Aboriginal Antecedents and Contemporary Practices of Restorative Justice: Canada and United States Comparisons.

Larry French
Justiceworks Institute
University of New Hampshire
frogwnmu@yahoo.com

Abstract

Canada and United States share the same American Indian and Inuit/Alaska Natives groups with many native groups cut off by the artificial border separating not only Canada and the United States but Mexico and the U.S. as well. In pre-Columbian times these peoples moved freely across these artificial borders that later demarcating the United States from both and Canada (formerly British North America) and Mexico (Spanish America). This work focuses on the U.S./Canadian divide. The First Nations subscribed to a harmonious lifestyle where the restoration of balance was the basis for justice. The Euro-American sense of adversarial justice was a foreign concept forced upon them. In the 1980s attempts were made in both Canada and the United States to implement some semblance of restorative justice among the recognized tribes. In Canada, the foundation of these programs emerged from the sentencing circles while in the Unites States peacemaker courts reemerged among their largest tribe – the Navajo (Dine). This article looks at these programs including their similarities and differences – important factors for American Indians caught up in cross-border judicial issues.

Introduction

The concept of restorative justice re-emerged within tribal areas in Canada (reserves) and the United States (reservations) as a viable alternative to Euro-American and Euro-Canadian adversarial systems beginning in the 1980s. In Canada, sentencing circles need to be examined in relation to the 1982 Canadian Charter of Rights and Freedoms while the Peacemaker Courts emerged in U.S. Indian Country (federally-recognized tribes) again in the 1980s. The major problem within either system is determining which attributes of traditional customary laws have survived from aboriginal time to the present. Clearly, aboriginal justice standards would be difficult to implement within most Native communities, especially those adjacent to large non-Indian or Inuit population centers. Another problem is the fact that while a number of Native group's ancestral lands transcend the eventual North American boundaries separating the United States and Canada (as well as the United States and Mexico); linguistic and trial linkages continue to exist between these separated groups.

Transnational tribes are supposedly allowed intra-tribal movement to traditional tribal lands between the United States and Canada as a condition of the 1794 Treaty of London (aka Jay Treaty). These rights were extended to those tribes transcending the United States/Mexico border as conditions of both the 1848 Treaty of Guadalupe Hidalgo and the 1854 Gadsden. Border restrictions implemented by the United States following the terrorist attacks of September 11, 2001 have further complicated these treaty agreements with serious consequences for implementing alternative dispute resolutions among these various tribal factions both at the federal levels and at the State/Province levels. Hence,

geopolitical differences between the United States and Canada extend beyond their differences in identifying Native lands as either reservations or reserves.

The 565 "recognized" Indian groups in the United States ultimately fall under federal supervision and collectively comprise Indian Country. The inhabitants of Indian Country are known as American Indians or Alaska Natives (AI/AN). American Indians and Alaska Natives are recognized by their official tribal enrollment, usually based on some historic record compiled by U.S. Census takers and by blood degree. Canada's Aboriginal People, on the other hand, are divided into three basic categories: First Nation, Inuit, and Métis. Another determination is made as to whether they are Status Indians, Treaty Indians or Non-status Indians. A Canadian status Indian is similar to their U.S. counterparts in that they are registered – which is similar to being enrolled. Status Indians reside among 633 bands located on 2,281 reserves. Most Status Indians are also Treaty Indian with the exception of those residing in British Columbia. Non-Status Indians allude to Indian women who married non-Indians and to Indians serving in the Canadian military. These exclusions of Indian women and veterans from status recognition changed in 1985 adding some 92,000 Indians to the registry. Métis, on the hand, are people of mixed Indian and non-Indian (mostly French-Canadians) accounting for another 400,000 Canadians. The Inuit is the term Canada uses for what the United States calls, Alaska Natives (some still refer to this population as Eskimos). There are about 35,000 registered Inuit in Canada (Terrill, 2003).

