CASE COMMENTS AND NOTES

LAW IN AN AGE OF PROTEST*

I. LAW AND THE NATIVE PEOPLE

While some of my remarks will apply equally to native people, particularly Indians, wherever they may be found in Canada, I should warn you that my emphasis is mainly on conditions as I think they exist in the Northwest Territories.

1. Before 1955

For most of the period before 1955 the almost absolute power of the Hudson's Bay Factor in each post was about the only vehicle for the dispensation of justice and law enforcement. Gradually in modern times, particularly by the 1920's, the Royal Canadian Mounted Police began to operate isolated posts and patrols throughout our Arctic and northern regions. Towards the end of this period, serious cases were being tried by stipendiary magistrates located in the Territories. Murder cases, infrequent as they were, were tried by Superior Court Judges coming in from one of the provinces, usually from Alberta.

2. 1955 to Present

In 1955 provision was made for the first time for the appointment of a full time Superior Court Judge for the Northwest Territories.[1] At this time the new Court, designated as the Territorial Court of the Northwest Territories, was constituted and the first man appointed to this position was the late Honourable Justice J. H. Sissons, formerly Chief Judge of the District Court of Southern Alberta. Increased settlement from the south and an awareness of some of the plight of our northern people brought about this change.

With the appointment of the new Judge came provisions for a Police Magistrate and for Justices of the Peace, the latter to be located in the larger settlements. From that time on, as much as possible, the Court system was expected to function in much the same way as the Courts in the provinces, with the same relative powers and duties, and applying the laws of England of 1870 except where changed by Federal or Territorial enactment. The new Judge was very quick to set up a circuit court system whereby the Court went to the people.

3. People

In general, I think we can take it that during the last few years of the period we are concerned with here, there were three groups of people, in equal numbers, making up the population of the area: whites, including metis, Indians and Eskimos.

I think it can be said, too, that there were and still are (but to a less marked degree) three stages of sophistication in the area. The whites

*This is the text of a speech delivered by Mr. Justice Morrow during the Symposium on "Law in An Age of Protest", May 5, 1972, on the occasion of the official opening of the new Law Centre at The University of Alberta.

[1] The Northwest Territories Act, R.S.C. 1952, c. 331, s. 20(1).

for the most part have brought the southern culture or way of life with them. Because of more frequent contact with and more exposure to the whites, the Indians were further along the road to adopting the white way of life. Finally, the Eskimos, particularly those in the central and eastern regions were just emerging from a primitive society or way of life. I should observe that at the present time the latter people have made great strides in joining the new century and (in some areas) may have already reached parity with their Indian brothers.

These three stages of social development pretty well parallel the economic and educational development the Northwest Territories has experienced, particularly since about 1965.

4. Sources of Territorial Law

The statutory enactments which govern this area provide for three basic forms of law:

(1) Federal enactments: such as the Criminal Code.
(2) Territorial Ordinances passed by the Commissioner in Council: such as those dealing with Game, Liquor, and so on.
(3) Such English law as seems applicable, making allowances for differences in conditions, as was in force on July 15, 1870.

By decisions of the Territorial Court local law or custom law has received recognition with respect to adoptions and marriages.

II. WHAT IS WRONG AND WHAT IS RIGHT

1. What is Wrong?

The native people in the Northwest Territories are subject to the same laws as those living in the north who have come from the south. This causes problems particularly with the Criminal Law and the Game Laws. It is argued by some that it is a real shock for these people to be almost overnight, as it were, confronted with a sophisticated system of laws or "taboos", if you want to call them that. They are a people still, to some extent, following their own taboos and now are subjected to a foreign set as well.

There can be no doubt that the rapid changes in the north, the movement from a sub-marginal subsistence level, through a hunting and fur-trading economy to a wage and welfare way-of-life all in a few years has caused frustration and dislocation. People, who a generation ago, or even less, were living off the land are now involved in a struggle to become part of our "wage and job" way of life with little opportunity left to live off the land, or to live in the old way.

Almost everything that has happened in the north in recent years has encouraged the native people to turn from a nomadic hunting life to a way of life dependent on wages or, worse still, welfare. At best the old way was tough and hard and in many ways marginal. It does not take much to persuade people used to such hardships to move into a community where they can obtain housing, food and entertainment—all provided by the Government or made easy to obtain from that same source:[2]

> These new developments tended also to attract the natives to the white man's es-

[2] The exerpt is from a lecture by W. G. Morrow entitled *Northern Judge Looks at Law and Native Custom*, delivered at the University of Calgary, 28 Jan. 1970.

