

# A DIFFERENT APPROACH TO JUSTICE

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The current tensions between First Nations and the Canadian government remind us of the need for new approaches to criminal justice.

Les tensions actuelles entre les Premières Nations et le gouvernement canadien nous rappellent la nécessité de nouvelles approches en matière de justice pénale.

Since achieving a majority in 2011, Stephen Harper's government has had an easier path pushing new laws through Parliament aimed at fulfilling its pledges to get tough on crime. The government has introduced mandatory minimum sentences for drug offenders (including marijuana production), eliminated the use of two-for-one credit for pretrial custody and increased the state's capacity to use custodial sentences for youth. These laws were passed despite evidence from Statistics Canada that crime rates were at their lowest levels in years. And none of these changes acknowledge the implications of the Supreme Court of Canada's historic 1999 decision in *Gladue*, which recognized the "drastic overrepresentation of Aboriginal peoples within both the Canadian prison population and the criminal justice system," and urged judges to consider "all available sanctions other than imprisonment that are reasonable in the circumstances...with particular attention to the circumstances of aboriginal offenders."

The current tensions between First Nations and the Canadian government have raised a wide range of social and economic grievances that compel us to examine how Canada's criminal justice policies affect Aboriginal peoples — and offer us an opportunity to analyze what can be learned from different systems of justice. The Harper government's approach ignores the emerging body of evidence of alternatives to incarceration that are used in many jurisdictions to solve the problems underlying crime.

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As part of the Center for Court Innovation's Tribal Justice Exchange in New York City, I've had the opportunity to study a different rendition of the concept of justice. Peacemaking, which is practised in scores of Native American communities across the United States and Canada, is a traditional form of justice that focuses on healing and restoration. Although peacemaking varies across tribes, it generally brings together the disputants, along with family members and other members of the community who have been affected by the conflict.

Peacemakers invite each participant to speak about how the event, crime or crisis affected them personally, a process that is unrestricted by the evidentiary rules of the criminal justice system that limit what may be said in a courtroom. The purpose of peacemaking is to reach a consensus to resolve the dispute and, more generally, "to talk it out in a good way."

Even before the latest sentencing additions, Canada's criminal justice system was suffering from an overreliance on punitive and isolationist tactics. In its day-to-day operations, criminal courts typically focus on assigning guilt and meting out punishment. The lawyer speaks for the accused in court and negotiates with the Crown, and the accused is encouraged to remain silent for fear that anything said may tend to incriminate.

Indeed, most accused go through the criminal justice system never having told their story to anyone, except perhaps defence counsel. If found guilty and sentenced to jail, the offender is then physically separated from the community, furthering the system's ethos of isolation, and is no longer monitored by the courts, the Crown or even defence counsel. The focus is on paying a debt to society, and the effects of incarceration are seen as irrelevant to the concept of justice having been served.

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Of course, for violent offenders, a custodial sentence is often essential in order to keep communities safe. But often the system's inability to consider the long-term consequences of incarceration produces individuals who remain a threat to society when they emerge from prison. Jeremy Travis's 2000 work on re-entry was a wake-up call in the United States, the country with the highest per capita rate of incarceration in the world. Travis's work, aptly titled *But They All Come Back*, stressed the need to plan for the inevitable return of most prisoners into society. This sparked a movement dedicated to planning for "re-entry," but otherwise, the criminal justice system is simply not set up to face forward. Rather than thinking ahead, all of the

efforts are used to ascertain what happened in the past and how best to measure punishment for the previous act.

Peacemaking is focused more on the future of the injured relationships than on the disputed act or crime. This does not mean that peacemaking ignores personal accountability or restitution. In fact, one might argue that facing one's victims and explaining what happened is more challenging than

standing silent in a courtroom.

In a recent case in Florida, a young man who murdered his girlfriend sat in a restorative justice circle with the family of the victim and the attorneys, and explained his actions in great detail. The family wanted the young man to go to jail and "pay for his crime," but they also wanted to come to terms with what had happened. Their search for forgiveness and the process of talking it through prior to sentencing led to a deeper, more comprehensive level of accountability, in that it "deprived [the murderer] of a certain kind of refuge — of feeling abandoned and hated — and placed the reckoning for the crime squarely in his hands."

Inspired by the stories of positive change that have resulted from peacemaking, the Center for Court Innovation's Tribal Justice Exchange has expanded the practice of peacemaking into a state court setting. With a grant from the United States Department of Justice's Bureau of Justice Assistance, the Center planned a peacemaking pilot program in the New York State court system. In January, after years of studying and conferring with Aboriginal experts on peacemaking, and with support from the Kings County District Attorney and New York's Office of Court Administration, we launched our pilot program in Red Hook, Brooklyn.

We brought in peacemaking experts from the Navajo Nation, who trained local Brooklyn community members in the principles of peacemaking, and a selection of cases from the Red Hook Community Justice Center will soon be sent to the Red Hook peacemakers to resolve. Even though Red Hook is not a Native American community, once the Red Hook peacemakers learned more about the practice of peacemaking, they found the underlying concepts both surprisingly intuitive and necessary for their community.

In the current political climate in Canada, the business-as-usual approach to criminal justice, replete with a plea-bargaining system geared toward quick admissions of guilt, jail and the processing of "bodies" in and out of court, is a stop-gap solution that often leads to more problems. The Supreme Court's significant findings in *Gladue* in 1999 are becoming moot as the country moves toward the increased use of incarceration across the board, despite the harsh realities already experienced by the country's First Nations. The flip side is to look not only at how the criminal justice system is affecting First Nations, but also at what can be learned from Aboriginal communities to improve the delivery of justice for everyone. ■