The Aboriginal Worldview

Aboriginal groups of North America historically subscribed to a cooperative lifestyle especially within their own tribal or linguistic group. This differs considerably from the competitive worldview of Europeans and Euro-Americans. Here, the aboriginal worldview is known as the Harmony Ethos; a value system where cooperation is extended to nature and all life forms. Prior to European contact, North American Indians were a varied lot, comprised of hundreds of separate social units further divided into a number of linguistic groups. Yet they shared a common metaphysical belief system, one based upon harmony with their natural environment. While myths of origin vary from group to group, they all share a common theme – that of a cooperative, harmonious ethos, especially regarding norms pertaining to their group in particular. Accordingly, many indigenous native groups referred to themselves as the people, a label signifying strong in-group ethnocentrism (French, 1994).

While they may have felt strongly about their own group, most American Indians had a rather humble perception of themselves within their total natural environment. They showed considerable respect not only for powerful natural phenomena but also for other living organisms sharing their ecosystem. They usually referred to their tangible natural environment as Mother Earth while viewing extraterrestrial elements, those interacting with earth, as constituting Father Sky. Within the aboriginal harmony ethos, order and control were dictated by folkways, mores, and customs, without the aid of formal institutions such as those existing within Western-type societies. This was the glue that linked families and clans to their ethno-methodological belief system. Even so, traditional Indians were exposed to a complex system of socialization, one involving all aspects of their existence, punctuated by rites and rituals that denoted time and space, essence and being, from adulthood until death. Case law and written rules did not exist before the advent of Euro-Americans. Accordingly, the aboriginal folk socialization-

enculturation processes were transmitted orally from generation to generation by family and clan elders (French, 2007a).

Elements of the harmony ethos exist even today among Indian groups especially among those tribes that still retain their language and traditional rituals, including some members the largest Indian tribe in the United States and Canada – the Inuit and Algonquin, Iroquoian, and Athabasca linguistic groups. Characteristics of the harmony ethos that conflict with the dictates of the majority society, including those dictated by the criminal justice system, are the resentment of imposed authority; a hesitancy to command others; a reluctance to refuse requests made by others within the tribe or clan; an obligatory hospitality and sharing with kinfolk; an impassivity regarding greetings and exchanges (including a lack of eye contact with others, notably non-clan members); a refusal, or unwillingness, to contradict others; and the absence of gestures in public speaking. Caught between the dictates of two different social systems, many Native Americans become marginalized contributing greatly to socio/cultural maladjustments such as substance abuse and resulting impulsive behaviors (French, 1997; 2000).

The transformation of Aboriginal justice in the United States

The significance of aboriginal justice among North American tribes was its effort to restore balance to the community. In doing so, the jurisdiction for retribution was generally limited to the calendar year. Harsh methods prevailed, including homicide, but with the focus on intra-tribal balance between the wronged parties. This process was based on clans and families and not on individual perpetrators per se. Inter-tribal vengeance, on the other hand, was based on raids carried out regularly between different tribes sharing a geographical area. These altercations were usually based on linguistically different neighboring tribes such as Algonquin versus Iroquoian tribes in what is now the New York/New England region of the U.S.A. and eastern Canada. Here warring parties attempted to even the number of kills and captures resulting from previous raids. The idea was to maintain balance between the tribes and not to engage in excessive kills. Excessive kills, including scalping, was a concept introduced by their European allies during the colonial era.

The pre-Columbian Cherokee, people who at that time resided in what is now the southeastern United States, illustrate an example of aboriginal blood vengeance. Blood vengeance was the traditional vehicle used in resolving serious intra-tribal transgressions, the most serious being the violation of marriage taboos and homicide. The clans played the major role in these matters. Violation of taboos was a clan matter and not necessarily a village or personal issue. Killings were not always resolved by the issuance of a death penalty for the offender. Yet, when a death sentence was deemed necessary for intra-tribal balance, the honorable method of dying was to be killed in an inter-clan game of stickball (forerunner of lacrosse). If this arrangement was not acceptable, then the condemned offender was hunted down by the avenging clan and killed. However, if the offender could escape to a neutral village (designated safe zones) undetected until the weeklong, new-year purification ritual designating the beginning of a clean slate for all Cherokees, then this transgression, along with all other inter- and intra-clan transgressions, were officially forgiven. Hence, the statute of limitations for all offenses in aboriginal Cherokee society did not exceed one year. The New Year purification ritual represented an annual rebirth for the Cherokees, allowing them to focus anew on the upcoming spring planting and the rituals and ceremonies associated with their horticultural society.