> tablishments, attracted by chance of employment and availability of goods and medical assistance—but often drawing whole communities away from areas that could and had supported them in the past. A population explosion came next—assisted by family allowances and welfare payments.
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> Even at this date fish and game constitute a major item of diet to many remote communities in the north. The increase in the native population, introduction of the modern rifle and the mobility of the skidoo have, along with the intrusion of new population centres such as new mining towns, sadly depleted the game resources. But the natives operating, as they do, from their own settlements, do not comprehend what is happening. Hence they have inevitably come into conflict with game laws.

By taking the children from the encampments and putting them through schools we have now arrived at the point in time where a whole new generation of young people have become educated to our way of life and have enjoyed, and unfortunately, also suffered because of some of the pleasures of the modern way of living. They cannot be blamed for not wanting to go back to the old way.

So, in addition to the uprooting of the old way-of-life, we have also brought about a possible break-up in the basic family life of these people and have contributed to a generation gap that may be even more pronounced than that in the south. These factors cannot help but accentuate the basic problem of adjustment. Add to this the lack of employment for these students (no longer hunters) as they leave school, the ready access to alcohol and the increasingly easy access to drugs, and it is not difficult to see that things are not all good in the north, that there are frustrations which are seeking outlet.

In my report with respect to the Administration of Justice in Hay River, I set forth my thoughts in this regard. This report was written in 1968 but I see no reason to alter a line as I examine the present situation.[3]

> It is feared that if some solution is not found quickly that the next ten years will see a complete generation of as yet unsophisticated young Indians and Eskimos, now eagerly attending Government schools, pass through the courts of the Territories. This result surely must be avoided at all cost.
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> It may be all right to take young children from the teepee and from the igloo and teach them the three "R's" and carry them along through high school, so that we can point with pride to how they have been educated. It is certainly wrong, I believe, to stop there and expect them to go back to the teepee or the igloo with their diplomas and pick up where they left off. Job training is a must and it may even be necessary to manufacture jobs. The money that is being used and that actually will be used for welfare payments and to staff our jails, or as we now call them, correctional institutions, would be better used to create jobs if for no other reason than to restore self-reliance and pride to the native people. In other words, let it be spent before, not after, for prevention, not detention.

In a speech given at the University of Calgary in January 1970 I observed:[4]

> The development and growth of our country is usually reflected in the reported cases found in our law books. The day by day adjudications of the courts at every level reflects the times. For example, the law reports during the hungry thirties are full of cases dealing with foreclosures, debt cases and so on. Similarly, these days, our law reports record the conflict between aboriginal rights and the onrush of economic and and social development, particularly in the Northwest Territories and the Yukon. Since 1955, for example, the Territorial Court has covered such subjects as Treaty rights, game laws, the Bill of Rights in conflict with the Indian Act, and just recently the issue of sovereignty in respect to the sea ice and polar bear hunting. This is to be expected as this is where the action is now.

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[3] W. G. Morrow, *Administration of Justice in Hay River*, 1968.

[4] *Supra*, n. 2.

One of the unfortunate offshoots of the present set-up is the absence of a penal institution in the Northwest Territories for handling those natives who have received sentences of two years or over. At present they are required by law to go to Prince Albert and from there, sometimes to Drumheller. This is a bad situation. Aside from having Eskimos and Indians serving their sentences in a "foreign" area, far from their normal environment, these relatively inexperienced people are for the first time placed in direct contact with hardened criminals, with professionals. It does not take too much imagination to appreciate what is likely to happen. Picking up hitherto unknown bad behavioural ideas, these persons on returning to their small settlements are likely to contaminate the community. There have already been examples of this.

2. What is Right?

In an attempt to offset or compensate for some of the above difficulties the Court, and I include the Magistrates here, has adopted many practices that would be considered unorthodox or aberrations from the norm in the southern communities. For example, some adjustment is made in sentencing and probation and suspended sentences are being used to a great extent. Adjustments in the length of sentences are made to compensate for the cultural differences and for the shorter life span of the natives.[5] Also, rules of procedure are not as rigidly applied, so that, among other things, appeals, even out of time, are permitted and confessions are more carefully scrutinized.

