

## Family

# Justice through Indigenous community courts

By **Angelique W. EagleWoman**



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(October 26, 2018, 1:33 PM EDT) -- For decades the failure of the Canadian justice system to provide fair processes for Indigenous Canadians has been the subject of papers, policy recommendations, reports and news articles. The self-governance and self-determination of First Nations has yet to be reinstated since the passage of the *1876 Indian Act*.

First Nations' leadership has struggled under this outdated piece of legislation and seized the opportunity to advance self-government at every prospect. This includes establishing Indigenous community courts when possible through inherent right, self-government agreements and modern-day treaties.

There is ample support for the proposal to establish these inherent right courts in First Nation communities or in shared regional and/or urban centres. With the paradigm shift brought about by the *Truth and Reconciliation Commission (TRC) 94 Calls to Action*, there is a moment now in Canada to make broad long-term changes realizing the recommendations from the shelved and dusty reports from past decades.

Further, the TRC Call to Action Number 42 is squarely on point: "[w]e call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems." This is accompanied by a reference to the United Nations Declaration on the Rights of Indigenous People which provides support in Article 34: "Indigenous peoples have the right to provide, develop and maintain ... juridical systems or customs."

Implementation of Indigenous community courts is critical to address the overincarceration crisis of Aboriginal peoples and the child welfare crisis for Aboriginal children.

The incarceration statistics for Indigenous Canadians are shocking and indicate human rights violations are occurring on a regular basis. In 2015-16, Statistics Canada reported that Aboriginal people representing only three per cent of the Canadian population accounted for 26 per cent of the adults in provincial and territorial custody and 28 per cent of the federal correction admissions.

These statistics represent a one per cent and a six per cent increase respectively from the prior year.

Aboriginal women show the greatest over-representation as 38 per cent of the provincial and territorial custody admissions and 31 per cent in the federal system. Even more dire is the intergenerational cycle of incarceration as demonstrated through custodial admissions of Aboriginal youth. In 2015-16 compared to the 44 per cent of non-Aboriginal youth admitted to custody, 54 per cent of Aboriginal youth were admitted to correctional services with the over-representation highest for female Aboriginal youth at 43 per cent.

The consequences of over-incarceration are tragic and go to the heart of Indigenous community survival. In particular, the generations of Indigenous women sentenced to jail and prison time undermine the role of women as culture holders, nurturers and as life givers for the next generations of First Nation peoples.

Indigenous female youth subjected to correctional services are experiencing disruption from the age-

old traditions of learning traditional ways and seeing their place within the circle of life. Often there is a link between incarceration and the child welfare crisis of removing Indigenous children from their homes and placing them in multiple short-term foster care placements.

From the very first TRC Call to Action, a clear message was sent that the crisis in Indigenous children placed outside of their homes must be addressed. From the traumatic impact of the Indian residential school mandatory policy to the widespread Sixties Scoop to the current dire statistics on Indigenous children in care, the Canadian court system has and is failing the children and families from First Nation communities.

The resiliency and strength of character Aboriginal peoples have demonstrated in surviving these aggressive actions aimed at them in their most vulnerable moments as children is truly remarkable. That there are men and women leaders, lawyers, judges, doctors, educators, administrators and professionals arising in spite of these barbaric policies are a true testament to the values, spirituality and sheer determination as inherited traits from Indigenous ancestors.

The next step is to re-establish the institutional structures necessary to support Indigenous self-government, including Indigenous community courts. There are models leading the way through the Akwesasne Court and the Court of Kahná:wake.

Others are in process, but many challenges lie ahead to make space in the Canadian legal framework which has embraced a common law system and a civil law system but seems hesitant to the final addition of the Indigenous law system. Indigenous community courts are necessary to provide culturally relevant legal forums to provide appropriate justice in criminal cases and to provide appropriate support to Indigenous children and families.

In the United States, there are approximately 330 Tribal Courts that have been in operation for close to 80 years since the enactment of the *1934 Indian Reorganization Act*. The expertise, technical assistance and common cultural basis exist to collaborate and engage between Tribal Nations in the U.S. and First Nations in Canada. There is nothing extraordinary about Indigenous community courts and there is nothing to fear in their establishment.

Rather, remedying the over-incarceration crisis and the child welfare crisis fully justify supporting the establishment of these courts. Funding can be diverted from the current costs of incarceration and payments for children in care and used proactively in First Nation communities to support court staff, judges, restorative justice programs and family services. There is a way forward to end these cycles of despair and devastation and it starts with Indigenous self-government leading the way.

From the Royal Commission on Aboriginal Peoples 1996 report, the statement, "[t]here can be no peace or harmony unless there is justice" still rings true.

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