Another significant departure from Euro-American jurisprudence was the absence of a "criminal record" for the offender. All was forgiven once the New Year began. Elements of aboriginal justice prevailed in the United States until 1883 and the Crow Dog case (French, 2003a). Early Federal efforts to control crime in Indian Country began in 1789 with the establishment of the War Department under the new U.S. Constitution that, at the same time, established federal authority needed to regulate Indian policy and Indian affairs, including all treaties. The first policies were the Trade and Intercourse Acts (1790, 1796, 1799) that was designed to keep unauthorized non-Indians from exploiting Indian groups. In 1849, federal Indian affairs were transferred from the War Department to the newly created Interior Department. The War Department continued to deal with "hostile" Indians making the Indian Wars the longest war in U.S. history (1776-1890, not including Wounded Knee II in the 1970s). In 1883, the Federal Courts of Indian Offenses was established to impose Euro-American jurisprudence in tribal courts while, at the same time, eliminating traditional native spiritual dances and customary practices, including purification rites, vision quests, sun dances, and plural marriages. The Courts of Indian Offenses were designed to adjudicate only minor offenses in Indian Country as defined by the Federal Enclaves and Assimilative Crime Acts. The challenge to more serious offenses was working its way through the legal system in the Crow Dog case.

The Crow Dog case involved the 1881 killing of a federally sponsored Sioux leader, Spotted Tail, by another Sioux leader, Crow Dog. Both Spotted Tail and Crow Dog were Brule Sioux from the Rosebud Reservation in what is now southern South Dakota. The case was initially adjudicated within the tribe according to traditional restorative justice customs in line with the Sioux Harmony Ethos. Both Spotted Tail and Crow Dog were respected warriors and leaders among their people, with the former being the head chief of the Brule at the time of the treaties of the 1860s establishing the Great Sioux Reservation. Spotted Tail's status was elevated by the United States when he kept the Brule Sioux out of the 1876 uprising that led to defeat of the 7th Calvary under Colonel John Armstrong Custer. Crow Dog was a traditional leader who had once served as the chief of the Orphan Band of the Brule Sioux. He remained the leader of the survivors of Big Raven's band following the massacre of Big Raven and all his warriors in the 1844 conflict with the Shoshone. Crow Dog was a close associate of Crazy Horse, leader in the Custer defeat. Crow Dog was also an associate of Sitting Bull and was in contact with him while he and his band were in exile in Canada following the Little Big Horn battle.

Both Spotted Tail and Crow Dog were vying for leadership positions within the new Rosebud Agency following its creation in 1878. Spotted Tail, who supported the agency's accommodative stance of farming and ranching, was preferred by the United States over Crow Dog who represented the old, traditional Sioux ways. These ideological differences aside, the actual altercation apparently was over a woman, Light-in-the-Lodge. Here, Spotted Tail was seen as enticing her away from her disabled, elderly husband while Crow Dog objected to this move. Thus, on August 5, 1881, the forty-seven year old Crow Dog shot fifty-eight year old Spotted Tail as they approached each other on a road near the agency.

Since this was seen as an intra-tribal matter, it was presumed to be exempt from federal or territorial jurisdiction under the existing Federal Enclave/General Crimes Act regulating Indian Country at that time. The respective clans subsequently resolved the matter when Crow Dog's clan compensated

Spotted Tail's clan with a monetary restitution ($600), eight horses, and a blanket. While this settlement restored balance within the Sioux community, it did not resonate well with the federal civilian agents and the U.S. Army. Crow Dog was then arrested by orders of the Indian agent and brought to Fort Niobrara (Nebraska) for trial charged with death-qualified murder.

