

Aboriginal offenders and the Criminal Code

There is a good reason why the sentencing provisions refer specifically to natives

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The recent sentencing of Deanna Emard, a Métis woman convicted of manslaughter in British Columbia, has focused a great deal of attention on Section 718.2(e) of the Criminal Code. Editorial-writers, columnists and callers to talk shows have been quick to condemn the section, which they say marks a disturbing trend toward race-based justice and can be seen as a "get out of jail free" card for Aboriginal people. Nothing could be further from the truth.

Section 718.2(e), enacted in 1996 as part of a comprehensive review of sentencing policy in Canada, directs a sentencing judge to consider "all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to the circumstances of aboriginal offenders."

It is plain on the face of it that the section's application is not restricted to Aboriginal people. What, then, are we to make of the last phrase of the section: "with particular attention to the circumstances of aboriginal offenders"?

One possible interpretation is that it directs judges to look not only at the circumstances of the individual offender before the court, but, in the case of an Aboriginal offender, at the circumstances of Aboriginal offenders as a group.

What do we know of Aboriginal offenders as a group? The most notorious fact is that they are disproportionately overrepresented in provincial and federal jails across Canada. The Canadian Centre for Justice Statistics reported that in 1995-96 Aboriginal people made up 16 per cent of all sentenced admissions to jail, but only 3.7 per cent of Canada's population. This overrepresentation is particularly acute in the West, but it exists across Canada.

What else do we know? We know that jail is not a very effective deterrent for Aboriginal offenders. A study commissioned by the federal Ministry of the Solicitor-General found that their recidivism rates are higher than for the offender population as a whole.

We are also beginning to understand the impact of estrangement from the community on Aboriginal criminality. In its travels across Canada, the Royal Commission on Aboriginal Peoples found that Aboriginal inmates share a history of family and cultural dislocation. For example, 95 per cent of the Aboriginal inmates at the Prince Albert Penitentiary in Saskatchewan had been adopted or placed in foster care at some point in their lives.

In Toronto, some 500 Aboriginal people have participated since 1992 in a criminal diversion program offered by the community council of Aboriginal Legal Services of Toronto. More than 40 per cent of them were adopted or have been in foster care, and more than 70 per cent have virtually no contact with the Aboriginal community. Much of the estrangement of Aboriginal people from their culture stems from the impact of government policies such as forced attendance by Aboriginal children in residential schools.

Many inquiries have concluded as well that the overrepresentation of Aboriginal people in prison is caused in part by systemic discrimination against them in the criminal justice system. Aboriginal accused are denied bail more often, face more charges and spend less time with their defence lawyers. These factors make them as a group particularly vulnerable to unnecessary imprisonment.

This information is important for a sentencing judge. There has been a tendency for judges in Canada to rely on myths and stereotypes regarding Aboriginal offenders. These stereotypes suggest that those who live away from the reserve and aren't connected to their Aboriginal community do not deserve recognition as Aboriginal people. An understanding of the circumstances of Aboriginal offenders would help judges see that it is precisely these people who are most in need of sentences that can, among other things, re-establish that connection.

Section 718.2(e) is not about excusing the criminal acts of Aboriginal people because they are Aboriginal. It is not about not jailing them simply because they are Aboriginal. Rather, it suggests that sentences other than imprisonment might meet the needs of the community and the offender better than incarceration.

The community is not well served if an individual who is imprisoned comes out and immediately re-offends. This is true whether the offender is Aboriginal or non-Aboriginal -- which is why the section applies to everyone coming before the courts. Aboriginal recidivism rates suggest that approaches to sentencing other than a blind reliance on incarceration are needed to try to ensure that Aboriginal offenders do not re-offend and thus that community safety can be enhanced.

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