmental labels put us into blind canyons where we actually ‘contribute’ to the development of those one-dimensional and dangerous people we are sworn to prosecute.” (Ross, 1996, p106)

Further, these summary-and-final-judgment nouns and adjectives affect not only the integrity and effectiveness of judicial proceedings and the name and reputation of the accused, they reflect upon and damage the family, clan, tribe and nation of the accused as well. In short, they lead to ongoing consequences and further victimization. Speech must be careful and focus on the act and its consequences rather than on judgments about the actor nature and character.

5. FOCUS ON WHAT A PERSON ‘SHOULD’ DO RATHER THAN ON WHAT A PERSON ‘SHOULDN’T’ DO

Indigenous judicial processes are concerned primarily with establishing what people ‘should’ do--as members of a family, clan, tribe and nation--rather than focus on what people ‘shouldn’t’ do. This may appear to be a distinction without a difference, but in fact it is a profound distinction.

Instead of long lists of potential offenses (listed as “should not do”) and an attempt to cover every possible negative act, with the implication that if a given act is not on the ‘should not do’ list, it is at least not illegal if not permissible, Indigenous Law focuses on core principles and values to guide general conduct such that if one followed those principles, each situation or act can be properly evaluated as to its propriety and proper legality or illegality without having memorized the “should not do” list or in dealing with a potential act not covered on the list. There are many acts that are not illegal or even regarded as improper or immoral from an absolute sense but nonetheless might have negative consequences on an individual committing the act or on others in a particular context.

Instead of something like the “Ten Commandments” with “Thou Shalt Not...”, in Indian life and law there is more focus on “Thou Should...--as a family member, a clan member, a tribal member, a member of a nation, to live a happy life, to treat others as you want to be treated...

Resources and Sources

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