Crow Dog's trial came to represent a number of similar cases working their way through the federal courts at the time. Crow Dog was portrayed as a bad Indian through his association with Crazy Horse and Sitting Bull, who were subsequently murdered while under U.S. detention. At his trial, all efforts by the defense to introduce local customs of the Brule tribe were suppressed by the prosecution. There was little doubt that the all-white jury would find Crow Dog guilty and sentenced to be hanged. Crow Dog's attorney appealed the conviction to the First Judicial District Court of Dakota where the same sentencing judge, G.C. Moody, presided. Moody quickly rejected the appeal and the case went to the U.S. Supreme Court which upheld Crow Dog's petition, releasing him from incarceration. This decision of December 17, 1883 became known as Ex Parte Crow Dog (French, 2003b).

The U.S. Congress, which controls all Indian Country matters, responded to the U.S. Supreme Court Crow Dog decision by enacting the Major Crimes Act in 1885. The Major Crimes Act represented a significant encroachment on tribal authority and autonomy. It provided overlapping jurisdiction with the Federal Enclaves Act by applying these rules to any offender, Indian or non-Indian, in Indian Country. The Major Crimes Act provided a list of the original seven Index Crimes which later fell under the jurisdiction of the U.S. Department of Justice and the emerging federal police force created in 1908, and later called the Federal Bureau of Investigation (FBI) under the long tenure of its first director, J. Edgar Hoover. With the exception of designated inter-state crimes, or treason-like offenses, the federal jurisdiction of index crimes has its greatest application within Indian Country where the FBI and federal courts have original jurisdiction over these offenses (French, 2007b).

Major Crime Act-March 3, 1885

That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefore to the laws of such Territory relating to such crimes, and shall be tried therefore in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectfully; and the said courts are hereby given jurisdiction in all such cases; and such Indians committing any of the above crimes against the person or property of another Indian or other persons within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States (U.S. Statutes at Large, 23L: 385 ((18 U.S.C.: 1153, 1885)).

The Major Crimes Act was challenged in 1886 in United States v. Kagama but was upheld by the U.S. Supreme Court (U.S. v. Kagama, 1886). An obvious problem with this law was that American Indians did not have equal weight before the courts, especially when cases were adjudicated before white judges and white juries. It was not until 1869, in the Standing Bear federal court ruling that the status of

American Indians elevated them from that of feral animals with bounties on their heads to "persons," albeit not persons equal to the white man. Even then, American Indians did not have access to the protection of the U.S. Constitution until 1924 when Congress provided them federal "citizenship." Again, this did not guarantee equal legal status before State jurisdictions, notably those where they did not enjoy citizenship, a phenomenon that lasted until the 1970s. Complicating this issue was the fact that the federal government represented all aspects of justice in Indian Country, law enforcement, judiciary, defense, and corrections. Clearly, these actions ruled out any pretense of Native autonomy in Indian Country in the United States. (French, 2003).

The Indian Crimes Act of 1976 expanded federal jurisdiction over tribes from the original 1885 Major Crimes Act. Now Indian defendants could be prosecuted in federal courts for an additional seven crimes, for a total of fourteen offenses. This law was passed largely in reaction to the 1973 Wounded Knee uprising on the Pine Ridge Reservation in South Dakota where two FBI agents and dozens of Indians were killed.

Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder; manslaughter; kidnapping; rape; carnal knowledge of any female, not his wife, who has not attained the age of sixteen years; assault with intent to commit rape; incest; assault with intent to commit murder; assault with a dangerous weapon; assault resulting in serious bodily injury; arson; burglary; robbery; and larceny within the Indian Country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States [U.S. Statutes at Large, 90:585-86, May 29, 1976].

At the same time, tribal jurisdictions were weakened. In 1978, the U.S. Supreme Court held in Oliphant v. Suquamish Indian Tribe, that tribes held no criminal jurisdiction over non-Indians in Indian Country (435 U.S. Reports, 2006-12, March 6, 1978). This view was reinforced and expanded to include nonmember Indians by the U.S. Supreme Court in 1990 with Duro v. Reina (110 S.Ct. 2053, May 29, 1990). Here, the High Court limited the tribe's judicial authority to only its own members even when the crime occurs on the reservation and would be otherwise covered by the tribal code.