As much as possible, therefore, the Courts have and are attempting to compensate for problems of the north. Governmental authorities are doing their part here as well. Legal aid, for example, has now been officially introduced and is working well. The local Government is also now working towards opening a penitentiary in the Territories and for a more viable correctional system which will permit day employment for lesser offences.

III. CONCLUSION

Just as in the south, there is a wave of protest in the air. The native peoples, in particular, are becoming noticeably more vociferous in their demands for what they consider to be justly theirs. Sometimes one may wonder if they really know what they seek or if they fully appreciate what they are after. Instinctively, though, it seems to me, they know that all is not well and that if they do not get what they want now they may never get it.

So far, little of this protest, if any, has become directed towards the Court system itself. I like to think that this is due in part to the fact that in the Northwest Territories the Court or Courts have in a sense led the way in protesting the injustices that the changing situation has caused.

In 1961 the late Justice Sissons in respect to adoptions showed how he stood when he stated:[6]

> The Eskimos, and particularly those in outlying settlements and distant camps, are clinging to their culture and way of life which they have found to be good. These people are in process of cultural change and have a right to retain whatever they like

[5] *R.* v. *Ayalik* (1960) 33 W.W.R. 377.

[6] *Re Katie's Adoption Petition* (1961) 38 W.W.R. 100 at 101.

> of their culture until they are prepared of their own free will to accept a new culture. In particular, although there may be some strange features in Eskimo adoption custom which the experts cannot understand or appreciate, it is good and has stood the test of many centuries and these people should not be forced to abandon it and it should be recognized by the Court.

In cases involving other aspects of their life, the Court has attempted to hold the line or at least soften the blow for Canada's original inhabitants: e.g. the duck case,[7] the musk-ox case,[8] the caribou case[9] and the marriage case.[10] The decisions in favour of the native way of life have not always been upheld on appeal and sometimes subsequent legislation has overruled its effect. The Court's sympathy, however, is there for all to see.

In recent years there has been the Bill of Rights case[11] and the moose case[12] and more recently one involving custom adoptions where I stated:[13]

> As a result of the submissions put forward by counsel I am forced to observe that one of the most important and I believe most cherished customs, namely that of custom adoptions, has been placed in direct conflict with the "white" or "southern" culture. What started out, therefore, as a relatively simple case, has now reached a point in time where perhaps the last vestige of native culture, heretofore recognized by our Court, is in danger of being lost to these people, of going down the same path as their hunting and other rights.
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> I am pleased that I have been able to reach the result which I have, so that the problem of *stare decisis* which *Re. Katie* would have presented had I been inclined to reach a contrary decision, has not emerged. I think I should state here, however, that had I felt the law was otherwise, I would still have felt that I should follow *Re Katie* because of the public interest. It is well recognized that "Where a series of decisions of inferior courts have put a construction on an act . . . and have thus made a law which men follow in their daily dealings, . . . that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding.

In a recent case where the Crown argued that an appeal by an Indian could not be heard because he had not followed the correct procedure I said:[14]

> To me, procedural rules, such as we are dealing with here, are to assist the Court in holding orderly trials but should never become the instrument of a denial of justice.
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> It will have to be a higher court than mine that will have the unpleasant duty to interpret the law in a manner which will deny justice to our native people, if, of course, my judgment is appealed higher.

It is not good for the Courts to have to, in effect, disobey the law or to deliberately misinterpret the law in order to see justice done. I am pleased to observe, however, that our different levels of Governments seem to be showing a greater alertness and understanding to the problem. It is to be hoped that this trend will continue and will bear fruit.

W. G. MORROW**

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[7] *R.* v. *Sikyea* (1962) 40 W.W.R. 494, (1964) 46 W.W.R. 65.

[8] *R.* v. *Kogolak* (1959) 28 W.W.R. 376.

[9] *R.* v. *Sigeareak* (1966) S.C.R. 645.

[10] *Re Noah Estate* (1961) 36 W.W.R. 577.

[11] *R.* v. *Drybones* (1967) 60 W.W.R. 321, *aff'd* 61 W.W.R. 370, *aff'd* (1970) 71 W.W.R. 161.

[12] *R.* v. *Smith* (1969) 71 W.W.R. 66.

[13] *Tucktoo* v. *Kitchooalik* (unreported), W. G. Morrow, 23 February 1972.

[14] *R.* v. *Lockhart* (unreported), W. G. Morrow, 8 April 1968.

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