In 1991, the U.S. Congress exercised its authority as ultimate guardian in all matters within Indian Country by passing Public Law 102-137, an act entitled, Criminal Jurisdiction over Indians. This was another example of Congress exercising its authority over the U.S. Supreme Court in matters regarding Indian Country. Unlike Congress' action in the Crow Dog case, over a hundred year earlier, the Congress this time sided with the tribes reinstating their judicial authority, albeit limited, over all Indians on the reservation, including nonmembers [those not enrolled members of the specific tribe residing on a reservation within Indian Country]. It was under these circumstances that the largest Indian tribe residing on the largest reservation in the United States – the Navajo – reintroduced it aboriginal/traditional Peacemaker Court.

Navajo/Dine Peacemaker Court

The contemporary Navajo court system came about on April 1, 1959 and was revised under the 1985 Judicial Reform Act in order to provide more flexibility and to promote Navajo common law, setting the stage for the reintroduction of the traditional Navajo Peacemakers model of tribal justice. The essence of "law" and "justice" arises from the Navajo word, beejazaannii, signifying balance within the

Aboriginal Beauty Way. The aim of Beauty Way justice is not to punish or divide people into offenders and victims, but rather to restore harmony to the parties involved in these altercations and socio/cultural disruptions. The Navajo Nation has a two-level court system: district trial courts and the Navajo Nation Supreme Court that serves as the appellate court. There are seven judicial court districts, four in Arizona and three in New Mexico. These courts serve all 110 chapters (communities) comprising the Navajo Nation on its 25,000 square mile reservation located in parts of three states – Arizona, New Mexico, and Utah.

The Navajo Peacemaker Court was reintroduced in 1982 gaining international attention especially among those parties interested in restorative justice and community policing. This system differs from the adversarial district courts based on the Anglo-American court system. Former Chief Justice, Yazzie noted that in the Peacemaker process the goal is restoring true justice among individuals, families, and the larger community: "Navajos have always believed that the more individuals are restored to harmony, the more the family, community, and society will live and function in a harmonious fashion. In the adversarial system there is little or no chance of restoring what Navajos call "ke bil nil," or "harmony." While there is no formal legal representation (e.g., lawyers) in the Peacemaker's Court, once a district court judge appoints a Peacemaker, all parties involved are compelled to cooperate in the process. The Peacemaker is usually selected on a case-by-case basis and needs to be a respected member of the community, one who has a thorough knowledge of Navajo religious traditions. This requirement alone exempts Navajo who are Christians or Mormons. The Peacemaker Court only hears minor disputes. Even then, the Peacemaker must report the results of his or her efforts to the Court. The report may be informal, and if the Trial judge permits, can be given orally. At any rate, even oral reports need to be noted in the Court files.

Clearly, the Navajo Peacemaker's Court is not as cut-and-dried as one would expect. Its symbiotic entanglement with the Anglo-American-driven district courts obviates a truly stigma-free adjudication process. In aboriginal times, the Navajo (Dine) were a homogeneous society with a single belief system. This is a far cry from the numerous Christian-based religions and the Native American Church that now compete with the traditional Beauty Way spirituality. Obviously, trying to be everything for everyone has greatly compromised the original Peacemaker process. Moreover, during aboriginal times, harmony restoration was a process without a record. It dealt with the here-and-now and was forgotten once harmony was restored. In its current application a record exists even if it does not lend itself to case law (French, 2006).

Canadian Sentencing Circles

Unlike the United States and its varied policy changes regarding American Indians, Canada has used the Royal Proclamation as the foundation of Canadian/Aboriginal relations based on basic Indian civil rights. These rights have been incorporated into the Constitutional Act of 1982. Nonetheless, by 1830, British North America, like the United States, came to view the American Indians as economic liabilities and an impediment to white expansionism. Here, Peace and Friendship treaties were replaced with land Cession and Surrender Treaties where First Nation traditional territories and hunting grounds were taken in exchange for reserves and trust relationships. With conditional tribal sovereignty came

inferior social status. This process began in 1850 in Ontario Province and continued as the westward movement progressed, continuing until 1921.

The Constitutional Act of 1867 and Confederation spelled out Canada's federal relationship with American Indians. This relationship was made into law in 1876 with the first consolidated Indian Act. With this codification, came the legal definition of Indian. Indian is the term used to denote all aboriginal people of Canada who are not Inuit or Métis. All three groups are recognized as Aboriginal in the Constitutional Act of 1982. Canada did a far better job in allowing its Aboriginals to continue the practice of their traditional ways as is evident in Treaty No. 11, verified on July 17, 1922, whereby the King allowed Indians the right to pursue their usual vocations of hunting, trapping and fishing throughout Canada.

Article 25 of the Constitutional Act of 1982 recognized Aboriginal rights and freedoms stipulated by the Royal Proclamation of October 7, 1763, as well as any rights of freedoms that now exist by way of present or future land claims agreements. Additionally, the Supreme Court of Canada affirmed that section 35 of the Constitutional Act of 1982 reinforces the existing Aboriginal and treaty rights. Section 35 on the Rights of Aboriginal Peoples of Canada addresses: (1) a recognition of existing Aboriginal and treaty rights; (2) definitions of aboriginal peoples of Canada; (3) land claims agreements; (4) Aboriginal and treaty rights gender guarantees; and (5) Aboriginal participation in Provincial constitutional conference (French & Manzanarez, 2003).

Even then, many First Nation people are skeptical of the subsequent interpretation of these guarantees provided under the Constitutional Act of 1982 feeling that some provincial governments may continue to view Aboriginal treaties as mere real estate deals where the non-Indians got a good deal at the expense of the Indians and Inuit. Others are hopeful of a more compatible relationship between First Nation people and other citizens of Canada, especially relevant to shared resources such as water rights, mineral, timber, and recreational uses of these lands. (Chartrand, 2006; Paul, 2006). Most Aboriginals do not feel that they can get a fair hearing before Provincial Courts given that they are primarily "White-mans" courts. John A. Winterdyk, the noted Canadian criminologist, addresses some of these issues stating that Canada's Aboriginal people are often the victims of racial discrimination by both the police and courts. He goes on to say: "It is well documented that Canada's Aboriginal people are overrepresented in the criminal justice system and that they get more severe sentences than non-Aboriginal people for similar offenses" (Winterdyk, 2006: 201). This phenomenon of racial discrimination provided more reason for a greater emphasis on Sentencing Circles and adherence to the Gladue Principle.

In Canada, a Sentencing Circle is an attempt to incorporate traditional Aboriginal customs in the judicial process. Any aboriginal member can request a sentencing circle with the judge taking into consideration the following factors:

-the accused must agree to be referred to the sentencing circle;

-the accused must have deep roots in the community in which the circle is held and from which the participants are drawn;

- -Elders or respected non-political community leaders need to be available and willing to participate in the circle;
- -the victim needs to be willing to participate without coercion or pressure;

- -disputed facts need to be resolved in advance of the sentencing circle process, and
- -the court needs to be willing to depart from the usual range of sentencing.

The typical Sentencing Circle includes the accused, the victim, the families of all parties, elders, and other interested members of the community. A judge and defense lawyer or prosecutor is also in attendance. The circle discusses the issue at hand attempting to reach a consensus on the sentencing outcome (Ross, 2006). Even then, the circle's recommendation is advisory and the judge retains his/her judicial authority to either impose the recommended sentence or to issue a modified sentence. Even then the sentencing circle phenomenon has taken on a life of its own leading to the proliferation of books on this topic with widespread application published by Living Justice Press. (Ball, et al., 2010). Problems with the Sentencing Circles before 1999 included the fact that they were seen as being optional by Provincial Courts and many felt that the Aboriginal rights and freedoms had not been affected by the 1982 Canadian Charter of Rights and Freedoms. However, subsequent cases are supposed to be guided by the 1999 R. v. Gladue Guidelines.

The Gladue modification (R. v. Gladue (1999) 1 S.C.R. 688)

Jamie Tanis Gladue was accused of killing her common law husband, Reuben Beaver, on September 16, 1995 during a party celebrating her 19th birthday. Born in McLennan, Alberta, Jamie was one of nine children born to a Cree Indian mother and a Métis father. Her mother left the home when Jamie was 11 years old and died three years later in a car accident n 1987. Jamie resided with her father since her mother's departure. Jamie began living with the decedent in 1993 when she was 17 years old and this relationship produced a daughter, Tanita. At the time of the homicide, Jamie and Reuben were living in the same townhouse complex as her father and two of her sisters, Tara and Bianca, in Nanaimo. Jamie was five months pregnant at this time and engaged to be married to Reuben. The circumstances of the resulting altercation is abstracted in R. v. Gladue, [1999] 1 S.C.R. 688:

The accused, an aboriginal woman, pled guilty to manslaughter for the killing of her common law husband and was sentenced to three years' imprisonment. On the night of the incident, the accused was celebrating her 19th birthday and drank beer with some friends and family members, including the victim. She suspected the victim was having an affair with her older sister and, when her sister left the party, followed by the victim, the accused told her friend, "He's going to get it. He's really going to get it this time". She later found the victim and her sister coming down the stairs together in her sister's home. She believed that they had been engaged in sexual activity. When the accused and the victim returned to their townhouse, they started to quarrel. During the argument, the accused confronted the victim with his infidelity and he told her that she was fat and ugly and not as good as the others. A few minutes later, the victim fled the home, she was heard saying "I got you, you fucking bastard". There was also evidence indicating that she had stabbed the victim in the arm before he left the townhouse. At the time of the stabbing, the accused had a blood-alcohol content of between 155 and 165 milligrams of alcohol in 100 millilitres of blood. (R. v. Gladue, 1999).

The Crown counsel recommended a sentence of between three and five years. Subsequently, Jamie Gladue was sentenced to three years imprisonment and a ten-year weapons prohibition. Her appeal to the British Columbia Court of Appeals was dismissed. The Supreme Court of Canada overturned the conviction stating that Miss Gladue's aboriginal status were not seriously taken into consideration as

stipulated by Part XXIII of the Criminal Code: "In that Part, s.718.2(e) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders." The Supreme Court decision went on to state that Section 718.2 (e) is designed: "to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing". In summary, the 1999 Supreme Court review found:

In this case, the sentencing judge may have erred in limiting the application of s.718.2(e) to the circumstances of aboriginal offenders living in rural areas or on-reserve. Moreover, he does not appear to have considered the systemic or background factors which may have influenced the accused to engage in criminal conduct, or the possibly distinct conception of sentencing held by the accused, by the victim's family, and by their community. The majority of the Court of Appeal, in dismissing the accused's appeal, also does not appear to have considered many of the relevant factors. Although in most cases such errors would be sufficient to justify sending the matter back for a new sentencing hearing, in these circumstances it would not be in the interests of justice to order a new hearing in order to canvass the accused's circumstances as an aboriginal offender. Both the sentencing judge and all members of the Court of Appeal acknowledged that the offense was a particularly serious one. For that offence by this offender a sentence of three years' imprisonment was not unreasonable. More importantly, the accused was granted, subject to certain conditions, day parole after she had served six months in a correctional centre and, about a year ago, was granted full parole with the same conditions. The results of the sentence with incarceration for six months and the subsequent controlled release were in the interests of both the accused and society. (R. v. Gladue, 1999).

The Supreme Court of Canada's decision led to the Gladue Guidelines which basically reiterates the provisions stipulated under the Criminal Code under "Purpose and Principles of Sentencing". While specifically citing Section 718.2(e), other elements of Section 718 also appear relevant to the Gladue Guidelines, notably Sections 2(a) and Section 2(d).:

718.2 (a) "A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offense or the offender, and, without limiting the generality of the foregoing". The effects of fetal alcoholism Fetal Alcohol Syndrome- FAS/Fetal Alcohol Effect/FAE) represents a common mitigating circumstance within First Nation populations and, as such, needs to be considered as a strong mitigating circumstances especially in substance-fueled altercations like the Gladue situation. Associated with FAS/FAE is the phenomenon of victim precipitation whereby the victim aggravated the offender to act. Again, a circumstance indicated in the Gladue case and common in Indian on Indian violence both in Canada and the USA.

Section 718.2(d) also has relevance to the Gladue Guidelines especially regarding international extraditions to the USA. Canada ended capital punishment in 1976, the same year the U.S. Supreme Court allowed states to reintroduce the death penalty since outlawing it in its 1972 Furman v. Georgia decision (Gregg v. Georgia, 1976; Jurek v. Texas,1976; Proffit v. Florida, 1976). In 1991, the federal government reinstated the death penalty as well. And since federal jurisdiction is mainly restricted to Indian Country, this law became known as the Indian Death Penalty Act (French & Manzanarez, 2003;

Death Penalty in the U.S., 1976-2008). As of April 1, 2008, 37 U.S. states, the Federal Government and the U.S. Military had the death penalty on their books.

Canada, like the European Union and Mexico, are reluctant to extradite offenders to the U.S. if they are likely to be death qualified for their crimes. Beyond the death penalty and in reaction to the Gladue Principle, Canadian courts are more reluctant to extradite aboriginal defendants to the United States given that no such standards exist in state, federal or military jurisdictions. In September 2012, Ontario's Appeal Court refused the United States' extradition request for two aboriginals, Zachary Leonard and Rejean Gionet, for drug offenses. The Appeals Court overturned the lower court's decision to extradite these men because this decision did not apply the Gladue Principle to their decision (Jones, 2012). Even then, judicial matters are more complicated within Canadian jurisdictions in that the rules of administering the Gladue Principle, or the Sentencing Circle process, differ between Provinces. Quebec, home to a number of First Nation reserves imposes very strict conditions to qualify for Sentencing Circle diversions. These complicated rules make it difficult for cross-border/cross Province First Nation groups like the Iroquois whose tribal lands exist in both Quebec and Ontario as well as between Canada and the United States.

Summation

The international boundary between Canada and the United States is an artificial demarcation separating four major Aboriginal linguistic groups – the Athapaskan, Algonquin, Iroquois, and Inuit/Eskimo – whose peoples live on either side of this political divide. And while these groups share language and cultural attributes among their peoples, social and criminal justice is another matter. Both Canada and the United States provide federal recognition for the original indigenous populations but with mixed results. This makes it difficult for Native Americans in either country (also between the tribes transcending the U.S./Mexico border) to fully understand their legal rights. It is worst for those natives who do not subscribe to the Euro-American judicial principals and instead would like to resort to traditional aboriginal customs. In the United States, the U.S. Congress holds the ultimate authority for federally-recognized tribes and peoples residing within Indian Country although some of this authority is shared with Public Law 250 states which include Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin). Self-determination, or tribal control, is greatly restricted in the U.S.A. relegating Aboriginal restorative justice efforts to lesser offenses. In Canada, the Provinces and Provincial or Territorial Courts hold sway in enforcing Federal laws relevant to indigenous groups (First Nations, Inuit, Métis) although some Inuit now hold greater authority in their self-determined subsequent to the Labrador Inuit Land Settlement.

In both systems, the criminal justice system is based on the British adversarial system with non-Native jurists, and prosecutors. Cultural sensitivity and a better understanding of mitigating circumstance plaguing Aboriginals on either side of the international border is greatly needed and should become a crucial part of legal training in both countries. The Navajo Peacemaker Court, the Canadian Sentencing Circles, and an overall awareness of the dictates of the Gladue principle in Provincial and Territorial Courts, are a good start but much more needs to be done if Native Americans are to find justice before the "white-man's" courts. Another factor may be that adherence to an aboriginal model of restorative justice may be too compromised by the European-Americas formal, adversarial model of criminal

justice. From this perspective, the aboriginal restorative justice often becomes merely a partial solution to low –level tribal disputes.

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